UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: March 12, 2003

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
PICTURED ROCKS NATIONAL LAKESHORE
MUNISING, MICHIGAN

Respondent

and Case No. CH-CA-01-0276

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 2192

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 transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF THE INTERIOR NATIONAL PARK SERVICE PICTURED ROCKS NATIONAL LAKESHORE MUNISING, MICHIGAN Respondent	
and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 2192 Charging Party	Case No. CH-CA-01-0276

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 **APRIL 14, 2003**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
1400 K Street, NW, 2nd Floor
Washington, DC 20424-0001

RICHARD A. PEARSON
Administrative Law Judge

Dated: March 12, 2003
Washington, DC

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

U.S. DEPARTMENT OF THE INTERIOR NATIONAL PARK SERVICE PICTURED ROCKS NATIONAL LAKESHORE MUNISING, MICHIGAN Respondent	
and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 2192 Charging Party	Case No. CH-CA-01-0276

James E. Gwyn
For the Respondent

John F. Gallagher, Esq.
For the General Counsel

Gary Vieth
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

The General Counsel of the Federal Labor Relations Authority (the Authority), by the Regional Director of the Chicago Regional Office, issued an unfair labor practice complaint on June 21, 2001, alleging that the Respondent violated § 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (the Statute) by refusing to allow two representatives of the Charging Party to change their work schedules to attend a meeting with a Member of Congress.

Respondent's answer denied that it violated the Statute in denying the representatives' request to change their work schedules,

asserting that it has generally not allowed employees to change their work schedules for reasons unrelated to the performance of work.

A hearing in this matter was held on October 30, 2001, at which time all parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. The General Counsel and the Respondent subsequently filed post-hearing briefs, which I have fully considered. I conclude, in agreement with the General Counsel, that the Respondent's actions violated § 7116(a)(1) and (2) of the Statute.

Based on 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

The National Federation of Federal Employees, Local 2192 (Charging Party/Union), is the exclusive representative of a bargaining unit of approximately
13 employees, out of a total complement of approximately
23 employees, at the Pictured Rocks National Lakeshore, Munising, Michigan (Respondent/PIRO). The top management official at PIRO is the superintendent, with five division chiefs reporting to him, and two supervisors reporting to certain of the division chiefs. At all times relevant to this case, there has been no collective bargaining agreement in effect between the parties, although the parties have been negotiating and have reached tentative agreement on some articles of a contract (Tr. 135-37).

1. The Events Giving Rise to the ULP Complaint

On November 20, 2000, Union President David Kronk sent an e-mail message to PIRO Administrative Manager Sherry Tunteri, requesting that he and two other Union officials, Union secretary-treasurer Mary Jo Cook and Union steward Gary Vieth, be given official time from 1:00 to 3:30 p.m. on December 12, to meet with Bart Stupak, the Congressman for the 1st District of Michigan (G.C. Exh. 13, p. 3).
The Union representatives wanted to discuss with the Congressman various issues of concern to the Union relating to PIRO. (Tr. 138-39.) The meeting was scheduled to occur during the regular tours of duty for each of the three Union representatives. (Tr. 22, 124.)

In a return e-mail to Kronk dated December 4, 2000, Tunteri granted permission for the meeting with Congressman Stupak to be held at PIRO, but she stated that official time would be approved for only one Union representative. The next day, Kronk e-mailed Tunteri

that he had told Cook and Vieth to ask their supervisors for "flex time work hours" to enable them to attend the meeting. Kronk added that "[e]ach union official has something to present to Representative Stupak and needs to be at this meeting." (G.C. Exh. 13, pp. 2-3.) The "flex time work hours" Kronk referred to meant, for example, allowing Cook and Vieth to come in a few hours earlier, or to stay a few hours later, on the day of the meeting, to make up for the hours the two employees would spend at the meeting during the work day. (Tr. 120.)

Tunteri denied Kronk's request for flex time for Cook and Vieth in an e-mail on December 7, 2000. (G.C. Exh. 13, p. 2.) She suggested the two employees use annual leave if they wanted to attend the meeting. Kronk responded to Tunteri that same day, requesting, among other things, that Tunteri explain why the flex time requests for Cook and Vieth were being denied. Tunteri responded to Kronk the next day, explaining that flex time was not granted because "none of you are on a flex time schedule. Flex time time schedules are not for a specific instance." (G.C. Exh. 13, p. 1.) Vieth and Cook also separately asked their supervisors for permission to change their work schedules for December 12, to enable them to attend the meeting with the Congressman. Both requests were denied, although they were told they could use annual leave if they wanted to attend.

Kronk met with Tunteri on December 11, 2000, and asked her to approve a change in the scheduled work days of Cook and Vieth, that is, allowing them to take the day of the meeting off in exchange for their working another day that week. Kronk said it was his understanding that granting such changes in an employee's weekly tour of duty, referred to as "in lieu" days, had been allowed in the case of another PIRO employee, Teri Perry, a computer specialist who was not in the bargaining unit. Tunteri responded that she would not approve any changes in employee work schedules. (G.C. Exh. 14; Tr. 83-85, 121.)

In an e-mail to Tunteri the next day, December 12, Kronk confirmed the events of their meeting the prior day. In the e-mail, he also said that "[p]ast practice at PIRO proves that schedules are changed all the time at Pictured Rocks for many different employees and for many different reasons. Please explain if this is a new policy now and exactly what is the specific reason why schedules couldn't be changed to accommodate this request". (G.C. Exh. 13, p. 1.) The record does not reflect whether Tunteri responded to this message. Kronk met with Congressman Stupak as scheduled on December 12, but Cook and Vieth did not attend the meeting. The Union filed the ULP charge in this case on February 12, 2001.

2. Management's Prior Treatment of Employee Requests to Change Their Work Schedules

Most of the evidence presented by the parties in this case focused on what, if any, policy or practice existed at PIRO regarding the treatment of employee requests to make ad hoc changes in their fixed work schedules for personal reasons. I make the following findings concerning these employees.

Brenda St. Martin was the secretary to the Superintendent of PIRO and was a part-time confidential employee excluded from the bargaining unit. At all relevant times, she worked a fixed, 32-hour per week tour of duty, from 8:15 a.m. to 3:45 p.m. Monday through Thursday, and 8:15 a.m. to 12:45 p.m. on Friday, with a lunch break from 12:00 noon to 12:30 p.m. each day. During 2001, St. Martin had numerous ad hoc, informal changes in her schedule approved by her supervisor. These included allowing her to work through her lunch hour so that she could either arrive later or leave work earlier that day; working extra hours one day to minimize her need to use annual leave on another day, for purposes such as taking her dog to the veterinarian or returning a rental car; or working extra hours on Monday through Thursday so that she could take Friday off altogether. (Tr. 59-68, G.C. Exh. 6, 8).

Union president Kronk was the training instructor at PIRO and was supervised by Greg Bruff, the chief of interpretation and cultural resources. Kronk's regular, fixed tour of duty was 8:00 a.m. to 4:30 p.m., Monday through Friday. On several occasions over the years he was allowed, with supervisory approval, to make up for late arrivals by working later in the day than called for under his tour of duty schedule. On several occasions, Kronk also was granted an "in lieu" day for personal reasons; that is, he took one of his scheduled work days as a day off and worked on the weekend instead, usually the following Saturday. For example, this occurred in November 1998, when Kronk was allowed to extend a personal weekend out-of-town trip to Monday, and he worked the following Saturday to make up for having Monday off. (Tr. 122-24, G.C. Exh. 15, p. 1.) A similar in lieu day arrangement for an out-of-town trip was allowed in September 1999. (Tr. 128-29; G.C. Exh. 16.) He was also allowed to alter the days of his tour of duty in April 2001, to accommodate his wedding anniversary. (Tr. 127; G.C. Exh. 15, p. 3.) His supervisor, Bruff, allowed these "in lieu" days because he did not believe it was contrary to agency policy, and at least in one instance, as a "favor to the employee."[1] (Tr. 193-95.) The only instance of Kronk being denied a work schedule change for

[1] In certain of these situations, Kronk's work on Saturday fulfilled specific work-related needs for PIRO. (Tr. 193-94.) However, he was allowed to vary his work days and days off to accommodate his personal needs, and it appears that it was Kronk, not management, who initiated the schedule changes. For example, when his wedding anniversary fell on a Wednesday, he took that Wednesday off and worked Saturday instead, when a science program was scheduled at the park. (Tr. 193-95.)

personal reasons was when he was not allowed to change his work hours to enable him to get a haircut.

Teri Perry was a computer specialist/personnel clerk who was excluded from the bargaining unit because she worked in a confidential capacity for Administrative Manager Tunteri. Prior to August 1999, Perry worked a fixed, full-time tour of duty, 8:00 a.m. to 4:30 p.m., Monday to Friday. However, in August 1999, to accommodate

her attending nursing classes at a nearby college, Perry was allowed to

change to a part-time schedule that had her working from 7:00 a.m. to 12:00 noon from Monday to Friday.[2] (Tr. 87; G.C. Exh. 12, p. 2.) On at least one occasion, Perry was allowed to take an in lieu day during her part-time schedule, in which she worked on a Saturday in order to be able to take off the prior Wednesday, to accommodate her college schedule. (Tr. 87-88; G.C. Exh. 12, p. 3.) Further, from late 1999 through the summer of 2000, Perry was allowed to establish a variety of work schedules to accommodate her college studies. These included regular 8 hours per day, 5 days per week schedules; 10 hours per day, 4 days per week schedules; and part-time 5 hours per day schedules. (Tr. 88; G.C. Exh. 12, p. 4.)

Steve Howard was a maintenance worker at PIRO and was in the bargaining unit. He worked a fixed schedule, but was allowed to change his days off during the work week to accommodate his attendance at college. (Tr. 81-82; G.C. Exh. 11.) Greg Bruff, Kronk's supervisor, was allowed to take an in lieu day off to spend time with his children. (Tr. 76-79.) Mary Jo Cook, the Union secretary-treasurer, was also the payroll clerk at PIRO and was in the bargaining unit. She was allowed on one occasion by her supervisor, Ms. Tunteri, to work through lunch and go home one hour early. (Tr. 112-13.) There have also been instances of groups of employees taking longer than the scheduled half hour lunch break to attend a farewell lunch for departing employees, without making that time up at some other time of the work day or week. (Tr. 108-11.)

The record demonstrates that PIRO did not have any overall policy or guidelines as to when supervisors could grant employee requests to change their work schedules to accommodate the employees' personal needs. On the one hand, Tunteri testified that "we don't change schedules for one hour, for two hours here or one hour", except to allow an employee to attend school or when there is a specific management need (Tr. 165-66). She also stated that

---

[2] Perry changed her field of study from nursing to general studies shortly after starting at the college. (Tr. 161.)

employees are only allowed to work four ten-hour days for an

entire pay period (Tr. 165). On further questioning, however, Tunteri conceded there was not a "hard and fast policy" concerning the granting of "in lieu" days, and that different supervisors permit individual employees to make ad hoc changes in their work days and their days off during a work week for a wide variety of personal reasons (Tr. 184-85). Testimony of other supervisors confirmed widely varying understandings of PIRO policy and actual practice. In the maintenance division, where Union steward Vieth worked, neither supervisor John Ochman nor division director Chris Case was aware of any instances where employee requests for schedule changes for personal reasons were granted (Tr. 200, 205), but in the divisions in which Kronk and Cook worked, such changes were more common.[3]

DISCUSSION AND CONCLUSIONS

Positions of the Parties

The General Counsel argues that under the analytical framework established in *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*), PIRO management treated Cook and Vieth

---

[3] In making my findings of fact, I have also considered the entries on General Counsel Exhibit 4, which is a list of changes to the work schedule for PIRO employees for the years 1997 through 2000. The document, a synthesis of information contained in employee tour-of-duty schedules, was prepared by Ms. Cook after management complied with a Union data request relating to schedule changes (See G.C. Exh. 17). For 1999, it specifies which employees had their schedule changed in each pay period, and the nature of the change. For the other years, it simply names the employees whose schedules were changed each pay period. However, absent clarifying testimony from a witness, it is unclear from the document whether these changes were initiated by employees for personal reasons or by management for work-related reasons. Notwithstanding the inherent limitations of the document, I find the exhibit useful in providing some objective context to the often- subjective testimony of many of the witnesses. I also note that despite Tunteri's above-cited assertion regarding employees working ten-hour days, page 2 of G.C. Exh. 4 indicates that three employees worked four ten-hour days for only one week of pay period 18 in 1999. That exhibit also indicates that in two pay periods of 1999, Vieth had his schedule changed from five eight-hour days to four ten-hour days; although it is unclear whether this was done at Vieth's initiative or management's, it undercuts the supervisors' general assertions somewhat.

disparately from other similarly situated employees when it denied their requests for either "flex time" or an "in lieu" day to meet with Congressman Stupak on December 12, 2000.[4] In support of this, the General Counsel notes that PIRO management has "consistently and knowingly" granted schedule changes for personal reasons to all types of PIRO employees, both inside and outside the bargaining unit. Moreover management knew, when it denied their requests, that Vieth and Cook were requesting changes in their work schedules in order to represent the Union at the meeting with the Congressman. Finally, the General Counsel asserts that PIRO management cannot establish that it would have denied the schedule change requests in the absence of protected activity. This is so because management's policy or practice was to grant employee requests for work schedule changes for personal reasons, unless to do so would interfere with the accomplishment of work goals. Since Vieth and Cook's requests did not interfere with their work, the only reason PIRO denied the requests was the Union-related purpose of the meeting.

The Respondent argues that there was no consistent practice of granting employee requests for work schedule changes for personal reasons. It challenges the probative value of the General Counsel's evidence regarding schedule changes, noting that much of it was presented in the form of hearsay testimony. It also objects to evidence of schedule changes for supervisory or confidential employees, because such employees are not similarly situated to bargaining unit employees. Rather, the Respondent argues that its policy was to permit schedule changes only if the changes would benefit the agency in the accomplishment of its mission. Therefore, the denial of flex time and an in lieu day to Vieth and Cook was consistent with that policy.[5]

---

[4] The General Counsel does not allege that the denial of official time to Cook and Vieth was improper, and I do not discuss that issue further.

[5] At the hearing, counsel for Respondent also alleged that the parties have tentatively negotiated a collective bargaining agreement provision which would require the Union to pursue its claim in this case through the grievance procedure (Tr. 14). However, the agreement has not been fully negotiated or executed, and the tentative agreement was never offered into evidence. I expressed the view at the hearing that such a contractual provision would not bar the Authority's consideration of the complaint in this case. (Tr. 137.) The argument was not pursued by PIRO in its post-hearing brief, and I therefore consider it to have been abandoned.

Analysis

1. Analytical framework under *Letterkenny*

Section 7116(a)(2) of the Statute makes it an unfair labor practice to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment. In *Letterkenny*, 35 FLRA at 118-19, the Authority explained the analytical framework for evaluating such allegations. The General Counsel bears the burden in all such cases of establishing by a preponderance of the evidence that an unfair labor practice has been committed. The General Counsel must demonstrate: (1) that the employee against whom allegedly discriminatory action was taken was engaged in protected activity; and (2) that such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion or other conditions of employment. If the General Counsel does so, it has established a *prima facie* case of unlawful discrimination. The Respondent can, in turn, rebut the *prima facie* case by establishing, by a preponderance of the evidence, that: (1) there was a legitimate justification for its actions; and (2) the same action would have been taken in the absence of protected activity. *Id.*

2. Application of the *Letterkenny* framework to this case

a. The General Counsel's *prima facie* case - There is no dispute in this case that Cook and Vieth were engaged in protected activity under the Statute when they requested, on their own and through Union president Kronk, to be allowed to change their work schedules to meet with Congressman Stupak to discuss conditions at PIRO which affected unit employees. Thus it is also clear that PIRO management was aware of the Union-related purpose of the meeting. Accordingly, the first element of the General Counsel's *prima facie* case has been satisfied. The more difficult question is whether the protected nature of the meeting was a motivating factor in management's refusal to allow them to use flex time or to change their day off to attend the meeting. In evaluating this question, I have considered the evidence of record as a whole, and not just the evidence offered by the General Counsel in its case in chief. *See, e.g., 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*).

There is no significant evidence here directly showing an unlawful motivation by the Respondent; nonetheless, a finding of unlawful motivation can be based on indirect factors such as the timing of the action, anti-union animus, or disparate treatment. *See, Warner Robins* at 1205-06 n.5; *American Federation of Government Employees, Local 3354, AFL-CIO*, 58 FLRA 184, 188 (2002). In this case, the crucial issue, both in attributing the Respondent's motivation and in evaluating the Respondent's defense, is whether Vieth and Cook's requests to change their schedule were treated disparately from all other schedule change requests.

The record indeed reflects, as the General Counsel has argued, that PIRO management commonly authorized ad hoc, informal changes to work schedules for the convenience of employees over a period of at least 3 years prior to the hearing in this case. The practice dates back at least as far as November 1998, when Union president Kronk was allowed to take a Monday off and work the following Saturday, so that he could extend a weekend trip, and the practice was followed repeatedly over the ensuing three years.[6] Other examples are listed in the Findings of Fact above, and many more such examples are evident from a reading of the entries on G.C. Exh. 4. Most of the changes listed on G.C. Exh. 4 simply allowed employees to work an earlier or a later shift, but a significant number of others resulted in a change in days off.[7] This pattern stands in stark contrast to the Respondent's refusal to allow Vieth and Cook to change their schedules for December 12. The only other specific example of an employee's request for a schedule change being denied was Kronk's request to split

---

[6] The November 1998 incident was not necessarily the first time such a change was made, but it was the earliest example specifically described by a witness.

[7] In some instances, changing from a schedule of five eight-hour days to four ten-hour days accomplished the same result of giving an employee an extra day off (Tr. 47).

his work day to allow him to get a haircut.[8] Thus the record presents a severe disparity between the treatment of a meeting to engage in protected Union activity and the treatment of other requests for schedule changes.

The Respondent objects to the use of evidence of schedule changes relating to supervisors and confidential employees who are not in the bargaining unit, because it argues that these employees are not similarly situated to bargaining unit employees. The General Counsel, on the other hand, argues that the PIRO policy concerning schedule changes has been consistently applied without regard to the bargaining unit status of the requesting employee, and therefore the evidence concerning non-unit employees is relevant to the issue of disparate treatment. In some contexts, I would agree that non-unit employees, especially supervisors, are not similarly situated to unit members, but in the context of this case there is no reason to distinguish between these groups. Although an agency is not required to apply the same rules or systems for leave and attendance to supervisors or non-bargaining unit employees as it applies to unit employees, the record reflects that at PIRO, the same system and rules applied to all (Tr. 59-60). Since there is no indication in the record that management had previously applied different standards for approving schedule changes for confidential employees and supervisors than for rank and file employees, it is appropriate here to consider all such evidence in evaluating whether Vieth and Cook were treated disparately in December 2000. For purposes of evaluating the Respondent's granting and denial of schedule change requests, confidential employees and supervisors appear to be similarly situated to rank and file employees.

---

[8] Testimony by Facility Manager Chris Case was ambiguous as to whether other requests had been denied (Tr. 205):

Q. Do you – have you ever received any requests for schedule changes by employees for personal reasons?
R. I am aware of – infrequently someone has asked.
S. Are you aware that any of them have ever been approved?
T. None that I'm aware of.

This line of questioning avoids asking him whether he ever refused such requests or was aware of other supervisors refusing them, and it avoids asking him the specifics of any such incidents.

The Respondent also argues that much of the testimony from the General Counsel's witnesses regarding schedule changes was hearsay, and therefore should not be considered. It is well established, however, that under section 7118(a)(6) of the Statute, unfair labor practice hearings are not confined to the rules of evidence that govern court proceedings. *Indian Health Service, Winslow Service Unit, Winslow, Arizona* 54 FLRA 126, 127 (1998). Rather, the Administrative Law Judge has discretion to decide what evidence should be admitted into evidence. See also, 5 C.F.R. § 2423.31(b) (2002). In this case, I find no basis to conclude that the hearsay nature of the testimony concerning the reasons for employees requesting or receiving permission for schedule changes renders it inadmissible. It is true that in many situations, one employee's recollection of why another employee requested a schedule change would be quite unreliable. But here, it was primarily Ms. Cook who testified about these examples, and as payroll clerk she regularly kept records of schedule changes; it was part of her job to ascertain whether a supervisor had granted the request, and why. Moreover, her recollection, as well as that of the other employees, was generally corroborated by payroll records as well as the cumulative list of schedule changes she compiled (G.C. Exh. 4).

Although the record establishes that many employees (including rank and file employees such as Kronk, Howard, Girard, Bos, Smith, Bleutscher and Vieth; confidential employees such as Perry and St. Martin; and supervisors such as Bruff and Korsmo) had for at least three years been permitted to change their work schedule for personal reasons, it does not establish that all types of schedule changes were treated with equal tolerance. The Respondent is charged with unlawfully denying Vieth and Cook's requests for "flex time" and "in lieu" days, and each type of request must be evaluated separately.

While there is ample evidence of employees being allowed to adjust their tour of duty in order to arrive late or leave early, there is little or no evidence of employees being permitted to leave work in the middle of a shift and to return later in the day, as Vieth and Cook were requesting when they asked for flex time on December 12. Indeed even Ms. Cook, the General Counsel's primary witness, admitted that schedule changes in the middle of the day are "unusual" and could not give a

specific example of one being granted (Tr. 112).[9] The one clear example of such a request was Kronk's request to leave in the afternoon to get a haircut (Tr. 145, 196-97), and this was also the only incident specifically described in the record of a schedule change request being denied. If the meeting with Congressman Stupak had been scheduled for early morning or late afternoon, and if Vieth and Cook had requested to stay late or report early in order to make up for the time missed, I would agree with the General Counsel that a denial of flex time would have been discriminatory. But the record shows that there was no practice of granting employees flex time to leave work in the middle of a shift; therefore, I conclude that the General Counsel has not made a *prima facie* case of discriminatory motivation in the denial of flex time here.

However, the record does establish a *prima facie* case as to the granting of "in lieu" days. As I have already described, a number of employees both within and outside the bargaining unit were allowed to change their days off, for a variety of personal reasons, over a period of years. Some of these changes were granted to enable two employees (Perry and Howard) to attend college courses, but as I will discuss further in my evaluation of the Respondent's defense, I do not consider these two employees to be distinguishable from Vieth, Cook and other PIRO employees. The record discloses no instance (other than Vieth and Cook's request for December 12) when an employee request for an in lieu day was denied. I also find no basis in the record for distinguishing among the various divisions at PIRO, in terms of their establishing varying practices in granting in lieu day requests for personal reasons. Thus the maintenance division, where Vieth worked, granted in lieu days to Howard, and allowed Vieth himself to work ten-hour days twice in 1999 alone to enable him to take an extra day off (G.C. Exh. 4). The administration division, where Cook worked, granted them to Perry. There is a clear disparity between the denial of Vieth and

---

9 This issue is further complicated by the fact that PIRO management officials claimed that their allowing more than a one-hour break during the work day would constitute an illegal "split shift." Although neither the management witnesses nor its counsel specified the basis of the alleged illegality of this practice, I take note of 5 U.S.C. § 6101 (a)(3)(F), which states in relevant part that agency heads will ensure that "breaks in working hours of more than one hour may not be scheduled in a basic workday." I express no opinion on whether granting Cook and Vieth's requests for "flex time" for the meeting with Congressman Stupak would have violated this statutory provision, but the statute does suggest that the managers' claim was not pretextual.

Cook's request in December 2000 and the otherwise-widespread accommodation of employees' personal requests. Accordingly, I find that the General Counsel has met its burden of establishing that the Respondent's denial of an in lieu day to Vieth and Cook for December 12, 2000, was motivated by the protected nature of the activity in which Vieth and Cook were engaged.

b. The Respondent's affirmative defense - For the reasons that follow, I further hold that under the *Letterkenny* analysis, the Respondent has failed to show either that it had a legitimate justification for denying the requests by Vieth and Cook for in lieu days, or that it would have taken the same action in the absence of protected activity.10

Most of PIRO's argument in its post-hearing brief was devoted to attacking the General Counsel's showing of a *prima facie* case, specifically arguing that the evidence did not establish a consistent practice of supervisors allowing employees to change their schedule for personal reasons. It did not deny that employees were sometimes allowed to change schedules, but it argued that it granted such requests only if the schedule change benefited PIRO in the accomplishment of its mission. Thus, PIRO claims, it would have denied Cook and Vieth's requests for in lieu days for December 12, even if they were not engaging in protected activity, since their proposed changes would not have advanced PIRO mission objectives.

Much of my analysis of the General Counsel's *prima facie* case, above, refutes the Respondent's defense. As I have explained, the record establishes that employee requests to change their days off were regularly, indeed almost invariably granted, throughout the various divisions of PIRO. The testimony from supervisors, that these requests for in lieu days off were granted only for the benefit of PIRO, is unconvincing. For example, Tunteri testified that Perry was allowed in lieu days to attend college because she wanted to encourage Perry to remain at PIRO. (Tr. 153.) However, Perry was engaged in college studies that were unrelated to her work at PIRO. By facilitating Perry's college studies, Tunteri was, if anything, hastening Perry's departure from PIRO, to pursue a career consistent with her studies. It therefore scarcely stands to reason that allowing her to change her work

10
Since I have already found that the General Counsel did not establish a *prima facie* case of discrimination with regard to the requests for flex time, I will not discuss that allegation further.

schedule to attend college was designed to enhance the chances of her remaining at PIRO. Even assuming that refusing to accommodate Perry's college schedule might have caused her to become dissatisfied and to immediately quit her job at PIRO, this simply demonstrates that satisfied employees will stay longer; the same argument could be made for accommodating all employee requests. Moreover, there was no testimony at all that the schedule changes allowed for Howard were also designed to keep him employed at PIRO. Nor does this rationale of encouraging employees to stay at PIRO explain why Bruff and Kronk were allowed in lieu days for personal and family-related reasons.

In sum, I do not accept that there was any coherent, consistent policy at PIRO of denying schedule changes unless they advanced a mission objective. The absence of any written policy or guidelines on this issue weakens the Respondent's argument from the start. Moreover, such a policy is inherently subjective, an impression that is reinforced by the testimony of record here. If Kronk's desire to take a long weekend trip or to take his anniversary off, or if Bruff's desire to spend a day at home with his child, can be accommodated by finding a corresponding "benefit" to management, it is hard to understand how this was not possible for Cook and Vieth's meeting on PIRO property with a congressman to discuss issues affecting the agency. Instead of a coherent policy governing the granting of in lieu days, the record reflects that each supervisor was given generally unfettered discretion to grant or deny such requests as they saw fit, and for the most part they granted such requests unless the timing of the request severely interfered with agency operations (e.g. during holiday periods when many employees were on leave).

Moreover, the Respondent did not demonstrate that allowing Vieth and Cook to take all or part of December 12 as a day off, and to work additional hours on one or more other days, would have caused any problems at PIRO or in their respective departments. Although employees in Cook's department apparently all work a Monday-Friday schedule, making it more difficult for an employee to work on Saturday or Sunday as an in lieu day, Ms. Perry was allowed to work on Saturday instead of Wednesday in pay period 22 of 1999 (G.C. Exh. 4), and her college schedule was frequently accommodated in a variety of other ways. Similarly, other employees were allowed to work four ten-hour days rather than their normal five eight-hour days, to enable them to take an extra day off. Finally, I find it suspect here that Ms. Tunteri, PIRO's administrative manager and Cook's supervisor, acted on Vieth's requests, rather than Vieth's

immediate supervisor. This suggests to me that PIRO treated the Union officials' requests differently than other employees' requests, and that the denial was based on factors other than what the immediate supervisor would normally consider.

Therefore, I conclude that the Respondent has not adequately justified the denial of in lieu days to Vieth and Cook for December 12. Rather, I conclude that Vieth and Cook were victims of disparate treatment, and that their requests for in lieu days would not have been denied, but for the fact that the requests were made in order to enable them to engage in protected activity.

CONCLUSION

Based on the foregoing, I conclude that the General Counsel has established by a preponderance of the evidence a *prima facie* case that PIRO violated section 7116(a)(1) and (2) of the Statute by refusing to grant the requests that Cook and Vieth be allowed an "in lieu" day off for December 12, 2000, to meet with Congressman Stupak. I further conclude that PIRO did not establish as an affirmative defense that it had a legitimate justification for its action, or that it would have taken the same action in the absence of protected activity. Therefore, I conclude that PIRO committed an unfair labor practice in violation of section 7116(a)(1) and (2).

I therefore recommend that the Authority issue the following remedial 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 Statute), it is hereby ordered that the U.S. Department of the Interior, National Park Service, Pictured Rocks National Lakeshore, Munising, Michigan (PIRO), shall:

1. Cease and desist from:

(a) Discriminating against employees by denying employees the right to change their schedules for personal need, except as is consistent with established PIRO practice, and without regard to employees' Union or other protected activity.

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

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

(a) Post at all PIRO facilities a copy 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 Superintendent of PIRO, 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.

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

Issued, Washington, DC, March 12, 2003.

_____
RICHARD A. PEARSON
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 Interior, National Park Service, Pictured Rocks National Lakeshore, Munising, Michigan, 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 employees by denying employees the right to change their schedules for personal need, except as is consistent with established PIRO practice, and without regard to employees' Union or other protected activity.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of rights assured them by the Statute.

WE WILL, in the future, treat employee requests for changes in schedule for personal need consistent with established PIRO practice and without regard to employees' Union or other protected activity.

Department of the Interior, National Park Service
Picture Rocks National Lakeshore
Munising, Michigan

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Chicago Regional Office, Federal Labor Relations Authority, whose address is: 55 West Monroe, Suite 1150, Chicago, IL 60603-9729, and whose phone number is (312) 353-6306.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. CH-CA-01-0276, were sent to the following parties in the manner indicated:

CERTIFIED MAIL AND RETURN RECEIPT **CERTIFIED NOS:**

John F. Gallagher 7000 1670 0000 1175 1365
Counsel for the General Counsel
Federal Labor Relations Authority
55 West Monroe, Suite 1150
Chicago, IL 60603-9729

James E. Gwyn 7000 1670 0000 1175 1372
Labor Relations Officer
National Park Service
Washington Headquarters Office
1849 C Street, NW, Stop MIB-2013
Washington, DC 20240

Gary Vieth, Union Steward 7000 1670 0000 1175 1389
David Kronk, President
NFFE, Local 2192
E 9758 Highway H-58 East
Munising, MI 49862

REGULAR MAIL

National President
National Federation of Federal Employees
1016 16th St., NW
Washington, DC 20036

Dated: March 12, 2003

Washington, DC