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

MEMORANDUM DATE: June 10, 2003

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE AIR FORCE
60TH AIR MOBILITY WING
TRAVIS AIR FORCE BASE, CALIFORNIA

Respondent

and Case No. SF-CA-02-0660

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES
LOCAL 1764, AFL-CIO

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

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DEPARTMENT OF THE AIR FORCE 60TH AIR MOBILITY WING TRAVIS AIR FORCE BASE, CALIFORNIA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 1764, AFL-CIO Charging Party	Case No. SF-CA-02-0660

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/her 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 **JULY 14, 2003**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, Suite 201
Washington, DC 20424-0001

_____
PAUL B. LANG
Administrative Law Judge

Dated: June 10, 2003
Washington, DC

OALJ 03-31

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

DEPARTMENT OF THE AIR FORCE 60TH AIR MOBILITY WING TRAVIS AIR FORCE BASE, CALIFORNIA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 1764, AFL-CIO Charging Party	Case No. SF-CA-02-0660

Major Douglas Huff
Major Douglas Cox
For the Respondent

R. Timothy Sheils
For the General Counsel

Michael R. Anderson
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an unfair labor practice charge filed on June 25, 2002, by the American Federation of Government Employees, Local 1764, AFL-CIO (Union) against the Department of the Air Force, 60th Air Mobility Wing, Travis Air Force Base, California (Respondent). On September 18, 2002, the Regional Director of the San Francisco Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing alleging that the Respondent committed unfair labor practices in violation of § 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (Statute) by temporarily reassigning Karen Taylor, a member of the

bargaining unit, to a different work place and changing her hours of work, all on account of Taylor having filed grievances under the collective bargaining agreement between the Union and the Respondent. The General Counsel also alleged that Taylor was informed that her temporary reassignment was the result of her grievances.

A hearing was held in Fairfield, California on January 16, 2003. The parties appeared with counsel and were given an opportunity to present evidence and to cross examine witnesses. This Decision is based upon careful consideration of all of the evidence, including the demeanor of witness, as well as of the post-hearing briefs submitted by the parties.

Finding of Facts

General Counsel

The General Counsel maintains that, on May 30, 2002, the Respondent temporarily reassigned, or detailed, Karen Taylor from the Child Development Center (CDC) to which she was assigned as Lead Clerk to another CDC because she had filed grievances. According to the General Counsel it is of no consequence that the Respondent had previously contemplated the permanent reassignment of Taylor because of her deteriorating relationship with Alan Tornay, her immediate supervisor. If Taylor had not initiated the grievances, Tornay would not have gone to Major Marcus Bass, the Commander of Respondent's 60th Service Squadron to which Taylor and Tornay were assigned. Tornay informed Bass of the grievances and stated that he could no longer function if Taylor remained under his supervision. As a direct result of Tornay's statements and behavior, Bass ordered Taylor's detail. The reassignment necessitated a change in Taylor's work schedule and removed her from an environment with which she was familiar and where she was well regarded by the parents of the children who received care at the facility.

The General Counsel further argues that, whatever the problems that existed between Tornay and Taylor, the Respondent had not previously deemed them sufficient to justify overt action against Taylor. It was only because of the filing of the grievances that the Respondent, through Bass, decided to remove Taylor from her regularly assigned work place, ostensibly to carry out the mission of the organization. The General Counsel maintains that it does not matter whether the grievances were the only reason for Taylor's reassignment. The Respondent's unfair labor practices are established by uncontroverted evidence that

the transfer would not have occurred if it were not for the filing of the grievances.

The Respondent

The Respondent argues that the CDC's are designed to care for the young children of military and civilian personnel and are therefore especially sensitive areas. It is essential that the Respondent maintain the highest standards of efficiency and decorum in the CDC's. Tornay's conference with Bass presented Bass with a situation in which immediate action was necessary in order to maintain the security and efficiency of the CDC operation. Bass was solely motivated by operational necessity; Taylor's grievances played no part in his decision.

As Lead Clerk at CDC#2, Taylor was in an especially sensitive and important position. Taylor's performance indicated that she was unable to handle those responsibilities. It is essential to the proper functioning of a CDC that the Lead Clerk and the Director of the CDC (in this case Tornay) have a professional working relationship. Taylor's reassignment was an attempt to alleviate ongoing problems between her and Tornay. Bass hoped that the 30 day reassignment would allow for a cooling off period.

The Respondent recognized the problems between Tornay and Taylor long before the detail was ordered on May 30, 2002. In the early part of 2001, and later in January of 2002, Shenethia Carter, Tornay's immediate supervisor who reported directly to Bass, attempted to permanently reassign Taylor. Carter was unable to effect the reassignment either because the only vacancy was for a GS-3 (Taylor was a GS-4) or because Taylor did not have the required skills.

According to the Respondent, Taylor only filed the grievances in order to forestall an impending reassignment. Taylor's motivation was shown by her solicitation of testimonial letters from parents in April of 2002. Taylor submitted her grievances to the Union on or about May 9 but the Union did not pass them along to the Respondent until May 28 which was after Taylor had begun soliciting statements from parents in an attempt to thwart her reassignment.

The timing of Taylor's reassignment was the result of a vacancy in CDC#3 which was caused by the transfer of Lettie Vasquez to the Medical Center where she had accepted a job offer. Vasquez accepted the position on May 16, 2002, and reported to the Medical Center on June 2. The reassignment was accomplished in accordance with the

collective bargaining agreement as well as all pertinent regulations. The Union was informed of the detail but did not raise concerns with regard to the slight schedule change or any other alleged hardships.

The Respondent further maintains that the General Counsel has not presented a *prima facie* case of unlawful discrimination inasmuch as there were no changes in Taylor's working conditions or such changes were *de minimis*. Secondly, the detail did not affect Taylor's "conditions of employment" as defined in the Statute.

The Respondent also contends that, even if the General Counsel is found to have presented a *prima facie* case, there was a legitimate reason for the detail and the action would have occurred even in the absence of Taylor's protected activity.

Findings of Fact

The 60th Service Squadron at Travis Air Force Base encompasses a number of support activities. Among them are three CDC's, each of which provides day care to the children of military and civilian personnel; the ages of the children range from six months to five years. CDC#1 and CDC#2 each accommodate about 200 children while CDC#3 has about half of that capacity. CDC#1 and CDC#2 are adjacent to each other with joined playgrounds. CDC#3 is about a half mile away.

Tornay is the Director of CDC#2. As such, he is in charge of its operations and reports to Carter. Carter is a Flight Chief whose responsibilities include all three of the CDC's. She reports to Bass who is the Squadron Commander. Taylor is the Lead Clerk at CDC#2.[1] Her duties include opening the CDC each morning, greeting parents, receiving instructions for the children's medication if necessary, ensuring that the proper ratios are maintained between staff members and children and calculating the fees which parents pay for the use of the CDC. She reports directly to Tornay.[2]

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[1] Taylor was selected by Tornay for promotion to Lead Clerk.

[2] The evidence indicates that there was a vacancy for the position of Assistant Director at CDC#2. It is unclear whether Taylor would have reported to that person if the position had been filled.

Both Bass and Carter were aware of past problems between Tornay and Taylor.[3] Consideration had been given to permanently transferring Taylor to another CDC. Taylor was obviously aware of the possibility of being transferred since she collected written testimonials from parents in an attempt to prevent such a transfer. It is possible, as alleged by the Respondent, that the decision had been delayed until a suitable opening was available and that such an opening first occurred shortly before Taylor's detail. In any event, the evidence shows that as of the time of Tornay's meeting with Bass on May 30, 2002, no decision had yet been reached.

Tornay sought a meeting with Bass on May 30 after learning that Taylor had filed the grievances.[4] He testified that he felt "whammied" by the fact that Taylor had taken certain problems to a new level in spite of the fact that he had been trying to resolve them for her. Tornay stated that he met with Bass because of the stress of the further breakdown of his communications with Taylor as evidenced, at least in part, by the filing of the grievances.

Tornay also gave highly contradictory testimony as to whether he was under the impression that Carter had already decided to detail Carter. At one point he stated that Carter had told him that the detail would occur as soon as certain "logistical" details were worked out.[5] At another point he denied that Carter had made a final decision. Carter testified that they were actively exploring the possibility of a detail or a permanent reassignment for Taylor, but also indicated that a final decision had not been made. Carter also testified that they were considering sending one of the other clerks to CDC#3. In view of this evidence, I find as a fact that the Respondent had not decided either to permanently transfer or to detail Taylor prior to the meeting between Tornay and Bass on May 30, 2002.

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[3] Taylor had been suspended for insubordination after failing to follow instructions from Tornay. Also, her most recent performance appraisal had been unsatisfactory.

[4] He would normally have met with Carter, his immediate supervisor, but she was out of town on that day.

[5] Tornay had apparently drafted a letter for Carter's signature on or before the end of April which would have informed Taylor of the detail.

Tornay testified that he did not care about the grievances as such, but only the lack of trust which they demonstrated. Tornay had informed Carter that he was under a great deal of stress because of his relationship with Taylor. In fact, the stress had affected his relationship with his wife to the point that they were seeking counseling. Tornay stated that he did not recall whether he took copies of the grievances into his meeting with Bass on May 30 and did not recall whether he mentioned the grievances during the course of the meeting. Bass testified that Tornay mentioned the grievances during the May 30 meeting and that he was under the impression that the grievances were "the straw that broke the camel's back."[6] He stated that his decision to detail Taylor to CDC#3 was not motivated by the grievances, but was an attempt to alleviate what he described as an explosive situation.

Taylor testified that Bass told her that the detail was intended to give Tornay a chance to "clear the air" with regard to her grievances. Bass' recollection of the conversation is less specific, but he acknowledged that he probably mentioned the grievances in his conversation with Taylor. Accordingly, I find as a fact that, in effect, Bass told Taylor that she was being detailed because of her grievances.

Discussion and Analysis

The General Counsel Has Presented a *Prima Facie* Case of Discrimination

In *Letterkenny Army Depot*, 35 FLRA 113, 118 (1990), the Authority set forth the two requirements for a *prima facie* case of discrimination. The first is that the employee against whom the allegedly discriminatory action was taken was engaged in protected activity. The second is that the protected activity was a motivating factor (not necessarily the sole motivating factor) in the allegedly discriminatory action.

The Respondent has gone to great lengths in an attempt to show that Bass did not detail Taylor to CDC#3 because of her admittedly protected activity in initiating the grievances. The Respondent has emphasized the fact that Bass did not make discriminatory statements to Taylor and that he has never exhibited anti-union animus. Bass was a highly credible witness and I have accepted his assurances that his decision was in no way motivated by Taylor's grievances. I have also credited Tornay's testimony that he

6 The quoted language was used by me in a question to Bass.

was not upset by the grievances as such, but only by the fact that he considered them as an indication of Taylor's lack of trust and a further erosion of communications between them. However, the lack of discriminatory motive on the part of Bass and Tornay does not absolve the Respondent of liability under the Statute.

The Respondent has been charged with violations of § 7116(a)(1) and (2) of the Statute. The cited language states that:

> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency-
>
> > (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
> >
> > (2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

There is nothing in that language to suggest that an agency may only be found to have violated its provisions if it has acted wilfully and with intent. The evidence clearly shows that Tornay went to see Bass because of Taylor's grievances. Bass, in turn, knew that Tornay considered the filing of the grievances to be the "last straw". Bass, by his own admission, ordered Taylor's detail in order to defuse an explosive situation caused by Tornay's distress over the grievances. That chain of events is sufficient to establish a *prima facie* case of discrimination. It is of no consequence that neither Bass nor Tornay intended to interfere with Taylor's rights under the Statute. They knowingly did so regardless of their intentions.

The Respondent's *de minimis* argument is inapplicable to the issues in this case. The *de minimis* defense pertains only to the issue of whether an agency has the obligation to bargain over the impact and implementation of the exercise of management rights under § 7106 of the Statute. The Respondent has not cited any precedent showing that the Authority has expanded the application of the *de minimis* defense. There can be no legitimate doubt that Taylor's unscheduled detail was caused by the filing of her grievances. In view of Taylor's efforts to prevent a transfer from CDC#2 she, as well as other members of the bargaining unit, could reasonably have been expected to

consider the detail as a form of retaliation for the exercise of her protected rights.

The retaliatory nature of the detail is further supported by the fact that, although Taylor suffered no loss in pay or benefits, she was not detailed to serve as a Lead Clerk at CDC#3. That change in status, although temporary, could reasonably be interpreted as being in the nature of a warning to Taylor of a possible demotion and reduction in her pay grade.[7] Even if the Respondent's *de minimis* defense were relevant, the effect of Taylor's detail on her working conditions was of sufficient gravity to overcome the defense.

The Respondent maintains that there is no evidence which could show that it changed Taylor's conditions of employment as defined in § 7103(a)(14) of the Statute and that, therefore, it may not, as a matter of law, be found to have violated § 7116(a)(2). In support of this position the Respondent has cited the concurring opinion of Chairman Cabaniss in *U.S. Dept. of Labor, Occupational Safety and Health Administration, Region I, Boston, Massachusetts*, 58 FLRA 213, 216 (2002).[8] It should be noted that the Chairman's concurrence was directed only to the allegation that the agency had failed to bargain in violation of § 7116 (a)(5) of the Statute. Her reasoning was that, because the agency had changed certain working conditions rather than conditions of employment of the affected employee, its actions fell outside of the scope of § 7116(a)(5).

Suffice it to say that the Authority has never applied the distinction, if any, between conditions of employment and working conditions to an alleged violation of § 7116(a) (2) of the Statute. The violation of § 7116(a)(1) was established by Bass' statement to Taylor indicating that he was ordering her detail because she had filed grievances. The violation of § 7116(a)(2) arose out of the actual detail.

Taylor Would Not Have Been Detailed If She Had Not Engaged in Protected Activity

[7] A Lead Clerk is classified as a GS-4; an Administrative Clerk (the position to which Taylor was detailed) is a GS-3.

[8] The Chairman's concurring opinion draws a distinction between "conditions of employment" established by rules, regulations, policies and practices for the entire bargaining unit and "working conditions" which apply only to individual employees.

It may well be true, as argued by the Respondent, that it would have been justified in detailing or permanently reassigning Taylor even if she had not engaged in protected activity. Nevertheless, the Respondent did not take action until after the grievances had been submitted and there can be no valid question that the Respondent's action was caused by the filing of the grievances. It may also be true that another incident was bound to occur and that Taylor's permanent reassignment or detail was inevitable. However, that is conjectural. It does not matter that similar action might have been taken at an earlier or a later date. The fact remains that the Respondent's action on May 30, 2002, was improper.

This is not a situation in which the proximity between the time of the protected activity and the adverse action is no more than circumstantial evidence of a discriminatory motive as was the case in *Department of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 55 FLRA 1201, 1205 (2000). Bass essentially admitted that his decision to order Taylor's detail was triggered by the effect of the filing of her grievances. That admission was direct rather than circumstantial evidence that an unfair labor practice had occurred.

Although Taylor might have been a problem employee, the deficiencies in her performance and attitude do not deprive her of the protection of the Statute. The Respondent would have been entitled, and is still entitled, to take appropriate administrative and disciplinary action against Taylor. However, the Respondent was not entitled to base its actions, even in part, on Taylor's protected activity.

The Respondent has argued that credibility determinations should be made in its favor. As stated above, I have credited the testimony of Tornay and Bass as to their motives and I recognize that Taylor's testimony might have been self serving. However, this Decision is based upon the testimony of Tornay and Bass that, regardless of their intentions, their actions were triggered by Taylor's grievances.

There can be little doubt that Bass sincerely believed that when Tornay approached him on May 30, 2002, he was faced with an emergency situation that required immediate and decisive action. If so, the situation could have been prevented by earlier action or by a temporary reassignment of Tornay. While Tornay's distress was undoubtedly real, as a supervisor he should have been able to continue

functioning in spite of the pendency of Taylor's grievances, even if those grievances were frivolous or were submitted in bad faith.

For the reasons set forth in this Decision I have concluded that the Respondent committed an unfair labor practice in violation of § 7116(a)(1) and (2) of the Statute by detailing Taylor because of her protected activity in submitting grievances.

I therefore recommend that the Authority adopt the following Order.

ORDER

Pursuant to § 2423.41 of the Rules and Regulations of the Federal Labor Relations Authority and § 7118 of the Federal Service Labor-Management Relations Statute (Statute) it is hereby ordered that the Department of the Air Force, 60th Air Mobility Wing, Travis Air Force Base, California shall:

1. Cease and desist from:

(a) Discriminating or retaliating against employees in the collective bargaining unit represented by the American Federation of Government Employees, Local 1764, AFL-CIO, by assignment of temporary details or by any other means, because they have submitted grievances or have engaged in other protected activity within the meaning of the Statute.

(b) Making statements that interfere with, restrain or coerce employees in their exercise of activities protected by the Statute.

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

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

(a) Post at facilities where employees assigned to its Child Development Centers report to work copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon the receipt of such forms, they shall be signed by the Respondent's Commander and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily

posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced or covered by any other material.

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

Issued: Washington, DC, June 10, 2003

PAUL B. LANG
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF

THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of the Air Force, 60th Air Mobility Wing, Travis Air Force Base, California 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 or retaliate against employees in the collective bargaining unit represented by the American Federation of Government Employees, Local 1764, AFL-CIO, by the assignment of temporary details or by any other means, because they have submitted grievances or have engaged in other protected activity within the meaning of the Statute.

WE WILL NOT make statements that interfere with, restrain or coerce employees in their exercise of activities protected by the Statute.

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

_____
(Agency)

Dated: _____ By: _____
(Signature) Commander

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, San Francisco Regional Office, whose address is: 901 Market Street, Suite 220, San Francisco, CA 94103, and whose telephone number is 415-356-5002.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. SF-CA-02-0660 were sent to the following parties:

_____

CERTIFIED MAIL AND RETURN RECEIPT	**CERTIFIED NOS:**
R. Timothy Sheils **3528** Counsel for the General Counsel Federal Labor Relations Authority 901 Market Street, Suite 220 San Francisco, CA 94103-1791	**7000 1670 0000 1176**
Major Douglas Huff **1990** Major Douglas Cox AFLSA/CLLO U.S. Department of the Air Force 1501 Wilson Boulevard, 7th Floor Arlington, VA 22209	**7000 1670 0000 1175**
Michael R. Anderson **2003** Chief Steward AFGE, Local 1764, AFL-CIO P.O. Box 1566 Travis AFB, CA 94535-5004	**7000 1670 0000 1175**

Dated: June 10, 2003
Washington, DC