UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: December 18, 1996

TO: The Federal Labor Relations Authority

FROM: ELI NASH, JR.
Administrative Law Judge

SUBJECT: INDIAN HEALTH SERVICE,
WINSLOW SERVICE UNIT,
WINSLOW, ARIZONA

Respondent

and Case No. DE-CA-60131

NAVAJO NATION HEALTH CARE
EMPLOYEES, LOCAL 1376,
LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(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

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WASHINGTON, D.C. 20424-0001

INDIAN HEALTH SERVICE, WINSLOW SERVICE UNIT, WINSLOW, ARIZONA Respondent	
and NAVAJO NATION HEALTH CARE EMPLOYEES, LOCAL 1376, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO Charging Party	Case No. DE-CA-60131

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. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **JANUARY 21, 1997**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

ELI NASH, JR.

Administrative Law Judge

Dated: December 18, 1996
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

INDIAN HEALTH SERVICE, WINSLOW SERVICE UNIT, WINSLOW, ARIZONA Respondent	
and NAVAJO NATION HEALTH CARE EMPLOYEES, LOCAL 1376, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO Charging Party	Case No. DE-CA-60131

Judith E. Scherr
For the Respondent

Robert D. Purcell, Esq.
For the Charging Party

Steven B. Thoren, Esq.
For the General Counsel

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

On February 29, 1996, the Regional Director for the Denver Region of the Federal Labor Relations Authority, pursuant to a charge filed on October 30, 1995 by the Navajo Nation Health Care Employees, Local 1376, Laborers' International Union of North America (herein called the Union), and amended on March 4, 1996, issued a Complaint and Notice of Hearing alleging that the Indian Health Service, Winslow Service Unit, Winslow, Arizona (herein called Respondent) violated section 7116(a)(1), (2) and (4) of the Federal Service Labor-Management Relations Statute (herein called the Statute) on or around October 18, 1995 when the Respondent discriminated against unit employee Anne Lavoie

by detailing her to another position. Thereafter on May 28, 1996, the Union, the Respondent, and the Regional Director entered into a Settlement Agreement in the matter. Subsequently, on July 8, 1996, the Acting Regional Director issued an Order Withdrawing Approval of Settlement Agreement, and also issued a Complaint and Notice of Hearing reinstating the complaint that had been issued on February 29, 1996.[1]

A hearing in this matter was held in Flagstaff, Arizona on August 27, 1996. The parties were represented and afforded a full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses and to file post-hearing briefs. Respondent and the General Counsel filed timely briefs. The Charging Party's brief was untimely filed and has not been considered in the resolution of this matter.[2]

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

Anne Lavoie has been a Public Health Nurse (PHN) at the Indian Health Service, Winslow Service Unit (WSU) in Winslow, Arizona since about 1991. She was assigned to District 7 of WSU from the time she started until October 1995.[3] As the senior PHN in the Dilkon District, Lavoie was the team leader and coordinated the work of approximately ten health care providers, who worked both for IHS and for the Navajo Nation. Since Lavoie was a licensed professional nurse, the Licensed Practical Nurse (LPN) and the Community Health Representative (CHR, who are like nursing assistants and are employees of the Navajo Nation) worked under Lavoie's nursing license. Lavoie is non-Navajo. She also testified that there were two other non-Navajo PHNs in WSU, Maria Miller, who has since retired and Nancy Elwell.

Lavoie's supervisor since around April 1994, has been Sally Pete, who at the time of her promotion to the Director of Public Health Nurses at WSU, was a co-worker. It is also

[1] The complaint was amended at the hearing to reflect the date above.

[2] The General Counsel's unopposed Motion For Expedited Consideration is denied.

[3] District 7 is also known as the "Dilkon District" because the Public Health Nursing office is stationed in Dilkon.

noted, that Lavoie, at the request of the Chief Executive Officer (CEO) Vida Khow[4] served temporarily, as acting director for about a month. Lavoie testified that she was not qualified for the position, but told Khow that "with Sally Pete's support . . . I said with their support that I thought I could probably do it and I would give it a go. So I agreed." Lavoie complained that "not only was I not given assistance and support but I was held to some standards that I just wasn't qualified to even meet." Thereafter, Pete, who apparently had served in a similar position previously took the position. Prior to Pete, Seraphine Elam was the Director of Nurses and there is no evidence that Lavoie had any problems with Elam.

During her time as a PHN at Dilkon, Lavoie received performance appraisals that rated her either as outstanding or excellent in overall performance from 1992 through 1995. Prior to this time, management at WSU never expressed any problem with Lavoie's performance. Her supervisor Pete, confirms that there were no performance problems with Lavoie, but testified that there were conduct problems that would not be reflected in her appraisals. Pete thus testified that getting along with co-workers and others in the community was not one of the elements in the nurses performance standards by saying, "No, those were left out."

Sometime in January 1995, Lavoie became a union steward. Lavoie had been a member of the Union for about two and one half years prior to becoming a steward and professional representative. In her role as steward, Lavoie filed unfair labor practice (ULP) charges and participated in the investigation of ULP's. She also filed grievances on behalf of herself and other employees, represented the Union before the health care organization that accredited WSU, attended labor management partnership committee meetings,

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[4] Lavoie testified that she joined in a petition, with about 35 other employees to the Health Board that concerned the dictatorial management style of the new CEO, Khow, but there is no indication that there was any action by the Health Board on the petition or that Khow was even aware that such a petition was circulated.

and participated in an informational picket.[5] In addition, she circulated and signed a petition for the Union among employees and attempted to speak to the WSU Health Board.

Miller, has since retired but while working at Dilkon she also filed grievances and unfair labor practice charges. In

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[5] A number of those grievances involved Pete and were the subject of arbitration. Lavoie testified that she prevailed in the arbitration, but the Arbitrator did not deal with the specific issues found herein. Furthermore, the Arbitrator noted in closing that the parties "seem to have lost sight of their important mission of providing the highest levels of patient care and safety at the Winslow Service Unit. The deterioration of the relationship between the parties has impacted the cooperation and problem solving necessary to meet this goal on a regular and continuous basis." A salient observation that some of the parties seem to have completely missed.

fact, Miller joined Lavoie in filing a grievance against a

secretary because they were not getting telephone messages that impacted on their work. The record reveals that Miller, was not a popular figure at the WSU.

Pete called Lavoie at the Dilkon clinic on Monday, October 16, 1995, and asked if Lavoie had received a letter from the WSU administration. Lavoie told Pete that she had not. Sometime later, Pete called Lavoie back to read her the letter. The letter which was from Khow to Lavoie, advised Lavoie that she was being detailed to the Outpatient Clinical Nursing Department at the main WSU facility effective on October 18, 1995 for a period not to exceed 120 days, and that Lavoie was to close out her present duties with Pete. Neither the letter nor Pete gave Lavoie any reason for the detail. According to Lavoie, she did not have any idea why she was being detailed.

Lavoie called Union attorney Bob Purcell and told him about the detail. She asked Purcell to find out what was happening and why she was being detailed. Apparently, Purcell wrote Khow on October 17, 1995 requesting information regarding Lavoie's detail. Khow responded on October 18, 1995, stating that she was enclosing "documents from [Lavoie's] colleagues and Navajo tribal programs that support my decision. Issues addressed in the documents relate to lack of courtesy, respect and cooperation from Ms. Lavoie and racist statements made by Ms. Lavoie which is creating a hostile work environment." Among the documents Khow provided Purcell was a letter from Pete to Khow dated September 28, 1995, as a reason to justify the detail. Purcell subsequently faxed the letter to Lavoie. In the letter, Pete made reference, among other things, to Lavoie's grievances, ULP's, complaints, and the use of official time by Lavoie as reasons for asking that Khow take some action against Lavoie, up to and including having Lavoie leave the WSU.6

On October 11, 1995, Pete advised Khow, in writing, that she had just received "the 50th/51st memos/grievances written by Anne Lavoie within the last year. Majority of these memos came within the last six months." Pete restated her request

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The documentation attached to the letter was placed in evidence by Respondent to support its reason for Khow's detailing Lavoie. The General Counsel objected to their receipt as hearsay. They are part of the record simply because they were used by Khow to show Purcell, on advice from Respondent's personnel office, her reasons for the detail and not to show that they were allegations which were true.

that Khow take some action regarding Lavoie, "requesting a

serious consideration and resolution to stop the daily harassment, intimidation, and unbearable situation caused by Ms. Lavoie in our department." Five days later, Lavoie was informed that she was being detailed out of Pete's department.

While Lavoie had a great deal of experience as a PHN, she was concerned that she was being detailed to a position for which she was not qualified. Although she had a degree in nursing, she had no experience as a clinical nurse. PHN's work independently and provide direct health care with standing orders to diagnose, assess and treat patients and to prescribe and dispense medicines. Clinical nurses, however, are more in a supportive role with skills in the area of the emergency room and "advanced cardiac life support certifica-tion and skills to administer cardiac medications and run a defibrillator and other equipment."

Lavoie stated that she became very depressed as a result of being detailed. She also said that, she was devastated and humiliated, could not sleep and had no appetite, so she could not eat. Lavoie testified that she sought medical attention from the Employee Assistance Program and her personal physician for these problems caused by the impact that her being detailed had on her. According to Lavoie, she took about 90 hours of sick leave between the illnesses and her medical appointments due to the detail.

Lavoie attempted to inform management of her lack of qualifications to be a clinical nurse by sending a letter to the Director of Nursing at WSU. However, she was required to work as a clinical nurse from October 18, 1995 until about February 5, 1996, when she was returned to the Public Health Nursing Department. She was not returned to Dilkon, though. When the detail ended, Lavoie was reassigned to the Border Town District. At the Border Town District, Lavoie worked alone, she was not given a team to work with for the health care needs of the patients. Four months into her work at the Border Town District, Lavoie was detailed again, this time to another IHS facility in Tuba City, Arizona. I credit Lavoie with respect to all of the above testimony.

Sallyann Dick works for the Navajo Nation. She coordinates services between the PHNs in the field with the eight CHR staff members she supervises. In addition, Dick testified that she not only had complaints about Lavoie from the CHRs, but from patients as well. Dick further testified that not only did Lavoie not know the Navajo culture, but that at least one patient did not want Lavoie to come back to her home. Dick also alluded to statements by Lavoie that she deemed to be racially insensitive. She says that she

reported some of the matters to Pete, who in turn relayed them to Khow. Dick testified that she complained about Lavoie to the previous director of nursing, Elam. Those complaints, it was said, involved Lavoie not helping out in the field with home visits. A January 25, 1995 memorandum from Community Health Worker, Minnie Jackson to Dick corroborates some other problems recounted by Dick. I credit Dick.

Both Pete and Khow were fully aware of Lavoie's engaging in representational activity prior to the detail. In view of the lengthy arbitration which included references to Lavoie's protected activity, they could hardly deny that knowledge. The September 28, 1995 letter from Pete to Khow, reveals that Pete was "frustrated with a lot of things . . . within our department . . . And also with the community health representatives." Pete said further, that when she wrote the letter to Khow, she did not realize that it was to be sent to others or she would not have written the letter. She concluded that, "Actually I was just telling her about my frustrations." Lavoie is also alleged by Pete to effectuate "her aggressiveness b[y] [sic] arguing with her co-workers and me as her supervisor." Furthermore, Khow could not deny that she did consider Lavoie's protected activity in making her decision, for she stated that she knew Pete was frustrated "about being unable to resolve the issues with Ms. Lavoie," because among those issues certainly loomed the protected activity of Lavoie.

Khow credibly testified that she first began receiving complaints about Lavoie from Pete around December 1994 which is about the time or shortly before Lavoie became a union steward, in January 1995. Khow says that she expected Pete, as a supervisor to deal with the problems that Lavoie was having and that she [Pete] was having. Khow told Pete to contact area personnel for guidance or assistance with the problems. She further testified that she began to receive complaints about Lavoie from her co-workers in August, September 1995. And finally, in October 1995, "the patient staff had come to me voicing their frustrations about their work environment and how tense and stressful it had become. And their reason was it was because of the behavior of Anne Lavoie." Khow went on to say that they [the patient staff] felt intimidated by Lavoie and that there was no respect because of some of the racists statements Lavoie had made to them. Khow further stated that they were fearful of jeopardizing their nursing license because if they said anything to Lavoie that she did not like, she would threaten that she would take it to court or that she would write to

the State Board of Nursing.[7] Lavoie's own testimony substantiates their fear, as she admittedly reported an LPN who worked with her to the Arizona State Nursing Board for suspected alcoholism and she admittedly referred to Jeri Begay, another PHN as "Pocohantas".[8] When Begay responded on the spot, Lavoie seemingly realized that the statement might be derogatory or insensitive. With respect to insensitivity, Lavoie allegedly made a comment to Nancy Elwell, also a PHN and non-Navajo, "why do you only approve leave for Indians."

Although Lavoie testified that she would shy away from writing a record of problems or complaints, the record reveals otherwise. It shows that she wrote various memoranda about things from a maintenance worker not emptying trash at the office for which she claims she was responsible, to excessive telephone calls by her driver-interpreter, to reporting Navajo emergency medical technicians [ETMs] using the offices on the weekends in an improper manner. In addition, a statement that she made concerning a missing door knob was apparently construed by a Navajo resource mother as an accusation that she [the resource mother] had stolen a door knob. Finally, Khow confirmed the complaints of Dick that the CHRs were having with Lavoie in the community. Khow articulated Dick's complaints as how Lavoie acted around patients or her refusal to go with CHRs to visit patients with special needs or high risk patients. The more serious complaints involved Lavoie's insensitivity with patients when on home visits, where she would not touch them or when changing dressings she would make faces or have someone else do the dressing. Khow said that Dick wondered why Lavoie was even out there and, furthermore why was Lavoie a PHN if she was unwilling to see the patients that she was responsible for. Dick's testimony is corroborated by Khow.

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[7] This appears to be the same meeting Khow was earlier discussing when she said that the Public Health Nurses as a group had come to her in either August or September 1995 and told her about their frustration in the workplace, because of continuing problems with hostility in the work place and the attendant stress. There was only one such meeting.

[8] There were continuing problems between a Navajo LPN and Lavoie and some of those problems impacted on other employees such as Cornelia Keams, a Social Hygiene Technician, who refused to attend Dilcon Team meetings because of disruption because of arguments between the LPN and Lavoie over health issues regarding their clients. Keams said that "they" were loud and made her uncomfortable.

Khow denied that the 120 day detail was for discriminatory reasons, but states instead that it was in hope that it would provide some space for the PHNs to assess "why they were public health nurses, why they were there and hopefully as a group work out a way to resolve these problems." With respect to the letter from Pete, Khow again credibly testified that, she read the letter, "but I took it as her . . . I'd been listening to Sally for like six, seven months, you know just being frustrated about being unable to resolve the issues with Ms. Lavoie. And then not having . . . for them just to sit down and talk and try to resolve some of these issues. So, when I received her letters, to me it was like, yes she's venting again . . . ." Khow added, Pete was not the only one asking her to do something about Lavoie for according to her undisputed testimony, "I have five of the staff members from PHN. I had the CHR, you know. And so my decision. . . wasn't based on what Sally's . . . requesting." In response to a question as to whether Pete's letters did not carry a lot of weight in her decision, she responded credibly, "Well, not in this situation. Just because I knew that . . . she was just getting burnt at this point in time. So, her letter did not carry, you know, the weight in making my decision." Khow was obviously growing weary of the bickering between Pete and Lavoie, some of which was related to protected activity and some of which clearly was not protected activity.

Conclusions

This section 7116(a)(1), (2) and (4) case is a mixed motive situation that is governed by *Letterkenny Army Depot*, 35 FLRA 113 (1990). Under that framework the General Counsel must establish that an employee against whom an alleged discriminatory action is taken was engaged in protected activity and that consideration of such protected activity was a motivating factor in connection with hiring, tenure, promotion and other conditions of employment. *See, Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah,* 35 FLRA 891, 899 (1990) *(Hill Air Force Base); United States Department of Agriculture, United States Forest Service, Frenchburg Job Corps, Mariba, Kentucky,* 49 FLRA 1020, 1031-34 (1994) *(Frenchburg).* If the General Counsel under *Letterkenny* makes such a *prima facie* showing, the respondent may seek to establish by a preponderance of the evidence that there was a legitimate justification for its action and the same action would have been taken even in the absence of the consideration of protected activity.

The alleged section 7116(a)(4) violation in this case must also be analyzed under the *Letterkenny* framework since in *Federal Emergency Management Agency*, 52 FLRA No. 47 (1996) where the Authority restated that it applies the same analytical framework for resolving complaints alleging discrimination under section 7116(a)(4) of the Statute as it does in resolving discrimination complaints under section 7116(a)(2).

In this case the General Counsel relies heavily on the mythical "smoking gun" found in the opening paragraph of Pete's September 28, 1995 letter to Khow in which she refers to Lavoie's protected activities. In any event, the General Counsel does establish a *prima facie* case of discrimination against Lavoie in this matter. Thus, it was shown by reliable evidence and testimony that Lavoie was engaged in protected activity, that Respondent was aware of the protected activity and that Lavoie's protected activity was a motivating factor in detailing her for 120 days to the Outpatient Clinical Nursing Department. It is undisputed that Lavoie engaged in protected activity and both Pete and Khow were aware of Lavoie's protected activity, and finally, that Lavoie's protected activity was a motivating factor in detailing her for 120 days.

In addition, Pete referred to Lavoie submitting complaints about various individuals and alleged that Lavoie failed to follow the "Union Agreement" when filing some of the grievances. Pete "combines" complaints/grievances," indicating that she did not separate the protected activity from the unprotected, but that she considered them to be one in the same. As for unfair labor practices, Pete wrote that she understood that Lavoie had filed a ULP against having the student nurses with them. There is no dispute that filing an unfair labor practice charge constitutes protected activity under the Statute. *See VA, Brockton*, 43 FLRA at 781. She also complained about Lavoie grieving her EPMS (Employee Performance Management System, the performance standards and elements) and grieving to have her 1994 EPMS rating raised to outstanding. The record revealed that technically Lavoie was an outstanding employee and the grievances were warranted. In the letter, Pete clearly asks Khow to take some action with regard to Lavoie because of her protected activity, and specifically suggested reassigning her to the clinic, the action ultimately taken. Pete's letters clearly refer to other reasons why action should be taken against Lavoie, however.

Even where the motivating factor is shown to be the employee's protected activity, the Authority allows the agency to show that it had a legitimate justification for

its action and that it would have taken the action anyway. *Letterkenny* at 118. Respondent contends that Lavoie complained about "everyone and everything," that her alleged protected activity protected no one but herself and that she was using her union position as a shield and therefore, the detail in this case was for legitimate work related reasons. Although the General Counsel did not address this aspect of the case, it is certainly an issue. In *Bureau of Census*, 41 FLRA 436 *(1991), 976 F.2d, 882 (4th Cir., 1992)* reversed on other grounds, the Authority dealt with an abuse of process issue saying that extreme behavior by an employee can remove the protection of the Statute, however the agency must show that the employee's grievance filing activity "has so abused his right to file grievances as to have engaged in unwarranted harassment of [the employer]." Citing *Wayne W. Sell Corp.*, 281 NLRB 529, 532 (1986); *Ad Art, Inc.*, 238 NLRB 1124, 1131 (1978), enf'd 645 F.2d 699 (D.C. Cir. 1980). The Authority thus analyzed the matter by determining whether the employee's conduct constituted "flagrant misconduct" which removed it from the protection of the Statute. *United States Air Force Logistics Command, Tinker Air Force Base, Oklahoma City, Oklahoma*, 34 FLRA 385, 389-390 (1990) *(Tinker Air Force Base; Department of the Navy, Naval Facilities Engineering Command, Western Division, San Bruno, California*, 45 FLRA 138, 156 (1992) *(Naval Facilities Engineering Command)*.

Whether an employee has engaged in flagrant misconduct is determined by balancing the employee's right to engage in protected activity, which 'permits leeway for impulsive behavior, . . . against the employer's right to maintain order and respect for its supervisory staff at the job site." See, *Department of Defense, Defense Mapping Agency Aerospace Center, St. Louis, Missouri*, 17 FLRA 71, 80 (1985) (*Defense Mapping Agency*); *Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington*, 2 FLRA 54, 55 (1979). Relevant factors in striking this balance include the following: (1) the place and subject matter of the discussion; (2) whether the employee's outburst was impulsive or designed; (3) whether the outburst was in any way provoked by the employer's conduct; and (4) the nature of the intemperate language and conduct. *Grissom Air Force Base* at 12; *Defense Mapping Agency* at 80-81. The foregoing factors need not be cited or applied in any particular way in determining whether an action constitutes flagrant misconduct. *Cf. United States Department of Defense, Defense Logistics Agency*, 50 FLRA 212, 217-18 (1995).

In applying those factors to the instant matter, it does not appear to the undersigned that Lavoie's grievance filing was so "flagrant" in and of itself, to require

detailing. I must consider however, whether Lavoie was using the process as a sword in order to conceal her true motive, thereby abusing her right to file grievances. It is particularly worthy of note, that Pete was promoted instead of Lavoie to the Director of Public Health Nurses and that Lavoie attributed, at least part of the reason, for her not getting the job as a lack of support from Pete, who was a co-worker at the time. In this regard, the Authority has rejected the idea that an employee may file an unlimited number of grievances and unfair labor practice charges. *Census* at 450. This record certainly lends itself to a finding that Lavoie, who had no problems with her previous director of nurses certainly found a lot to complain of with Pete. Their issues also go beyond the protected activity that Lavoie was engaged in and to a certain extent proved beyond Pete's ability to handle. While a part of Lavoie's agenda might have involved a dislike for Pete, there is insufficient evidence to show that she was engaged in misconduct which was so flagrant as to amount to an abuse of process by her. Consequently, it is found that Respondent's claim that Lavoie was misusing the grievance and unfair labor practice processes in this case, lacks merit.

Respondent sought to establish its justification for the detail through objections from co-workers and Navajo tribal health workers complaining about Lavoie and her performance. The General Counsel urges that the evidence about Lavoie's shortcomings, in view of her denials and explanations is contrived and pretextual. It is thus asserted, as could be expected, that the General Counsel's evidence certainly outweighs that of Respondent. It is clear that prior to the detail herein, no one ever suggested to Lavoie that there was any problem requiring any action to be taken against her.[9] Lavoie was not detailed because of any deficiencies reflected by her performance standards, however, she was detailed for the reasons stated by Khow. Pete certainly testified that she never talked to Lavoie about possible problems that Lavoie's protected activity were causing her department. Nor according to Pete, did she ever attempt to balance Lavoie's activities as a union representative with her duties as a PHN. Moreover, Pete never discussed with Lavoie complaints from the CHR's. According, to Pete's undisputed testimony, while she never had performance problems with Lavoie, there were conduct

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9 While Lavoie testified that no one ever told her that they were uncomfortable about her alleged insensitivity, she asked her driver, Priscilla Chatter to write a letter on her behalf saying something "good about me" because she allegedly heard that Pete was telling people or suggesting that she was a racist.

problems and that was not one of the elements of the performance plan under which Lavoie was graded. Those conduct problems were detailed in Pete's September 28, 1995 letter to Khow.[10] Furthermore, Khow, in response to Purcell, submitted not only the so-called "smoking gun" letter, but the complaints of CHRs and Lavoie's co-workers as part of the reason for the detail. Khow never contended that any of these things were true, but only that they were things that she had to consider if she was going to provide the high level of patient care in the WSU that was certainly expected in the community that they were serving. As previously noted, an already jaded Khow tried to remain above the fray and was relying on the complaints of other PHNs and CHRs which are revealed in this record.

Pete's letter of October 11, 1995 suggests that Lavoie had filed at least 50 memoranda during the year. Lavoie's testimony reveals that she filed at least a dozen grievances and equally as many unfair labor practice charges since she became a steward in January 1995. She also filed information requests and other memoranda which might account for the number arrived at by Pete. Other than the reference to "memos/grievances" the October 11, 1995 memorandum, does not concern protected activity but, clearly referred to two topics about which Lavoie was complaining, Lavoie's continuing difficulties with a Navajo LPN and Pete's failure to communicate a mumps case in a student. In fact, the same LPN was also complaining to Pete about Lavoie at this same time and had requested reassignment from Lavoie's team. Pete's reference to numbers here simply reveals a frustration in having to deal with Lavoie on the matter with the LPN which had been going on since at least December 1994. It was then that Lavoie testified that she smelled alcohol on the LPN's breath. It is not difficult to see that Pete would be disconcerted about not being able to get beyond that issue.

The record suggests that Lavoie was also having difficulty with other PHS's and CHR's in the District. Although Lavoie does deny calling one of her co-workers an alcoholic, she did not deny turning that individual in to the State. Lavoie also does not deny having made an insensitive statement to another Navajo working with her. Her explanation being that she was unaware of the nature of

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[10] A September 14, 1995 memorandum written by Lavoie's driver-interpreter at Lavoie's request clearly indicated to the undersigned that Lavoie knew or suspected that her conduct was about to be challenged. She testified that she requested the memorandum because of some accusation that Pete was about make.

the remark, at the time it was made. Only when that individual reacted did she realize that what she had said was insensitive. In addition she clearly evidenced a confrontational style in at least one meeting which she remained standing and would not sit when it was obvious such an action could be construed as disrespect-ful. The record also shows concern for her patient care responsibilities, where Dick, a CHR coordinator complained that Lavoie was not helping the CHR's in the field. Khow confirms that the information supplied her by Dick about Lavoie's unwillingness to see patients in the field "that she was responsible for" entered into her decision to detail Lavoie. In my view, this reason alone would appear to be ample justification for the detail in this case.

Khow also credibly testified that her decision to detail Lavoie was because of apparent frustration by the nurses because the "courtesy wasn't there, the sensitivity was not there because of the racist statements that were made to them." It is uncontroverted that Khow had a meeting with the patient staff and that they complained about Lavoie. The problems to which Khow refers are corroborated in a memorandum from the patient staff dated September 27, 1995. Khow moved slowly on the situation, "Because, as I said Anne [Lavoie] was complaining about them, they were complaining about her, everybody was complaining about everybody, right?" Additionally, Khow's testimony reveals that she was somewhat disappointed with Pete's handling of the matter and that it was time for her to step in. Since she perceived this as a somewhat delicate situation, Khow credibly claims that she discounted Pete's venting in her September 28, 1995 and October 11, 1995 letters and made the decision to initially detail Lavoie for 120 days to "provide some space . . . . I was hoping that during this time they might assess why they were public health nurses, why they were there and hopefully as a group work out a way to resolve these problems." Consequently, she appears to have waited patiently before making a decision but, when she finally received another memorandum on October 11, 1995, Khow apparently felt she could wait no longer. In this memorandum, Pete once again refers to problems with grievances filed by Lavoie. As already noted, the grievances that she refers to in that memorandum are not protected activity. Pete concluded by requesting "a serious consideration and resolution to stop the daily harassment, intimidation, and unbearable situation caused by Ms. Lavoie in our department." Faced with the number and kinds of complaints that Khow received, a disturbing picture must have emerged as to whether these individuals could accomplish the health service mission. Khow's action, in my opinion, is also totally consistent with the arbitration

decision of August 1995 imploring the parties to cut out the bickering and get back to their "important mission of providing the highest levels of patient care and safety in the Winslow Service Unit."

Respondent has demonstrated, in my opinion, that the detail in this case is the action it would have taken even in the absence of the consideration of protected activity. In this regard, Pete testified that in her time at the WSU, no other employees ever had been detailed. Further, Khow testified that, "This is the first time in my almost 23 years with IHS that I've had to detail someone." Her testimony that Lavoie's October 1995 transfer was necessary in order to give everyone an opportunity to reassess whether or not they wanted to be PHNs is supported by reliable record evidence. Moreover, her testimony that Lavoie was singled out because there were no complaints from anyone that others were creating the hostile atmosphere she knew she had to curb, is unrefuted. Not only did Khow have a hostile atmosphere she needed to defuse, but she also had charges that Lavoie was having problems with the CHRs. In all the circumstances of the case, Khow's reasons are sufficient, in my view, to establish that the action would have been taken even if the protected activity of Lavoie had not been considered.

Accordingly, it is found that Respondent proved by a preponderance of the evidence that legitimate justification existed for its action in detailing Lavoie and that it would have taken the same action in the absence of the consideration of protected activity. Therefore, it is concluded and found that Respondent did not engage in an unfair labor practice within the meaning of section 7116(a)(1), (2) and (4) of the Statute by detailing employee Anne Lavoie because she engaged in protected activity under the Statute, as alleged.

It is therefore recommended that the Authority adopt the following order:

ORDER

It is hereby ordered that the complaint in case DE-CA-60131, be, and it hereby is, dismissed.

Issued, Washington, DC, December 18, 1996

ELI NASH, JR.
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by ELI NASH, JR., Administrative Law Judge, in Case No. DE-CA-60131, were sent to the following parties in the manner indicated:

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Dated: December 18, 1996
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