UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: November 29, 1996

TO: The Federal Labor Relations Authority

FROM: ELI NASH, JR.
Administrative Law Judge

SUBJECT: MARINE CORPS AIR GROUND COMBAT CENTER
TWENTY-NINE PALMS, CALIFORNIA

Respondent

and Case No. SF-CA-50732

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2018, 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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MARINE CORPS AIR GROUND COMBAT CENTER, TWENTY-NINE PALMS, CALIFORNIA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2018, AFL-CIO Charging Party	Case No. SF-CA-50732

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 **DECEMBER 30, 1996**, 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: November 29, 1996
Washington, DC

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

MARINE CORPS AIR GROUND COMBAT CENTER, TWENTY-NINE PALMS, CALIFORNIA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2018, AFL-CIO Charging Party	Case No. SF-CA-50732

Henry J. Noonan and
Captain Kurt D. Gustafson, Esqs.
For the Respondent

John R. Pannozzo, Esq.
For the General Counsel

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

A Complaint and Notice of Hearing was issued by the Acting Regional Director for the San Francisco Region on January 11, 1996, pursuant to a charge filed on July 3, 1995, which was amended on July 27, 1995 and December 18, 1995 respectively, by the American Federation of Government Employees, Local 2018, AFL-CIO (herein called the Union or Charging Party) alleging that the Marine Corps Air Ground Combat Center, Twenty-nine Palms, California (herein called the Respondent) committed unfair labor practices within the meaning of section 7116(a)(1), (2) and (4) of the Federal Service Labor-Management Relations Statute (herein called the Statute) by restricting the time of arrival at the work place of an employee; taking that employee's office keys to insure that he did not have access to the work place more than fifteen minutes prior to the start of his workday in

violation of section 7116(a)(1) and (2) of the Statute, by restricting the time of arrival for all civilian employees of the Hazardous Waste Management Branch in violation of section 7116(a)(1) and (4) of the Statute. Finally, it is alleged that the issuance of a three-day suspension to an employee was in violation of section 7116(a)(1) and (2) of the Statute.

Findings of Fact

Elmer Fobian was employed as a contract surveillance representative within the Installation and Logistics Directorate (ILD) from 1988 through late 1992. From late 1992 through December 1995 Fobian worked in the Hazardous Waste Accumulation Area of the ILD, as an environmental specialist. For almost the entire time, Fobian's first line supervisor was Marshall Smith. Around July 1994, Lieutenant Colonel Gary Peters became Fobian's second line supervisor.

Sometime in January 1996, Fobian was detailed from the ILD to the Operations and Training Directorate (OTD). Fobian became a member of the Union sometime in 1992 and remained a member until March 1996. It is undisputed that he held several Union offices representing both appropriated and non-appropriated fund employees from May 1992 to December 1993; from February 1994 to December 1995, he was the Union's chief steward for the appropriated fund employees; from January to the middle of March 1996, Fobian was the shop steward for the appropriated fund.[1] The uncontested facts reveal that Fobian was active as a union representative, filing numerous unfair labor practice charges and between 15-25 grievances from 1992 to 1996. The unchallenged evidence also shows that between two to six of the unfair labor practices and approximately three grievances were filed against his immediate supervisor, Smith.

On March 10, 1995, Smith issued a Letter of Requirement because of Fobian's use of 156 hours of sick leave during the period December 1, 1994 to March 3, 1995. It is noted that, at that time Fobian had more than 300 hours of sick leave on the books when he began taking what is termed "stress related leave." Although Smith was aware of Fobian's stress related leave problem, he apparently was not aware that Fobian also had gastrointestinal difficulties. Furthermore, Smith stated that "his (Fobian's) physician and I felt that he (Fobian) needed some time off." Notwithstanding, Smith's awareness of at least some of

[1] It is uncontroverted that Fobian was a union representa-tive during all periods relevant herein.

Fobian's health problems, Smith no doubt suspected that Fobian was abusing sick leave. In addition to seeing a psychologist and taking medication to deal with the work related stress, Fobian also had a medical condition that caused pain in his colon and had injured his back. The Letter of Requirement was directed to "employee" Fobian and constituted personal business, not union business. Fobian, as an employee, had to submit appropriate medical certification in accordance with Article 17, section 4 of the parties' agreement.

The Letter of Requirement stated the following:

> Effective immediately, you are hereby required to furnish, to me, an acceptable medical certification for all subsequent absences because of a claimed illness or medical appointment regardless of the duration. Further, unscheduled annual leave will be approved only after a determination has been made that an emergency existed. (Emphasis added).

Article 17 of the parties' collective bargaining agreement, entitled Absence and Leave, states in section 4 (d) the following:

> A medical certificate in support of an application for sick leave of three days or less normally will not be required. Such certificates may, however, be required in individual cases if the supervisor has reason to believe the employee has abused sick leave privileges.

On May 2, 1995, Fobian gave Respondent a confidential letter from Licensed Clinical Social Worker Lois K. Doi from 121 Counseling which mentioned that Fobian experienced stress and mild depression brought about by work and the document also set forth Fobian's therapy schedule. Smith previously reviewed Doi's letter and other medical documentation relating to Fobian. On the same day, Fobian gave Respondent another letter from Doctor Jeffrey Spielman, which also addressed Fobian's work related stress disability. The above correspondence which clearly related to Fobian's medical condition was examined by Smith, Peters and labor relations.

Around May 9, 1995, Smith issued Fobian a Modification of Letter of Requirement of March 10, 1995. The purpose of the modification allegedly was to "assist" Fobian in providing "adequate" medical information in support of a claimed illness or appointment added the following language:

> Adequate medical certification will contain a written statement signed by a licensed practicing physician which certifies the nature of the incapacitation; the treatment used, including medication and any possible side effects; the period of incapacitation; any restrictions to work activities; the nature of any similar restrictions recommended for non-work related activities and a prognosis.

On May 9, 1995, Fobian was scheduled to see Doctor Charles J. Sophy (Dr. Sophy) in Sophy's Palm Springs' office at 3:30 p.m. Dr. Sophy apparently has a number of offices, including one in the Los Angeles area. The Palms Spring office is located approximately 60 miles (one way) from Fobian's residence in Twenty-nine Palms. It is uncontradicted that Fobian did not learn that Dr. Sophy had canceled the scheduled appointment until he arrived in Dr. Sophy's office that afternoon. It is also undisputed that the office rescheduled Fobian's May 9, 1995 appointment to May 16, 1995 at 3:30 p.m. Smith acknowledges that in connection with Fobian's appointment with Dr. Sophy on May 9, 1995, Fobian provided him with an Application for Leave (SF-71) for a medical appointment. Under the March 10, 1995 Letter of Requirement and its subsequent modification, Fobian certainly was required to provide acceptable medical certification based on a claimed illness or medical appointment.

The morning of the following day, May 10, 1995, Fobian presented Smith with an Application for Leave, Standard Form 71 (SF-71) requesting four hours of sick leave for May 16, 1995, and the rescheduling slip from Dr. Sophy's office. The sick leave medical certification requirement letters as referenced in Article 17 of the parties' agreement, and the various correspondence, specifically concerned "employee" Fobian.

Fobian kept the May 16, 1995 appointment with Dr. Sophy in the Palm Springs office. The next morning, May 17, 1995, Fobian gave Dr. Sophy's signed medical certificate regarding the previous day's visit to Smith. Smith by letter rejected Fobian's May 16 medical certificate as evidence of incapacitation, because it did not set forth in detail the information required per Respondent's medical requirement correspondence. Smith stated in the letter that Fobian was required to provide the information by Monday, May 22, 1995, at 4:00 p.m. Fobian was "being carried AWOL" by Smith until Fobian provided an "adequate" medical certificate. Smith

did extend the deadline to resubmit the medical certificate until on or about Wednesday, May 24, 1995.

On Tuesday, May 23, 1995, Fobian prepared another medical certificate for Dr. Sophy's signature. This medical certifi-cate was addressed to Smith and provided greater detail concerning Fobian's work related stress medical condition. The next morning, May 24, 1995, at 6:19 a.m., Fobian faxed the medical certificate using the Hazardous Waste Management Branch (HWMB) fax machine to Dr. Sophy's office for his signature. Fobian testified that he faxed the medical certificate instead of mailing the document based on travel considerations (120 miles), the uncertainty of Dr. Sophy's schedule and the potential that Respondent would assess him another day of leave without pay if took another day of sick leave in order to obtain the excuse in person. The same day, at 12:48 p.m., Dr. Sophy faxed the signed medical certificate back to Fobian on the HWMB fax machine.

Fobian for some unexplained reason did not give Dr. Sophy's executed medical certificate to Smith until the following afternoon, May 24, 1995. After presenting the medical certificate, Fobian was verbally counseled by Smith concerning his use of the HWMB fax machine and the use of the telephone for personal reasons. Fobian's account of that meeting is that Smith told him that he felt that the fax to Dr. Sophy constituted personal business. Fobian replied, that the medical certificate constituted "information that you had requested." Smith responded, "Well, this is personal," and Fobian said, "Okay." During conversations prior to May 24, 1995 between Fobian and Smith concerning medical certificates, Smith stated that the additional information required by Respondent from Fobian was a personal matter. At the May 24, 1995 meeting, Smith according to Fobian said, that Fobian was not to use the fax machine or telephone for personal reasons. Smith did not mention anything about Fobian's use of the HWMB fax machine for union business. Although Smith testified that Fobian's actions constituted an "unauthorized use of Govern-ment equipment," he was not aware of any union business having been faxed by Fobian that day, only personal business regard-ing the medical certificate. Fobian speculated that had Smith counseled him concerning the use of the fax machine for union business, Fobian would have immediately filed an unfair labor practice charge.

Smith refused to accept the second medical certificate as "adequate" with regard to satisfying the Letter of Require-ment, as modified. Smith stated that if a doctor provided information concerning the illness that he treated

the employee for during the visit, that explanation would be "adequate" and he would approve the medical certificate. However, Smith's actions in rejecting the May 23 two-paragraph medical certificate are inconsistent with his testimony. The May 23 medical certificate was later reviewed by Peters and Respondent's labor relations officer, along with the May 2 letters from Doi and Spielman, and Fobian's May 10 sick leave request was granted by Respondent. The Letter of Requirement was not removed by Respondent, however.

Smith, on the other hand, testified that Fobian was verbally counseled on May 24, 1995 concerning his use of the fax machine for personal and union business. Smith further stated that on August 2, 1993, during Fobian's employee briefing, he told Fobian that he could not use Government equipment to perform union work nor would Fobian be in work status. Smith was concerned over Respondent's potential workers compensation liability. Respondent's New Employee Briefing memorandum makes it clear that employees are not to use the office telephone to make unofficial toll calls or engage in unauthorized use of office equipment. This memorandum notwithstanding, there was no official policy in existence regarding the use of the fax machine to conduct union business until October 18, 1995. Smith also testified, that on May 22, 1995, he had a conversation with Peters in which Peters told him that Fobian had used the HWMB fax machine to transmit union business without Smith's knowledge or approval. Although Peters stated that he may have spoken with Smith (who was one of his eight branch heads), he did not recall the topic or contents of the fax or even whether the fax bore Fobian's name. Thus, Peters did not recall anything about the alleged fax. Peters oversees the operation of eight branches within the Supply Division, which consists of approximately 216 employees, including about 67 civilians. The HWMB is located approximately 3-4 miles from Peters' office. Peters further stated that he did not recall the name of the Human Resources Office (HRO) representative who contacted him and that he believed that the fax came from the HWMB.

According to Fobian, Smith did not object to his use of the office equipment until May 24, 1995. Furthermore, Fobian states that he never sought Smith's permission to use the HWMB fax machine prior to May 24 nor was he counseled about such use prior to that date. Fobian was never charged by Respondent for the alleged fax to HRO and any evidence of the fax was produced by Respondent at hearing. After

Fobian's May 24 discussion with Smith, he stopped using the HWMB fax machine and telephone for personal use.[2]

Fobian testified that he believed that he could continue to use the fax machine to conduct union business based on Article 9 (entitled Facilities and Services), § 6 (entitled Telephones), and his knowledge of the use of the fax machines by other union officials to transact union business over the years.

Article 9, § 6 of the parties' agreement states, in pertinent part, that:

> To ensure that employee representatives have a reasonable opportunity to communicate with employees, other local union representatives and management, the employer agrees that union representatives may use existing activity telephones for authorized representational duties, when such use does not interfere with the activity's requirements. . . .

The record reveals widespread use of the fax machines, telephones and electronic mail by other union officials in order to communicate with one another and Respondent's officials. In regard to these various means of communication, particularly the use of fax machines to conduct union business, Fobian stated that past presidents, executive vice presidents, chief stewards and stewards on both the appropriated and non appropriated sides, used them. There was no evidence that any of these officials ever sought permission from management to use the fax machine in order to conduct union business. Fobian had used the fax machine and telephone since 1992. Fobian communicated with the labor relations officer by forwarding data requests and responding to inquiries from HRO.

Also Fobian received faxed documentation and observed former President Bill Harless send faxed materials to the Respondent and two other union officials. George Rugels, a former union representative, would periodically come into Fobian and Harless' office to use the fax machine. Current President Dan Dickerson, who works in Morale, Welfare and Recreation on the non appropriated side, faxed documents to other union stewards. Furthermore, there is no evidence that any other union representative was ever counseled or

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[2] Fobian made several telephone charges before the May 24, 1995 for which he received verbal counseling. He was subsequently reprimanded regarding these calls, but paid the charges resulting in removal of the reprimand.

disciplined by Respondent in connection with their use of the Government fax machine to conduct union business.

Supporting Fobian's testimony regarding use of the fax machines to conduct union business, Leazer stated that as the former president and executive vice president, he used the fax machine to conduct union business and transmit correspondence to management officials since 1980, including the Personnel Officer for ILD Connie McKitrick, current Labor Relations Officer June Foster and former Labor Relations Officer Glenn Ball. Respondent was obviously aware that Leazer was faxing materials because they received the documents, and in turn, transmitted documentation back to Leazer. Further, then Executive Vice President Leazer faxed a thirteen-page partnership agreement to the fire captain at Port Hueneme Fire Department and a thirty-page Physical Fitness Program to the Barstow Fire Department. Leazer also stated that the current Executive Vice President Jackie Griffith and the former Vice President for the Appropriated Section Colleen Silva, who was in the position for two years, used the fax machine.

In June 1995, Fobian received an employee complaint from Ray Salius. On June 16, 1995, Fobian prepared two letters, the first to Peters and the second to the Commanding General, that requested information concerning Respondent's authority to take certain action in a safety matter. Fobian, in his capacity as chief steward of the appropriated fund employees, was in charge of the Charging Party's Safety Board that was authorized to conduct safety investigations. As chief steward, Fobian was authorized to forward the correspondence to Respondent, without a designation of representative form. Moreover, Fobian was authorized to sign this type of correspondence, since the union's June 20, 1995 internal guidance, which was issued by Leazer, stated that the only time that the union president's signature was required was when the union invoked arbitration.

Leazer, who served as the Charging Party's Executive Vice President from June 19, 1995 until on or about February 22, 1996 and was in charge of the steward program, stated that neither a steward nor chief steward had to present a represen-tational release to Respondent in order to investigate a work place or employee complaint. Further, no representational release had to be submitted to Respondent in connection with a data request, unless it involved the Privacy Act. The June 19 and 27 data requests did not implicate Privacy Act issues. According to Leazer, Fobian did not need a representational release to submit the June 19 and 27 data requests. The letters, which were on

union letterhead and constituted union business by then Chief Steward Fobian, requested data under section 7114(b)(4) of the Statute. On Monday morning, June 19, 1995 at 7:33 a.m. and 7:36 a.m., respectively, Fobian faxed the letters to Peters and the Commanding General. Fobian did not require a representational release to fax these documents or others on behalf of the union.

In June 1995, Fobian received another complaint, but this time from Health, Morale and Recreation employee Ned Carter, who worked in the recycling program at the Defense Utilization Marketing Office. The employee felt that funds, which were received by the Resource Recovery Recycling Program (RRRP), were not being put back into the recovery program in accordance with law and regulation.[3] On June 27, 1995, at 6:23 a.m., then Chief Steward Fobian faxed another letter on union letterhead to Lieutenant Colonel Phillips, the Director of ILD, again seeking data under § 7114(b)(4) of the Statute concerning the RRRP. Fobian did not fax any documents from the HWMB fax machine after June 27. Fobian's conduct was consistent with the July 9, 1995 internal union guidance issued by then Executive Vice President Randy Leazer to Fobian, which directed Fobian not to fax any further documen-tation until the parties had resolved the matter. Fobian's version of the May 24 counseling is supported by Leazer, who testified that the Union would have promptly filed a grievance over any attempt by Respondent to infringe on its means of communication, including the fax machine. The Union did not file a grievance until July 24, or six days after Fobian received his proposed suspension, which cited his union representational conduct. The July 24 grievance contended that Fobian was never counseled on May 24 over the use of the fax machine for official union business.

The following day, June 28, Smith issued a letter to Fobian changing his work schedule by closing the office until approximately fifteen minutes prior to the start of Fobian's 7:30 a.m. shift. Smith's letter cited the May 24 and June 27, 1995 uses of the fax machine to transmit "unofficial information." For two and one-half years, Fobian typically arrived at work between 6:00 and 6:10 a.m. in order to review his mail, prepare union correspondence and take military correspondence courses. On June 29, 1995, at 1:30 p.m., Smith told Fobian to surrender his keys to

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3 The RRRP funds are non appropriated funds that allegedly should have gone to Morale, Welfare and Recreation. The employee believed that a number of large screen television sets had been purchased for the appropriated side with non appropriated generated funds.

ensure that Fobian did not have access to the building. Smith stated that Fobian had used the fax machine for unauthorized business, namely, the faxing of union documentation. Smith stated that he took Fobian's key because he was worried about office security, the records and supplies. However, Smith waited a month before taking similar action concerning the remaining civilian employees in the HWMB, however. Thereafter, on July 3, 1995, the Charging Party filed the original unfair labor practice charge.

On July 18, 1995, Smith issued a Proposed Suspension letter to Fobian stating that Smith had counseled Fobian on May 24 concerning the unauthorized use of HWMB office equipment to conduct union business without prior approval. Smith apparently believed that Fobian willfully disregarded Smith's May 24 counseling (defiance of authority) and failed to follow published regulations (unauthorized use) by faxing the aforementioned union documentation. The letter further cited the two June 19 faxes (paragraphs (b) and (c)) and the June 27 fax (paragraph (d)) as additional violations of the May 24 verbal counseling.

Again, Fobian denied that he was verbally counseled by Smith on May 24 concerning his use of the HWMB fax machine to conduct union business, only the personal use of the fax and telephone. Fobian claimed that the June 19 and the June 27 correspondence that he faxed from HWMB were not in violation of Smith's May 24 verbal counseling. On July 27, 1995, the Union filed the first amended charge in this case.

On July 24, 1995, the Union filed a grievance entitled Union Grievance, Use of Telephones by Union Representatives. The Union Grievance alleged violations of Article 9, § 6(a) and (b) along with Article 13, § 9 (Grievance Procedures) of the parties' agreement. Peters in a letter dated August 7, 1995, which was issued in response to Leazer's request that Respondent overturn Fobian's proposed suspension, stated that the Union Grievance was a "separate and distinct action by the union." The Union Grievance stated that on May 24 Fobian was not counseled "over the use of the fax machine for official union business."[4]

At an all hands meeting, on July 31, 1995, Smith distributed a letter to all civilian employees, which

[4] At the hearing, Peters agreed that if Fobian's representation was correct then the July 18 proposed five day suspension was faulty, which in turn meant that Peters' August 24 three- day suspension letter was also faulty, since it was predicated on Smith's earlier representations.

immediately restricted their time of arrival at the HWMB to 7:15 a.m. Smith's policy is still in effect. On August 1, 1995, at 2:40 p.m., Smith gave Fobian back his key to the building on the condition that Fobian adhere to the terms of the July 31 letter.

On August 24, 1995, Peters issued a Suspension Without Pay letter to Fobian, suspending him for three working days - August 29 through 31, 1995.[5] The suspension letter relied on Fobian's May 24 use of the HWMB fax machine to "conduct personal business" (no mention of union business) and Fobian's use of the HWMB fax machine on June 19 and 27 for "union business." The suspension letter further relied on Smith's representation, which Fobian denied, that Fobian was counseled on May 24 regarding the use of the HWMB fax machine to conduct union business. The suspension letter stated "the use of the fax machine on 24 May 1995 was for personal use" and that "the use of a fax machine for union business is in a 'gray area' and needs to be resolved as noted in the Union Grievance." Peters further asserted in the letter, that the question whether a fax machine was "clearly telephonic in nature and nothing more than an extension of technologies to the telephone" was not the issue regarding Fobian's suspension, the failure to follow Smith's instructions was the basis for the suspension.

According to Leazer, Respondent never filed a command grievance. Leazer believed that the Fobian matter was better addressed through a command level grievance.

On August 24, 1995, Peters issued a Modification of Suspension Without Pay letter to Fobian changing the dates of the three-day suspension to September 12 through 14, 1995. Peters conceded that if Fobian was not counseled on May 24 concerning the use of the HWMB fax machine for union business then Fobian's conduct on June 19 and 27 would not have been considered disobedient by Respondent.

The dates for serving the suspension were changed based on a recommendation by the Office of Special Counsel, which was investigating Smith and Peters, because the Office of Special Counsel wanted to commence the investigation of the safety complaints before Fobian began serving the suspension. Fobian stated that the issues contained in this case are separate from the OSC matters. Fobian served the three-day suspension on those dates thereby incurring a loss in salary of approximately $400.

5
According to Smith, he had not read the August 24 suspension letter prior to the hearing.

On October 18, 1995, Respondent's Chief of Staff J.D. Majchrzak, in response to the July 24, 1995-grievance filed by the Charging Party over the use of telephones by union representatives, stated that the "use of FAX machines and telephones are authorized for official union business on a not to interfere basis and in accordance with MCAGCC orders[6]. The October 18 letter further stated, in pertinent part, that the use of telephones and fax machines are governed by Article 9, § 6 of the parties' agreement, but "Fobian was not fulfilling representational duties, since no authorization was provided from an aggrieved employee designating him as such and the information requested was for his own interests." There was no policy concerning the use of a fax machine by union repre-sentatives prior to the issuance of the October 18 letter. Peters could not point to any policy, which prohibited the Union's representatives from using the fax machine to conduct union business. Moreover, Peters assumed that Respondent's representatives Connie McKitrick and June Foster received faxed documentation from the union. Furthermore, Peters could not distinguish between the faxed documents that Fobian sent to Peters (on June 16), Colonel Phillips (on June 27) and the Commanding General (on June 16) and those materials that Peters assumed were faxed by other union officials to McKitrick and Foster.

Analysis and Conclusions

1. Respondent's jurisdictional arguments are without merit.

a. *The unfair labor practice charge is not barred under section 7116(d) by the Charging Party's July 24, 1995-grievance.*

Respondent claims that the legal predicates for both the grievance and the unfair labor practice are the same. Respondent maintains, therefore, that the only section 7116 (d) bar issue in this case is whether the subject matter of the unfair labor practice is the same issue that is the subject matter of a grievance. *United States Department of the Army, Army Finance and Accounting Center, Indianapolis, Indiana*, 38 FLRA 1345, 1351 (1991) *(Army Finance), petition for review denied sub nom. American Federation of*

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6 Respondent's October 18, 1995 letter is consistent with Fobian's claim that the use of the fax machine was nothing more than an "extension of technologies" vis-a-vis the telephone.

Government Employees, AFL-CIO v. FLRA, 960 F.2d 176 (D.C. Cir. 1992).7

The General Counsel submits that the July 24 grievance does not bar Authority consideration of the instant dispute. *Olam Southwest Air Defense Sector (TAC), Point Arena Air Force Station, Point Arena, California, 51 FLRA 797 (February 8, 1996) (Point Arena)*. The General Counsel urges that where the legal theories advanced in the grievance and unfair labor practice charge are not substantially similar, the filing of a grievance does not bar the filing of the unfair labor practice charge under section 7116(d) of the Statute. The Authority has found that even though the grievance and the unfair labor practice arise from the same set of factual circumstances (factual predicates) and both matters requested bargaining as a remedy there is still no 7116(d) bar. The Authority obviously was guided by the holding in *Army Finance* where the court stated that in "each case, the determination whether a ULP charge is barred by an earlier-filed grievance requires examining whether 'the ULP charge arose from the same set of factual circumstances as the grievance and the theory advanced in support of the ULP charge and the grievance are substantially similar.' Only if both requirements are satisfied is a subsequent action barred by a former one." The General Counsel argues that the procedural issues raised by Respondent that the July 24, 1995 grievance filed by the Union over the "Use of Telephones by Union Representatives" serves as a bar under section 7116(d) of the Statute, lacks any merit.

In this case, Respondent claims that the Union could not separate the proposed five-day suspension issued on July 18 from the actual three-day suspension on August 24 since both were based on the same underlying facts and legal theories. *Department of Commerce, Bureau of the Census v. Federal Labor Relations Authority*, 976 F.2d 882 *(4th Cir. 1992) (Department of Commerce)*. It also contends that both the July 24 grievance and the unfair labor practice allege that the actions taken against Fobian were based on Fobian's protected representational activities. Third, the grievance argued that because the use of the fax machine was covered

7
Respondent also contended that Fobian was not fulfilling his representational duties or that Fobian was not authorized to submit the data requests since no authorization was submitted from an aggrieved employee designating Fobian as the representative. At the hearing, Smith admitted that Fobian did not need to present any type of authorization or representational request for certain types of documents which seemingly includes the documents that he was suspended for faxing.

by the parties' agreement (an extension of technology) it was protected, and therefore, the only way to justify disciplinary action against Fobian was based on flagrant misconduct.

The General Counsel urges that the July 24 grievance filed by the Union concerned the "Use of Telephones by Union Representatives" and could not serve as a bar under section 7116(d) to the instant unfair labor practice charge. Thus it claims that the grievance and unfair labor practice allege different legal theories; the respective actions are based on different factual predicates; and, furthermore each seeks a different remedy. *Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 43 FLRA 318, 325-26 (1991) *(SSA); United States Department of the Army, United States Marine Corps Logistics Base, Albany, Georgia*, 37 FLRA 1268, 1271 (1990) *(MCLB, Albany)*. Finally, the General Counsel contends that even Peters, in his August 7 letter in response to Leazer's request that Respondent overturn Fobian's proposed suspension seems to agree that the grievance was a "separate and distinct action by the union."

In regard to the respective legal theories, the July 24 grievance asserts only that Respondent was interfering with the institutional right of union representatives to use the telephones (extension of technology to fax machines). Further, the Union in asserting its institutional right, alleged various contractual violations, namely involving Article 9, § 6(a) and (b) and Article 13, § 9. The grievance makes no reference to alleged "flagrant misconduct" which is the theory of the section 7116(a)(1) and (2) violations urged in the charge and complaint of this matter.

The unfair labor practice case, on the other hand, alleges that Respondent discriminated against Fobian based on his protected union activities thereby asserting a statutory violation under section 7116(a)(2) and not a violation of any section of the collective bargaining agreement between the parties. Particularly, it was contended that Respondent only had the right to discipline Fobian for remarks or conduct that "exceeded the boundaries of protected activity such as flagrant misconduct." Only remarks or conduct that is of such "an outrageous and insubordinate nature" as to remove them from the protection of the Statute constitute flagrant misconduct. *Grissom Air Force Base at 11-13; United States Department of Housing and Urban Development, Region VI and United States Department of Housing and Urban Development Region VI, San Antonio Area Office*, 24 FLRA 885, 886 (1986) *(HUD, San Antonio)*.

Finally, the complaint alleges discrimination by Respondent in issuing Fobian the August 24 three-day suspension, stemming from a personnel action that would not take place until a month after the grievance had been filed.

Consequently, it is found that the grievance in this case sought to establish a contractual right based on a specific contractual provision of the collective bargaining agreement, while the unfair labor practice sought to establish a statutory violation based on discriminatory conduct, i.e., the absence of flagrant misconduct by Fobian. The gist of the grievance was that the Union's representatives are entitled to use the fax machine for representational purposes, since such use constituted an "extension of technologies to the telephone" and, therefore those union officials did not need to obtain permission before using the telephone.

Finally, the factual predicates and the remedies sought in the respective actions are different. The grievance relies on Article 9, § 6(a) and (b) of the collective bargaining agreement in asserting that union officials were not required to obtain permission before using the telephones and Respondent's attempts to dictate or contradict the actions of the Union's stewards while they were performing representa-tional duties was equivalent to "crossing over into my [Charging Party] jurisdiction."

In this case, the factual predicate of the grievance appears to be that union representatives in general were not required to obtain permission from Respondent's officials prior to using the telephone for representational purposes. It appears to the undersigned that the grievance merely attempted to demonstrate that there was an established past practice that union officials did not need to obtain permission from Respondent's officials before using the telephone to engage in representational activities. The grievance, therefore, raised a contractual argument that is not involved in the unfair labor practice case, namely, that under Article 13, § 9, the proposed discipline was untimely. Additionally, the grievance, in pertinent part, sought to enter into negotiations over what constituted proper use of office equipment and fax machines by union representatives. Moreover, on October 18 in response to the Union Grievance, Respondent represented that it would send a letter to all directorates to the effect that the "use of fax machines and telephones are authorized for official union business on a not to interfere basis and in accordance with MCAGCC orders and the MLA [Article 9, § 6]." Furthermore, the remedy sought in the grievance was to allow all union stewards, not just Fobian to use the fax machine for representational

purposes. Thus both the factual predicates underlying the grievance and remedies sought by the grievance were broader in scope because they involved all of the Union's representatives and not just Fobian.

Contrarily, the factual predicates of the unfair labor practice charge concerned whether or not Fobian's conduct between May 23 and June 27, 1995 constituted flagrant misconduct. Thus the unfair labor practice complaint facts involve an alleged personal use of the fax machine by Fobian which was clearly not a part of the grievance filed by the Union. Further, the remedy sought in the unfair labor practice case was, as already noted, limited to actions related to Fobian. What was sought therefore differed considerably from the grievance since the General Counsel is seeking rescission of the August 24 suspension letter, expunging the letter from Respondent's records and reimburse-ment of Fobian for the loss of back pay, plus interest, in accordance with 5 U.S.C. § 5596, as amended.[8] The grievance and the theory advanced in support of the unfair labor practice charge and the grievance is not substantially similar in this case. Since both requirements are not satisfied here, it is my view, that there is not bar in this case. *Army Finance.*

Based on the foregoing it is found that there is no section 7116(d) bar in this matter.

b. There is subject matter jurisdiction over the case.

Respondent asserts an unusual theory, that the Authority has no jurisdiction in this case based on its interpretation of *Department of the Treasury, Internal Revenue Service*, 110 S. Ct.1623 (1990). Respondent apparently reads this case to mean that nothing in Chapter 71 of Title 5, will affect its prerogative to take actions

8 *Department of Commerce* and *United States Small Business Administration, Washington, D.C.,* 51 FLRA 413, 422-25 (1995) are distinguishable from the instant matter since the employees in those cases attempted to maintain two simultaneous administrative challenges to their removal, each action relying on essentially the same facts and legal arguments. Here the Union's July 24 grievance concerned only the "Use of Telephones by Union Representatives," not Fobian's protected activities. It appears therefore, that the issue regarding the union representatives' right to use the fax machine for representational purposes was developed out of, but was not a part of, the proposed discipline of Fobian.

enumerated in section 7106(a) including, it suggests, the right to discipline. Respondent finally argues that the dispute involved differing and arguable interpretations over Article 9, § 6 of the parties' collective bargaining agreement. In its view the matter is more appropriately dealt with under the negotiated grievance procedure.

The General Counsel urges that there is subject matter jurisdiction over this case, since this dispute, unlike the July 24 grievance, does not involve a matter of contract interpretation, thereby giving Respondent an unfettered right to discipline Fobian.

In my opinion, Respondent's latter argument involving contract interpretation is short of the mark since it addresses only a portion of the case. The facts herein show that the July 24 grievance filed by the Union concerned the use of the fax machine by union representatives and the "extension of technology" dispute involved a matter of contract interpretation, specifically, Article 9, § 6 of the Master Labor Agreement. The case is much broader than that single contract interpretation issue cast by Respondent. In fact there are clearly a number of issues raised in the unfair labor practice forum that would not be decided or even raised in the grievance machinery, i.e., the alleged personal use of the fax by Fobian in May 1995, which appears to be an integral part of the complaint in this case. Respondent certainly understands the implications of this matter's being pursued in the unfair labor practice forum and, it must further under-stand it is being charged with the commission of a number of Statutory violations.

Likewise, it is my view that, Respondent's section 7106 argument misses the point in this case. It has never been argued that Respondent had no right to discipline its own employees. Respondent argues that under the Supreme Court's *IRS* case management has the unrestricted right to take actions contained in section 7106(a) with "only two limitations." First, it is argued rather disingenuously that the complaint does not cite any alleged violations outside of Chapter 71 of Title 5. In my opinion, it need not do so where an alleged unfair labor practice has been charged for it is peremptory that the exercise of the right to discipline under section 7106(a)(2)(A) does not go unchecked and disciplinary decisions may not be based on an employee's protected union activities under the Statute. Secondly, Respondent claims that subsection (b)(1), (2) and (3) of section 7106 are embodied in the parties' collective bargaining agreement and that its actions are consistent with "those authorities." The short answer to that assertion, of course, is that there was a grievance filed by the Union addressing the subsection (b) issue which seeks

redress in certain areas. Thus, it is concluded that the subsection (b) issue is not before the Authority and its handling under the parties' grievance machinery does not foreclose the Authority from deciding the unfair labor practice aspects of this case. Accordingly, it is found and concluded that this jurisdictional argument has no merit.

Consequently, it is found and concluded that the Authority has subject matter jurisdiction over this case, since the matter before it does not involve contract interpretation unlike the July 24 grievance and Respondent does not have an unrestricted right to discipline any employee, including Fobian without considering whether or not its action violates section 7116(a)(2) of the Statute.

2. The August 24, 1995 three-day suspension of Fobian violated section 7116(a)(1) and (2) of the Statute.

With respect to the merits of this matter, the General Counsel submits that Respondent's actions on June 28 and August 24, 1995 were taken because Fobian engaged in protected activity under the Statute, including faxing documents to management officials in his capacity as a union official. For this, Fobian was forced to serve a three-day suspension from September 12-14, 1995. The General Counsel theorized that while Respondent had the right to discipline Fobian for his alleged misuse of the fax machine, it could do so in this case only if his conduct exceeded the boundaries of protected activity, such as flagrant misconduct. It is well settled that only remarks or conduct that is of such an outrageous and insubordinate nature as to remove them from the protection of the Statute constitute flagrant misconduct. *Department of the Air Force, Grissom Air Force Base*, 51 FLRA 7, 11-13 (1995).

Respondent contends that there is no merit to the allegation that its discipline of Fobian was discriminatory since, in essence, Fobian needed a specific grant of permission to use the fax machine. Thus, Respondent maintains that there is no *prima facie* case because Fobian was not engaged in protected activity when he used the fax machine without permission, thereby giving it a legitimate justification to suspend Fobian. Further, Respondent contends that its actions herein were consistent with the Master Labor Agreement. Therefore, absent a specific contractual grant of permission, union officials did not have an unfettered right to use office fax machines.

The inquiry into this case is controlled by *Letterkenny Army Depot*, 35 FLRA 113(1990) that requires the General Counsel to 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.

While Respondent does not directly raise the "flagrant misconduct" issue, the undersigned agrees with the General Counsel that this issue is clearly at the core of the August 24 three-day suspension where insubordination was allegedly involved. The undersigned is therefore, bound to make a determination as to whether Fobian's conduct exceeded the bounds of protected activity and constituted flagrant misconduct because it was "of such an outrageous and insubordinate nature as to remove [it] from the protection of the Statute." *U.S. Air Force Logistics Command, Tinker Air Force Base, Oklahoma City, Oklahoma and American Federation of Government Employees, Local 916, AFL-CIO,* 34 FLRA 385, 388-91 (1990) (quoting *Federal Aviation Administration, St. Louis Tower, Bridgeton, Missouri,* 6 FLRA 678, 687 (1981). The General Counsel maintains that Fobian did not engage in "flagrant misconduct" when he faxed a total of four correspondences on May 24 (medical certificate), June 19 (two data requests) and June 27, 1995 (data request). Its case rests almost entirely on a finding of whether or not Fobian's actions on June 19 and 27, 1995 constituted insubordination because Smith had not verbally counseled Fobian on May 24, 1995, or for that matter on any other occasion, concerning the use of the HWMB fax machine for union representational purposes.

In examining the evidence, it is clear that Fobian performed numerous representational activities on behalf of appropriated and non-appropriated fund employees, such as filing various unfair labor practice charges and grievances. It is also clear that some of the filings involved Smith, who was also involved in Fobian's suspension. In my view, the General Counsel made a *prima facie* showing that Fobian's protected activity was a motivating factor in his three-day suspension. The August 24 letter relied on Fobian's May 24 misuse of the HWMB fax machine to "conduct personal

business" (no mention of union business) and Fobian's use of the HWMB fax machine on June 19 and 27 for "union business."

The suspension letter itself supports Fobian's claim that the May 24 meeting with Smith concerned only a discussion of personal misuse of the fax machine by Fobian and did not concern the later "union business." The suspension letter stated, "the use of the fax machine on 24 May 1995 was for personal use" and that "the use of a fax machine for union business is in a 'gray area' and needs to be resolved as noted in the Union Grievance." Notwithstanding uncertainty surrounding the "extension of technology" issue, the absence of a policy between the parties regarding the use of the fax machine for representational purposes, and contrasting versions of the May 24 counseling session, Fobian was suspended for three days by Peters. Peters acknowledged at the hearing, which if Fobian were not counseled concerning the use of the HWMB fax machine for union business, Fobian's subsequent conduct on June 19 and 27 would not have been considered by Respondent to have been disobedient. If nothing else, it is clear that Respondent mixed the two different uses of the fax machine by Fobian in order to discipline him. Its most compelling defense, which appears to be an afterthought, is that this matter should have been handled under the party's grievance machinery.

On October 18, 1995, more than a month after his suspension Respondent's chief of staff provided a new justification for discipline for Fobian's June 19 and 27 union-related faxes. At that time Respondent contended that "Fobian was not fulfilling representational duties, since no authorization was provided from an aggrieved employee designating him as such and the information requested was for his own interests." In other words, Fobian was using the fax machine for personal business on June 19 and 27, not union-related business, in disregard of the verbal counseling. Leazer, who is credited testified however, that Fobian was not required to present a representational release to Respondent from an employee under these circumstances.

There is no doubt that an agency has the right to discipline an employee who is engaged in otherwise protected activity for remarks or actions that "exceeds the boundaries of protected activity such as flagrant misconduct." Remarks or conduct that is of such "an outrageous and insubordinate nature" as to remove them from the protection of the Statute constitutes flagrant misconduct. *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 follow-ing: (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).

When the four relevant factors are applied here, it does not appear to the undersigned that Fobian's conduct was so flagrant as to require discipline. At the outset, there was the admitted uncertainty surrounding the "extension of technology" issue and the use of Respondent's fax machines to conduct representational activities vis-a-vis Article 9, § 6 of the parties' Master Labor Agreement; second, the fact that there was no policy in effect between the parties concerning the use of the fax machine for representational purposes (the policy became effective on October 18, 1995); third, both Fobian and Leazer's understanding regarding other union representatives' use of the fax machine for representational purposes; and fourth, Fobian immediately ceased using the fax machine for the respective purposes once instructed by Smith. In all the circumstance, it cannot be concluded that Fobian's actions exceeded the boundaries of protected activity.

The record reveals that Fobian and Smith were at odds regarding whether or not Fobian had work related stress problems; that Smith on March 10, issued Fobian a Letter of Requirement, after he used some 156 hours of his approximately 300 accrued hours of sick leave; the Letter of Requirement forced Fobian to provide "an acceptable medical certificate for all subsequent absences because of claimed illness or medical appointment regardless of duration."; the

Letter of Requirement and the May 9 modification imposing additional sick leave restrictions on Fobian was personal and not union related business. In relation to this personal business, on the morning of May 24, Fobian faxed a letter to a Dr. Sophy for signature and later received an executed copy of the letter via a return fax from Dr. Sophy's office.

That afternoon, Fobian was verbally counseled by Smith concerning his use of the HWMB fax machine and the use of the telephone for personal reasons. The credited testimony is that Smith told Fobian he felt that the fax to Dr. Sophy constituted personal business. Fobian responded that the medical certificate constituted "information that you had requested." Smith replied, "Well, this is personal," and Fobian said, "Okay." Smith further stated that Fobian was not to use the fax machine or telephone for personal reasons. The credited testimony also is that Smith did not mention anything about Fobian's use of the HWMB fax machine for union business. Fobian speculated that had Smith counseled him concerning the use of the fax machine for union business, an unfair labor practice charge would have been filed immediately. Fobian's version of the May 24 meeting with Smith, specifically that he was only counseled about his personal use of the fax machine, not union use, must be credited for several reasons. Initially, there is no dispute that the May 24 discussion arose in the context of a matter that was personal to Fobian, namely, the medical certificate and the Letter of Requirement. It is also uncontroverted that Fobian did not fax any union-related documentation that day and, furthermore Smith was not aware of any union business having been faxed by Fobian on May 24. Moreover, it is highly unlikely that Smith would have waited two days, as represented by Respondent, to speak with Fobian about Fobian's so-called use of the HWMB fax machine to transmit documentation to HRO.

Smith's memorandum of that meeting is entitled "Unauthorized Use of Government Equipment," which based on Smith's testimony in connection with the August 2, 1993-employee briefing of Fobian, meant the faxing of government-related or work-related materials prior to the start of Fobian's shift, not union documentation. In addition, Smith's Memo does not reference any alleged conversation with Peters on May 22. At best, there was a misunderstanding between Smith and Fobian as to what was meant by the phrase "unauthorized use of government equipment." The uncertainty surrounding the meaning of this phrase cannot now be exploited as the basis for any subsequent disciplinary action against Fobian.

Respondent's witnesses also provided inconsistent testimony concerning the so-called May 22 discussion over the alleged fax to HRO. Smith stated that, per Peters, Fobian had used the HWMB fax machine to transmit union-related business to HRO. However, Peters stated that he may have spoken to Smith, but in any event, Peters did not recall the topic or contents of the fax, whether it bore Fobian's name and he believed the document came from the HWMB. Peters could not recall the name of the HRO representative who contacted him. Fobian was never charged by Respondent for the alleged fax to HRO despite Respondent's track record for charging Fobian for any personal telephone call. There was no evidence that Fobian was responsible for the so-called May 22 fax to HRO. Moreover, no evidence of the fax was produced by Respondent at the hearing. Finally, neither Peters nor Smith produced a memorandum concerning this alleged discussion.

After the May 24 discussion, Fobian ceased using the HWMB fax machine and telephone for personal business in accordance with Smith's verbal counseling. Fobian was also granted sick leave in connection with the May 16 medical appointment with Dr. Sophy.

Fobian, however, continued to use the fax machine for union related business. On June 19 and 27, in response to two employee work place complaints concerning a safety matter and the recycling program, respectively, Fobian, who was a chief steward at the time, faxed three data requests under section 7114(b)(4) of the Statute on the HWMB fax machine to various Respondent officials on union letterhead. Leazer, who was in charge of the Union's steward program at the time, stated that Fobian did not need a representational release in order to submit the aforementioned information requests. Leazer, however, instructed Fobian not to fax any further documentation on the HWMB fax machine until the parties had resolved the issue. There is no evidence that Fobian did not again, act in accordance with Leazer's directive and did not fax any materials after June 27. In all the circumstances, the credited evidence indicates that faxing union related business was not discussed during the May 24 meeting between Smith and Fobian and because it was not discussed Fobian continued to fax union related material.

On July 18, Smith issued Fobian a five-day proposed suspension letter concerning the "unauthorized use" of HWMB office equipment for union business. The July 18 proposed suspension cited the June 19 and 27 faxes as violative conduct. On July 24 a grievance was filed over this action by the Union. The facts in this case are distinguishable

from those cases in where it was found that a union representative crossed the line and engaged in flagrant misconduct. *United States Department of the Air Force, Tinker Air Force Base, Oklahoma,* 35 FLRA 1146, 1152 (1990); *Veterans Administration Medical Center, Birmingham, Alabama*, 35 FLRA 553, 560-61 (1990); *Veterans Administration Medical Center,* 32 FLRA 777, 780-81 (1988); *United States Department of Justice, Immigration and Naturalization Service, El Paso Border Patrol Sector*, 44 FLRA 1395, 1400-01 (1992). Here Fobian's conduct was consistent with the actions of Union representatives in the past. It is clear from the record that Fobian was not aware of any policy that was inconsistent with his action in faxing union related business to management officials in pursuit of his representational activities. Respondent in seeking to justify its action in suspending Fobian clearly mixed the personal and business uses of the faxes sent by Fobian. Since the credited evidence reveals that there was no misconduct for which Fobian was previously counseled, I agree with the General Counsel that Fobian did not engage in any misconduct that was insubordinate, as Respondent alleges or could be considered "crossing the line" and engaging in flagrant misconduct while performing representational duties that would allow Respondent to suspend Fobian for three days.

Respondent only had the right to discipline Fobian, who was engaged in otherwise protected activity on June 19 and 27, for actions that "exceeds the boundaries of protected activity such as flagrant misconduct." *Grissom Air Force Base* at 11; *Tinker Air Force Base* at 390; *Long Beach Naval Shipyard* at 1005. After considering the uncertainty surrounding the "extension of technology" issue, the absence of a fax policy pertaining to representational conduct and Fobian's understanding that other union representatives, including himself, had used the fax machine for representational purposes, the undersigned concludes that Fobian's actions did not constitute flagrant misconduct.

Accordingly, it is concluded that Respondent only had the right to discipline Fobian, who was engaged in otherwise protected activity on June 19 and 27, for actions that "exceed the boundaries of protected activity such as flagrant misconduct." *United States Department of Justice, Immigration and Naturalization Service*, 51 FLRA 914, 925-26 (1996); *United States Department of Veterans Affairs Medical Center, Jamaica Plain, Massachusetts*, 50 FLRA 583, 586-87 (1995); *United States Department of Justice, Immigration and Naturalization Service*, 43 FLRA 939, 948-49 (1992). Since there was no "flagrant misconduct" shown here, Respondent did not establish by a preponderance of the evidence that it

had a legitimate justification for the three-day suspension served by Fobian.

Based on all of the foregoing, it is therefore found that the August 24, 1995 three-day suspension issued to Fobian constituted a violation of section 7116(a)(1) and (2) of the Statute.

3. The access restrictions placed on Fobian violated section 7116(a)(1) and (2) of the Statute.

The General Counsel alleges that Respondent's June 28, 1995 prohibitions concerning Fobian's accessing the building and the subsequent confiscation of Fobian's key on June 29, 1995 constituted an added violation of section 7116(a)(1) and (2) of the Statute. It thus claims that Fobian was engaged in protected activity while faxing the June 27 data request, could only have these access restrictions placed upon him if, as previously argued, he was engaged in conduct that exceeded the boundaries of protected activity such as flagrant misconduct. Alternatively, the General Counsel maintains that Respondent's access restrictions and its forcing Fobian to surrender his building key were motivated by his heretofore protected activity.

Respondent insists that the access restrictions did not violate the Statute since it had a legitimate concern about Fobian using the office fax machine without permission and contrary to the instructions of his supervisor, Smith. According to Respondent, Fobian was not engaged in protected activity when he sent the faxes and it had the right to ensure that he did not continue to send faxes without permission.

Again the alleged violations must be considered within the framework of *Letterkenny* and its progeny where the Authority confirmed that the General Counsel bears the burden of establishing by a preponderance of the evidence that an unfair labor practice has been committed. Consequently, the General Counsel must establish that: (1) the employee against whom the alleged discriminatory action was taken was engaged in activity protected by the Statute; and (2) such protected activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment. Even when the General Counsel makes this requisite showing, an agency will not be found to have violated the Statute if the agency demonstrates that: (1) there was a legitimate justification for its action; and (2) the same action would have been taken even in the absence of protected activity.

The first of the alleged discriminatory access restrictions occurred on June 28, 1995, when Smith issued a letter to Fobian changing his work schedule by closing the office until approximately fifteen minutes prior to the start of Fobian's 7:30 a.m. shift. This letter mentioned the May 24 and June 27, 1995 uses of the fax machine to transmit "unofficial information." The second alleged restriction took place on June 29, 1995, when Smith required Fobian to surrender his keys to ensure that Fobian did not have access to the building. Smith stated that Fobian had used the fax machine for unauthorized business, namely, the faxing of union documentation.

The General Counsel renews its argument that Fobian's conduct did not "exceed the boundaries of protected activity such as flagrant misconduct." *Grissom Air Force Base* at 11; *Tinker Air Force Base* at 390; *Long Beach Naval Shipyard* at 1005. Consequently, in its opinion, Respondent had no right to restrict Fobian's access and take his key based on conduct that were predicated on Fobian's alleged insubordinate conduct in faxing the union-related data request to Lieutenant Colonel Phillips on June 27, 1995.

Following the *Letterkenny* framework, the General Counsel established that Fobian was engaged in protected activity. Thus, Fobian, it was shown held various positions with the Union and filed a number of grievances and unfair labor practices, including the instant charge. The evidence, it is urged, disclosed that Fobian's protected activities were a motivating factor in Respondent's treatment of him in connection with changing his conditions of employment, namely, the access restrictions and removal of his building key. *Letterkenny* at 118; *Hill Air Force Base* at 899; *Frenchburg* at 1031-34. Based on the foregoing, it is my view that a *prima facie case* of discriminatory treatment in violation of section 7116(1)and (2) was established.

Smith attempted to legitimize his actions by stating that he took Fobian's key because he was worried about office security--the records and supplies. Smith's explanation lacks credibility for a number of readily apparent reasons. Clearly, Fobian and Smith have worked together and known each other for a very long time. Further, for the past two and one-half years Fobian has been arriving at work at approxi-mately 6:00 a.m., without incident. Fobian plainly did not pose a security risk to the Respondent since there was no evidence of missing records or supplies. Heretofore the Authority has not been persuaded by such an uncorroborated or undocumented reason.

Hill Air Force Base at 900. It is unlikely that it will accept such a reason in this case. Furthermore, after Smith told Fobian not to use the HWMB fax machine for personal use on May 24, it is undisputed that Fobian complied leaving no reason for Smith to suspect misuse of the fax machine or any other breach of security. In light of the foregoing, it is found that Respondent failed to establish by a preponderance of the evidence that Smith had a legitimate reason to place access restrictions on Fobian or to take his key.

Accordingly, it is found that Respondent's prohibition concerning Fobian's accessing the building and the subsequent taking of Fobian's key constituted separate violations of section 7116(a)(1) and (2) of the Statute. Fobian, who was otherwise engaged in protected activity while faxing the June 27 data request, could only have these access restric-tions placed upon him if he was engaged in conduct that "exceed the boundaries of protected activity such as flagrant misconduct." *Grissom Air Force Base* at 11; *Tinker Air Force Base* at 390; *Long Beach Naval Shipyard* at 1005.

4. The July 31, 1995 access restrictions that were placed on all civilian employees of the HWMB violated section 7116(a)(1) and (4) of the Statute.

The General Counsel asserts that Respondent's July 31 imposition of the access restrictions on all civilian employees of the HWMB constituted a violation of Section 7116(a)(4) of the Statute. It is alleged that Fobian's protected activity in the filing of unfair labor practice charges on July 3 and 27 were the motivating factor in Respondent's decision to make a change in the conditions of employment involved here. The General Counsel, submits that Respondent's justification for its actions in this matter is clearly pretextual.

Respondent submits that the access restrictions were not only nondiscriminatory, but were *de minim[i]s* and made simply to ensure equal treatment of all employees.

a. The framework for resolving complaints alleging violations of section 7116(a)(4) of the Statute.

In *Federal Emergency Management Agency*, 52 FLRA No. 47 (1996) 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). That framework was set out by the Authority in its decision in *Letterkenny*.

In *Letterkenny*, the Authority reaffirmed that the General Counsel bears the burden of establishing by a preponderance of the evidence that an unfair labor practice has been committed. In cases of alleged discrimination, the General Counsel must establish that: (1) the employee against whom the alleged discriminatory action was taken was engaged in activity protected by the Statute; and (2) such protected activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment. Even when the General Counsel makes this requisite showing, an agency will not be found to have violated the Statute if the agency demonstrates that: (1) there was a legitimate justification for its action; and (2) the same action would have been taken even in the absence of protected activity.

b. Respondent violated section 7116(a)(1) and (4) of the Statute.

There is no dispute that on July 3, 1995, the Union filed the original unfair labor practice charge. There is also no dispute that on July 24, Fobian served copies of the first amended charge on Respondent, including Smith. Nor is there any question that the Union filed the first amended charge, in this case on July 27. It is also uncontroverted that on July 31, Smith disseminated a letter to all civilian employees immediately restricting their time of arrival at the HWMB to 7:15 a.m. Finally, there is no question that on August 1, Smith returned Fobian's key on the condition that Fobian adhere to the terms of Smith's July 31 letter. Clearly, the access restriction was imposed on the civilian employees because Fobian filed the aforesaid unfair labor practice charges. The first amended charge alleged discrimination by Smith against Fobian regarding the access restriction and the surrender of his building key. There is a clear causal link between Fobian's filing of the unfair labor practice charges and the July 31 access restriction in terms of the type of violation and the timing of Smith's actions.

There is also no dispute that filing an unfair labor practice charge constitutes protected activity under the Statute. *See VA, Brockton*, 43 FLRA at 781. Employee conduct which otherwise would be protected, such as filing unfair labor practice charges, may exceed the bounds of protected activity if the conduct constitutes flagrant misconduct because it is "of such an outrageous and insubordinate nature as to remove [it] from the protection of the Statute." *U.S. Air Force Logistics Command, Tinker Air Force Base, Oklahoma City, Oklahoma and American*

Federation of Government Employees, Local 916, AFL-CIO, 34 FLRA 385, 388-91 (1990) *(quoting Federal Aviation Administration, St. Louis Tower, Bridgeton, Missouri*, 6 FLRA 678, 687 (1981). In this case, the facts do not reveal that Fobian's actions constituted flagrant misconduct such that they would lose the protection of the Statute.

Respondent's reasons for its action do not withstand scrutiny. Respondent contended that the access restriction on the civilian employees was imposed because of security concerns, specifically, over safeguarding supplies and records. It did not offer any evidence in support of its security justification, however. Failure to offer corroboration or documentation in attempting to rebut claims of discrimination has been looked on unfavorably by the Authority. *Hill Air Force Base* at 900. Furthermore, the access restriction was not imposed until nearly five weeks after Fobian's June 28 access restriction which allegedly was imposed for the same security reasons. If security justification was the motivating factor behind the change, Respondent undoubtably would have first imposed these restrictions on all the civilians, including Fobian at the same time. *Letterkenny.*

Evidence of discriminatory motive may be demonstrated by suspicious timing of the questioned conduct. *United States Customs Service, Region IV, Miami District, Miami, Florida,* 36 FLRA 489, 496 (1990). It appears that after Fobian filed the unfair labor practice charges over Smith's conduct, Smith imposed the same access restriction on all civilian employees and then sought to have Fobian conform to the terms of the July 31 restriction as a condition to receiving back his building key. This attempt to treat all employees in the same manner in order to counter Fobian's unfair labor practice charges fails because it follows too closely on the heels of the unfair labor practice charges. Under the circumstances, the timing of Respondent's actions, just after unfair labor practice charges were filed provides considerable motivation.

In light of the above, it is found that the General Counsel has satisfied its burden of establishing that Respondent was motivated by the Respondent's consideration of Fobian's protected activity. As the Respondent has not demonstrated a legitimate justification for its placing access restriction on its employees in HWMB, the undersigned concludes that Respondent violated section 7116(a)(1) and (4) of the Statute.

It is therefore recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Marine Corps Air Ground Combat Center, Twenty-nine Palms, California, shall:

1. Cease and desist from:

(a) Discriminating, retaliating and taking reprisal against Elmer Fobian, or any other employee because they engaged in protected activity under the Federal Service Labor-Management Relations Statute, including transmitting documents via fax to various managers and the Commander and filing unfair labor practice charges with the Federal Labor Relations Authority.

(b) Restricting the time of arrival for employees of the Hazardous Waste Management Branch because Elmer Fobian filed an unfair labor practice charge.

(c) In any like or related manner interfere with, restrain, or coerce its employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

2. Shall take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Rescind the restrictions (including the letter) placed on Elmer Fobian's time of arrival on June 28, 1995, and allow Elmer Fobian to come to work at any time prior to the start of the workday.

(b) Rescind the restrictions (including the letter) placed on employees of the Hazardous Waste Management Branch on July 31, 1995, and allow these employees to come to work at any time prior to the start of the workday.

(c) Rescind the three-day suspension issued to Elmer Fobian on August 24, 1995, for using a fax machine to transmit Union documents.

(d) Reimburse Elmer Fobian for the loss of pay and benefits that he suffered as a result of the three-day suspension. The back pay will be made in accordance with the Back Pay Act, 5 U.S.C. 5596, as amended, and will include the payment of interest.

(e) Expunge from all records the August 24, 1995 three-day suspension issued to Elmer Fobian, including the related July 18, 1995 proposed five-day suspension, and expunge from all records any and all references to the proposed suspension and suspension of Elmer Fobian.

(f) Post at the Marine Corps Air Ground Combat Center, Twenty-nine Palms, California facility copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commanding Officer and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and 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.

(g) Pursuant to § 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, San Francisco Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, November 29, 1996

ELI NASH, JR.
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Marine Corps Air Ground Combat Center, Twenty-nine Palms, 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, retaliate, or take reprisal against Elmer Fobian, or any other employee, by (1) taking away Elmer Fobian's keys to the work place, (2) restricting Elmer Fobian's time of arrival at the work place, and (3) issuing a three-day suspension to Elmer Fobian because he engaged in protected activity under the Statute, including transmitting documents via fax to various managers and the Commander, in his capacity as a Union official, on behalf of the American Federation of Government Employees, Local 2018, AFL-CIO, the agent of the exclusive representative of our employees.

WE WILL NOT restrict the time of arrival for employees of the Hazardous Waste Management Branch because one of its employees filed an unfair labor practice charge with the Federal Labor Relations Authority.

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

WE HAVE returned Elmer Fobian's keys to the workplace.

WE WILL rescind the restrictions (including the letter) placed on Elmer Fobian's time of arrival on June 28, 1995, and allow him to come to work at any time prior to the start of the workday.

WE WILL rescind the restrictions (including the letter) placed on employees of the Hazardous Waste Management Branch, on July 31, 1995, and allow these employees to come to work at any time prior to the start of the workday.

WE WILL rescind the three-day suspension issued to Elmer Fobian on August 24, 1995, for using a fax machine to transmit Union documents and WE WILL reimburse Elmer Fobian

for the loss of pay and benefits that he suffered as a result of the three-day suspension. The back pay will be made in accordance with the Back Pay Act, 5 U.S.C. 5596, as amended, and will include the payment of interest.

WE WILL expunge from our records the three-day suspension issued to Elmer Fobian on August 24, 1995, including the related proposed five-day suspension issued to Elmer Fobian on July 18, 1995, and will expunge from our records any and all references to this proposed suspension and suspension of Elmer Fobian.

Marine Corps Air Ground Combat Center, Twenty-Nine Palms, California

Date: By: (Signature) (Commanding Officer)

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 of the Federal Labor Relations Authority, San Francisco Regional Office, 901 Market Street, Suite 220, San Francisco, California 94103-1791, and whose telephone number is: (415) 356-5000.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by ELI NASH, JR., Administrative Law Judge, in Case No. SF-CA-50732, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

John R. Pannozzo, Esq.
Federal Labor Relations Authority
San Francisco Regional Office
901 Market Street, Suite 220
San Francisco, CA 94103-1791

Commandant of the Marine Corps (MPL)
Attn: Henry J. Noonan, Esquire
Headquarters, U.S. Marine Corps
Washington, DC 20380-0001

Mr. Elmer Fobian
5911 Rose Ellen Street
Twenty-nine Palms, CA 92277

Daniel Dickerson, President
American Federation of Government
Employees, Local 2018, AFL-CIO
P.O. Box 515
Twenty-nine Palms, CA 92277

REGULAR MAIL:

National President
American Federation of Government
Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

Dated: November 29, 1996
Washington, DC