

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

.....
DEPARTMENT OF THE AIR FORCE, .
410TH COMBAT SUPPORT GROUP, .
K. I. SAWYER AIR FORCE BASE, .
MICHIGAN .
Respondent .
and .
NATIONAL FEDERATION OF .
FEDERAL EMPLOYEES, LOCAL 1256 .
Charging Party .
.....

Case No. 5-CA-70066

Major Phillip G. Tidmore
For the Respondent
John M. Paolino
For the Charging Party
Judith A. Ramey
For the General Counsel, FLRA
Before: JOHN H. FENTON
Chief Administrative Law Judge

DECISION

Facts

The Background

The nature and complicated circumstances of this case suggest the usefulness of a quick overview of its setting and its salient features before presenting a detailed account of its facts, in the hope that the latter effort will be the more comprehensible.

NFFE represents two bargaining units at the Air Force Base. Employees paid from appropriated funds have long been covered by a collective bargaining agreement. Local 1256 was certified as bargaining agent of the non-appropriated fund (NAF) employees in 1976. For reasons not disclosed on this record, the first contract covering them did not become effective until September 2, 1985.

This case concerns NAF employees in the Officers Club, particularly bartenders. The alleged discriminatee is the only one of more than 20 employees in the Club who ever joined the Union. She thereafter became a steward, although formal written notification of such status was not provided to management until the anniversary of the contract. A few months later she was terminated after leaving the Club insecure (unlocked). Unlike the garden-variety case, job trouble did not follow union activity. Here, the alleged discriminatee received a formal reprimand and threat of termination before she was seriously motivated to join the Union. She was in deep trouble before she engaged in the activities which the General Counsel contends led to her separation. She did, however, engage in some representational activities and this, together with the severity of the discipline imposed and the reason given therefor (attitude disruptive to the harmonious operation of the Club) raise troublesome questions as to the motive for her discharge.

Perhaps because there is no convincing evidence of hostility to unions, General Counsel dwells on the lack of union activity and grievances, i.e. on the very novelty of the alleged discriminatee's membership and activities, as if to suggest that they put club managers' teeth on edge. The evidence, if anything, indicates that the managers were not hostile to the union but rather oblivious of it. They were certainly ignorant of the obligations its presence created. There is utterly no suggestion that the lack of union members and activity was the result of any fear. Apathy would appear to explain the attitude of employees.

The Facts

Renelle Ottensman, the alleged discriminatee, was hired in September of 1985, soon after the collective bargaining agreement went into effect. She was promoted to Grade 5 bartender (regular part time or RPT) the following month, and was for most of period with which we are concerned the senior and highest graded bartender. John Zachau was hired as a Grade 3 RPT bartender in October. He resigned the

following May. Larry Fowlkes was hired in late October as a Grade 3 bartender IOC (intermittent on call). He was promoted to Grade 5 the following August. Mary Sheesley was hired as a Grade 3 IOC bartender in December and was promoted to Grade 5 in August. Nancy Swartzfeger was hired as an assistant bartender in January, and was promoted to Grade 3 bartender (IOC) in September. Ottensman was fired in October.

Thus, at material times the principal bartenders were Ottensman, Fowlkes, and Sheesley. They worked in the beginning under Sgt. William Robinson, the Night Manager, Sgt. Mark Gowings, Assistant Manager, and Sandra Rutherford, the Club Manager. Ottensman was known as the Acting Head Bartender, although she in fact had no supervisory authority. In February Jacqueline Asher became Manager and Robinson became Assistant Manager.

Shortly after arriving Asher put an end to Ottensman's status as "Head" bartender on the ground that it was improper in the absence of supervisory authority. Ottensman was for awhile resentful and withdrawn, particularly toward Sgt. Robinson who had to tell her he was boss and she could not be boss. This matter takes on some importance because Ottensman, as the highest graded and senior bartender, seems to have been looked upon as the leader and tended to be the spokesperson for the others, a factor which complicates the determination of when Respondent should have known that she was a steward and spoke in that new capacity.^{1/} She was not officially designated until September 2, but claims to have functioned as such from approximately July 4.

Also in February an inspection team visited the premises and asked Asher whether she knew she had a bartender who was pouring free drinks. Ottensman was identified as that person. Asher and Robinson posted a notice to bartenders on February 27 (R. Exh. 16) which was critical of the sloppy condition of the bar, and highlighted the prohibition on pouring free drinks. Each bartender was required to initial the announcement.

^{1/} As bartender Larry Fowlkes testified for the General Counsel, Ottensman was the employee who would carry employees' problems to management - she remained "kind of head of the bartenders" even after she lost that title and she was looked to as a leader. Swartzfeger likewise said Ottensman was the employee who dealt with management about employee problems, without any suggestion that it began with her Union office.

On March 13 Sgt. Robinson posted another, rather sharp notice to the bar staff. He said that big improvements were needed, and that he had better see them over the next two weeks. He called for teamwork and said that the closing bartender would be totally responsible for problems found the next day. He imposed a dress-code of sorts and instructed those without nametags to get them. Apparently all employees were counselled about these matters. All of this, and particularly the dress-code caused some employee concerns, which they discussed among themselves and later with Asher and Robinson.

Ottensman spoke to her husband about her concerns, and learned that there might be a union representing NAF employees. She then visited Joseph Schlumpf, the NAF Personnel Specialist. Her testimony about the meeting was, as usual, very definite and specific, although I have real doubts as to its accuracy. She said that she asked him about union representation of NAF employees, and that he responded that, to his knowledge, there was no union on the Base for NAF people. She then said she understood there was a Union office on the Base. He replied that if there was he did not know where it was, and then inquired whether she had a problem for which he might provide help. She recounted the trouble the bar staff was having getting liquor and pourers, said that they were running out at parties, and that the staff was unhappy about having to pay for uniforms. That, she said, ended the conversation.

Schlumpf could not recall any discussion of union presence on the Base, though he vigorously and credibly denied that he would ever have told any employee that NAF employees did not have a union. He vaguely recalled a discussion about work-related problems - including the lack of pourers, and his advice to Ottensman that these were not personnel problems but management problems she should take up with her supervisors.

Given the presumably notorious, and certainly easily verifiable fact that NAF employees were in fact represented by the Union, as well as my doubts about the accuracy of her recollection, I do not credit Ottensman's account of the conversation.^{2/} Even the prosecutor suggests that there

^{2/} Bartender Larry Fowlkes said he was at all time aware of the Union, based on his previous work at the NCO Club.

must have been a misunderstanding: Schlumpf very likely was asked whether Officer Club employees had a Union representative, i.e. a steward or other official designated to speak for them, and replied in the negative. None in fact was designated until about six months later, when Ottensman was.

I dwell at some length on this incident because it throws light on the accuracy of Ottensman's sure sense of recall, and because the General Counsel necessarily attempts to make the most of it as the only evidence that the serious discipline soon thereafter imposed on Ottensman may have been tainted by knowledge that she was interested in the Union. General Counsel's case, is of course, weakened by a finding that Ottensman was in employment trouble and had been threatened with removal before there was any indication that she was interested in the Union. On the first subject, I do not find, based on demeanor, that Ottensman did not tell the truth. Rather, she and Schlumpf appeared to give honest accounts of the conversation. The logic of the situation, particularly the palpable falsehood of any statement that NAF employees were unrepresented and had no Union office strikes me and the prosecutor, as strong evidence that it is highly improbable that any such statement was ever made. The inference drawn is strengthened by the absence of any evidence that Base management was hostile to the Union. I conclude that Ottensman is not a particularly reliable witness.

The inference the General Counsel would like to see drawn is that Schlumpf quickly relayed to Club Manager Asher that Ottensman was attempting to locate Union representation. For within a few days of Ottensman's talk with Schlumpf, she spoke to Asher about the dress-code, asking why the employees should be required to pay for a "uniform." Asher indicated that code would not be strictly enforced and then asked Ottensman whether she had any other problems in the Bar. Ottensman said she did not (although she clearly did) and Asher then indicated that she understood Ottensman was having other problems and was sorry that Ottensman felt she couldn't come and discuss them with her. Asher spoke of the liquor supply problem she understood Ottensman was having and said that she had ordered the pourer tops. These problems had not been previously discussed with Asher, thus strongly suggesting that Schlumpf had called Asher to relay the criticisms of management and perhaps more.

Neither Schlumpf nor Asher was asked whether he relayed to her the fact that Ottensman was looking for a union as well as complaining about the operation of the Bar. This lends some strength to the inference sought by General Counsel that Ottensman's interest in representation was discussed. Clearly there is reason to suspect such a conversation took place, but it is slim and unaccompanied by any convincing evidence that Asher would have been disturbed by such news. I therefore find that a preponderance of the evidence does not establish that the decision to reprimand Ottensman was tainted by anti-union considerations. Thus the case is one where the alleged discriminatee was in serious performance-related trouble before she engaged in any protected activity. The task then is to determine whether her subsequent Union activity, her subsequent lapse in performance, or some mixture of the two, explains the decision to terminate her.

Also in March, Ottensman's supervisor had occasion to record the following in her Form AF 971 (Supervisor's Record of Employee):

Renelle has a problem dealing with authority from management and doing what is asked of her without questioning management directions. Gave both Mrs. Asher and Sgt. Robinson a problem at the Bar.

This observation that she did not give managers the respect or loyalty they thought they deserved is a constant refrain in this case, as is the claim that she was critical of management before customers and others. She was clearly perceived as having such tendencies long before she became a Union member and steward, and a conflict with Sgt. Robinson existed going back to when she was stripped of "head bartender" status. It is also clear that she was a good bartender in the sense of her rapport with customers. Finally, it is clear that her record in other respects - cash shortages and overages, bank verifications and bar cleanliness was poor.

On June 7, Ottensman had a cash shortage of \$17.25 - a size which required management to explain the cause and outline corrective action. In his explanation Sgt. Robinson on June 10 said she had left early and without permission on the night of the shortage, that she would be reprimanded, and that he was consulting with Personnel about her removal, noting that this was her second shortage exceeding \$10.00.

On June 11, Mrs. Asher was called by Mr. Mike Casey of SAC HQ, who reported that Ottensman had served him and his assistant free drinks on June 9. Given the warning to all bartenders in February that they were not to give away drinks, which had been provoked by her conduct, Asher and Robinson decided that serious action was required, and consulted Personnel for guidance.

On June 13, 1986, Ottensman received a letter of reprimand. The reasons given were that:

(1) On June 9 she served free drinks to a Mike Casey of SAC HQ, and his assistant, notwithstanding the written notice of February 27 that this was strictly forbidden;

(2) On May 17 she ordered a pizza from another facility and had it delivered, even though the main kitchen where she was was open and could have provided same;

(3) On June 12, management learned she was guilty of two cash shortages exceeding \$10.00, one on November 4, 1985 and the other on June 7, 1986;

(4) She repeatedly failed to have the main bar set and ready for business.

The reprimand warned that any future infraction could be cause for removal and informed her of her right to grieve under the Collective Bargaining Agreement.

Ottensman attempted to discuss the reprimand with Asher and Robinson in the presence of her husband. They refused to discuss the matter in his presence. After he left, she complained of the unfairness of their action, of the (alleged) lack of any warning, and sought to work out an informal resolution with her immediate superiors. They told her to contact Schlumpf for any further information. This unaccountable refusal to be drawn into discussion, and to shift such burden to Personnel, was to be repeated during the incident which led to this proceeding.

She again, through her husband, learned of a steward at the NCO Club, called him and got the Union office telephone number. She talked to Union President Ed Bengry who referred her to Mary Ann Knight, third vice-president and steward.

Knight assisted her in the preparation of her grievance, which she filed with Madelaine Prout, Chief of Morale, Welfare and Recreation. The grievance sought removal of the letter of reprimand, as well as of derogatory information allegedly placed in her personnel folder without her knowledge. Prout met with Ottensman and Knight and, after investigating the matter, removed two of the reprimand specifications: the claimed cash shortage of November 1985 (as too remote) and the pizza incident (on the ground that, while Ottensman should have known better, there was no proof she had been told not to do what she had done). Prout specifically discussed the free beer with Ottensman. She testified without contradiction that Ottensman at first denied such conduct, later admitted having given some and then, when confronted with the fact that Prout had talked to Casey, admitted she had provided free beer all evening.^{3/}

Prout sustained the reprimand on the basis of the June cash-shortage, the failure to clean up and open on time and the free beer. Ottensman did not appeal, asserting she disregarded the Union's contrary advice and decided not to further antagonize Respondent. During this time Ottensman developed an interest in the Union, studying the contract and the Air Force regulations relevant to the work-site. President Bengry told her of the opening for a steward at the Club and she expressed an interest. She was given manuals and other material furnished to stewards.

It is not clear when she became a steward. She joined the Union and submitted a checkoff authorization form on June 18, in connection with her grievance. She asserts that she became a steward in early July, and that such fact was known to others, who called her "Norma Rae," and was made known to Asher. Management denies knowledge of such a role until official notice was provided in early September. President Bengry did not indicate when he agreed that Ottensman would become a steward. Ottensman testified that she told Asher that the kitchen employees were referring to her as Norma Rae. Interestingly, she says she passed such information on because she regarded it as comical. Asher

^{3/} I do not find significant Ottensman claim that Prout did not know the difference between free-pouring and pouring free drinks. The former has to do with the measurers attached to bottles which insure that only one ounce is poured. They have no application to beer, which all parties knew was what the Casey incident involved.

responded (perhaps in kind) that she hoped Ottensman was not taking the role too seriously. Ottensman rejoined that she would not do anything to upset her employer - she would always come to them first with any problems. (This seems to be a reference to having earlier gone over Asher's head to Schlumpf). Asher answered that she would hope Ottensman would do that. Asher said she had no recollection of such a discussion.

This is the only evidence offered to indicate explicitly an anti-union attitude on the part of Club management. As the conversation is described as jocular, and as it is difficult to imagine Ottensman making light of such a matter in an environment she would otherwise have us believe was hostile to union activity, I do not find such incident persuasively indicates any disposition to punish Union activists. Arguably, it runs counter to such a suggestion. Only one employee testified that she called Ottensman Norma Rae (or was identified as doing so) and she, too, thought it was amusing. That employee, Pam Phillips, could not recall when she used that name and said that she learned of Ottensman's stewardship after the latter was dismissed. She offered no explanation for using such a name before she knew Ottensman was a steward, i.e. before her separation. The laughter she said they shared would have by then been odd indeed. Suffice it to say that I do not find that the fact of Ottensman new office was notorious prior to written announcement of it in September. If Ottensman told Asher that she was being called Norma Rae, I credit her statement that she thought it comical, i.e. I am not persuaded that knowledge of Union activity was thereby established. While this seems a small matter, it relates to the difficulty of establishing when management should have known of her new role, and also whether there was any taint in the fact that her supervisor began in mid-August to again document shortcomings in her AF 971. Respondent asserts that the reprimand had its intended effect of causing her to shape up, but that, in about two months, her performance returned to the unacceptable pre-reprimand level.

Ottensman claims that her first representational activity occurred in July in behalf of waitress Diane Olson. She asserts she spoke to Asher, in her capacity as steward, following Olson's request that she speak to Asher in her behalf. Olson was distraught about a failure to put an emergency call from a hospital through to her. She said she spoke to Ottensman as a friend, not knowing who else to talk to, and that she thereby learned that Ottensman was a steward. Ottensman saw Asher, but does not assert that she informed the latter that she was there as steward.

Later, perhaps in August, Diane Olson had further complaints about her hours being cut and not being deemed qualified to be a hostess. She spoke of her problems to Ottensman, who spoke to Asher for her. Later Olson went directly to Asher with her complaint of unfair treatment. Asher said she was too busy to get to it right then. Later, in a chance encounter, Asher asked her why she thought she was unfairly treated. For reasons Olson could not explain, they got on the subject of friends, and Asher observed that she thought Olson was too friendly with Ottensman. This arguably ties in with such evidence as there is that Ottensman was acting as a steward, or with Asher's anger, and counselling of Ottensman, over an alleged badmouthing "loyalty" incident to be discussed below. In any event Asher was not asked and we have such inferences as ought to be drawn from a failure to cover the point. Nor did Ottensman indicate she represented Olson concerning her hours prior to late October, at which time Asher quickly agreed and rectified the complaint. Given the amount and quality of the evidence, I do not find that the remark about friendliness with Ottensman was based on Ottensman's status as a steward.

On August 16, according to her AF 971, Ottensman failed to verify her bank. Three days later she made an \$11.00 cashier error. An entry on August 25 indicates that informants told Sgt. Robinson that Ottensman had made degrading remarks about the managers of the club at the NCO Club and at a Squadron Picnic. Thus she allegedly indicated that Asher "had no idea" how to order food, and that she would have Robinson removed. An entry on August 31 indicates that Asher, as a result of these incidents, counselled Ottensman on the importance of loyalty and team-playing. Ottensman denied the reports but did, according to Asher, say that her problem was not with Asher but with Robinson, and that "everything would be fine if he was out of the club." Or, as the 971 entry indicates, she said that the problem was not "with the Club manager, but with the military assigned, but if he was only going to be here a year, maybe she could tolerate it that long."

There are further entries in September concerning cashiering errors, as well as one complimentary of her rapport with customers. In early October she had two \$10.00 overages and was counselled by Robinson. In mid-October, during a large dinner party she accidentally hit the intercom button which put her work message over the loudspeakers in the dining room. Robinson hurried to the Bar, told her to hang up, and explained what was happening. She apologized.

But as he was leaving she commented, in the presence of customers, "Well, there goes another write-up on my 971 by him." The 971 entry indicates Robinson would not have written her up but for the "wisecrack" in the presence of customers.

Meanwhile, the Union on September 2 provided management with written notice of its current officers showing Ottensman as steward for the Club. Under date of September 25, the same document was posted on the bulletin board. Asher and Robinson acknowledge their awareness of the posting.

Again to back up, on July 2 Ottensman and Sheesley had been reclassified in a RIF action to permit assignment of fewer hours to them. That took effect in August and, it appears others also received fewer hours. This intensified long-standing feelings that Sheesley was Robinson's favorite and drew preferred assignments. Allegedly she did not receive her fair share of party bars, which afford more work and less tips. When the November schedule was posted in mid-October, Fowlkes, Swartzfeger and Ottensman discussed what they perceived as continuing bias. They decided to bring the matter up at the next bar staff meeting (a regular "jawboning" session attended by all bartenders, Robinson and Asher). Then Fowlkes decided not to wait and telephoned Robinson. The three met Robinson in his office, and Fowlkes outlined the purpose of their visit and the nature of their concerns. Ottensman then allegedly spoke of her feeling that she was being deliberately "shorted" in her hours, and said that the collective bargaining agreement prohibited assignment based on favoritism, because of a reprimand, or as punishment. The above is based solely on Ottensman's testimony and curiously appears to give Fowlkes the lead role in bringing about the meeting and presenting the problems to Robinson. Whatever, Robinson heard them out and said he would set up one of the regular meetings to further address the problems.

A meeting was then set for October 22, involving the above four plus Sheesley and Asher. Before it took place, Ottensman, Fowlkes and Swartzfeger met to go over the points to be raised. The latter two asked Ottensman to speak for them, and Fowlkes told her that this was an opportunity for her to take notes and act like a steward. Ottensman asserts that she said that she was there in her capacity as steward, and that she raised old problems of drink pourers, a shortage

of glasses, dress code and scheduling. She had a notebook from which she brought up the items for discussion, and did most of the talking. This, said Robinson, was in response to his request that the bartenders get together and correlate their ideas, after having been approached by a number of them. In any event, there is dispute as to whether Ottensman identified herself as the steward-spokesperson. Since there is no quarrel over the fact that she was by then known to be steward, this would have only the marginal effect of demonstrating that she was at that point something more than a nominal steward.

As this is in many respects a marginal case, perhaps the dispute merits some analysis. Robinson denied, on cross-examination, that Ottensman had "advised" him that she was acting in the capacity of steward at that meeting, although acknowledging that she did most of the talking, and had a notebook. The denial is dismissed by General Counsel as disingenuous, given his acknowledgement that he had known since the posting (September 25) that she was steward. Neither Fowlkes nor Swartzfeger testified that she identified herself, and Asher admitted only that Ottensman had acted as steward in a subsequent discussion about Olson's schedule. Ottensman had never before, she said, represented an employee before Robinson, taking such matters directly to Asher. Robinson acknowledged that Ottensman did most of the talking, but this meeting ought not be divorced from its predecessor, which had been set up not by the steward but by Fowlkes, who led off the presentation. Robinson did no more than deny that Ottensman identified herself as present at the meeting in her capacity as steward. I am inclined to think that there was no need for Ottensman to so identify herself and that she did not do so. In any event she led the discussion and she was the steward.

At the end of the meeting Robinson, acting upon complaints from, and at the suggestion of, the Security Police, announced the institution of a new policy when buildings were left insecure. Until then, whether because he was military, thus living on base or because he drew no additional pay for such chore, the Security Police were to call Robinson whenever they found an insecure building. Henceforth, he said, the employee responsible for closing would also be summoned in the middle of the night. This, it was thought, would get their attention and lead to more care.

On October 24 Ottensman and Olson met Asher to discuss the fact that Olson, as an IOC employee, was not being scheduled for work. Four or five other IOC employees were being scheduled. According to Ottensman, AF regs prohibited scheduling of IOC employees, and it was therefore unfair to schedule the others but not Olson. This point was made to Asher, who was also informed that Roxanne Hutchinson, an office employee, had told Olson that she had "Renelle Ottensman to thank" for the fact she was not scheduled. This was taken as an indication that the Union was responsible. Whatever its meaning, Asher, according to Ottensman, professed ignorance of the scheduling problem and promised to take care of it. According to Olson, Asher agreed that such treatment of Olson was unfair, promised to put Olson back on schedule and did so.

Ottensman worked the evening of October 27. Swartzfeger was assigned to learn security procedures from her. Ottensman asserts Swartzfeger trained under her because she had the best record for securing buildings of all the Bartenders. She in fact asserts she never left a building insecure, although security police records do not support this. Swartzfeger, however said that she was assigned to understudy each of the three Bartenders who was qualified to close up, and that everybody was being trained. Thus one witness for the General Counsel undercuts another, and provides further evidence both that Ottensman's view of her own performance is unrealistically high, and that the Club was indeed seriously concerned about physical security.

In the early hours of October 28 Ottensman went through the security procedures, locking all windows and checking to see that all doors were locked. Again there is conflict in the testimony. Ottensman testified that Swartzfeger followed her, checking behind her, thus suggesting that any blame for an unlocked door would surely be shared. Swartzfeger testified that she merely observed the routine used by Ottensman, thus suggesting she was not responsible. In any event, Ottensman informed her that the door which was to be found insecure (and which normally was left locked), was one which had to be pushed extra hard to make sure it would "catch." Ottensman did that. Nevertheless the Security Police found the door insecure, and called Sgt. Robinson - the standard operating procedure - who in turn called Ottensman in the first application of the new procedure outlined by him at the last meeting with the bartenders.

The stories about what then ensued are, as usual, irreconcilable. Ottensman said that she asked Sgt. Robinson why the door had been left unlocked - it was always locked and had to be locked from the outside by a key not on the night manager's keyring. She told him that she had gone through the usual procedure and that the deadbolt had taken effect. She punched in and heard Robinson verify to the Police that the door was never left unlocked. The Officer responded that she would not be held responsible if she could find the person who left the door unlocked. She then told Robinson that she was entitled to two hours of recall pay and he responded that he did not think so. She added that it was not fair to call her in for something she was not responsible for, and that she planned to grieve it. He answered that she had to do what she had to do.

Robinson testified that Ottensman upon being shown the insecure door, rudely denied that it was her fault and asserted that someone else must have unlocked it. They then went into the lobby, where she said she was going to punch in and he said "fine." When she returned and was unable to produce her ID for the officer who was filling out the incident report, she pointed at Robinson, looked at the Officer and said she could not believe what was happening. She added that she had been there longer than Robinson, had never had an insecure building and that the treatment of her was not fair. She then said to Robinson "I'll have you know you're paying for this" and he responded "whatever." She then left. He was then embarrassed by the Security Office (who out ranked him), who asked whether she always talked to him like that.

Later, during the normal workday, Robinson told Asher of the incident and of Ottensman's demand for pay. Asher said she should be paid. Robinson sought and received further confirmation on this by a phone call to Schlumpf. He and Asher then allegedly decided that, given the various problems with Ottensman and the addition of this incident and the reaction to it, termination proceedings should begin. They called Schlumpf, told him of their decision, and asked for his help in doing things correctly. They talked for about an hour, went over Ottensman work record, and decided the termination was justified, according to Robinson, by an "attitude that affected the harmonious operations of the Officers Open Mess, and it was a culmination of all the facts leading up to the time that we fired her." In further elaboration of that point, Robinson said that the decision was based on her whole record, going back to the matters that led to the reprimand, "but it was her attitude. Everytime you tried to talk to her, she would

not want to listen to anything at all that you had to say. She either said it wasn't my fault, it's not my responsibility, you're wrong."

Whatever precisely happened in these discussions, Schlumpf drew up the reasons for termination, after going through Ottensman's AF-971. A Form 2548 (Respondent Exhibit 11), dated October 29, recites above the signatures of Asher and Robinson, that Ottensman had been "Terminated because of attitude which is disruptive to the harmonious operation of the Officer's Open Mess." An attached page then listed in abbreviated form seven entries from the Form 971 described above plus the insecure building. Only two of these, the August entry about public comments "degrading . . . against management," and the October entry about the wisecrack in the presence of customers, fit the mold of an attitude disruptive to harmonious operation of the Club.

That same day Ottensman was called at home and told to come to a 1:00 pm meeting with Asher. She arrived with her representative, Knight. Robinson was also there. She was told that her employment was terminated, effective immediately. She says she asked for, and management says it volunteered the statement about disruption of harmony. She asked why, and was told to contact Schlumpf for further information. She called Union President Bengry, who called Schlumpf. Schlumpf said the reason was attitude and promised further details at a later time.

A look at Security Police reports of insecure buildings is necessary, as the General Counsel contends that two other employees (Mary Sheesley and Roxanne Hutchinson) has two such incidents, just as did Ottensman, and that Sgt. Robinson had the worst record of all: five during the 13 months ending in October of 1986. Analysis of the records is not easy, given the fact that Robinson was routinely called as the manager responsible for such matters, and thus, often appears on Incident Reports when it is far from clear and highly unlikely that he had actual responsibility as the closing person, to ensure that all doors and windows were secure. It is clear that the Club had the most trouble with such security of all facilities on the Base.

The Incident Reports are contained in General Counsel Exhibit 10 A-L. Sgt. Filipkowski testified as custodian of such records, that the "Subject" named on such a form by the Police was either the person responsible for leaving a building insecure or the person who went to secure the

facility. Fault is then determined by the facility manager and noted under "Offender" on the back of the form. The General Counsel seeks to minimize the importance of the insecure building on October 28 by establishing that Sgt. Robinson was far and away the most frequent offender.

The records are not very clear on that point. Robinson was the "building custodian" and as such was routinely called, as had been his predecessor Sgt. Gowings. As night manager he was responsible for building security even if he was not there, i.e. it was his job to see that the bartenders secured the premises. In his absence, Asher or Roxanne Hutchinson were to be called. Of the 12 incident reports in evidence, Robinson appears as the subject six times. In only one of these is there any indication that he, in fact secured the building, and in one it is clear that Mary Sheesley did so.^{4/} Nor is there any evidence that Robinson would normally secure buildings. Similarly Sgt. Gowings was the subject of two reports (10(e) and (f)) and was also labelled the offender, although John Zachau and Renelle Ottensman were said to have secured (or failed to secure) the buildings.^{5/} Roxanne Hutchinson, the Cashier, is the subject and offender in an October 1985 incident and the subject of an August 10, 1986 incident for which Larry Fowlkes was counselled. Mary Sheesley was guilty of her second offense on September 19, 1986 and was counselled. This apparently led to the decision to call the offending bartender in.

My analysis of these records leaves me unconvinced that Robinson was a serious offender, as opposed to the responsible first line supervisor who was routinely called in. Among the bartenders Zachau and Fowlkes were guilty once and Sheesley and Ottensman twice. Hutchinson was also

^{4/} G.C. Exh. 10(b) and G.C. Exh. 10(i).

^{5/} In neither case is there any indication that the bartender who failed to secure was notified or counselled, although Robinson recalled that Gowings was angry and counselled Ottensman. Rather, Gowings was counselled, as was Robinson in those cases where he was called in, including where Sheesley was in fact responsible. The fifth of the six reports of which he was the subject indicates he had no prior record!

guilty once. Ottensman's second offense occurred at a time of heightened concern about security, and, most importantly it was the attitude rather than the event which was the principal reason given for her separation. It was her rude and repeated denial of responsibility which, says Robinson, convinced him that she would never accept blame and seek to improve. In addition, only Sheesley also had two insecure incidents and there is no evidence she was a troublesome employee. She had not been reprimanded and, in fact, she was the alleged "favorite" of Robinson in the scheduling disputes.

There is a dispute respecting the security routine, with General Counsel contending that Ottensman, on the morning of October 29, following the usual procedure of checking from the inside only, and that Robinson admitted that the procedures were thereafter changed. However, I understand Robinson's testimony as indicating that a reminder was thereafter necessary. Larry Fowlkes, General Counsel's own witness testified on direct that building security had become "a problem back in the end of the summer, beginning of fall when we had several in a row, so they told us to make sure to check all the windows, you know, go outside of the building also and check all of the doors."

Thus there is no convincing case that Ottensman was inappropriately faulted for the insecurity, and, more importantly, the chief reason given was attitude, not performance.

Conclusions of Law

This is a long and messy record - one with many loose ends and evidence of limited probative value. Counsel for the General Counsel has made an impressive effort to extract from it the indicia of a violation of law. It is, of course, necessary that the General Counsel prove such violation by a preponderance of the evidence. In my judgment that effort falls short, although the case is hardly free from doubt.

The issue, as properly posed by the General Counsel is whether Ms. Ottensman's protected activity was a motivating factor in the decision to terminate her. If so, it is then necessary for Respondent to show that the outcome would in any event have been the same.

It is not disputed that Ottensman was engaged in protected activity and that Respondent was, at least by September, aware of it. There is much dispute as to how much earlier Respondent was aware, and concerning the weight to be accorded Ottensman's June reprimand in the light of some evidence that she made inquiries about the existence of the Union even before that.

General Counsel proceeds from the existence of protected conduct, and knowledge of it, to present the classical argument that one may infer a discriminatory motive in the termination from the timing of the discharge, which followed soon after Ottensman's most significant union activity, the allegedly shifting reasons given for the termination, the absence of any warning between the original reprimand and the separation, and a claim of disparate treatment, which focuses most forcefully on the contention that the insecure building incident cannot explain the termination, as Sgt. Robinson had by far the worst record in that respect.

As already belabored, there is reason to suspect, but hardly convincing evidence, that Ottensman's interest in contacting a union was known to Respondent before she was reprimanded. Nevertheless, it is clear that the reprimand was principally precipitated by her conduct in serving free drinks after all had been warned that such conduct would not be tolerated, and secondarily by a very recent cash shortage. In a preview of what happened in connection with the October termination - and is seized upon as evidence of shifting and therefore suspect reasons - Respondent did not rest on that incident. Instead, under the guidance of personnelists, it literally threw the book at her. It picked up a cash shortage incident predating the reprimand by seven months and another (the pizza incident), which looked like make-weights. Both of these incidents were thrown out as a consequence of the grievance. But the discipline - including what is dismissed as a "boilerplate" warning of discharge - was in the main imposed, and Ottensman chose not to pursue it. She nevertheless maintains her innocence. The handling of the reprimand does indicate that, in an atmosphere free of union considerations, management was prone to reach for virtual straws to bolster the reasons of real concern.

Ottensman did, after the reprimand, join the Union and submit to dues checkoff. There is no convincing evidence - in fact none at all - that Club management knew or cared

about this. The Norma Rae remarks are not placed in time, were jocular by Ottensman's own account, and make little sense in the context of July. Ottensman did speak for Olson during that month, but then she tended to speak up more than others, and she was asked to do so by Olson who did not even know she was functioning as a steward when she brought her complaint. There is simply no convincing evidence that Asher knew any more about Ottensman's status than did Olson, or that she had reason to believe that Ottensman brought the matter to her attention as the steward. And if management did know and was hostile, it did not crack down on her with a knit-picking fault finding or counselling until mid-August, five weeks or so after Ottensman claims to have made her new status known.

In late August, shortly after a failure to verify her bank and a cashiering error, Robinson received word that Ottensman had been bad-mouthing him and Asher at the NCO Club and a picnic. Whether it was true or not, the written record indicates that Robinson was upset about her statement that Club managers did not know what they were doing and that he should be removed. The same record shows that Asher was sufficiently upset to counsel her on the need for loyalty and teamplaying, and that Ottensman's response was not simply to deny the statements attributed to her, but to volunteer that she had no problem with Asher - that everything would be fine if Robinson was out of the Club. Ottensman did not deny the latter statement, one which Asher rather emotionally referred to as indicative of the attitude which concerned her. So far as can be determined, the statement Olson attributed to Asher - that she, Olson, was too friendly with Ottensman, was as referable to Asher's concern about the latter's lack of loyalty in this respect as it was to any Union role. For there was simply no other statement indicating that either Asher or Robinson cared about such matters.

Timing may, as General Counsel argues, also be indicative of illegal motivation. Where the case is fairly convincing that an employer has seized upon a pretext to rid itself of a union adherent, timing can loom large. But it does so only as part of a series of events or ingredients, which include normally good and convincing evidence of hostility to collective bargaining and a thin or highly suspect reason for the discipline imposed. I have addressed the unpersuasive nature of such evidence as there is for the proposition

that Respondent ever opposed the Union, never mind that it was prepared to take extreme measures to make its opposition clear and effective. Nor is the reason given for the discharge slight, whether viewed as an attitude most recently manifested in connection with the insecure building, or as the very insecurity itself.

Management had certainly made clear its real concern with insecure buildings by taking the extraordinary step of requiring those responsible to report to the Security Police. This was a move designed to get employees to give the matter their serious attention. And, of course, the timing of the insecurity found by the police, close as it was to Ottensman's representation work for the bartenders and for Olson, was certainly not within management's control, in the absence of any evidence whatever for Ottensman's assertion that she had been "set up."

Nor is there evidence for the argument that she was subjected to disparate treatment, i.e. that her record in this respect was at least as good as that of others, and that there was more reason to discharge Robinson on this ground than anyone else. Among the bartenders, only Sheesley has as many insecure buildings (2), and she otherwise was not a problem in terms of loyalty, attitude or performance. She was, in fact, the alleged pet of management. While Robinson appears many more times on the Incident Reports as the responsible person, he was in fact responsible as supervisor, he was the person to be called to an incident, and there is no evidence that he at material times was ever the person who actually engaged in the physical effort to secure the building. Thus Ottensman in fact shared with Sheesley the worst record among the closing bartenders.

More importantly, it was Ottensman's attitude about the incident that was allegedly so important, i.e. her refusal to accept responsibility for it, her wholly unconstructive approach to the problem the police had found and the evident need for her to acknowledge mistakes and promise to be more careful. Clearly, an "attitude which is disruptive to the harmonious operation" of the Club could also cover a growing inclination to exercise one's rights of association to seek the benefits of collective bargaining. Here the use of shifting reasons comes into play as indicating that the reasons provided are not the real ones, that is to say that the real ones were not mentionable if a confession was to be avoided. Here Ottensman was simply told that it was her

attitude, with the managers referring her to Personnel for any amplification. Thereafter other (or further) reasons were given, only two of which, in addition to the building incident, would clearly tie into attitude. These were the allegedly degrading talk about management in public at the NCO Club and the picnic, and the wisecrack about an entry in her Form 971, made before customers. Thus there is the appearance that they gave her a reason and then came up with a set of reasons not entirely meshing with the original.

This can give one pause if one expects a neat and tidy approach to such matters. But the point suffers somewhat in the light of Respondent's track record with respect to the reprimand. There, too, Respondent was clearly motivated by several reasons, but reached out to button up its case with whatever else was available to put her work performance in the most unfavorable light. There, too, her immediate supervisors unaccountably refused face-to-face discussions with her about the reasons for the discipline. In October, likewise, Respondent, having determined as a result of the insecure building incident that Ottensman's attitude was too disruptive (or that it destroyed any belief that she would reform), decided to discharge her and then, as it had previously done, went back through her Form 971 to extract all incidents of inadequate performance, regardless of their seriousness or their relevance to attitude. They beefed up their case wherever that was possible; anything adverse would do. Whatever one may make of it, that seemed to be the institutional approach, adhered to in June also, when there existed no real threat of a union.

In sum, I find that Ottensman was a troublesome employee from approximately the time Robinson carried out the decision to "demote" her. She was a "good" bartender, in the sense of having good rapport with her customers. She had her problems also, one of the clearest being her conflict with Robinson and her inclination to dispute his decisions if not his authority. Her rather serious reprimand was based primarily upon her disregard of a strong and written policy, receipt of which she had acknowledged. Her interest in the Union was ignited by her receipt of a formal written reprimand which warned of the possibility of discharge for further infractions.

Her status as the senior and former "head" bartender, and her disposition to speak for the others muddies the waters as to when she was serving as steward without portfolio (i.e. without written designation by the Union).

That status was certainly clear by late September, approximately one month after she began, once again and after the reprimand, to have performance deficiencies documented in her Form 971. Finally, as her representation of others increased, she also increased the seriousness of her deficiencies. In the light of greatly heightened concern over building insecurities, she left one insecure and, when called to account, responded by denying responsibility, suggesting she had been "set up," and otherwise indicating that implementation of the new policy requiring the closing bartender to report to the scene was a grossly unwarranted imposition on her.

It is true that she simultaneously said she would grieve if necessary to get call-back pay, and that she had just represented people as their steward. But there is utterly no suggestion that such representation received a hostile reception, it was in fact effective, and it was unattended by any rancor to which her "attitude" might have had reference. On the other hand the timing of the insecure incident was controlled by her, and the attitude displayed was hardly constructive in respects apart from the protected exercise of the right to grieve.

The way in which the decision to terminate her was handled, while no model of enlightened management, was wholly consistent with the way in which she had been reprimanded. And if one is tempted to think that discharge was harsh in the circumstances, so as to import some concern as to the presence of other impermissible considerations, it is to be remembered that Robinson had proposed her termination in June, before she became a member, because she had a cash shortage and had left early and without permission that night. Other early entries in her Form 971 speak to her problem in dealing with authority and in doing what is asked without questioning management directions, to the very good future she would have with work on her attitude, and her tendency to question Sgt. Robinson's judgment and to say that her problems were not with management as such, but with Robinson.

Thus, very serious and pre-existing problems with attitude towards management, as well as routine problems, intensified or at least remained uncorrected after Ottensman became mildly active as a steward. In the absence of any persuasive evidence that her Union activities caused her superiors any real concern, and with abundant evidence that

her attitude toward the competence and authority of her organizational superiors did not improve, I find persuasive Respondent's defense that it had, in effect, given her enough rope, and was finally convinced that the problem she presented would never go away.

Based upon these findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

The Complaint in Case No. 5-CA-70066 is dismissed.



JOHN H. FENTON
Administrative Law Judge

Dated: April 29, 1988
Washington, D.C.