

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

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DEPARTMENT OF HEALTH AND  
HUMAN SERVICES, SOCIAL  
SECURITY ADMINISTRATION,  
BALTIMORE, MARYLAND  
Respondent  
and  
AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES, AFL-CIO  
Charging Party  
. . . . .

Case No. 57-CA-80150

Mr. Wilson Schuerholz and  
Mr. Michael Gear  
For the Respondent

John F. Gallagher, Esq.  
For the General Counsel

Jacqueline Gulash  
For the Charging Party

Before: ELI NASH, JR.  
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. section 7101 et seq. (herein called the Statute). It is instituted by the Regional Director of Region V based upon an unfair labor practice charge filed November 23, 1987 and amended on December 10, 1987 and January 14, 1988, respectively, by the American Federation of Government Employees, AFL-CIO (herein called the Union), against the Department of Health and Human Services, Social Security Administration, Baltimore, Maryland (herein called the Respondent). The Complaint alleged, in essence, that Respondent violated section 7116(a)(1) and (2) of the Statute

by placing an employee on restricted leave, stating that her future emergency leave requests would be denied and that she would be placed on AWOL, and subsequently placing her on AWOL.

Respondent's Answer denied the commission of any unfair labor practices.

A hearing was held before the undersigned, in St. Louis, Missouri at which the parties were represented by counsel and afforded full opportunity to adduce evidence, and to call, examine and cross-examine witnesses and to argue orally. Timely briefs were filed by the Respondent and the General Counsel and have been duly considered.

Upon consideration of the entire record in this case, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendation.

#### Findings of Fact

1. The Respondent maintains its principal office in Baltimore, Maryland, which is known as the Office of the Commissioner. Respondent also maintains and operates a facility in St. Louis, Missouri called the SSA Teleservice Center (herein called TSC).
2. The Union is the exclusive representative of Respondent's bargaining unit employees, including those employees located at the TSC. At all times material, a Master Labor Agreement between the parties was in existence.
3. Jacqueline Gulash has been a service representative at the St. Louis TSC since 1980. Gulash's immediate supervisor between July 1, 1987 and October 1, 1987 was Sheila Louis. From October 1 to the time of the instant hearing, Gulash was supervised by Linda Bigogno. Both Bigogno and Louis report to the TSC manager, Corrie McMillan.
4. Since 1984 Gulash has been the principal grievant in three different grievances filed under the aforementioned Master Labor Agreement. Each of those grievances, in some way, questioned the TSC leave policy as it applied to the grievant, Gulash. One involved denial of annual leave for a court appearance. The second concerned the leave call in procedure in 1985. The last filed in 1986 concerned a sick leave restriction. Gulash, as a steward, was the Step 2 union grievance official on each of these grievances. Gulash

did not win the grievance in arbitration for an absence which occurred in 1985, after she became the steward.

5. As already noted, Gulash is the shop steward and has held the position since 1984. In 1987 there were approximately 32 bargaining unit employees at the TSC. Only one employee other than Gulash belonged to the Union and that employee was not an active Union member.

6. Gulash in her capacity as steward has represented individual employees both officially and unofficially. As the Union's representative she receives notice of changes in conditions of employment and adverse actions. She acts as the Union representative at TSC staff meetings; she has conducted representational activities on official time; and, she has submitted records of official time used to keep track of that time by management. Gulash has also submitted numerous requests for information. Her activities on behalf of the Union are no doubt well known to Respondent.

7. Since at least 1980, Gulash has maintained a low accumulated sick and annual leave balance. The record shows that Gulash's low sick and annual balances resulted from numerous illnesses including a bout with cancer, allergies, dental and other assorted continuing medical problems which required periodic check-ups from an assortment of doctors and dentists. McMillan and other management officials, as will be shown later, were well aware of these medical and dental problems. Gulash was placed on restrictive leave status in 1986, but there is no evidence that she at any time abused leave. Prior to the incident involved herein, Gulash requested and received emergency annual leave when she was ill, without any apparent problem in getting the leave, on many occasions. October 1987 was the first time that she was denied such leave.

8. From Gulash's own testimony, it is clear that her leave practices were not that of the typical employee. Her testimony shows a long history of problems and difficulties connected with her use of leave. She admitted being counseled five or six times about her leave situation at the yearly performance appraisal discussions and also recalled another five or six write-ups being prepared on other discussions concerning leave problems. While none of the reasons for requiring use of her leave appear abusive, it is clear that her leave balance was always negligible and could have been a cause for concern for any manager.

9. Against this background, on September 30, 1987, Louis met with Gulash and explained that she had requested emergency annual leave because she was sick on four occasions in 1987, that that was too frequent and that if she continued to make such requests she could be placed in leave without pay (LWOP) status. Later that day Louis gave Gulash a written record, report of contact, of their meeting. Gulash brought to Louis's attention that the report of contact indicated that Gulash could be placed in AWOL status, instead of LWOP status as Louis had earlier explained. Louis changed the report of contact to leave without pay. The report of contact was placed in Gulash's 7B file (personnel file). The report of contact stated as follows:

On this date Jackie Gulash & I discussed her use of annual leave for sickness. I explained that AL used in this manner is considered emergency AL & should be infrequent. Since PP 1/31/87 Jackie has used emergency AL on 4 occasions - 3 during the last 3 months - for a total of 26 1/2 hrs AL. This is not considered "infrequent". Continued frequent requests for emergency AL may be denied, at which time Jackie will be placed on LWOP. A copy of this discussion will be placed in Jackie's 7B file.

10. On December 21, 1987, Bigogno changed Gulash's leave restriction pursuant to a report of contact. That report of contact read as follows:

I am correcting an error that I found on the attached report of contact dated 9/30/87.

In reviewing the 9/30/87 record documenting the discussion between you and Sheila Louis, I noted you were told frequent requests for emergency annual leave might be denied and result in your being placed in LWOP status. This should have said continued frequent requests for emergency annual leave may be denied, at which time you may be placed on AWOL.

On December 21, 22 and 23, 1987, Gulash was ill. Because she only had 16 1/2 hours sick leave, Gulash requested that

for the remainder of her absence she be placed in annual leave status. Although she had a sufficient annual leave balance to cover her request, Gulash was placed in AWOL status.

11. Between January 31 and September 30, 1987, other bargaining unit employees had requested emergency annual leave (not scheduled in advance) because they were sick as follows:

<u>Employee</u>	<u>Number of Workdays</u>	<u>Total Hours</u>
Gulash	4	19 1/2
Boyd	2	14
Christy	4	28 1/4
DeBoe	5	37
Demetrulias	7	35
Jackson	3	17

Gulash was the only employee during that period who had a restriction placed in his/her file restricting their use of emergency annual leave based upon his/her use of emergency annual leave for the period of January 31 - September 30, 1987.

12. The General Counsel called these five employees to testify, however, none of these five indicated any leave problems of the long duration experienced by Gulash. Thus, none had been reprimanded for leave problems, or left the office without approved leave, or had previously been placed on sick leave restriction.

#### Conclusions

The General Counsel argues vigorously that this is a "mixed motive" case and that he need only establish that the employee was engaged in protected activity; the employer had knowledge of that activity; the alleged discriminatory conduct concerns conditions of employment; and that a nexus exists between the protected activity which may include evidence of timing, union animus and/or disparate treatment. The General Counsel feels that all of the above elements have been met and it has established a prima facie case. Internal Revenue Service, 6 FLRA 96 (1981). Under the General Counsel's theory of the case, the burden, of course, shifts to the Respondent to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected activity.

The General Counsel's case will not withstand close scrutiny. While the employee herein was engaged in protected activity and the Respondent knew of that activity and the alleged discriminatory conduct concerns a condition of employment, it is difficult to find a connection between the alleged protected activity and the alleged discriminatory conduct. The General Counsel asserts that there was disparate treatment. Gulash, it is contended, was treated differently than other employees who had low accumulated sick leave balances. It is absolutely true that Gulash was treated differently than employees Christy, De Boe, Demetrulias, Boyd and Jackson who had either low sick leave balances or who had requested emergency annual leave more often than Gulash during 1987. However, it is also clear that each of these employees had undergone recent periods of major surgery and/or hospitalization. Furthermore, there is no record evidence that any of these employees had leave difficulties over the years that Gulash had experienced. In addition, as already noted, Gulash, even before she became a steward, carried low leave balances. She was also counselled concerning her leave balances before she became a steward. I would find that there could hardly be any disparate treatment based on all the circumstances. Thus, I can find no nexus between Gulash's protected activity and the leave restriction placed on her. Moreover, it is clear from the record that the so called "lenient hospitalization leave" was applied to these five individuals in much the same way that it was earlier applied to Gulash who benefited from that policy after her surgery for cancer. Therefore, McMillan is credited and it is found that Gulash's situation was different from the five employees who testified. Having found Gulash's situation to be different, it is accordingly found that there was no disparate treatment in the matter.

Recognizing that animus is a critical element in establishing a violation in this case, the General Counsel sought to establish animus through alleged harassment and discrimination against Gulash. The examples cited by the General Counsel concerning leave are either too remote in time or were resolved through the parties grievance system. Furthermore, the citing of McMillan's attitude by not saying good morning or responses to Gulash from McMillan may have been discourteous but are not shown to be connected to any of Gulash's protected activities. I find no animus in this matter. Accordingly, and based on the above, it is found that the General Counsel did not, in all the circumstances, establish a prima facie case that Gulash was discriminated

against in violation of section 7116(a)(1) and (2) of the Statute.

The Authority has made a distinction between "mixed motive" and pretext cases. See 22nd Combat Support Group (SAC), March Air Force Base, California, 27 FLRA 279 (1987). A pretext case according to the Authority is not one where both legitimate and improper motives are found which would require it to consider whether the agency would have acted as it did even absent an improper motive. In this matter the General Counsel asserts that Respondent's reasons for the leave restriction placed on Gulash was pretextual and that she was discriminated against because of her protected activity and for no other reason. However, there appear to be other reasons including Gulash's low leave balances. As already stated, I credit McMillan that there was a policy of leniency for certain periods after surgery or hospitalization for the employees who worked for her. Indeed, as already shown, Gulash herself was earlier a beneficiary of that policy. Finally, Michael Gear, the labor relations specialist who gave assistance to the TSC on when, or under what circumstances to allow emergency annual leave is credited. Gear's suggestion to Louis, at the TSC, that leave did not have to be approved if there was an operational exigency that required the employee to be there, is a sensible interpretation of the Master Labor Agreement. The exigency here was Respondent's concern that all employees, not just Gulash, be at work on certain days of the month because of work load requirements. Placing such a priority on an employee's presence during peak work periods is certainly a legitimate management concern. What is involved, therefore, is an arguable interpretation of the agreement which cannot be resolved under unfair labor practice procedures. Marine Corps Logistics Base, Barstow, California, 33 FLRA 626, 641 (1988); 22nd Combat Support Group (SAC), March Air Force Base, California, 30 FLRA 331, 334 (1987).

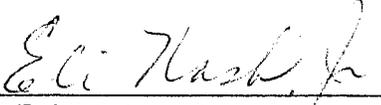
Since this case involves a question which raises a matter of interpretation of the Master Labor Agreement by the parties, all of the General Counsel's argument concerning pretext because of work exigency or any other application of the emergency annual leave policy based on what Respondent thought that policy to be, must of necessity fail. Consequently, I reject the General Counsel's position that Gulash was placed on restrictive leave, told that her future emergency leave requests would be denied and she would be

placed on AWOL and subsequently charged AWOL because of her protected activity. It is therefore, recommended that the Authority adopt the following:

ORDER

It is hereby ordered that the Complaint in Case No. 57-CA-80150 be, and it hereby is, dismissed.

Issued, Washington, D.C., May 25, 1989

  
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ELI NASH, JR.  
Administrative Law Judge