

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

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UNITED STATES CUSTOMS SERVICE,  
REGION IV, CHARLESTON DISTRICT,  
CHARLESTON, SOUTH CAROLINA

Respondent

and

Case No. 4-CA-90665

NATIONAL TREASURY EMPLOYEES  
UNION

Charging Party  
.....

John C. Flynn, Esq.  
For the Respondent

Steven P. Flig, Esq. and  
William Harness, Esq., on the brief  
For the Charging Party

Richard S. Jones, Esq.  
For the General Counsel

Before: SALVATORE J. ARRIGO  
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-  
Management Relations Statute, Chapter 71 of Title 5 of the  
U. S. Code, 5 U.S.C. Section 7101, et seq. (herein the  
Statute).

Upon an unfair labor practice charge having been filed  
by the captioned Charging Party (herein the Union) against  
the captioned Respondent, the General Counsel of the Federal  
Labor Relations Authority (herein the Authority), by the  
Regional Director for Region IV, issued a Complaint and  
Notice of Hearing alleging Respondent violated the Statute

by placing a unit employee on a Performance Improvement Plan for having filed a grievance against a supervisor.

A hearing on the Complaint was conducted in Charleston, South Carolina at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by Respondent, the Union and the General Counsel and have been carefully considered.

Upon the entire record in this case, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

#### Findings of Fact

At all times material the Union has been the exclusive collective bargaining representative of various of Respondent's employees including Customs Officers located in its Charleston, South Carolina District Office.

Customs Officer Kathy King has been employed by the Customs Service for approximately 11 years, serving as a Canine Enforcement Officer on the Contraband Enforcement Team since 1986 and working in Charleston for two years. As a Canine Enforcement Officer King works with a narcotic detecting dog and is responsible for the dog's training.

In December 1988 King was given an interim progress review by her immediate supervisor, Jose Ramirez, who was in charge of the Contraband Enforcement Team in Charleston since June 1988. The review considered 15 performance elements of which King was designated as meeting or exceeding the fully successful rating for 13 elements.<sup>1/</sup> However, while she was rated highly successful for elements #1 and #2, the ratings were qualified as follows:

#### Performance Element #1 (Critical):

Utilizing a narcotic detector dog enforces Customs laws and regulations concerning the interdiction of dangerous drugs. Searches cargo, vehicles, vessels, aircraft,

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<sup>1/</sup> There are five summary performance ratings: (1) Unacceptable; (2) Marginal; (3) Fully Successful; (4) Excellent; and (5) Outstanding.

baggage, mail and buildings. Canine searches are conducted in the most effective manner possible affording the dog an opportunity to thoroughly screen all accessible areas.

Unable to rate due to the fact that no performance evaluations have occurred thus far in the evaluation cycle. CEO King meets the highly successful level for this element.

Performance Element #2 (Critical):

Utilizes enforcement profiles and intelligence data in identifying those items requiring selective examination.

CEO King has recently assumed the role of monitoring and identifying narcotics smuggling via vessel crew members. This responsibility requires that she review and research information provided in the 1300 series paperwork presented upon each vessels' arrival into the Charleston District. Her knowledge and application of the TECS II system has resulted in the targeting of several vessels for crew's cabin searches. CEO King however, has not adequately utilized cargo shipping documentation in an attempt to identify irregularities that would serve as the basis for a selective canine examination. For the purposes of this progress review, CEO King meets the fully successful level for this element.

King was rated as meeting the marginal rating for 2 elements (#4 and #13): (1) conducting field tests of suspected narcotics and completing required documents pertaining to seizures arrests and chain of custody (a critical element); and (2) preparing various written reports on dog training and utilization (a non-critical element).

Officer King attended canine school in Virginia from May 24 to June 16, 1990 to receive and train a new dog.<sup>2/</sup> King returned to duty on Monday, June 19 with her new dog "June".

On June 20, 1990 Supervisor Ramirez signed Officer King's annual appraisal. Although he had misgivings about her performance, he nevertheless gave her an overall rating

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<sup>2/</sup> Her prior dog "Dusty" did not develop into an acceptable narcotics detector.

of "fully successful."<sup>3/</sup> Ramirez explained his rating King better than what he believe she actually deserved by indicating he was trying to work with King and develop her abilities and gave her the benefit of the doubt where he might have had questions as to her performance. Ramirez' reservations regarding King's performance is apparent from the following language taken from King's appraisal:

Performance Element #1 (Critical)

Utilizing a narcotic detector dog enforces Customs laws and regulations concerning the interdiction of dangerous drugs. Searches cargo, vehicles, vessels, aircraft, baggage mail and buildings. Canine searches are conducted in the most effective manner possible affording the dog an opportunity to thoroughly screen all accessible areas.

During the recent performance evaluations conducted by the Canine training center in the Charleston District CEO King performed very well with canine Dusty. Startup problems with canine June initially provided some problems. CEO King meets the fully successful level for this criterion.<sup>4/</sup>

Performance Element #2 (Critical)

Utilizes enforcement profiles and intelligence data in identifying those items requiring selective examination.

The large amounts of cargo entering the ports of Charleston has made extremely necessary that we actively attempt to target high risk cargo through in-depth analysis of cargo documentation. CEO King has not adequately utilized cargo shipping documentation in an attempt to identify irregularities that would serve as a basis for a selective canine examination. For this

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<sup>3/</sup> On June 21 the appraisal was reviewed and signed by Ramirez' superior, Supervisory Inspector Edward Bowers, who attached a note to the appraisal when returning it to Ramirez. The note indicated he thought Ramirez' appraisal was somewhat lenient in view of prior concerns Ramirez expressed to him about King's performance.

<sup>4/</sup> This appraisal was made after only two day's observation of King working with June.

reason CEO King meets the fully successful level for this criterion.

The appraisal contained the following comment:

CEO King has had a very difficult year in that she has had to maintain three narcotics detector dogs. One of these dogs was retired for health reason and another for the inability to detect narcotics. Much discussion was held on the reason why #2 dog was certified by the school and within 4 weeks was totally ineffective for detecting narcotics. CEO King could be a very effective Canine Enforcement Officer if she paid closer attention to detail. Small requirements such as providing the canine utilization reports, profiling cargo documentation, more effective utilization of the detector dog would go a long way in the next evaluation.

During the week of June 19 Supervisor Ramirez closely observed Officer King's work performance and dog handling and was displeased. He concluded from his observations that King was spending too much time in the office and was not working her dog long enough to properly acclimate the dog to the work. Thus, Ramirez testified:

"On the 20th I noticed that she came into the office and kind of milled about. She left the office around 9:30, 10:00 and then was back in the office at 11:00. Without my notes, I'll give you approximate hours. She stayed around in the office and did nothing all the way through. At 1:15, I went to her and I said hey, what's going on here, you're supposed to be taking this dog out, acclimatizing her to the area, making sure that the dog works in different environments. So finally around 2:00 she left the office and she was back in the office by 3:00. So that day I got two hours of work out of her and the dog. It was a new dog, we need many more hours than that."<sup>5/</sup>

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<sup>5/</sup> Ramirez testified that on June 19 he told King that the new dog needed at least 6 hours a day training. King, a trained dog handler, was of the opinion that a much more gradual training program was the correct procedure to follow. Ramirez has never had any training in handling narcotic detecting dogs.

Ramirez went on to testify that on June 21 he observed that Officer King trained her dog for only about an hour in the morning and an hour in the afternoon and spent the rest of the day in the office talking on the telephone and drinking coffee. According to Ramirez he also observed King engaged in similar conduct on June 22. On the afternoon of June 22 King told Ramirez she wanted to take off early to wash her car at home. Ramirez told King to have her car washed at a specific car wash where the wash would be quicker.<sup>6/</sup>

Supervisor Ramirez credibility testified that on Thursday June 22 he decided to put King on a Performance Improvement Plan (PIP).<sup>7/</sup> Ramirez testified he came to this conclusion after discussing the matter with Supervisory Inspector Bowers, who said he would support Ramirez, and consulting with an Agency Labor Relations staff person in Washington, D.C.<sup>8/</sup> Ramirez then wrote a draft of the PIP and gave it to his secretary for typing on the following day.<sup>9/</sup>

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<sup>6/</sup> King's subsequently filed grievance, *infra*, recites this incident and indicates that Ramirez also told King to go directly to and from the car wash and not to "stray". Later, according to the grievance, while King was at the car wash about 10 miles from the office she observed Ramirez drive by, inferring Ramirez was checking-up on her.

<sup>7/</sup> A PIP provides a course of action for an employee to follow in order to improve in areas of performance which the agency feels are needed. Failure to improve within 60 days could result in demotion or removal.

<sup>8/</sup> Bowers did not recall talking specifically about a PIP for King with Ramirez but did recall having a general conversation about PIP procedures with Ramirez sometime that week. I find that Bowers' recollection of times of events to be particularly unreliable. He admittedly was not sure of dates and his actual testimony of dates and events reveals a very poor recollection. Ramirez on the other hand testified about dates and events in a cogent, straightforward convincing manner. Accordingly, I have primarily relied upon Ramirez' testimony in making these findings of fact where his testimony differs from that of Bowers.

<sup>9/</sup> The secretary was not called as a witness.

After work on Friday June 23, Officer King contacted Union Chief Steward John Mason and recounted various incidents she had with Supervisor Ramirez during the prior week and told him she wished to file a grievance against Ramirez for harassment. On Monday June 26 Mason gave a copy of the grievance language he had written-up to Supervisory Inspector Bowers, indicating the Union was considering filing the grievance against Ramirez. The grievance alleged "Harassment" and cited Article 6, Section 2.B of the parties' negotiated agreement.<sup>10/</sup> The grievance accused Ramirez of assigning an Explorer Scout to assist King in training her dog and instructing the Explorer Scout to "keep an eye" on King and report her actions to him.<sup>11/</sup> The grievance also recited an incident on June 22 when Ramirez, by memo, requested the records of all K-9's King had handled, King being the only Canine Enforcement Officer who received the request.<sup>12/</sup> As stated previously, the grievance also recited the incident concerning King having her car washed at a car wash.

During the evening of Monday June 26, 1989, Supervisor Ramirez returned to his office from Columbia, South Carolina where he had been on temporary duty that day and discovered a copy of Officer King's grievance in his mail. On the following day around 10:30 a.m. Ramirez met with King and informed her he was going to put her on a PIP, explaining he observed her performance over the past couple of days and felt she did not meet various minimal standards. King defended her performance and Ramirez went over the reasons that led him to his conclusions, going back to events which occurred over the past year regarding King's handling of prior dogs. Ramirez handed King the two page typewritten PIP, noting the specific criteria deficiencies.<sup>13/</sup> King

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<sup>10/</sup> Article 6, Section 2.B of the agreement addresses soliciting or considering recommendations or statements with respect to any individual who requests or is under consideration for any personnel action.

<sup>11/</sup> An Explorer Scout is a high school student who is employed to observe the Agency's operations.

<sup>12/</sup> The Charleston office had one other Canine Enforcement Officer.

<sup>13/</sup> The PIP found King to be deficient in Critical Elements 1 and 2, supra, regarding under utilization of her dog and failure to take any role in the selection of cargo shipments for canine examination.

expressed her disagreement with Ramirez' conclusions. Then, according to King,<sup>14/</sup> Ramirez mentioned he had been informed about a grievance King "was filing about the personality problems" Ramirez felt King perceived existed between the two of them. Ramirez denied he had a problem in that regard and further denied he had been spying on King. The meeting ended without further discussion.

In the fall of 1989 every employee on the Contraband Enforcement Team for the full year, except King, received a cash award, the majority receiving \$200.<sup>15/</sup> A group award in the form of a plaque was also given to the approximately 10 members of the Contraband Enforcement Team. The plaque referred to specific narcotics seizures and activities in which Officer King had made a substantial contribution. As to the cash awards, the record does not reveal the criteria for award receipt but does reveal that selection of personnel for awards was made by Assistant District Director John Lenihan. The record further reveals Supervisor Ramirez did not know the criteria for the cash award nor had any input in determining the criteria for receiving awards or who would receive a cash award. However, according to King's testimony sometime after the awards were given to employees she talked to Ramirez about the matter and was told she didn't receive an award because she was on a PIP, but Ramirez also told King that it was Lenihan and not he who submitted the names for award receipt.<sup>16/</sup>

#### Additional Findings, Discussion and Conclusions

The General Counsel concludes Officer King was placed on a PIP in retaliation for having filed a grievance against Supervisor Ramirez thereby violating section 7116(a)(1) and (2) of the Statute. The General Counsel suggests this conclusion is supported by the timing of the PIP and the existence of procedural and substantive irregularities surrounding the issuance of the PIP. For example, counsel for the General Counsel avers to issuance of the PIP not following contract language concerning the timing of PIPs relative to the appraisal cycle and argues that King's performance did not warrant the issuance of a PIP. Counsel

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<sup>14/</sup> Ramirez was not questioned in detail about this meeting.

<sup>15/</sup> By this time King was no longer on the PIP.

<sup>16/</sup> Ramirez did not testify regarding this conversation.

also points to various discrepancies between the testimony of Supervisor Ramirez and Supervisory Inspector Bowers to support his argument. Counsel for the General Counsel further contends that any remedy should include granting King the \$200 award which King allegedly would have received but for being placed on a PIP.

Respondent denies the General Counsel has met his burden of proof of establishing a violation on the facts herein.

It is well settled that in order to establish a violation of section 7116(a)(2) of the Statute, i.e. to discriminate against an employee in connection with hiring, tenure, promotion, or other condition of employment, it must be shown that the employee was engaged in protected activity, the employer had knowledge of such activity, and the employer took the action against the employee because of the employee's having engaged in such protected activity. Department of Transportation, Federal Aviation Administration, Boston Air Route Traffic Control Center, Nashua, New Hampshire, 11 FLRA 318 (1983); Department of the Treasury, United States Customs Service, Region IV, Miami, Florida, 8 FLRA 561 (1982); and Veterans Administration Center, Leavenworth, Kansas, 1 FLRA 978 (1979). Clearly in the case herein Officer King was engaged in protected activity when she filed a grievance against Supervisor Ramirez. It is equally clear that Ramirez knew of the grievance when the PIP issued. However, Respondent contends that before the grievance was filed Ramirez had decided to issue the PIP to King and indeed had already begun work on the PIP and accordingly, it cannot be said that the PIP was given to King as a reprisal for her having filed a grievance.

The evidence establishes that Supervisor Ramirez had questions about Officer King's work performance in December 1988 when she received her progress review. Thus she received no excellent or outstanding ratings, received two marginal ratings and two of her successful ratings (elements #1 and #2) were given under circumstances where the highly or fully successful rating was qualified.

Ramirez' comments on King's annual rating given on June 20, 1989 also indicates Ramirez had substantial reservations regarding King's performance.<sup>17/</sup> More

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<sup>17/</sup> The appraisal was not personally given to King until after her 60 day PIP period had been successfully completed.

importantly however, both King and Ramirez agree that during the first week of King's return to the Charleston office, Ramirez was unhappy with King's performance. King denies Ramirez had good cause for his displeasure but that is not relevant. It is undisputed that Ramirez, correctly or incorrectly, was not satisfied with King's work and went to extraordinary lengths to check-up on King during that week. Indeed it was this close surveillance and attitude that prompted King to file her grievance.

I credit Ramirez' testimony that he decided to give King a PIP in the latter part of the week of June 19 and wrote, or at least began, a draft of the PIP at that time. During that week Ramirez' supervisor, Bowers, had indicated he thought Ramirez' annual appraisal had been too lenient. Ramirez, rightly or wrongly, was not satisfied with how King was working her new dog. Ramirez also obviously thought King was loafing and not putting in a full productive work-day. Indeed Ramirez' disagreement with King's training of the dog, both as to time and the use of training aids, was made known to King and King, correctly or incorrectly, disputed Ramirez' position on the matter. Thus, I find nothing inordinate about a conclusion having been reached by Ramirez at this time, in these circumstances, to issue a PIP to King.

Ramirez first knew of King's grievance when he returned to Charleston in the evening of Monday June 26. The next morning around 10:30 Ramirez issued the PIP to King. The PIP was a two page typewritten document following a rather stylized format.<sup>18/</sup> Ramirez testified he talked with Agency Labor Relations in Washington, D.C. during the prior week, found out what information was required to be put into a PIP and received Bowers' concurrence to issue the PIP and began to have the PIP typed at that time.<sup>19/</sup>

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<sup>18/</sup> The negotiated agreement indicates a PIP will be prepared on a standard form "or other designated format" during an appraisal cycle.

<sup>19/</sup> Bowers recalled Ramirez saying he was going to call Labor Relations about a PIP but Bowers' testimony revealed confusion as to the date and the particular circumstances of the conversation. Bowers did not recall Ramirez telling him

(Footnote continued)

Counsel for the General Counsel suggests that no PIP was envisioned by Ramirez until he received King's grievance. Then, according to the General Counsel's scenario, Ramirez hastily typed the PIP early on Tuesday June 26 for presentation to King that morning.<sup>20/</sup> The problem with this version, apart from my generally crediting Ramirez' recollection of events, is that Ramirez would either have to have contacted Labor Relations about a PIP before Tuesday, in which event such would tend to prove he intended to give King a PIP before he knew of her grievance, or have contacted Labor Relations in Washington, D.C. sometime Tuesday in time to get instructions and type the document and present it to King at 10:30 a.m. When would Ramirez have contacted Washington on June 26? At 7:00 a.m. or before? Later that morning after Washington offices opened but before 10:30? I find neither possibility likely to have occurred. Rather it seems most probable that Ramirez received his information on preparing a PIP during the prior week in order to have been able to have the document prepared in time for presentation to King on Tuesday at 10:30 a.m.

Certainly the timing of the PIP in relation to the filing of the grievance, the lack of corroboration, and various irregularities give rise to the suspicion of conduct violative of the Statute. However, suspicion standing alone is not proof and from my evaluation of the testimony and the record I conclude the General Counsel has failed to prove by

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(Footnote 19 continued)

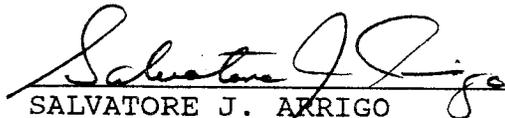
he was going to put King on a PIP prior to the grievance being filed. Union President Donald Miller testified that Bowers told him in a conversation he thought occurred September 1989 that Bowers informed Ramirez a grievance was forthcoming before King was put on a PIP. However, Miller did not testify as to whether Bowers and Ramirez discussed placing King on a PIP prior to the grievance being filed. In any event I find Bowers' recollection of times and events to be generally unreliable, supra.

<sup>20/</sup> Chief Steward Mason testified he observed Ramirez at work at 7:00 a.m. on June 26 typing something.

a preponderance of the evidence that Respondent has violated the Statute as alleged.<sup>21/</sup> Accordingly, I recommend the Authority issue the following:

ORDER

IT IS HEREBY ORDERED that the Complaint in Case in No. 4-CA-90665 be, and hereby is, dismissed.

  
SALVATORE J. ARRIGO  
Administrative Law Judge

Dated: August 15, 1990  
Washington, D.C.

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<sup>21/</sup> Even if a violation were found to have occurred I would nevertheless not grant the \$200 award King failed to receive in 1989 since the evidence fails to support the contention that, but for the PIP, King would have received the money. The evidence does not reveal that the PIP was any part of the criteria used in determining who was to receive the award. It is indeed possible that only Contraband Enforcement Team members who exceeded the "Fully Successful" rating received awards.