

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 AND SOCIAL SECURITY
ADMINISTRATION, DETROIT
TELESERVICE CENTER, DETROIT,
MICHIGAN

Respondent

and

Case No. 5-CA-90613

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 3239 OF COUNCIL 220,
AFL-CIO

Charging Party

.
Richard A. Matthews, Esq.
For the Respondent

Judith A. Ramey, 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. § 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 V, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute by terminating a probationary employee for having engaged in protected union activity.

A hearing on the Complaint was conducted in Detroit, Michigan 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 and the General Counsel and have been carefully considered.

Upon the entire record in this case, my observation of the witnesses and their demeanor,^{1/} and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material the American Federation of Government Employees, AFL-CIO (herein AFGE) has been the exclusive collective bargaining representative of various of Respondent's employees and AFGE Local 3239 of Council 220 has been the agent of AFGE for the purpose of representing Respondent's employees located at the Social Security Administration Detroit Teleservice Center (herein TSC).

Marie Thornton began employment with the Detroit TSC as a probationary Contact Representative on September 12, 1988. After completing a training program in Chicago with approximately eleven other TSC Contact Service Representative trainees, Thornton began her duties at the Detroit TSC on October 31, 1988. Her duties consisted of answering telephone inquiries about Social Security rights and benefits.

^{1/} Numerous credibility findings were required in drafting this decision due in part to contradictory testimony and, more particularly, to various fragmentary versions of an incident being given, which versions were not specifically denied by other witnesses and did not necessarily completely exclude testimony given by others. Thus I frequently have given a composite of the testimony which I credit as most probably reflecting what occurred during a particular meeting, sometimes crediting some but not all of an individual's testimony based largely upon my observation of the witnesses and my opinion regarding their demeanor during that testimony.

In early November 1988 Social Security Administration Detroit District Manager Jose Vidaurri and TSC Manager Carolyn Nixon met with the new Contact Representative trainees to welcome them to the facility. The meeting occurred in the office "break room" which was set up with three or four tables and numerous chairs. Thornton was sitting by herself at a table directly in front of the speakers and the remaining trainees were seated at a table behind Thornton. Nixon introduced Vidaurri to the trainees explaining his jurisdiction over the TSC and turned the meeting over to him. Vidaurri opened the meeting by greeting the trainees and Thornton, who was sitting erect and with arms folded in front of her, immediately asked how long it would be before they could become Claims Representatives, a higher paying job. Vidaurri did not directly answer the question, stating that satisfactory performance at their current jobs of Service Representatives was required before they were eligible to become Claims Representatives and went on to explain the nature of the Service Representatives' job and the training status of their positions. Numerous questions were asked and comments made after which Vidaurri and Nixon agreed the trainees were a good, aggressive, impressive group. Vidaurri asked what Nixon thought of the candidate with the question (Thornton) and Nixon responded she didn't know, "We'll have to see."

By January 1989 the new TSC trainees had still not been reimbursed for travel expenses incurred during their trip to Chicago for training. During a Union orientation meeting with the Local 3239 president in mid-January, the trainees complained of the travel expense situation and on February 3 the Union filed a grievance on the matter.^{2/}

On March 13, 1989 TSC Manager Nixon called Ms. Thornton into her office and asked Thornton if she was the person who filed the "class action grievance." Thornton denied knowledge of who filed the grievance and Nixon disputed Thornton's denial. Nixon told Thornton she had to conform if she wished to get ahead in the Agency, that Thornton should be thankful that she had a job and that normally the Agency decision to hire a trainee is based not on experience but on whether they like the individual. Thornton said she

^{2/} While Ms. Thornton was present at the meeting, another trainee, Ms. Kinney, acted as spokesperson for the trainees. Thornton was not involved in the grievance filing or processing and was unaware that one had been filed.

would get ahead in any event because she was an achiever. Nixon asked how Thornton would accomplish this and Thornton suggested transferring to another agency. Nixon stated that for a transfer, promotion or award, Thornton would need Nixon's recommendation. Nixon mentioned that it was Thornton's unlucky day since the travel voucher checks for the training session had been mailed from Division Finance and, inexplicably, Thornton's check did not arrive. Further, Nixon informed Thornton that a mistake had been made and Thornton had been previously overpaid and the current pay period would reflect that fact. Thornton observed that the office didn't do a very good job of processing such matters, there always seemed to be administrative problems and there were a lot of "inconsistencies" in supervision. Nixon indicated Thornton usually had a negative attitude and asked Thornton to be more understanding of office problems, and since Thornton was interested in promotions, she should be aware that attitude is a criteria considered for promotions or recommendations for employment.

In late March Ms. Thornton sent TSC Manager Nixon a memorandum indicating office morale could be improved by having such things as awards and a bulletin board display. Nixon asked Thornton to come to her office to discuss Thornton's memo. During their meeting Thornton indicated she had a problem with office procedural guidelines which, Thornton felt, were conflicting and incorrect. Nixon responded that the guidelines had been established by employees with substantial experience and Thornton should accept them. Thornton then stated that she heard Nixon made a lot of changes in the office and she could tell Nixon how to become a better manager and improve morale. Nixon asked what she had in mind and Thornton suggested Nixon go out to the office area every morning and speak to each employee. Nixon told Thornton that was an impossible task.^{3/}

In late March or early April 1989 TSC Manager Nixon observed Ms. Thornton at her work station waiving a paper in the air while those around her were talking. Nixon telephoned Thornton's supervisor, Patricia Eggleston, and inquired about the commotion and was told Thornton was interested in getting employment with the State and was waiving a statement from the State and giving out addresses or copies of the document to other employees.

^{3/} Approximately 75 employees work in the TSC.

Ms. Thornton had still not received reimbursement for travel to Chicago for training when, around April 7, 1989, she asked supervisor Eggleston which type of grievance she could file over the matter - an Agency or Union grievance. Eggleston did not know and after checking with TSC Manager Nixon, informed Thornton she could file a Union grievance. Accordingly, on April 10, 1989 Thornton sent a memorandum to Nixon entitled "Grievance - Travel Voucher Fund not Received After 7 month(s) of Waiting." The memorandum stated Thornton had made numerous attempts to collect the money owed to her and received little or no cooperation in the matter. Thornton questioned whether the delay was a punishment to her because Nixon may have felt Thornton was the spokesperson for the training group in connection with the "class action" grievance. She further stated in her memo that "everyone is entitled to Union representation and to (punish her) is an unfair practice." A copy of the memorandum was given to Union steward Carolyn Wingo, who talked to Nixon about the matter. Shortly thereafter Thornton received her travel reimbursement.

On April 11, 1989 a person who had talked to Ms. Thornton on the telephone called supervisor Eggleston to compliment Thornton for the courteous and thorough manner she had handled her inquiry. Eggleston wrote up the compliment in a report and put a copy in Thornton's personnel file and sent a copy to Thornton and Manager Nixon. Shortly thereafter Thornton made copies of the document, handed them to various employees in her unit including a number of trainees and went about the area saying, "I know I'm good, I know I'm good."

On May 8, 1989 TSC trainee Thornton was conversing with a client when the party made a statement which Thornton interpreted as a possible suicide threat. The procedural guidelines she followed for such an eventuality stated she was to seek the aid of local management. Thornton's immediate supervisor was busy on a phone inquiry at the time and previously indicated she was not to be disturbed when so engaged. Accordingly Thornton sought the help of a passing supervisor who refused to help indicating she was busy with a phone call. Thornton then went back to her own supervisor, indicated it was a possible suicide and was told to find another supervisor to assist her. Thornton then located a supervisor, Angela Washington, having lunch at her desk with two other employees and explained the situation to her. Washington questioned Thornton as to whether she followed procedural guidelines, read the procedural guidelines manual

provision to Thornton and explained how an experienced TSC employee handled a suicide call during the prior week. Finally Washington took the call herself.^{4/}

Disturbed by the lack of cooperation she experienced in this matter, Ms. Thornton wrote a memorandum to TSC Manager Nixon giving a detailed account of the situation. The memorandum which was highly critical of management indicated Thornton considered the episode to constitute "mental abuse" and she wished the memo be placed in her personnel file. On May 9 Thornton put the memo on Nixon's desk and, as noted on the bottom of the document, copies of the memo were sent to Social Security Administration (SSA) Detroit District Manager Jose Vidaurri, Thornton's supervisor, SSA Commissioner Dorcas Hardy and the Union.

In the afternoon of May 9 TSC Manager Nixon called Ms. Thornton to her office to discuss the memorandum. Essentially Nixon indicated that the supervisors' responses to the situation were correct and she didn't see where they did anything improper. Nixon also told Thornton that in the future she should not put memo's on her desk, rather, they should be left with her clerk. Nixon also questioned why Thornton, instead of writing the memo, didn't come directly to her or District Manager Vidaurri with the problem. Thornton said she didn't do so because she heard "management sticks together" and nothing will happen.^{5/} Nixon told Thornton that the manner in which Thornton behaved in this matter indicates she had an attitude problem and was seeking recognition. Nixon said she noticed a copy of the letter was being sent to Commissioner Dorcas Hardy and if she wanted to send the Commissioner a copy, she should correct various grammatical errors and correct the spelling of the Commissioner's first name.

^{4/} Washington later told Thornton the caller did not indicate to her she was contemplating suicide but later still told Thornton that further inquiry revealed the caller was a mental patient and an appropriate agency would contact the caller.

^{5/} Nixon testified Thornton, during the conversation, struck a defiant pose by arching her back and placing one hand on her hip.

On May 15, 1989 Ms. Thornton sent a three page letter to Commissioner Hardy setting out in detail the suicide call episode.^{6/} The letter began:

I would like to share with you my most trying experience as a new employee in the performance of my duty as a Teleservice Representative in the Detroit TSC. First, of all, I am in agreement with you on the issue of the success of the Teleservice Center requires team work from both management and employees. I believe a chain is only as strong as it's weakest link. I do understand that challenges are great, but our will to succeed should be greater. However, obstacles are sometime(s) placed in our way to prevent goals from being met. In the Detroit TSC the manager requires supervisors to answer telephone calls on busy days. Some supervisors are not receptive to working in the capacity of a Teleservice Representative, and demonstrate(s) how displeased they are through actions and lack of enthusiasm. This type of behavior has taken a toll on some of the employees needing their assistance with difficult or emergency calls. Sometime their behavior is an attributing factor in the quality of service given to the public.

In Ms. Thornton's letter to Commissioner Hardy she characterized the supervisors involved as lacking in enthusiasm, competence or compassion for the caller. Thornton concluded by stating: "I feel their lack of cooperation took away from the quality of service of SSA is known for, decreased my morale tremendously, and tarnished

^{6/} Thornton's discussion with Nixon was not a part of the letter. In her letter to Hardy, Thornton states that after complaining of her "abuse by supervision" a co-worker suggested she go to Nixon but she declined to do so because she was frustrated and upset and did not want to talk to management at that time and recalled being told in Chicago by one of her trainers that "Management sticks together and if you tell on one nothing will happen because we all play golf together."

my integrity by their rebuttals of the incident." The letter noted a copy was being sent to Detroit District Manager Vidaurri.

On May 26 Ms. Thornton's supervisor, Ms. Eggleston, informed her District Manager Vidaurri wished to meet with her concerning the letter to Commissioner Hardy. Thornton desired to have her Union steward present during the meeting but, since the Union steward was not at work that day, Thornton asked Jackie Mathies, a co-worker, to accompany her. They met in the office break room and Vidaurri began by saying he understood Thornton had written several letters and he wanted to talk about them with her. Thornton said she did not wish to discuss the issue.^{7/} Vidaurri replied that if she wrote the letter to the Commissioner she must have wanted to discuss the matter and asked Thornton to talk about it. Thornton replied she didn't want to discuss the subject at that time indicating she had requested Union representation for the meeting. Vidaurri said he was a little disturbed that she requested Union representation for the meeting. Thornton responded she was entitled to Union representation in this type of meeting and Vidaurri replied it was her right but he was disturbed nevertheless. Vidaurri then asked Ms. Mathies if he had asked to see her, would she have requested Union representation. Thornton interrupted and said any questions should be directed only to her since Mathies had no involvement in the conversation they were having. Vidaurri, in a raised voice told Thornton he was not speaking to her and said "Jackie" and waited for a response. Mathies answered "yes, depending upon the circumstances." Vidaurri asked Thornton if there was anything else she wished to discuss and Thornton answered "No." Vidaurri then brought up the subject of Thornton's prior request that she be given an Individual Development Plan (IDP).^{8/} Vidaurri explained that as a GS-5 Thornton

^{7/} Thornton testified she was apprehensive about discussing the matter with Vidaurri because Ms. Nixon had told her the supervisors were correct in their actions during the incident and she was wrong, she had an attitude problem, and Ms. Mathies was not a Union representative.

^{8/} An IDP is a personalized training program which is provided for in the parties' negotiated agreement. Around May 15 Thornton requested that supervisor Eggleston draw up an IDP for her. Eggleston was unfamiliar with an IDP and told Thornton she would look into the matter.

was considered to be a trainee in her current position and would be a trainee until she reached the GS-7 journeyman level and therefore no other development plan would be provided. Nothing further was discussed.

Ms. Thornton filed two grievances on June 2, 1989. One grievance alleged the Agency failed to honor her request for a Union representative during the May 26 meeting, above. The second grievance concerned the failure to provide Thornton with an IDP. Sometime during mid-June both grievances were presented to District Manager Vidaurri at the second step level by Michael Guerriero, President of Local 3239. During the meeting Vidaurri took the position that Thornton had the option to take a co-worker to the meeting or delaying the meeting and indicated it was "ludicrous" for a trainee to participate in an IDP.^{9/}

Ms. Thornton moved from supervision by Ms. Eggleston to supervision by Ms. Washington on June 19, 1989 when the supervisors' various units were changed. During her tenure of supervision, Eggleston considered Thornton's actual job performance to be completely satisfactory. However, Eggleston felt Thornton's ego was such that she wanted to be constantly complemented and told she was excellent. Thus on a "Monthly Feedback Sheet," recapping Thornton's job performance for February 1989, Eggleston put the notation "better" under the "Comments" section of the document.^{10/} Thornton added the statement "I think this is better than better." On an "Interview Audit" report dated May 5, 1989, Eggleston gave Thornton a very good rating for her interview performance with a claimant. Under "Employee's Comments" Thornton inserted "Yes, I thought I handled the call quite well too!"

^{9/} Both grievances were formally denied by Vidaurri at the second step on July 17, 1989.

^{10/} President of Local 3239 Guerriero testified that sometime during Agency negotiations with the Union in 1986 at the Regional level, the parties agreed that employees would have the right to comment on or rebut a deficiency noted on Feedback Sheets, on Agency time, and request specific information from a supervisor regarding the error noted.

Supervisor Washington had similar experiences with Ms. Thornton as those of Ms. Eggleston.^{11/} Thus, on a "Feedback Sheet" for June 22, 1989 Washington indicated that an incorrect action by Thornton resulted in a "reject". Thornton's comment contended the reject should not have been chargeable based upon the information provided her by the caller. However, Washington's reply indicated she made a follow-up call to the beneficiary and obtained information which substantiated her initial decision.^{12/} In addition, on a "Monthly Feedback Sheet" dated July 5, 1989 Washington evaluated Thornton's performance on various aspects of her work by giving stars beside those elements being considered. Washington also commented: Marie, your PE accuracy is good and you are logging in good phone time. Your call count is acceptable but you need to work on raising it. Thank you for volunteering for a gate assignment." Thornton commented: "This shows I am performing above Level 3 Supplemental Numeric Standards for Post-Entitlement Reject/Edits (and) this is great! I('d) rather have more 'adjective(s)' to describe my work performance than stars."^{13/}

When Ms. Thornton left Ms. Eggleston's supervision she was due to receive a summary review of her progress, apparently for the prior three month period. Upon inquiry, Thornton was told by supervisors Eggleston and Washington that none would be given. Thornton requested a Progress Review but Washington was of the view that no Progress Review was required for trainees.^{14/} Thornton asked to

^{11/} Sometime in February 1989 Washington and Thornton were at work early when Thornton told Washington that in her opinion management did absolutely nothing to improve employee morale and management needed to "get on the ball." Thornton told Washington she was speaking to her about this because Washington was young and therefore not set in her ways and with Thornton's help, Washington could change and become a better supervisor.

^{12/} Thornton subsequently filed a grievance over this matter, infra.

^{13/} Washington testified Thornton almost always responded to Feedback Sheets with a comment. Other employees only commented infrequently.

^{14/} Although seven employees were affected the same as Thornton, she was the only one who asked for the Progress Review at this time.

see a Union representative and after Washington discussed the matter with Union representative Wingo on June 28, 1989, Washington agreed to suggest to TSC Manager Nixon that Progress Reviews be given for all similarly affected employees. On the same day Thornton filed a grievance with Wingo on the matter but the issue was essentially resolved when Nixon later agreed to provide reviews for all such employees. Washington notified Thornton of this decision on June 29 and Thornton received a summary review on August 4.^{15/}

In mid-July 1989 Ms. Thornton received a letter from SSA Regional Commissioner Marlene Moleski which Thornton circulated to employees in the office. The letter stated:

This is in response to your letter of May 15, 1989 to Commissioner Dorcas Hardy. The letter was referred to me for response.

I am sorry about the difficulties you described in your letter. Our contacts with Jose Vidaurri and Carolyn Nixon confirmed that the responses you received to your requests for assistance were inappropriate. Handling a potentially suicidal caller is one of the most challenging tasks a TSR must learn to resolve. Supportive and appropriate reactions by management are just as important as those of the TSR. Ms. Nixon has reiterated to your supervisors the priority that must be given such calls, and assures me that the situation you experienced will not happen again.

The information you provided has led to a reevaluation of your TSC's method for handling such calls. The procedures from the TSC Operating Guide are now posted at each workstation. This change should allow you and your co-workers to quickly check the Guide, while concentrating on the caller's problem.

^{15/} Washington did not see the grievance until July 11 when Wingo presented it to her.

Thank you for bringing this matter to my attention. In the future, I urge you to express any concerns you may have to Ms. Nixon and Mr. Vidaurri themselves, to give them a chance to correct the problems in your workplace.

On July 17, 1989 Ms. Thornton filed a grievance concerning the chargeable reject matter, supra. Thornton essentially contended in her grievance that there was a lack of uniformity and clarity in the standards and also contended Washington's conduct of telephoning the caller was a violation of the Privacy Act since Washington should have accepted Thornton's rebuttal. Shortly thereafter Thornton, Washington and Union steward Wingo met and discussed the grievance.^{16/} A few days later Washington called Thornton to her desk and told Thornton she felt people were "egging" her on to file grievances and she should be more concerned about herself. Thornton concluded Washington was telling her she shouldn't file grievances. Washington denied she was trying to tell Thornton that and Washington said she had been a union representative, she supported the union and thought grievances helped employees at times, and stated "You have to play the game."

TSC Manager Nixon called Ms. Thornton and Union steward Wingo to a meeting in her office on July 25, 1989.^{17/} Nixon began by stating Thornton violated office policy by collecting money for a pregnant coworker without requesting permission from Nixon. Thornton explained that she received permission from a supervisor and her own supervisor contributed. Nixon indicated the training coordinator brought the matter to her attention and Thornton said that the coordinator should have brought the office policy to her attention so she would know she was doing something wrong. Nixon said the coordinator was correct in informing her and

^{16/} The Agency granted partial relief on the grievance. The grievance decision, dated August 18 states: "Based on office policy at the time the reject was issued, the reject stands as being chargeable. However, it has been decided that to prevent occurrences such as this, a uniform policy will be adopted regarding the issuance of chargeable and non-chargeable rejects. This policy is forthcoming."

^{17/} The meeting began on July 25 and was continued on July 26.

not mentioning the matter to Thornton. Nixon also told Thornton some employees were upset because Thornton had repeatedly asked them for a contribution. Thornton replied that she sent the envelope around the room and if she didn't see a signature on the envelope she might have asked if the person had seen the envelope which some employees might interpret as being asked again to donate. Nixon also stated that several employees had told her from the beginning of the year that Thornton stated she was "out to get" Nixon and had been maintaining a log of her activities and those of management.^{18/} Nixon stated such statements were inappropriate and added tension to the office. Thornton denied making the statement and asked who made the accusation but Nixon declined to reveal her sources. Nixon also explained that Thornton's attitude would be considered when she assessed whether Thornton would be retained beyond the probationary period. Nixon indicated it seemed as though Thornton was having difficulty accepting the guidance and leadership of her supervisors; her assessment of herself was higher than her supervisors; and she would have to cooperate with supervision. Thornton asked what Nixon was basing her observations on and Nixon said she reviewed employees' folders and as she reviewed Thornton's comments, it appeared she was not accepting her supervisor's suggestions for improvements. Nixon also accused Thornton of misusing the "Comments" section on the "Feedback Sheets" indicating that this section was not normally used by employees and supervisor Washington felt it was taking up too much of her time. Nixon stressed repeatedly that no matter what comments or rebuttal Thornton inserted, the remarks would not serve to change the comments the supervisor made. Upon questioning from Wingo, Nixon said she was not instructing Thornton to refrain from making comments or a rebuttal, but wanted Thornton to be specific in what she wrote.^{19/} Wingo asked if the attitude problem was affecting Thornton's job performance and Nixon answered, "No." Nixon informed them however that Thornton's attitude could be the reason for her termination. Wingo asked if Nixon was reprimanding or counselling Washington and Nixon indicated that she was being counselled. Upon inquiry by Wingo as to how Thornton

^{18/} Nixon testified that the employees referred to Thornton as "that woman."

^{19/} I assume Nixon was telling Thornton that her comments were to directly relate to an evaluation item in the Feedback Sheets.

might improve, Nixon suggested Thornton limit her comments, take up less of her supervisor's time and be more supportive of management. Nixon said she could terminate Thornton at any time during her probationary period for any reason and when asked by Wingo if she was going to terminate Thornton, Nixon replied she did not know yet. Asked if Washington also perceived an attitude problem on Thornton's part, Nixon answered affirmatively. Thornton asked why Washington hadn't mentioned it to her before now and Nixon said she didn't know. Wingo asked if they could talk to Washington after their meeting concluded and Nixon agreed.^{20/}

That afternoon, supervisor Washington met with Union representative Wingo and Ms. Thornton.^{21/} During the meeting Washington indicated Thornton had an attitude problem and stated she was concerned with Thornton's unwillingness to accept directions and propensity to challenge her supervisor. Washington referred to the comments Thornton wrote on the Feedback Sheets and cited various other instances which she felt reflected Thornton's undesirable attitude. During her testimony Washington recounted those instances as follows:

. . . I told her, (as to one incident) I said that seal was incorrect. This may reject. She went away from my desk, and then she called me over and she says well, no. She pulled out what we use as a cheat sheet to help us with our inputs. But she said, no, look. This says I was supposed to do this. I don't know why you're saying that. I said, Marie, slow down, calm down, read it carefully. It says if you put this seal on, you have to code all these others. You didn't do that. You only have to code this one field. And she looked at it and she still insisted. I said, no, let's go

^{20/} Nixon testified that throughout the major portion of the meeting Thornton sat before her in a defiant or hostile pose with back arched and a hand on her hip.

^{21/} I was very much impressed with Ms. Washington's demeanor as a witness and credit her straight-forward account of what transpired during this meeting.

over it. This is your example. This is what you should have done.

When I said that, when she finally saw, she just said, oh. And she didn't talk to me any more. I walked away and went back to my desk.

On another occasion, there was a transmittal. That is any new additions that we have to our program manual. And on that occasion I was discussing it in (a) Unit meeting about a policy that we had that was not actually new but it was a clarification of existing procedures.

. . . I was actually telling the entire Unit what the procedure was. She disagreed with what I was saying. I said I am reading it exactly as it appears in our program manuals. And she said well, no, it can't say that. And I told her, yes, it did. She says, well, let me see it. So I gave her a copy of it; the Unit meeting continued.

After the Unit meeting, she called me over to her desk again. And she went through with her finger and she pointed, and just pointed at the paper, and she just consistently said, look, this says that you do it this way. And I said, okay, Marie, let's go over this again. I said read the entire thing. She kept reading up to a certain point that would prove what she was saying; she stopped. I finally took her finger and I pulled it across the page as I read every single word until it supported what I said. When I did that, she looked at me and just said, oh, and left it at that.

So I told her about that occasion.

Another occasion, in June, because there were three occasions in June.

. . . She had a fan on her desk; and the minute I saw the fan, I went to Marie. I

said, Marie, it's against GSA regulations. We are in a federal building; they don't allow us to have these things in here. Marie says, sorry. She comes to me later on that afternoon and Marie says, well, I spoke to GSA, and they said I could have a fan or that arrangements could be made if I didn't have a vent around my desk. And I pointed up and I said well, look Marie, you do have a vent going right over your desk.

And I just said, why would you have spoken to GSA? (She replied) Well, I can call them if I want to. I just wanted to know what their position was. I says fine.

We also discussed occasions that we had in July. I had a Unit comprised primarily of trainees. So my job is to see that they are trained in the most efficient and effective way possible. What I do to help this, and I did it in my other Unit also, is that periodically when I give a Unit meeting, I want to see how effectively you are taking notes but also I want to see what did you find important. Well, I asked for the Unit notes at the end of the meeting, I just said I would like to see your notes, people questions. Well, what are you going to do? I said I just want to read it. It's not for performance, documentation; just to give me an idea where you are coming from.

Marie began to seriously scribble on her paper, across the top, across the bottom. When she came up to me to give me her notes, she did like that and walked out the door.

THE COURT: You are saying she threw the notes on your desk as she passed?

THE WITNESS: Yes, she did. She threw them on the desk in front of me. When I read the notes, I just made little corrections on each person's notes or

little additions, and I passed them out. On Marie's notes, she put at the very top, why are you looking at my notes? At the bottom she wrote, I didn't write down everything; I only wrote down what I didn't know.

When I gave Marie her notes back, she was on a phone call. She took the notes, balled them up while I was there, threw them in the trash, . . . I could not understand if you wrote down what you did not know why you did not still need these notes. So I asked her. I said, Marie, why did you throw your notes away? And I don't know if (it was) because she was on a phone call, but she just turned her head further away from me. And I left. And that occurred in July.

On another occasion . . . she had a problem with a payment for an individual. She brought me the queries which are computer printouts, and she says, well, I can't figure this out. Can you figure it out? Well, it was later in the day. So she was going home and I told her, sure, I'll just work on it tonight and I'll see what I can tell you.

Well, I worked on it, stayed there, went through it until I could figure it out, gave it to her the next morning; and she looked at it and she goes, oh, you figured it out? I said yes. And she said oh, well I know you didn't do it on your own. You probably had Pat (Thornton's former supervisor) or someone like that help you. I said Marie, I am quite intelligent enough that I can do these things on my own.

. . . there are two other things. One was regarding another Pom's (Programs Operations Manual) reference where she had a problem with Medicare, which is the Social Security Health Insurance Program. And I referred her to a Pom's section regarding the computation of the

insurance benefit. I told her exactly where to go, but I didn't have time to go with her.

Well, when she went over there, what she did is that she could not find it. She asked the technical assistant. He also referred to that section. She came back to me and said, Angela, it's not there. And I think that's just ridiculous. We should be able to explain to these people how to comp out their insurance payment, and it's just not there. I said, Marie, it is there. She was adamant. It is not there. I looked; I know it's not there. I told her, okay, fine. I went over to the Pom section and I spent twenty minutes and what it was was that I basically took her at her word. I said, well, she says she can't find it; that must mean it's not here.

When I went to the Pom's section, finally I just said, wait a minute. I know it's here. I turned right to the page after (where) she said she had been looking, and it was right there. I went to her and said, Marie, it's right there. It's right on the next page. I said I have talked to you about this before; you've got to read slower. You've got to slower; you've got to read things thoroughly.

. . . there was another time . . . I had a trainee in my Unit who was a newer trainee than Marie. And what I had observed is when this trainee would be interviewing, Marie would hand her a pamphlet; she would hand her an envelope, or she would hand her a reader guide to interpret data. And I am looking at this and, you know, well, what's going on? And I am listening to the employees interview; and what I am realizing is that as the employees say, okay, sir, I will send you out a Medicare pamphlet. Marie has the Medicare pamphlet out giving it to the employee. And I told her, you can't do that. I said if you do

that you are impeding the employee's development.

Well, Marie felt that the employee had come to me and had told me that. I said no; I said where my desk is, I just saw it. And I said you can't do that. That's not helping her. Well, subsequently, after that meeting, Marie didn't talk to the girl any more after that, not even "Hi", "Hello."

Ms. Washington recounted another incident which occurred in mid-July where there were more volunteers than positions available on a particular social committee so, for the first time, the Agency decided to have elections for committee membership. Ms. Thornton wished to be on the committee and expressed the view that elections were being held just to eliminate her from the committee. Washington was unable to convince Thornton that the procedure was not adopted to eliminate her from the committee and encouraged Thornton to talk to her about it and not to "think like that". Thornton's retort was that she would think any way she wanted to think.

At the conclusion of the July 26 meeting Washington indicated she would put her recommendations in writing regarding things Thornton would have to do to improve her attitude so as to be retained beyond the probationary period but later told Thornton she would not because she thought they understood one another.

After Ms. Washington's meeting with Ms. Thornton and Ms. Wingo, Washington relayed the conversation to TSC Manager Nixon.^{22/} Later that same week Washington reported that Thornton was wearing a black arm band and when Washington questioned her about it Thornton replied she was "in mourning." Around the same time a sign appeared over Thornton's desk that said "Attitude."

In mid-August the TSC had a training session at which approximately 75 unit employees attended. Supervisors participated and continually came and left the session. The

^{22/} Washington had previously related the above incidents as they occurred to Nixon and they had agreed that if Thornton's attitude did not improve significantly regarding accepting directions and her view of management, they would terminate her.

room where the training was conducted was about 30 feet by 14 feet. Employees were seated at two tables and in chairs around the perimeter of the room. Supervisors who remained located themselves at either end of the room. Ms. Thornton was seated somewhere towards the center of the room at a table. Union representative Wingo sat about four or five seats from Thornton. Apparently a number of employees were dissatisfied with the training and at the end of one training period Thornton openly remarked to Wingo "I'm filing a grievance on this." A silence came over the group and Wingo replied, "No grievance." Employees around Wingo and Thornton then began to talk among themselves for about a minute regarding their disappointment with the training session and the possibility of filing a grievance. Supervisors Torrey and Wilhite were in the room at the time standing about 10 feet from Thornton. The supervisors said nothing about the comments and started into the next training period.

The record reveals that on August 23, 1989 Ms. Washington gave a Performance Plan for a GS-6 position which would begin on September 24, 1989 to Ms. Thornton for signature. Since Thornton was a GS-5 and because of her discussion on July 26, supra, she asked Washington if this meant she would still be employed during the new appraisal period. Washington replied that the issue had never been her performance but her attitude and Washington hadn't heard "anything otherwise at this point."23/

In late August the August 1989 edition of the Union publication "Unity" contained on page four the following letter:24/

23/ Around this time "the system" automatically puts into motion authorization for a within-grade increase after an employee's completion of one year in service. No supervisory approval is required. Two weeks thereafter a grade increase, if it is to be given, will be effectuated.

24/ Thornton testified that when she first wrote her letter to Commissioner Hardy, supra, Union steward Wingo told her Unity knew of the letter and wanted her permission to publish the information contained in it and use her name. Thornton gave permission to use the letter but only her initials. Thornton acknowledged the Unity published article went beyond the matters contained in her letter to Hardy.

Dear UNITY;

I wrote to SSA Commissioner Dorcas Hardy complaining about the cancellation of approved leave, modification of our breaks and lunch schedules, and strict requirements on medical documentation to support sick leave requests. These work changes were imposed in the teleservice center and had a negative effect on Service Reps in our office.

My manager asked to meet with me in his office after he had apparently received a copy of the letter. I asked for union representation because management had earlier accused me of having an attitude problem in reference to the letter. Even though no representative was available, the manager wanted to have the meeting anyway. So, I asked a co-worker to attend the meeting as an observer.

During the meeting, the manager told me that he was "disturbed" that I sought union representation and became angry when I questioned him. I felt it was my right to obtain union representation and I believe that his denial of my right is grounds for a grievance.

What should I do?

M.T., Detroit, MI

The publication contained a response notifying "M.T." that management's action alleged in the letter constituted a violation of the parties collective bargaining agreement and filing an unfair labor practice charge should also be considered.

Union representative Wingo testified she received her copy of Unity around the end of August and upon entering the office numerous employees called her attention to Thornton's letter. Wingo also testified that when she arrived at work on that day the majority of TSC employees had copies of Unity. However she saw no supervisor with a copy of the Unity paper nor did she discuss the matter with any

supervisor.^{25/} A copy of the entire six page publication was, as usual, posted on the Union's bulletin board located in the employee break room which is also used by supervisors.^{26/}

Around this time TSC Manager Nixon received Ms. Thornton's comments on the performance review given her on August 4. After receiving Thornton's comments, which Nixon described as "the crowning," and discussing this matter with Ms. Washington in late August or early September, Nixon decided to terminate Thornton. The performance review for the period March 6 to July 12, 1989 consisted of a one page narrative covering five tasks of work, concluding Thornton's performance of those tasks was "at least fully satisfactory."^{27/} Thornton subsequently submitted "comments and rebuttals" consisting of three highly self-laudatory typewritten pages which commented on virtually every item covered in the review and challenged and questioned numerous statements, facts and figures presented by the reviewer including: expressing "surprise" that the review summation was not more detailed; challenging the use of the statement "at least fully satisfactory" since it is not one of the standard ratings;^{28/} noting the lack of mention that she had three compliments from the public; and claiming she exceeded the required standard in most areas reviewed.

^{25/} Wingo testified that on a few occasions in 1989 she has discussed with TSC Manager Nixon a matter which appeared in either Unity or another Union newspaper.

^{26/} No other testimony was offered with regard to the promulgation of this publication or circulation of the Thornton letter therein.

^{27/} The review also contained a Monthly Feedback Sheet for the period April 7 to May 4, 1989 dealing with numbers of calls and hours worked and accuracy in a particular area.

^{28/} Thornton indicates that there are five ratings: Unsatisfactory; Minimally Satisfactory; Fully Satisfactory; Excellent; and Outstanding. She professed being "bothered" by the use of "at least fully satisfactory" and claimed not to understand the use of this phrase, questioning whether it meant she was fully satisfactory to a small degree.

On September 7, 1989 TSC Manager Nixon terminated probationary employee Thornton's employment. The letter of termination presented to Ms. Thornton stated, in relevant part:

This is notice that I am terminating your career conditional appointment as a Contact Representative (TSR) GS-962-05 during your Probationary Period effective end of business September 7, 1989. This decision is based on your failure to demonstrate the personal qualification necessary for retention in your position with Social Security Administration.

You entered on duty with Social Security Administration on September 11, 1988, subject to the completion of 1 (one year) probationary period. You were advised that in evaluating you for retention beyond the period of probation, I would consider your performance of duties, your conduct on and off the job, and cooperation with both your supervisors and your co-workers. Upon a thorough examination of your employment record, I find that although your performance and your conduct have been acceptable, you have been reluctant to accept your supervisor's good faith attempts to assist and guide you in your development. Despite your status as a trainee, you have shown an inability or unwillingness to accept any constructive criticism of your work products; you have been contentious, argumentative, and uncooperative in your dealing with your supervisors and other members of management and you have demonstrated general resistance to management's authority. In conversation with co-workers, you have openly and without justification criticized the personal attributes of the management staff and have challenged both operational processes and the administrative practices of this office. Your impertinent manner and general disrespect toward your work or the Social Security Administration have provided a valid reason for my question

concerning your suitability for continuous service with this agency. Because you were clearly on notice that I would consider your attitude along with your performance and conduct in reaching a decision on your retention, I conclude that there is no reasonable basis for expecting improvement in your attitude and or in your willingness to co-operate with management in the future.

Ultimate Findings, Discussion and Conclusions

The issue to be resolved herein is whether probationary employee Marie Thornton was discharged because she engaged in conduct protected by the Statute. The General Counsel argues that a violation of the Statute has been established since: Thornton was engaged in protected activity; management had knowledge of that activity; and the record supports an inference that Thornton was terminated because of her protected activity. Respondent raises a jurisdictional argument contending that the unfair labor practice charge procedures under the Statute are not available to probationary employees. Respondent further contends that, in any event, no evidence exists that Thornton's protected activities formed the basis for her termination.

With regard to Respondent's jurisdictional argument, Respondent urges that Ms. Thornton, as a probationary employee, could contest a termination only if the matter was cognizable under 5 C.F.R. 315.806. That regulation essentially provides that a probationary employee may appeal to the Merit Systems Protection Board an agency's decision to terminate for unsatisfactory performance or conduct only regarding issues concerning allegations of certain forms of discrimination based on partisan political reasons or marital status or that improper procedures were followed in effectuating the termination, infra. Respondent relies on the decision in United States Department of Justice, Immigration and Naturalization Service, 709 F.2d 724 (D.C. Cir. 1983) wherein the court reversed the Authority negotiability determination in 8 FLRA 347 (1982) and found a union contract proposal providing that the termination of probationary employees would be grievable was not negotiable under the Statute. The court held, inter alia:

Congress has long recognized both that federal employees are due certain

procedural protections and that federal agencies must be able to terminate employees for unacceptable work performance or conduct. In accommodating these competing concerns, Congress created the concept of the probationary term and authorized agencies to terminate employees summarily during this period. It saw summary terminations as essential to an effective and efficient service, and it has repeatedly acted to preserve the agencies' discretion summarily to remove probationary employees. We detect no retreat from this position in the Civil Service Reform Act of 1978 or in the OPM regulations that implement the congressional mandate . . . (Footnote omitted.)

The OPM regulations referred to by the court were primarily 5 C.F.R. 315.802, 804, 805 and 806. Those regulations essentially provide for the length of the probationary period, the manner of notification to be sent to a probationary employee being separated because the employee's work performance or conduct fails to demonstrate fitness or qualifications for continued employment and limit the right of appeal for probationary employees to issues concerning: (a) discrimination for partisan political reasons or marital status; (b) improper procedures in effectuating the termination; and (c) discrimination based on race, color, religion, sex, national origin, age, or physical handicap where raised in addition to (a) or (b) above.

Subsequently, in U.S. Department of Labor, Labor-Management Services Administration, Cleveland, Ohio and National Union of Compliance Officers, 13 FLRA 677 (1983) the Authority stated it was adopting the court's approach in Immigration and Naturalization, supra, and would no longer follow prior contrary decisions regarding grievance and arbitration procedures negotiated under the Statute covering the termination of probationary employees. The Authority further stated in Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, Local 1923, AFL-CIO, 15 FLRA 714 (1984), in reversing an arbitrator's finding that management violated the parties agreement covering conditions under which a probationary employee could be terminated; ". . .

that in enacting the Statute, Congress did not intend that procedural protection for probationary employees be established through collective bargaining under the Statute."

Thereafter, based upon the rationale and conclusions in Immigration and Naturalization, supra, the Authority has consistently held that coverage under a negotiated procedure of a grievance concerning the separation of a probationary employee is precluded by governing law and regulation. In National Treasury Employees Union and U.S. Department of Agriculture, Food and Nutrition Service, Midwest Region, 25 FLRA 1067 (1987) at 1076-1078, the Authority found non-negotiable a union proposal requiring use of the negotiated grievance procedure for matters involving the termination of a probationary employee where the termination was the product of "unlawful discrimination." That decision was affirmed in National Treasury Employees Union v. F.L.R.A., 848 F.2d 1273 (D.C. Cir. 1988). In that case the court explained its prior holding in Immigration and Naturalization, supra, and when discussing the specific regulations against discrimination (5 C.F.R. 315.806, supra) the court assumed that the court in Immigration and Naturalization ". . . was fully aware that agencies' discretion over probationary employees was substantively limited by rules against dismissal for explicitly forbidden reasons" and refused to except the application of its holding in Immigration and Naturalization where application of the grievance procedure was limited to such situations. The court held that "such an exception would eviscerate Congress's intention that collective bargaining not supplement probationers' existing procedural protections". In dealing with the negotiability of the union's proposal concerning "unlawful discrimination", the court in National Treasury Employees Union acknowledged that "Congress has explicitly provided probationers with forums and remedies to enforce their indisputable right not be the victim of invidious discrimination," referring to the Equal Employment Opportunity Commission regarding claims of discrimination based on race, color, religion, sex or national origin (42 U.S.C. section 2000e - 16(a)) and the Merit Systems Protection Board regarding those specific matters set forth in 5 C.F.R. 315.806, supra, and in view of the prior determination made in Immigration and Naturalization, it concluded "that a single additional forum available to other federal employees - a negotiated grievance procedure - would remain unavailable to probationers."

Accordingly, it is clear that decisions of the Authority with court approval since Immigration and Naturalization, supra, have consistently held that a negotiated grievance-

arbitration procedure was not available to a probationary employee as a means to challenge termination from employment. The Authority, without explication, expanded this concept somewhat in Department of the Navy, Naval Weapons Station Concord, Concord, California, 33 FLRA 770 (1988), a case concerning rights of probationary employees decided by the Authority which did not involve a negotiated grievance procedure. In that case the agency unilaterally changed mustache grooming standards, among other conditions of employment, in violation of its Statutory bargaining obligations. A probationary employee refused to comply with the new standards and was terminated. The Administrative Law Judge found the probationary employee was terminated for insubordination and therefor did not order his reinstatement, even though the matter arose because of the agency's unfair labor practice of unilaterally changing moustache standards. The Authority however held it was not necessary to find that the probationary employee was insubordinate since, following Immigration and Naturalization, the agency had the right to remove the probationary employee "summarily during his probationary period." (Emphasis by the Authority.) While it could be argued that Naval Weapons Station Concord indicates the Authority interprets "summarily" to mean that the Statute is not available to a probationary employee for any purpose and that only terminations cognizable under 5 C.F.R. 315.806 may be contested by a probationary employee, and such matters would only be appealable to the Merit Systems Protection Board, I find such a reading of Naval Weapons Station Concord to be overly broad. Naval Weapons Station Concord did not specifically treat the question of the general availability of the Statute to probationary employees or whether a probationary employee would have Statutory protection to engage in union activity. Rather, Naval Weapons Station Concord dealt with a question of the right of a probationary employee which was derivative from the union's collective bargaining rights, i.e., the right to be given notice and an opportunity to bargain when a change in working conditions occurred. Further, while 5 C.F.R. 315.806 ostensibly sets forth only those matters upon which a probationary employee may appeal, probationary employees are nevertheless given the right by statute and regulation to challenge terminations regarding race, color, religion, sex, or national origin to the Equal Employment Opportunity Commission as would any other bona fide federal employee. National Treasury Employees Union, supra. Similarly, federal employees have been given the basic right to engage in union activity and I am not aware of any law or regulation which specifically curtails this right because an

individual is a probationary employee.^{29/} Thus there appears to be no indication in statute or regulation that the Statute is not available to probationary employees to protest termination for having allegedly engaged in union activity and having the Federal Labor Relations Authority make that determination. Accordingly, in all the circumstances herein I reject Respondent's contention and find the Authority does indeed have proper jurisdiction over the termination of probationary employee Marie Thornton.

Turning now to the substantive arguments in this case, the General Counsel alleges probationary employee Thornton was terminated in violation of section 7116(a)(2) and (1) of the Statute. In Letterkenny Army Depot, 35 FLRA 113 (1990), the Authority set forth various factors it deemed applicable in evaluating cases alleging violation of section 7116(a)(2) of the Statute. In United States Customs Service, Region IV, Miami District, Miami, Florida, 36 FLRA 489 (1990), the Authority, after noting that the General Counsel always has the burden of establishing by a preponderance of the evidence that a violation has been committed, summarized the approach it would take in such cases as follows:

We stated (in Letterkenny) that in all cases of alleged discrimination, the General Counsel must establish that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment. Id. at 118. We also stated that the General Counsel may also seek to establish, as a part of its prima facie case, that a respondent's asserted reasons for taking the allegedly discriminatory action are pretextual, or after presentation of the respondent's evidence of lawful reasons,

^{29/} See decision of Administrative Law Judge Jesse Etelson in Department of Defense, Defense Logistics Agency, Defense Contract Administration Services, Atlanta Region, Marietta, Georgia, Case No. 4-CA-90716, ALJ Decisions Report No. 85 (October 27, 1989).

the General Counsel may seek to establish that those reasons are pretextual. Id. at 122-23.

We noted that when the General Counsel makes the required prima facie showing, a respondent may seek to rebut that showing by establishing, by a preponderance of the evidence, the affirmative defense that: (1) there was a legitimate justification for its actions; and (2) the same action would have been taken in the absence of protected activity. Id. at 123. We pointed out that if the respondent rebuts the General Counsel's prima facie showing by a preponderance of the evidence, thereby establishing that it would have taken the allegedly unlawful action even in the absence of protected activity, the General Counsel has not established a violation of the Statute. Id. at 119.

The General Counsel contends herein that Ms. Thornton was terminated because she engaged in activity protected by the Statute. The General Counsel includes as protected activity the four grievances she filed; use of the employee "Comment" section on supervisory Feedback Sheets; her letter which appeared over her initials in the Union newsletter "Unity" in August 1989; her comment at the training session on August 16, 1989 concerning filing a grievance about the training; and her complaint to SSA management concerning supervisory response during the possible suicide caller incident.

It is well established that an employee's right to file and process grievances under a collective bargaining agreement is protected activity within the meaning of section 7102 of the Statute.^{30/} See Equal Employment

30/ Section 7102 provides:

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely

(Footnote continued on next page)

Opportunity Commission, 24 FLRA 851 (1986), affirmed sub nom. Martinez v. FLRA, 833 F.2d 1051 (D.C. Cir. 1987). It is also clear that to discriminate with regard to tenure or other conditions of employment because the employee has utilized the grievance machinery violates section 7116(a)(1) and (2) of the Statute. See U.S. Customs Service, Washington, D.C., 24 FLRA 773 (1986).

The record reveals that from February 3 to July 17, 1989 Ms. Thornton filed four grievances during her employment at the TSC and sought the assistance of the Union during her meetings with management and supervision. Respondent did not overtly take offense at the filing of grievances.^{31/}

(Footnote continued from previous page)

and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right-

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

^{31/} I consider supervisor Washington's comment on July 17 when discussing grievances with Thornton that "you have to play the game" to be vague and insufficient to convey hostility toward Thornton for filing grievances considering the totality of circumstances. Washington could have been attempting to tell Thornton that the way to succeed at her job was by changing her attitude irrespective of filing grievances.

However on March 13, 1989 TSC Manager Nixon erroneously accused Thornton of filing the "class action grievance" concerning trainee travel vouchers and coupled that accusation with an admonition that Thornton would have to conform if she wished to be retained or progress in the Agency. Further on May 26 District Manager Vidaurri while meeting with Thornton displayed his displeasure that Thornton sought out the Union to assist her during her meeting with Vidaurri. Such conduct indicated hostility towards Thornton for engaging in protected activity. Surely TSC Manager Nixon conferred with District Manager Vidaurri concerning Thornton's employment during which occasions, I infer, Vidaurri conveyed his sentiments about Thornton. As a member of the management team, Nixon would not lightly disregard Vidaurri's feelings on this matter. In these circumstances I conclude that Thornton's use of the negotiated grievance procedure which carried with it Union representation colored Nixon's conclusion that Thornton had an unacceptable attitude and was part of management's motivation in terminating Thornton before the completion of her probationary period.

The General Counsel also contends Thornton's use of the "Comment" section of Feedback Sheets was protected activity and alleges Respondent's displeasure with Thornton's comments was part of the motivation for terminating her. Indeed, on July 25 TSC Manager Nixon indicated she and supervisor Washington were displeased with Thornton's use of such "Comments." On the same day Washington independently criticized Thornton for her use of comments.

The "Comment" section of Feedback Sheets was negotiated by the Union and the Activity in 1986 and in my view was tantamount to a part of the collective bargaining agreement. When an employee utilized the Comment section of a Feedback Sheet the employee was asserting a right contained in a collective bargaining agreement and I conclude was engaging in protected activity. While I am unaware of any clear precedent to support this conclusion from cases decided by the Authority, the National Labor Relations Board (NLRB), with court approval has held that an employee asserting rights contained in a collective bargaining agreement is engaged in activity protected by the National Labor Relations Act (NLRA). Section 7 of the NLRA provides in relevant part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain

collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . .

The Board initially concluded in Bunney Brothers Construction Company, 139 NLRB 1516 (1962) that asserting a claim under a collective bargaining agreement (requesting show-up time pay) was an extension of the concerted activity which gave rise to the agreement and an employer's disciplining an employee for such conduct violated section 8(a)(1) of the NLRA which declares it to be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7.^{32/} Subsequently in Interboro Contractors, Inc., 157 NLRB 1295 (1966), enforced 388 F.2d 495 (CA2, 1967), the NLRB held that an individual's conduct of asserting a contract right affects the rights of all employees in the unit and therefore is concerted activity protected by section 7 of the NLRA.^{33/}

The Supreme Court affirmed the Interboro doctrine and interpretation of section 7 of the NLRA in N.L.R.B. v. City Disposal Systems, 104 S. Ct. 1505 (1984), 465 U.S. 822. The Court, when discussing concerted activity within the meaning of section 7 of the NLRA, noted that section 7 embraces such activities as joining and assisting a labor organization and went on to hold at 1511:

The invocation of a right rooted in a collective-bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement.

^{32/} The NLRB found it unnecessary to determine whether the employee discipline also constituted a violation of section 8(a)(3) of the NLRA (" . . . discrimination in regard to the hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .")

^{33/} The Board continued to find it unnecessary to make a finding as to whether the conduct also violated section 8(a)(3) of the NLRA.

That process - beginning with the organization of a union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement - is a single, collective activity. (Footnote omitted). Obviously, an employee could not invoke a right grounded in a collective-bargaining agreement were it not for the prior negotiating activities of his fellow employees. Nor would it make sense for a union to negotiate a collective-bargaining agreement if individual employees could not invoke the rights thereby created against their employer.

The Court further stated at 1513:

Moreover, by applying § 7 to the actions of individual employees invoking their rights under a collective-bargaining agreement, the Interboro doctrine preserves the integrity of the entire collective-bargaining process; for by invoking a right grounded in a collective-bargaining agreement, the employee makes that right a reality, and breathes life, not only into the promises contained in the collective-bargaining agreement, but also into the entire process envisioned by Congress as the means by which to achieve industrial peace.

Section 7102 of the Statute, supra, like section 7 of the NLRA, provides that employees shall have the right to form, join, or assist labor organizations. Thus it follows that under the Statute an employee's asserting a right which is the product of collective bargaining should be considered protected activity for the reasons expressed in City Disposal Systems. The right of employees to place a comment in the "Comment" section of Feedback Sheets was negotiated by the parties and this right was applicable to all TSC employees including probationary employees. Accordingly, I conclude that when Ms. Thornton asserted her right derived from collective bargaining to make a comment on Feedback Sheets she was engaging in protected activity. The record reveals that TSC Manager Nixon and supervisor Washington considered Thornton's comments objectionable primarily because response to the comments took too much of

Washington's time. Thus Thornton's use of comments on Feedback Sheets was part of her "attitude" problem which management found objectionable and I find and conclude was a motivating factor in management's decision to terminate her.

As to the article in the Union newsletter "Unity" of August 1989 bearing the initials "M.T.", I conclude publication of the letter was protected activity. See Veterans Administration Washington, D.C. and Veterans Administration Medical Center, Cincinnati, Ohio, 26 FLRA 114 (1987), affirmed 878 F.2d 460 (1989). However, I find the record insufficient to establish that Respondent's agents at the TSC knew the article had appeared prior to Ms. Thornton's termination. The evidence merely indicates that numerous employees had copies of the publication and an entire copy of the six page newspaper was posted on the TSC bulletin board sometime around the end of August 1989. There is no evidence that supervision or management was aware of the article. On these facts the General Counsel urges that I should infer management was aware of the article and infer that management took offense at the publication of the article and infer such was part of the motivation in terminating Thornton. The record simply does not support such inferences.

Similarly, I find the record insufficient to support a finding that Ms. Thornton's remarks at the August 16 training session concerning filing a grievance was made in such circumstances as to support a finding that responsible management or supervisors knew the statements were made. Thus there is no direct evidence that anyone in management or supervision heard the comment or if heard attributed the comment to Thornton and related the comment to responsible supervision or management. To conclude the statement was heard by the two supervisors in the area, were attributed to Thornton, then relayed to those responsible for deciding Thornton would be terminated and then used as motivation to terminate her would require building an inference, upon an inference, upon an inference, upon an inference, thus falling far short of "evidence" needed to support the contention.

With regard to Ms. Thornton's letter of complaint to SSA Commissioner Hardy regarding the possible suicide call, I do not find this conduct to be within the ambit of protected activity under the Statute. Thornton's complaint had no connection to her Union activity or asserting rights under the parties collective bargaining agreement. Thornton's action was taken completely as an individual complaining to

higher management of perceived failures and shortcomings of immediate management, supervision and local procedures. Accordingly I find no basis to conclude such activity represents conduct protected by the Statute.

Thus I conclude Ms. Thornton's four grievances, desire for Union representation when meeting with District Manager Vidaurri, and the use of the "Comment" section on supervisory feedback sheets constituted activity protected by the Statute. I further conclude under all the circumstances herein that as indicated above, such activity comprised motivating factors in Respondent's decision to terminate Thornton's employment.

However, I also conclude that part of Respondent's reasons for terminating Ms. Thornton concerned matters which did not involve protected activity on the part of Thornton. TSC Manager Nixon's September 7 letter of termination to Thornton characterizes her as unable or unwilling to accept constructive criticism, contentious, argumentative, uncooperative, resistant to managerial authority, impertinent and disrespectful. Indeed, a review of Thornton's employment history, which follows, reveals various incidents not involving protected activity from which a manager might conclude that Thornton's attitude during probation indicated she possessed some irritating traits and would be a troublesome permanent employee, difficult to supervise or manage. Thus, when Nixon and District Manager Vidaurri first met Thornton and other new trainees in early November 1988, Thornton was noticed for her outspoken and perhaps brash question regarding future promotion at a time when actual work as a probationary employee was just commencing. Physically apart from the other trainees, erect with arms folded in front, she could not help to be noticed and remembered. In February Thornton faulted management's failure to improve employee morale to supervisor Washington and made an unsolicited offer to help her change and become a better supervisor. On March 13, 1989 when Nixon told Thornton of the mistakes related to Thornton not timely receiving her travel pay and Thornton's reduced pay occasioned by a prior overpayment, Thornton responded by criticizing office administration and supervision.^{34/} Later in March while meeting with Nixon,

^{34/} At this time Thornton received her first warning that her attitude was a criteria considered in relation to her employment.

Thornton was critical of office procedural guidelines and gratuitously volunteered she could also help Nixon become a better manager and improve office morale. Around this time Nixon observed Thornton apparently openly encouraging other employees to obtain other employment.

While Ms. Thornton was obviously a diligent and competent worker, her ego obviously demanded she be overtly and repeatedly recognized as such as supervisor Eggleston so testified. Further illustrations of her high regard for her own abilities is the situation in April when after receiving a written complementary report from her supervisor, Thornton distributed copies of the complement to fellow employees, broadcasting to employees, "I know I'm good, I know I'm good." Management could readily see this as undesirable conduct.

Ms. Thornton's use of a memorandum to TSC Manager Nixon and letter to SSA Commissioner Hardy concerning the possible suicide call in May was also the source of disturbance to management. Nixon defended the actions, or rather inactions, of her supervisors and questioned why the matter was reduced to writing and not presented orally to her or District Manager Vidaurri.^{35/} Striking a defiant pose Thornton replied that since "management sticks together," nothing would result from simply complaining to Nixon, prompting Nixon to again mention that Thornton had an attitude problem and was seeking recognition by her actions.

Thornton's subsequent letter to SSA Commissioner Hardy must have also been the source of further irritation to Nixon since the questionable response to Thornton's possible suicide call by supervision obviously reflected poorly on management.^{36/} Indeed the July letter from SSA Regional Commissioner Moleski indicates that District Manager Vidaurri and Nixon were contacted over the matter and it was "confirmed" that the supervisory responses Thornton received to her requests for assistance were inappropriate, contrary

^{35/} Nixon obviously noted that copies of the memorandum were sent to her supervisor, District Manager Vidaurri and SSA Commissioner Hardy.

^{36/} I do not credit Nixon's denial that the letter to Hardy did not cause her any concern.

to Nixon's earlier reaction to Thornton's memorandum to her, above.^{37/}

On July 25 and 26 both TSC Manager Nixon and supervisor Washington discussed Ms. Thornton's shortcomings with her, conduct, they explained, which could affect her continued employment. The discussion highlighted past and current conduct by Thornton which led management to conclude she had an attitude which was objectionable. Thus Nixon, among other things, accused Thornton of violating office policy by collecting money for a pregnant coworker and during the discussion Thornton criticized the training coordinator who brought the matter to Nixon's attention for not having told Thornton that her action was against office policy. Nixon also indicated she had been told by other employees that early in the year Thornton had stated she was "out to get" Nixon and was maintaining a log of her activities. The matter was disturbing to Nixon and obviously had not been forgotten or given no weight by Nixon since she brought up the subject many months after the allegation had been made. Throughout the conversation Thornton maintained a pose which Nixon interpreted as hostile or defiant and Thornton gave no indication of being contrite. Indeed it was Union steward Wingo during this meeting who asked Nixon what Thornton could do to improve.

Supervisor Washington when meeting with Ms. Thornton and Ms. Wingo also recited a series of events which demonstrated what Washington considered to be Thornton's unacceptable attitude. Washington recounted Thornton's challenging her when she instructed Thornton on the use of a "seal"; Thornton's challenging her before the unit regarding instruction on a "transmittal"; her stubbornly refusing to accept Washington's interpretation of the program manual; her challenging Washington's interpretation of a SSA regulation on using fans by calling SSA directly; Thornton's disingenuous, hostile and insolent behavior regarding Washington's attempt to review Thornton's notes; Thornton's demeaning Washington regarding her ability to resolve a work problem without assistance; Thornton's challenging Washington on her knowledge and interpretation of the Poms;

^{37/} I assume the supervisors involved, including Ms. Washington, were apprised that higher management considered their responses to Thornton's call for assistance to be "inappropriate."

Thornton's hostility toward another trainee because of suspicion that the trainee resisted her assistance and reported it to Washington; and Thornton's hostile reaction to Washington's attempt to convince Thornton to accept a more conciliatory view regarding social committee elections.

Ms. Thornton's reaction to Nixon and Washington's encouragement that she improve her attitude was to wear a black arm band "in mourning" and to post a sign reading "Attitude" over her desk, hardly an indication that Thornton accepted Nixon and Washington's encouragement that she change her way of relating or responding to supervision.

Clearly Ms. Thornton had been essentially advised on numerous occasions that her comments on Feedback Sheets were not well received and were an indication to management that she was constantly challenging rather than accepting her supervisors' opinions of her performance. Further, Thornton was clearly warned that this conduct on her part, along with other conduct management found to evidence an unacceptable attitude, might result in her termination during her probationary year. Notwithstanding this warning, in August Thornton responded to essentially a one page performance review that concluded Thornton was at least "fully satisfactory" in her job performance with a three page document challenging and disputing numerous facts, figures and conclusions.^{38/}

Thus the record contains ample evidence that Ms. Thornton engaged in conduct not protected by the Statute and such conduct was sufficient to support Respondent's characterization of Ms. Thornton in the termination letter of September 7, 1989. Therefore, in view of the entire record in this case and applying the factors set forth in Letterkenny, supra, I conclude that while evidence exists that Ms. Thornton's employment was terminated in part because of conduct protected by the Statute, the preponderance of the evidence establishes that: (1) there was justification for Respondent's action apart from Ms. Thornton's protected

^{38/} Unlike employee comments to Feedback Sheets, no evidence was offered that the right to make comments regarding performance reviews was negotiated by the parties and accordingly I conclude that asserting a right to comment on performance reviews does not constitute conduct protected by the Statute.

activity;^{39/} and (2) Respondent would have terminated Ms. Thornton even if Respondent had not considered Ms. Thornton's protected activity in evaluating her for continued employment. Accordingly, under all the circumstances herein I recommend the Authority adopt the following:

ORDER

IT IS HEREBY ORDERED that the Complaint in Case No. 5-CA-90613 be, and hereby is, dismissed.

Issued, Washington, D.C., December 6, 1990.


SALVATORE J. ARRIGO
Administrative Law Judge

^{39/} While the standard set by the Authority uses the terminology "a legitimate justification for its action," I hesitate to say that "legitimate justification" existed since a part of Respondent's reason for terminating Ms. Thornton was hostility against her for having notified higher management of inappropriate supervisory reaction to the possible suicide call. "Legitimate justification" obviously refers to reasons not prohibited by the Statute.