FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

OALJ 13-04

DEPARTMENT OF THE ARMY HUMAN RESOURCE COMMAND ST. LOUIS, MISSOURI and DEPARTMENT OF THE ARMY INFORMATION SUPPORT ACTIVITY ST. LOUIS, MISSOURI RESPONDENTS AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 900 CHARGING PARTY	Case Nos. DE-CA-04-0219 DE-CA-04-0220

Michael Farley, Esq.
For the General Counsel

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For the Respondent

Kevin M. Grile, Esq.
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION ON REMAND

On September 28, 2009, the Authority remanded the instant matter to the undersigned, concluding that the 7116(a)(2) and (4) allegations of the complaint are not barred by the first sentence of section 7116(d) of the Statute and remanding the section 7116(a)(2)and (4) allegations for a decision on the merits. The Authority further found that the resolution of the (a)(2) and (4) allegations is germane to the resolution of the independent 7116(a)(1) allegation, and, consequently, deferred resolution of the Charging Party's

exception to the Judge's recommended dismissal of the independent (a)(1) allegation until adjudication of the merits of the (a)(2) and (4) allegations. *U.S. Dep't of the Army, Human Resources Command, St. Louis, Mo.*, 64 FLRA 140 (2009)(Member Beck dissenting in part).

The facts in these cases, as set out in the original recommended decision, are as follows:

STATEMENT OF THE FACTS

The Department of the Army, Human Resources Command-St. Louis, St. Louis, Missouri (Respondent HRC) and the Department of the Army, Information Support Activity-St. Louis, St. Louis, Missouri (Respondent ISA), are agencies under 5 U.S.C. § 7103(a)(3). Respondent ISA is a tenant organization of Respondent HRC and, as such, receives administrative support from Respondent HRC. (Tr. 76) Both Respondent HRC and Respondent ISA are physically located at the Federal Records Center Installation in St. Louis, Missouri. (Tr. 245) At all times relevant, Col. Debra Cook has been the commander of Respondent HRC and Lt. Col. Edwin Payne has been the Chief of Respondent ISA. (G.C. Exs. 1(e)-1(h); Tr. 242, 412) Pat York has been the Human Resources Management Specialist at the Civilian Personnel Advisory Center. (Tr. 32)

The American Federation of Government Employees (AFGE), Local 900 (Charging Party or Union) is a labor organization under 5 U.S.C. §7103(a)(4) and is the exclusive representative of a unit of employees appropriate for collective bargaining at Respondents' facility and represents employees from both Respondent HRC and Respondent ISA. (G.C. Ex. 1(e), 1(f), ¶¶ 4-5) A collective bargaining agreement (CBA) between the parties has an effective date of September 1993 and is currently in effect. (G.C. Ex. 2; Tr. 78-79)

At all relevant times, Rayburn Wilkins has been a Computer Operator at the Information Operations Branch in Respondents' facility and an employee under 5 U.S.C. § 7103(a)(2). Wilkins has been a member and the Chief Steward of the Union. (G.C. Ex. 1(e), ¶¶ 14-15, 1(g) ¶ 14; Tr. 82, 84) Wilkins has engaged in protected activity under the Statute, including filing and processing grievances on behalf of bargaining unit employees, and filing unfair labor practice charges. (G.C. Ex. 1(e), ¶ 15, 1(g), ¶ 15; Tr. 82, 85)

At all relevant times, James Shepherd has been a Lead Mail Clerk in the Mail Operations Section at Respondent ISA's facility and an employee under 5 U.S.C. § 7103(a)(2). Shepherd has been a member and the President of the Union. (G.C. Ex. 1(f), ¶ 14-15, 1(h), ¶ 14; Tr. 169-70) Shepherd has engaged in protected activity under the Statute, including filing and processing grievances on behalf of bargaining unit employees and filing unfair labor practice charges. (G.C. Ex. 1(f), ¶ 15, 1(h), ¶ 15; Tr. 172-87)

On February 24, 2004[1], Lt. Col. Payne issued to Wilkins a Notice of Proposed Removal, which charged that he fraudulently received pay for work on eleven occasions, failed to request leave properly on eleven occasions, was AWOL on eleven occasions, falsified his union representative time sheet on eight occasions, and lied during the investigation. (G.C. Ex. 4) On February 24, Lt. Col. Payne issued to Shepherd a Notice of Proposed Removal, which charged that he fraudulently obtained entitlements on three occasions, failed to request leave properly on thirty-four occasions, was AWOL on thirty-seven occasions, falsified his union representative time sheet on twenty-five occasions, and lied during an investigation. (G.C. Ex. 7) The Notices of Proposed Removal for both Wilkins and Shepherd contained the following paragraphs:

> During the advance notice period for this proposed action, you will be in a paid duty status. However, since Management must take precautionary measures to protect government property and provide for the safety of personnel, and you have displayed volatile behavior in the past, during the advance notice period of this proposed action, your access to organizations and personnel within this facility must be restricted. Your "Access Identification Badge" will be confiscated and you will only be permitted to travel to and from the Union Office (Building 100, Room 4108a) where you will be able to conduct activities associated with the position of AFGE Local 900 Chief Steward [or President] within the confines of that location.
>
> Your access to the facility will be in an "Escort Required" status with escorts assigned to you by the Command. To facilitate the use of escorts during the advance notice period, your tour of duty is changed to a fixed tour Monday through Friday with duty hours set at 7:30 a.m. through 4:00 p.m. and a 30-minute non-duty lunch from 11:30 a.m. to 12.00 p.m. You are barred from the premises outside the above-stated hours and on holidays and weekends. In addition to allowing you access to the Union Office, with proper escort as described above, you will be permitted to utilize the bathroom facilities located at the west end of the 4th floor, Building 100. If you are found to be in noncompliance with the escort requirement, the Federal Protective Service will be contacted, and may result in issuance of U.S. District Court Violation Notice to you.

(G.C. Exs. 4 & 7)

After receiving the Notices of Proposed Removal, both Wilkins and Shepherd were escorted out of the building and had their line badges confiscated. (Tr. 107, 248) After that day, both Wilkins and Shepherd required a military escort once inside the facility. (Tr. 110-12) These escorts were taken from a duty roster administered by Headquarters and

[1] All dates are in 2004, unless otherwise specified.

Headquarters Company (HHC). (Tr. 539) Wilkins and Shepherd were required to work 7:30 a.m. to 4:00 p.m., Monday through Friday, during the notice period. (Tr. 192) They were allowed access to the facility only on those hours and days, and not on weekends or holidays. Wilkins and Shepherd were ordered to report to the Union office each day during the proposed notice period, and both employees complied with this order. (Tr. 115) Further, each employee was assigned a military escort who would accompany them while they were at the facility. Each morning, at the start of the work day, Wilkins and Shepherd would arrive at the guard's desk at the main entrance to the facility and would wait for a military escort to meet them. The military escorts, who were dressed in battle fatigues, would meet them at the guard's desk and would escort them to the Union's office. Initially, and for about two weeks, the two military escorts stationed themselves inside the Union office. After two weeks, the military escorts stationed themselves immediately outside the only door to the Union office. The military escorts would accompany Wilkins and Shepherd at all times, even to the bathroom. (Tr. 109-10, 112, 115, 192-95) The military escorts were observed by bargaining unit employees throughout the notice period. Employees who wished to visit the Union office were obliged to pass by the military escorts stationed at the Union office door. (Tr. 226-27)

According to Lt. Col. Payne's order, Shepherd was only granted access to the Union office and nearby bathroom facilities. He did not deviate from these conditions, except for being escorted to one EEO hearing during the notice period. (Tr. 219-21) On a few occasions, Wilkins, as a Union representative, was directed by management representatives to report to other locations within the facility, where he was accompanied by the military escort. (Tr. 141-42)

The Union filed unfair labor practice charges on behalf of Wilkins and Shepherd on February 26, 2004. (G.C. Exs. 1(a) & 1(b)) Wilkins and Shepherd each provided a written response to his proposed removal on April 12. (R. Exs. 1, 2, 8 & 9) Albert Blanchard, the deciding official, informed Wilkins and Shepherd on June 4 that he was removing each of them from federal service. (G.C. Exs. 5 & 8) On June 17, Wilkins and Shepherd each filed an expedited grievance (R. Exs. 8 & 9) under Article XXVIII of the parties' CBA. (G.C. Ex. 2, pp. 77-78)

On August 2, Col. Marshall Fite denied Shepherd's grievance and informed him that he would be removed from federal service. (G.C. Ex. 9) On August 5, the Union elevated the "adverse action of Union Officers" to arbitration. (R. Ex. 10) On August 31, Col. Fite denied Wilkins' grievance and informed him that he would be removed from federal service. (G.C. Ex. 6) Shepherd was removed from federal service, effective September 7. Wilkins was removed from federal service effective September 9. On the effective dates of removal, Respondents suspended the use of military escorts, although both Wilkins and Shepherd still required civilian escorts when inside Respondents' facility. (Tr. 202, 256) On September 13, the Union elevated the removal of Wilkins to arbitration. (R. Ex. 11) On

September 24, the Union and the Respondents stipulated that both removal actions would be heard before the same arbitrator. (R. Ex. 12)[2]

SECTION 7116(a)(2) and (4) ALLEGATIONS

Positions of the Parties

The General Counsel

The General Counsel (GC) asserts that the Respondents labeled Ray Wilkins and James Shepherd as security risks and subjected them to extraordinary restrictions and conditions during the notice period of their proposed removals based on consideration of their protected activity, thereby violating section 7116(a)(1)(2) and (4) of the Statute.

The GC relies on two theories of a violation, asserting that although distinct, the theories are compatible with each other and violations of law may be found based on either or both theories.

The first theory maintains that the Respondents violated section 7116(a)(1)(2) and (4) based on Respondents concluding that Wilkins and Shepherd were security risks. This initial determination that they were security risks logically dictated the subsequent imposition of special security measures on Wilkins and Shepherd. The GC maintains that they were not

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[2] The arbitration on the removals of Wilkins and Shepherd were heard before Arbitrator George L. Fitzsimmons on December 14-17, 2004. The Arbitrator issued two decisions on March 14, 2005. The Arbitrator sustained the grievances in part and overruled in part. The Arbitrator found that the agency proved that the first grievant failed to request leave properly and was AWOL on eleven occasions. The grievance was sustained in that the agency failed to prove by a preponderance of the evidence that the grievant was guilty of falsifying union time sheets, fraudulently received pay for work and lied during an investigation. The removal of the grievant was set aside and ordered expunged from the grievant's personnel file. Reinstatement was subject to a suspension without pay of thirty work days. With regard to the second grievant, the Arbitrator ruled that the agency proved charges that the grievant was guilty of lying during an investigation. The grievance was sustained in that the agency failed to prove by a preponderance of the evidence that the grievant was guilty of falsifying union time sheets, fraudulently received pay for work, and failed to request leave properly and was absent without leave. The removal of the grievant was set aside and ordered expunged from the grievant's personnel file. Reinstatement was subject to a suspension of fifteen work days. The Arbitrator also ordered the agency to immediately terminate the military escort and confinement policy. In the body of the decision, the Arbitrator found that the Union failed to prove by a preponderance of the evidence its affirmative defenses of harmful error, racial discrimination, and reprisal for lawful Union activities. *2005 WL 1121947 and 2005 WL 1121948.*

security risks, that Respondents' rationale for imposing the special restrictions and conditions was therefore a pretext and that the Respondents were actually seeking to retaliate against them for their pursuit of protected activity.

The second theory of a violation is based on the premise that Wilkins and Shepherd are deemed to be security risks and that the Respondents could legitimately impose some sort of special security measures. Under these circumstances, a violation would be established based on Respondents discriminating against Wilkins and Shepherd due to their protected activity, even as security risks. A violation of law would be found because the evidence establishes a direct connection between Respondents' decision to subject Wilkins and Shepherd to extraordinary restrictions and conditions during the notice period of their proposed removals (even as security risks), and their status as Union official and general pursuit of representational activity. This theory of a violation, in effect a *per se* violation, is based on undisputed facts and does not require a close analysis or detailed inventory of Wilkins' and Shepherds' protected activity.

With regard to its primary theory, citing to the analytical framework set forth in *Letterkenny Army Depot*, 35 FLRA 113 (1990)(*Letterkenny*), the GC first argues that the evidence established that Ray Wilkins and James Shepherd were engaged in protected activity and that both men had histories as aggressive Union representatives with a penchant for pursuing a high volume of grievances, arbitrations and unfair labor practice charges, and with a particular inclination to go over local management's head and seek out higher-level authorities to correct local management's actions. The GC then addresses whether their protected activity was a motivating factor from the extraordinary security measures imposed on the two men. The GC asserts that the Respondents' claim that Wilkins and Shepherd were security risks is a pretext which Respondents have used to try to justify the security measures. In fact, however, they were not genuine security risks, as demonstrated by the fact that they were not judged by the same standards as other similarly situated employees. *See, HUD, Pa. State Office, Philadelphia, Pa.*, 53 FLRA 1635 (1998)(Authority approves decision in which ALJ found the agency's submitted reasons and justifications for its actions were pretextual, and thus it had an unlawful reason for its conduct.) The GC states that this case stands for the principle that where an agency's stated reasons for taking an alleged discriminatory action proves to be a pretext, a decision-maker may conclude that the real reason for the agency's action is discriminatory and illegal.

The GC points out that the notices of proposed removal of both Wilkins and Shepherd stated, in part:

> [S]ince Management must take precautionary measures to protect government property and provide for the safety of personnel, and you have displayed volatile behavior in the past, during the advance notice period of this proposed action, your access to organizations and personnel within this facility must be restricted.

(G.C. Exs. 4 & 7)

However, the GC argues that neither Wilkins nor Shepherd had engaged in "volatile behavior". Col. Cook testified that she had grown concerned after she reviewed evidence from a DCIS investigative file concerning Wilkins and Shepherd, and requested a written security assessment by the Chief of the HRC Security Office. (Tr. 249) Thompson's two assessments, dated November 13, 2003, were the first such assessments to ever be requested by management or prepared by the HRC Security Office.

In his assessment, Thompson identified two incidents of violent and disruptive behavior by Wilkins. The first was a physical assault with a fellow employee in 1987 some seventeen years earlier. The second was an allegedly disruptive exchange involving LTC Michael Kaufman in March 2001, in which Wilkins was engaged in Union representational activity at the time. Management never took any disciplinary action against Wilkins in either of these incidents.

In his assessment of Shepherd, Thompson identified three incidents of alleged violent and disruptive behavior. The first incident described an alleged physical assault with a fellow employee, but no specific evidence was produced at the hearing regarding this incident and the GC asserts that it should be disregarded. The second incident concerned an exchange with LTC Kaufman in March 2001 (the same incident mentioned above with Wilkins), which involved Shepherd as a Union representative. The third incident occurred in May 2003 and involved an exchange between Shepherd and a manager named Kathy Caylor. This exchange also involved Shepherd in his capacity as a Union representative. Further, no action was taken against Shepherd for any of these incidents.

Thompson testified that he did not consider the above incidents important and that the primary reason for recommending that special restrictions be placed on Wilkins and Shepherd was the alleged misconduct described in the notices of proposed removal. Similarly, Col. Cook testified that it was "honesty and integrity" issues rather than past "volatile behavior" that concerned her and she did not view either employee as violent. (Tr. 287)

Therefore, the GC asserts that the Respondents abandoned the position that "volatile behavior" was the reason for imposing the special security measures on Wilkins and Shepherd. Rather, it appears that the special security measures were imposed based primarily on the allegations against them contained in the notices of proposed removal. These allegations were primarily several alleged acts of AWOL. The GC asserts that the blatantly disparate treatment of Wilkins and Shepherd, when compared to similarly situated employees, is a primary proof that Respondents' stated reasons for labeling Wilkins and Shepherd as security risks and imposing special security measures is a pretext. Prior to imposing the special security restrictions on Wilkins and Shepherd, the Respondents had never labeled any other employee as a "security risk" or subjected any other employee to special security restrictions based on charges similar to those against Wilkins and Shepherd. Typically, employees have been permitted to go about their business as usual during their

proposed removal period, with no security measures being imposed. Of the remaining cases, in three, management detailed employees to a different position during the notice period with no security measures.

The GC further argues that the record evidence shows two employees who were perceived as security risks. Ronnie Franklin received a notice of proposed removal in May 1991, for alleged insubordination, discourtesy, creating a disturbance and making intimidating comments which resulted in creating a fearful environment. (Jt. Ex. 1(d)) During his notice period, Franklin was placed in a paid non-duty status (administrative leave). He was not permitted access to the facility unless he made special arrangements in advance.

The second security risk, Michael Steger, received a notice of proposed removal in August 2000, for allegedly circumventing electronic security measures, failure to comply with supervisor's instructions, and threatening his supervisor. (Jt. Ex. 1(qq)) During his notice period, he was placed in a paid non-duty status and barred from the premises. He was subsequently permitted access to the worksite, while accompanied by his Union representative, Roy Wilkins, as an escort, in order to meet with Union and management representatives.

The GC asserts that the charges against Wilkins and Shepherd were lesser in nature and were only harmless and non-violent offenses of being away from work on several occasions without properly requesting leave. Out of all the employees charged with AWOL and failure to request leave properly, only Wilkins and Shepherd were labeled as "security risks" and subjected to special security procedures. The GC asserts that this can only be because Wilkins and Shepherd were the only such employees who were active and aggressive Union representatives.

Assuming that Wilkins and Shepherd are deemed security risks and that the Respondents could legitimately impose some sort of special security measures, the Respondents still violated the Statute because they discriminated against them due to their Union activity, even as security risks. The evidence establishes a direct connection between Respondents' decision to subject Wilkins and Shepherd to extraordinary restrictions and conditions during the notice period of their proposed removals and their status as Union officials and their general pursuit of representational activity.

This action was triggered by its erroneous assumption that it had the authority to order them to report to the Union office during the notice period of their proposed removals. It was only because the Respondents required them to report to the Union office that restricting their movements and assigning them escorts became necessary. To accommodate the military escorts, it was necessary to impose the tour of duty from 7:30 a.m. to 4:00 p.m., thus forcing Shepherd to change his usual work schedule of 9:00 a.m. to 5:30 p.m.

The evidence clearly demonstrates that Wilkins and Shepherd were subjected to one-of-a-kind, unprecedented restrictions during their notice periods based solely on their status as Union officials and their history of representational activity. *See Dep't of the Army, Fort Riley, Kan.*, 26 FLRA 222 (1987).

Charging Party

The Charging Party argues that the Respondents' "military control" policy constituted discrimination against Wilkins and Shepherd on the basis of their protected activities in violation of section 7116(a)(1)(2) and (4) of the Statute. *See Letterkenny*, 35 FLRA at 118. The evidence reflects that both Wilkins and Shepherd engaged in protected activity and such activity was a motivating factor in the agency's treatment of them.

Further, the record evidence shows fifty notices of proposed removal at Respondent's facility from 1990 through the date of the hearing. In forty-five of these instances, no restrictions in access to agency premises or escorts while on agency premises were placed on the affected employees during the pendency of the proposed removals. (Tr. 46, 48) Of the remaining five, only two employees were barred from the premises during the entire duration of the proposed removal period. (Jt. Ex. 2) Of these two employees, one of these employees (Franklin) was allowed on the premises with a civilian escort. The other barred person (Steger), who was accused of threatening bodily harm to a supervisor, was allowed on the premises with Wilkins as his civilian escort and union representative. (Jt. Ex. 1(qq)) at 2-4; Tr. 62-63).

The Charging Party argues that only Wilkins and Shepherd were restricted to specific places on the agency premises (i.e. the union office and the men's bathroom). Shepherd lost his flexible schedule and was placed on a fixed schedule so that he could be under the control of the military escorts at all times. Such action was never taken against any person subject to a notice of proposed removal. In the Charging Party's view, the Respondent offered no real explanation for the reasons behind the restrictions. Any suggestions that they were not confined, must be rejected. The occasional special permission given to Wilkins to travel from the union office to the respondent's EEO office for representational purposes does not alter the fact that, for a period of several months, unit employees Wilkins and Shepherd were confined in the union office during working hours and under the control of the uniformed military personnel.

Respondents

The Respondents assert that the GC failed to establish a *prima facie* case of retaliation for the security measures imposed on Wilkins and Shepherd. *See Letterkenny*. The Respondents do not dispute that Wilkins and Shepherd engaged in protected activity prior to February 24, 2004. They deny however, that they were motivated by union animus in instituting the security measures. The Respondents asserts that the GC must do more than make a generalized showing and must prove union animus was the motivating factor behind

the Respondents actions. *U.S. Dep't of Commerce, NOAA, Nat'l Ocean Serv., Coast & Geodetic Survey, Aeronautical Charting Div., Wash., D.C.*, 54 FLRA 987, 108-09 (1998).

Neither Wilkins nor Shepherd were engaged in protected activity and were not in a protected status when each left the installation on numerous occasions. Although the Statute protects employees from discrimination because of the exercise of protected activities, the exercise of those rights does not cloak an individual with immunity from otherwise legitimate and justified management actions. *Dep't of the Navy, Portsmouth Naval Shipyard*, 7 FLRA 766 (1982)(An agency may take adverse steps against an employee for any valid reason apart from the employee's union activities.)

Respondents had overwhelming evidence of the employees' misconduct. This misconduct was the obvious motivation for their taking the security measures. The first time the Respondents contemplated security measures was upon receipt of the DCIS investigation. (Tr. 246, 355, 414, 416, 495) The security measures were contingent on, and invoked in, the Notices of Proposed Removal occasioned by the evidence in the DCIS report. (G.C. Ex. 4, pp.5-6; Tr. 246-52, 315, 354)

The Respondents argue that the GC failed to establish a *prima facie* case based on a theory of disparate treatment and failed to establish that any employee was "similarly situated". *See Pension Benefit Guar. Corp. v. FLRA*, 967 F.2d 658, 667 (D.C. Cir. 1992). The GC only referenced employees who were disciplined for simple AWOL charges*, i.e.* employees who were supposed to be at work but were not. (Jt. Ex. 1(hh)(ii)(kk)(oo)(rr)(ss)(uu). Only one of these incidents occurred while Payne was commander; none while Cook was commander. None of these employees were paid for the time that they were AWOL; none of them falsely claimed to be at the installation performing work for the agency or on official time for the union, and none lied to a federal criminal investigator.

The Respondents therefore argue that AWOL reflects on the dependability of an employee, while the falsification of documents and lying reflect on the trustworthiness of an employee. The fraudulent acts of Wilkins and Shepherd clearly differentiate their misconduct from these other employees.

Even if some employees were similarly situated, Wilkins and Shepherd were not subject to disparate treatment. The Respondent does not frequently bar people from the installation or order them to an alternate work area during the notice period. But the evidence reflects a clear trend to order employees to another work area or bar them if they engage in misconduct that indicates dishonesty and deceit. Franklin was barred for physically threatening a supervisor. Sublette was ordered to an alternate worksite for improperly touching some female employees. Other employees -- Johnson, Gallina, Steger, Page and Allen -- were all subject to extra security measures of some kind. Thus, the Respondents argue that Wilkins and Shepherd were treated consistently by providing an alternate work location but requiring escorts.

The Respondents assert that they took the security measures at issue in response to the egregious conduct of Wilkins and Shepherd. The Respondents took these security measures because of their legitimate security requirements and their need to balance these rights with the rights of Wilkins and Shepherd and other bargaining unit employees.

DISCUSSION AND CONCLUSIONS

In *Letterkenny*, the Authority established the analytical framework for reviewing allegations of discrimination under § 7116(a)(2) of the Statute. Under that framework, the General Counsel has the burden to establish by a preponderance of the evidence 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 connection with hiring, tenure, promotion, or other conditions of employment. 35 FLRA at 118. Whether the General Counsel has established a *prima facie* case is determined by considering the evidence on the record as a whole, not just the evidence presented by the General Counsel. *Dep't of the Air Force, AFMC, WRALC, Robins AFB, Ga.*, 55 FLRA 1201, 1205 (2000). The timing of a management action is a significant factor in determining whether the General Counsel has established a *prima facie* case of discrimination. *VA Med. Ctr., Leavenworth, Kan.*, 60 FLRA 315, 319 (2004); *U.S. Dep't of the Navy, NAD, Naval Air Station Alameda, Alameda, Cal.*, 38 FLRA 567, 568 (1990); *Dep't of the Air Force, Ogden Air Logistics Ctr., Hill AFB, Utah*, 35 FLRA 891, 900 (1990).

In this matter, the evidence is not disputed that Wilkins, Union President, and Shepherd, Union Chief Steward, both engaged in significant protected activity for a number of years. Such activity included representing bargaining unit employees, filing and processing grievances including arbitration, as well as filing and assisting in the processing of unfair labor practice cases before the Authority. Wilkins and Shepherd provided the central leadership for the Union. Prior to their termination, Wilkins and Shepherd both used a substantial amount of official time, although neither employee used 100% official time. (Tr. 84-85; 171-72)

During the two or three years prior to their terminations, the Union had been responsible for the pursuit of approximately 100 grievances each year. As President, Shepherd reviewed all grievances and complaints that were issued on behalf of the Union and Wilkins was personally responsible for filing approximately 45% of those grievances. Approximately 80% of Wilkins' grievances were presented to the Commander's designee, the Deputy Commander, at the final step of the grievance process. During the past two or three years, the Union's grievance activity has resulted in approximately 10 grievance arbitrations per year and Wilkins has been the Union's representative at half of those arbitrations. Further, between October 1999 and May 2004, the Union filed over 250 unfair labor practice charges. Such charges were filed with Shepherd's approval and Wilkins was personally responsible for filing most of these charges. (Tr. 85, 86, 173, 185-86; G.C. Ex. 3)

The GC also presented evidence regarding specific activity during the two years preceding these events. They were both involved in the pursuit of a grievance on behalf of Cynthia Tate, a Union steward, over the denial of a promotion. In approximately June 2003, Shepherd sent a letter to Lt. General Helmly seeking an investigation of Col. Debra Cook, HRC Commander, in connection with the denial of Tate's promotion. The matter remained unresolved and the Union initiated a grievance in late 2003 and the arbitration was held in June 2004. Wilkins was the Union's representative. On August 4, 2004, the arbitrator issued a decision finding that HRC management had discriminated against Tate by denying her a promotion in retaliation for her pursuit of Union activity. The arbitrator ordered an upgrade and back pay for Tate. (Tr. 87, 175, 176-81)

Other specific examples of protected activity by Wilkins and Shepherd included the Union's response to management's treatment of disabled employees in the Personnel Record Inventory Service (PRIS) Directorate. Management's alleged denial of accommodations for disabled employees generated several grievances which were primarily directed at Kathy Caylor, a Division Chief within the PRIS Directorate. Following consideration of the grievances by the Deputy Commander, the grievances remained unresolved. During approximately September 2003, Wilkins and Shepherd contacted Congressman Clay in order to seek his intervention in the matter. During approximately November 2003, Shepherd requested a Congressional investigation into the treatment of disabled employees employed by HRC management. (Tr. 92, 93)

In late summer 2003, Shepherd and Col. Robert Marsh, then Deputy Commander for HRC, were engaged in a dispute over the implementation of a work-at-home policy. Col. Marsh was unwilling to accept the policy guidelines of a DOD policy issued by Ms. Throckmorton, a DOD civilian employee with superior authority over the HRC Commander. Shepherd sent correspondence to Throckmorton complaining about local management's resistance to the work-at-home policy. According to Shepherd, after that, Col. Marsh responded more favorably to the work-at-home policy in his dealings with the Union. (Tr. 181-82)

Although conceding the extensive protected activities of both employees, the Respondents assert that the GC failed to establish a prima facie case. The Respondents deny that they were motivated by union animus in instituting the security measures at issue; rather they were motivated to invoke the security measures because of the employees' misconduct.

Based on the record evidence, I do not find that the General Counsel has met the burden of establishing a prima facie case in this matter. Specifically, I find that the evidence fails to show that the security measures were introduced in retaliation for the employees' protected activity. Rather, in agreement with the Respondents, I find that the security measures were placed in effect as a result of the alleged misconduct of those employees.

While there is no question that both Wilkins and Shepherd engaged in numerous protected activities, there were no specific incidents raised by the General Counsel that established animus by the Respondents' officials that in turn resulted in the security measures. In that regard, while the Tate grievance was ongoing during the same time period (from the summer of 2003 through the summer of 2004), I do not find the naming of Col. Cook in the grievance to be sufficiently connected to the actions regarding the issues in this matter. Further, the evidence fails to reflect that Col. Cook was even aware of the June 2003 letter to Congressman Clay or that anything ever resulted from the Union's request. The Union's efforts concerning disabled employees and negotiations over the work-at-home policy, while part of their overall protected activities, are disconnected from the issues in this matter. Without more than what was presented, I find the General Counsel's arguments too speculative to impose an unlawful motivation on the Respondents' actions.

I do agree with the General Counsel that the Respondent abandoned its' position that Wilkins and Shepherd had engaged in "volatile behavior" in the past. There is no indication that the incidents raised by the investigative report and set forth in the notices of proposed termination were ever a serious consideration. Rather, as Col. Cook credibly testified, she was concerned with the security issues at the facility, but wanted to make sure that the employees had access to the building.

The evidence reflects that the Respondents' facility follows standard security practices which require employees to have line badges for access throughout the facility. As a result of their proposed terminations, both Wilkins and Shepherd had their badges removed and they were no longer entitled to free access to the facility. In order to access the facility, the standard security practices required that employees and visitors be escorted. Wilkins and Shepherd were placed on a specific shift and assigned military escorts.

Under these circumstances, in viewing the allegations against the employees in their notices of termination and the security requirements of the facility, I do not find that the Respondents' identifying these employees as security risks violated the Statute. The imposition of security protocols was consistent with the Respondents' procedures and as such, its conduct was not violative of the Statute.

Therefore, I conclude that the evidence fails to establish that the Respondents violated sections 7116(a)(1) (2) and (4) of the Statute and the complaint should be dismissed.

7116(a)(1) ISSUE

Whether the Respondents committed an independent violation of section 7116(a)(1) of the Statute by imposing the security measures on Wilkins and Shepherd during the notice period of their proposed removals.

POSITIONS OF THE PARTIES

General Counsel

The GC asserts that bargaining unit employees were well-aware of the Respondents' requirement that Wilkins and Shepherd be accompanied by military escorts at the worksite. One employee testified that she observed the military escorts and the presence of the guards caused her to hesitate before going to the Union's office to discuss a work-related problem. (Tr. 227) Management actions which cause employees to "think twice" before engaging in Union activity have been found to be violations of 5 U.S.C. § 7116(a)(1). *See Dep't of the Treasury, IRS, Louisville Dist.*, 11 FLRA 290, 298 (1983).

Further, at the outset of the notice period, for approximately two weeks, the guards stationed themselves inside the Union office. The General Counsel asserts that, even if the general assignment of military escorts to Wilkins and Shepherd is not found to be a violation, the fact that Respondents had military escorts stationed inside the Union office cannot be excused and demonstrates an egregious independent violation of 5 U.S.C. § 7116(a)(1). The presence of military guards within the sanctuary of the Union office would definitely create a severe chilling effect that would, and did, discourage reasonable employees in the pursuit of their protected right to seek the assistance of the Union.

Charging Party

The Charging Party asserts that the net effect of the military escort for Wilkins and Shepherd is that a reasonable unit employee will be chilled in the exercise of his or her section 7102 right to confer with an official of the exclusive representative. The military presence around the two Union officials unduly denigrates the status and importance of the Union and thereby interferes with unit employees' confidence in, and/or respect for, the exclusive representative. Similar interference with the rights of bargaining unit employees occurred when either Wilkins or Shepherd was physically located within the Union office, and the military personnel were stationed immediately outside the Union office. The Charging Party asserts that unit employees were reasonably chilled from entering the Union office and discussing a workplace matter. The testimony of unit employee Janet Cook to the effect that she experienced trepidation and embarrassment whenever she saw either Shepherd or Wilkins under escort through the halls or under guard at the Union office was a reasonable response by a unit employee observing the escorts in the halls and in front of the Union office. Ms. Cook's reactions to the implementation of this policy can be deemed typical of the reactions of a countless number of unit employees observing Shepherd and Wilkins under the control of uniformed military personnel. (Tr. 112-13)

Finally, the military control policy affected the rights of bargaining unit employees by limiting ready access of unit employees to Wilkins and Shepherd. Both Wilkins and Shepherd explained that representational duties include visiting worksites and meeting on-site with unit employees and supervisors in an attempt to solve problems. From the

perspective of unit employees, the ready access that they had to Wilkins and Shepherd was lost with the Respondents' decision to confine Wilkins and Shepherd to the Union office.

Respondents

The Respondents deny that the use of the military escorts was an independent violation of the Statute. There was never any intention to chill Union activity, but the use of the military escorts was intended to facilitate such activity. Further, there is no evidence that any unit employee actually experienced any chilling effect, noting that Ms. Cook was able to pursue her protected activity of filing a grievance with the assistance of the Union.

The Respondents assert that the General Counsel and the Charging Party have placed undue emphasis on the subjective perceptions of employees observing military escorts. The Respondents assert that this perception would have existed even if civilian employees had been used as escorts for Wilkins and Shepherd. Finding a violation in this matter would result that Union officials could never be subject to security measures; because employees may perceive that the official was only subject to those measures because he or she engaged in protected activity.

The Respondents assert that the correct application of this standard takes into account all of the circumstances of the matter, circumstances that Cook was not aware of and that Shepherd did not inform the employees of. (Tr. 232, 207) Under all of the circumstances, a reasonable employee would not conclude that Respondents were treating the Union as a dishonest organization, but that in light of their misconduct, Wilkins and Shepherd had engaged in dishonest conduct and were being treated accordingly. Therefore, there was no evidence that a reasonable employee would be intimidated or coerced by management's use of security restrictions from engaging in protected activity, and there was no independent violation of the Statute.

More importantly, the use of soldiers would not have a chilling effect on a reasonable employee. The civilian employees at HRC work with soldiers on a daily basis and it was not remarkable that the escorts were soldiers. (Tr. 211-12, 242-43) The soldiers did not challenge visitors, did not record visitors, and performed no law enforcement functions. (Tr. 231, 542) An unarmed soldier sitting in the hallway would not, under the circumstances, have a chilling effect on employees seeking to access the Union's office. Certainly, if a reasonable employee were to be informed that the soldier was only there because of the misconduct of Wilkins and Shepherd as employees, the soldier's presence would not have a chilling effect on that employee in exercising their protected rights. Therefore, there was no chilling effect and no violation of the Statute in the use of military members as escorts.

There was no evidence that the Respondents attempted to deter any employee from exercising his or her rights under the Statute by the use of the security measures. There is no evidence that a single employee was deterred from exercising his or her rights under the Statute by the use of the security measures. A reasonable employee, with knowledge of the

relevant facts, would not conclude that the security restrictions were used to retaliate against Wilkins and Shepherd for their protected activity, and would not be deterred in their own exercise of rights under the Statute.

DISCUSSION AND CONCLUSIONS

Section 7116(a)(1) of the Statute provides that it shall be an unfair labor practice for an agency to interfere with, restrain, or coerce any employee in the exercise of any right provided by the Statute. Consistent with the findings and purpose of Congress as set forth in section 7101, section 7102 of the Statute sets forth certain employee rights, including the right to form, join, or assist any labor organization freely and without fear of penalty or reprisal and that each employee shall be protected in the exercise of such right.

In *U.S. Dep't of Agric., U.S. Forest Serv., Frenchburg Job Corps*, *Mariba, Ky.*, 49 FLRA 1020, 1034 (1994), the Authority restated the objective standard for determining interference, restraint, and coercion with the pursuit of protected rights as " whether, under the circumstances, the statement or conduct would tend to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement." Although the surrounding circumstances are taken into consideration, the standard is not based on the subjective perceptions of the employee or the intent of the employer.

After receiving their proposed notices of termination, the Respondents followed their standard security practices and removed the line badges that allowed Wilkins and Shepherd access to the facility as employees. Following September 11, 2001, the Respondents had increased security, which included limiting access to the facility and requiring employees and visitors to enter through a single entrance. Without their badges, Wilkins and Shepherd did not have free access throughout the building, but were required to be escorted. Generally, civilian employees were used as escorts for other civilian employees, but the Respondents in this matter, designated rotating military escorts in order to maintain consistent coverage. The evidence clearly establishes that Wilkins and Shepherd were placed on a specific day shift and reported daily to the Union office, where they spent the majority of their day. Uniformed, unarmed military guards set up positions outside the Union office, except for the first two weeks, when they were inside the Union office. When asked to stand outside, the military guards did so.

The evidence further clearly shows that bargaining unit employees located at the Respondents' facilities were aware that the Union officers, Wilkins and Shepherd, had security guards outside the Union office and accompanying them whenever they left the Union office. The question, therefore, is whether this conduct, as directed by the Respondents during the notice period of the termination actions, would tend to coerce and intimidate bargaining unit employees.

It is undisputed that once the Union officials lost their security badges they no longer had free and unfettered access to the Respondents' premises. They were directed to remain at the Union office, with an escort any time they left that office and with the guards continuously present in case they needed to leave. Both the General Counsel and the Charging Party refer to the usual practice of civilian escorts, but neither addresses the logistical problems of civilian over military escorts. Col. Cook's testimony regarding the logistical issues of furnishing guards on a daily basis is unrefuted and compelling. I see no indication that the General Counsel and the Charging Party would have been satisfied with civilian escorts.

The issue of the Respondents' escort policy is clearly a security issue reserved to management under section 7106(a). Although the presence of the military escorts may have been disconcerting to unit employees, I do not find that their use in this instance interfered with statutory rights by creating a chilling effect on unit employees. I find no evidence that the two week period in which the military escorts were stationed inside the Union office had any more of an egregious impact. There is no evidence that unit employees were aware of their presence in the Union office, that employees were not able to seek the assistance of the Union, or that either Wilkins or Shepherd expressed any specific concern to the Respondents (other than the initial filing of the ULPs).

Under all these circumstances, noting particularly the Respondents' security concerns in this matter, the use of the military escorts on a continuous basis during the notice period did not have a chilling effect on bargaining unit employees. Bargaining unit employees work with the military on a regular basis, and the employees continued to seek Union assistance. I do not find that the use of the military escorts for the Union officers was a substantial departure from the use of civilian escorts and subjected unit employees to interference in their pursuit of protected rights. Therefore, I find that the use of the military escorts for Wilkins and Shepherd did not directly interfere with the rights of employees in the exercise of their rights under the Statute.

It is therefore recommended that the Authority adopt the following Order:

ORDER

It is ordered that the complaint be, and hereby, is dismissed.

Issued, Washington, D.C., November 30, 2012

SUSAN E. JELEN
Administrative Law Judge