

FEDERAL CORRECTIONAL INSTITUTION SAFFORD, ARIZONA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2313, AFL-CIO Charging Party	Case No. SF-CA-30498

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **MARCH 20, 1995**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

ELI NASH, Jr.
Administrative Law Judge

Dated: February 17, 1995

Washington, DC

MEMORANDUM

DATE: February 17, 1995

TO: The Federal Labor Relations Authority

FROM: ELI NASH, Jr.
Administrative Law Judge

SUBJECT: FEDERAL CORRECTIONAL INSTITUTION
SAFFORD, ARIZONA

Respondent

CA-30498

and

Case No. SF-

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2313, AFL-CIO

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

FEDERAL CORRECTIONAL INSTITUTION SAFFORD, ARIZONA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2313, AFL-CIO Charging Party	Case No. SF-CA-30498

Yolanda Shepherd Eckford, Esq.
For the General Counsel

Steven R. Simon, Esq.
For the Respondent

Before: ELI NASH, Jr.
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).

Pursuant to an unfair labor practice charge filed and amended by the captioned Charging Party (herein the Union) against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority, by the Regional Director for the San Francisco Regional Office, issued a Complaint and Notice of Hearing alleging that the Respondent violated section 7116(a)(1) and (2) of the Statute by terminating Dennis Nickel, a probationary employee, because he sought the Union's assistance in defending his involvement in a motor vehicle accident. The complaint further alleges that the Respondent violated section 7116(a)(1) of the Statute by separately questioning Nickel and his Union representative, Joan Prentice, concerning their meeting to discuss Nickel's involvement in the accident. Finally, the complaint alleges

that the Respondent violated section 7116(a)(1) of the Statute when one of its supervisors, Bill Peterson, stated in the presence of unit employees that if the Union had not gotten involved, Nickel would have kept his job. Respondent filed an answer denying that it had violated the Statute as alleged.

A hearing in this matter was conducted before the undersigned in Safford, Arizona. Respondent and the General Counsel of the FLRA were represented and afforded a full opportunity to be heard, to examine and cross examine witnesses, to introduce evidence and to argue orally. Briefs were filed by Respondent and the General Counsel and have been carefully considered.

Based upon the entire record in this matter, my observation of the witnesses and their demeanor, and my evaluation of the evidence, I make the following:

Findings of Fact

The Council of Prison Locals, American Federation of Government Employees, AFL-CIO (AFGE), is the exclusive representative of a nationwide bargaining unit within the U.S. Department of Justice, Federal Bureau of Prisons, which includes the employees at Respondent's facility in Safford, Arizona. The Union is AFGE's designated agent to represent the Respondent's unit employees. At all times material herein, Joan Prentice was employed by the Respondent as a correctional counselor and served as the Union's secretary. Dennis Nickel was hired by the Respondent as a corrections officer in February 1992, and was serving in that capacity as a probationary employee until his termination by the Respondent in August 1992. Nickel's termination and the circumstances surrounding it have given rise to the instant proceeding.

A. The Events of August 9

On August 9, 1992, Nickel was working the midnight to 8:00 a.m. shift. At approximately 5:00 a.m., he was called upon to conduct the "outside patrol," a task which required him to drive slowly around the perimeter of the Respondent's facility and observe the fence and adjacent areas to guard against escapes or break-ins. At around 7:30 a.m., Nickel "dozed off" while driving the patrol vehicle and struck a large white-painted boulder located about three feet off the paved roadway. The accident caused at least \$1,500 in property damage to the vehicle, exclusive of labor costs. At the time of the accident, conditions were sunny and dry.

Nickel contacted the shift supervisor, Lieutenant LaBordi, immediately after the accident. When LaBordi arrived at the accident site, he questioned Nickel concerning the cause of the accident. Nickel informed LaBordi that he had dozed off at the wheel briefly, veering into the boulder before he could bring the vehicle back onto the road. LaBordi ordered Nickel to proceed directly to the Captain's office and fill out an accident report.

When Nickel arrived at the Captain's office, he was approached by Union secretary Prentice, who asked him if he needed a Union representative. Nickel stated that he did. As Nickel and Prentice were proceeding to Prentice's office to discuss the accident and prepare a report, they encountered Lieutenant Brawley, who was just coming on duty as the shift supervisor for the 8:00 a.m. to 4:00 p.m. shift. Brawley asked whether Prentice was Nickel's Union representative, and she said that she was. Lieutenant LaBordi, who was preparing the Captain's private office for Nickel to use while preparing his accident report, was unaware that Nickel had left with Prentice for that purpose.

At Prentice's office, she questioned Nickel about how the accident had occurred and advised Nickel to be factual and truthful in his report. Nickel wrote out a memorandum in which he stated, ". . . I dropped my head and accidentally veered slightly to the right, hitting the second large boulder with the right bumper of the perimeter patrol vehicle." He gave the memo to Prentice, who typed what Nickel had written after correcting misspelled words and improper punctuation. Nickel and Prentice then returned to the Captain's office, where Nickel submitted his memorandum to Lieutenant LaBordi and was told to meet with Respondent's Safety Manager, Darryl Cash.

Cash questioned Nickel about the cause of the accident and received a full explanation. When Cash asked Nickel

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Lieutenant Brawley testified that he remembered seeing Prentice in the Captain's office checking her mailbox that afternoon, but did not recall seeing her in Nickel's presence or authorizing her to use official time. I credit Prentice's testimony that Brawley saw them together, but not that Brawley authorized Prentice to use official time. It is more plausible to me that Brawley, who had just come on duty, would inquire about Prentice's status as Union representative and assume from her positive response that she had received authorization from Lieutenant LaBordi, who was in charge of the prior shift when the accident occurred and was the first management official at the accident scene. It is undisputed that LaBordi never authorized Prentice to use official time to represent Nickel.

what he meant by the phrase, "I dropped my head," Nickel responded that he had dozed off for a second. Cash subsequently prepared and submitted a summary report to Warden Joe Silvey, the chief management official at the facility, in which Cash concluded that Nickel was culpable in the vehicle accident but also suggested that the boulder's proximity to the road may have contributed to the accident. Cash's report further noted that Prentice had been present as Nickel's Union representative during the accident interview.

B. Subsequent Events Leading to Nickel's Termination

When Nickel next reported to work on the midnight shift, he went to the Captain's office and asked Lieutenant LaBordi about the status of the Respondent's investigation into his accident.² According to Nickel, LaBordi curtly told Nickel that he would be all right if he would just tell the truth. Nickel detected a certain coolness in LaBordi's tone, and decided on that basis not to have a Union representative throughout the remainder of the inquiry into his accident.

On August 13, 1992, Nickel was ordered to report to Captain Gail Williams' office. When he arrived at Williams' office, Nickel was given a standard "Form B" which states, in part, that the employee has "a duty to reply to these questions and agency disciplinary action, including dismissal, may be undertaken if you refuse to answer or fail to reply fully and truthfully." Williams then questioned Nickel concerning his vehicle accident on August 9. He also questioned Nickel about Prentice's involvement in the preparation of Nickel's accident report on August 9. Specifically, Williams asked Nickel the following: "Who wrote the memo or who advised you what to say in the memo?" "Did you approach Ms. Prentice for advise (sic) or did she approach you?" "Did she advise you what to put in the memo?" Nickel responded that he alone wrote the memo; that

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LaBordi testified that he had no further conversations with Nickel after those on the day of the accident, in which he inquired about the cause of the accident and also tried to calm Nickel down by advising him to tell the truth and everything would be all right. I credit Nickel's testimony that there was a second conversation. In light of how concerned Nickel was about what might happen to him as a result of his accident, it is likely that Nickel would follow up with status inquiries as soon as he returned to work. Conversely, LaBordi would have no reason to remember the second brief conversation, particularly since there had been no change in the status of the accident investigation at that time.

Prentice had approached him; and that Prentice's advice was to be completely truthful. Nickel's responses to these questions and the others asked by Williams were set forth in an affidavit prepared by Williams, then reviewed and signed by Nickel. Williams forwarded the affidavit to Associate Warden Medellin as part of the investigation package, but did not include any recommendations and never discussed the matter with any other management official thereafter. Williams did acknowledge, however, that he was concerned about the truthfulness and completeness of Nickel's accident report, which is why he questioned Nickel about who prepared it and what Prentice's involvement had been.

A few days after being questioned by Williams, Nickel was ordered by Associate Warden Medellin to appear before a three-member Board of Survey, the purpose of which was to investigate the cause of Nickel's accident. The Board of Survey convened on August 18, 1992, and was chaired by Medellin.³ After questioning Nickel about the cause of the accident and eliciting Nickel's candid statement that he had dozed off at the wheel, the Board of Survey adjourned to prepare and forward to Warden Silvey its report that Nickel's dozing off caused the accident. The report contained no recommended disposition of the matter.

On August 19, 1992, Nickel received a Notice of Termination signed by Warden Silvey which stated that Nickel was being terminated from his correctional officer position because of his inattention to duty which caused substantial damage to government property during the vehicle accident on August 9. Warden Silvey testified without contradiction

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I discredit Nickel's testimony that he had a conversation with Medellin before the Board of Survey convened. Thus, Nickel claims that when he asked Medellin what would happen to him, Medellin responded that he would make a recommendation to Warden Silvey based on the information obtained in the Board of Survey. Medellin testified without contradiction, however, that the Board of Survey never makes recommendations to Warden Silvey, but merely forwards its factual report--the very procedure followed in this case. Additionally, Nickel claims Medellin told him that as long as he told the truth, everything would work out. However, the record indicates that Warden Silvey never discusses disciplinary matters with other managers or supervisors, and therefore Medellin would not have been in a position to assure Nickel concerning the outcome of the case. Finally, Medellin testified that he had no cause to believe that Nickel had previously failed to be fully truthful, even with regard to the accident report which gave Captain Williams such concern. Accordingly, there would have been no reason for Medellin to caution Nickel to tell the truth.

that he reached this decision on his own, without discussing the matter with anyone else, because he concluded that Nickel was completely responsible for the accident and property damage through his inattentiveness to duty, and because probationary employees who are not absolved of responsibility during the accident investigation must be terminated under the Bureau of Prisons' policy.⁴ Silvey further testified that Nickel's purported lack of truthfulness during the accident investigation played no part in his decision to terminate Nickel,⁵ and that Prentice's involvement as Nickel's Union representative similarly was not a factor in his decision.

C. Events Following Nickel's Termination

1. The Peterson statement

On August 22, 1992, three days after Nickel's termination, unit employee (and Union treasurer) Michael Gauthier attended a rodeo along with fellow unit employee Ross Abner and Abner's wife. Standing next to Gauthier at the rodeo were General Foreman Bill Peterson, one of the 22

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Two probationary employees who were involved in vehicle accidents during Warden Silvey's tenure received no discipline because the investigations revealed that both accidents were caused by malfunctioning equipment--in one instance, the vehicle itself, and in the other, a faulty rifle clamp which ejected the weapon across the driver's lap, causing the vehicle to lurch involuntarily. Two other employees who received suspensions and reprimands rather than being terminated as a result of their responsibility for property damage during vehicle accidents were nonprobationary employees and therefore not subject to the Bureau of Prisons' policy towards probationary employees.

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I credit Silvey's testimony that while complete honesty is extremely important in a correctional officer and therefore lack of truthfulness is a ground for termination, he did not view Nickel's statements during the accident investigation as untruthful, and did not know about Captain Williams' misgivings in that regard before terminating Nickel.

However, I do not credit Silvey's statement that another probationary employee, designated as "Employee B" in the record, was terminated for inattentiveness to duty and causing property damage, although the letter of termination issued to Employee B did mention those matters. Rather, I find that Employee B was terminated for lying to management about his knowledge of and responsibility for the vehicle accident which caused the property damage in question.

supervisors at the Respondent's facility,⁶ and another unit employee, Dan Fajardo. According to Gauthier's uncontroverted testimony,⁷ he heard Fajardo and Peterson discussing the training that Peterson had attended during the previous week. At one point in the conversation, Fajardo asked Peterson whether he had heard what happened to Nickel. When Peterson said that he hadn't, Fajardo told him that Nickel had been terminated and asked if Peterson knew why. Peterson replied, "Well, if the Union hadn't gotten

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In addition to being a supervisor, Peterson was the Duty Officer on August 9, 1992, the date of Nickel's accident. As the Duty Officer with responsibility for acting on behalf of management after hours, on weekends and holidays, one of Peterson's duties is to contact the warden when incidents occur during his watch.

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Although Peterson was still employed by the Respondent at the time of the hearing in this proceeding, he was not called as a witness.

involved and muddied [the] waters⁸ . . . he probably would have kept his job."⁹

Later that day, Gauthier repeated Peterson's comments to Abner, who had not overheard them at the rodeo because he was standing too far away from Peterson and Fajardo and because of his hearing disorder. Gauthier also told Union president Charles Ornelas about the conversation between Peterson and Fajardo. Ornelas instructed Gauthier to prepare a memorandum concerning the conversation, which Gauthier did.

2. The Prentice interviews

As previously found, Joan Prentice offered to serve as Nickel's Union representative on August 9, 1992, and Nickel accepted. While the parties are in dispute with regard to whether Prentice sought authorization from her supervisor to use official time to represent Nickel, I have found that she

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Jackie White, a Union steward, testified that she had a conversation with Captain Williams shortly before Nickel was terminated concerning Prentice's representation of Nickel in preparing the accident report, in which Williams stated that Prentice's involvement "muddied the waters." Williams testified that no such conversation with White ever took place. I credit Captain Williams' testimony, which was forthright and credible in all respects, even when at odds with his superior's views. For example, Williams testified that he had some concerns that Nickel was not being completely honest about whether he had fallen asleep at the wheel while on patrol, even though Warden Silvey testified that he had no such concerns in deciding to terminate Nickel.

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It is undisputed that Peterson had no involvement in Nickel's termination. He was at training away from the Respondent's facility during the accident investigation, and had heard nothing about Nickel's termination. At the time, Peterson was a first line supervisor whose only contact with the matter was that he happened to be the Duty Officer on the day of Nickel's accident. Warden Silvey, who made the decision to terminate Peterson, testified without contradiction that he never discussed Nickel's situation with Peterson. Similarly, Associate Warden Medellin and Captain Williams both testified that they had not discussed the Nickel case with Peterson. Finally, while Kenneth Hensen, the Respondent's Associate Warden of Operations, testified that Peterson--as the Duty Officer on the day of Nickel's accident--would have had an interest in the outcome of the case, he also stated that he had not discussed the matter with Peterson.

did not. There is no dispute, however, that Prentice did not submit the appropriate official time request form until August 31. On the day after she submitted the form, Prentice was called to a meeting with Associate Warden Hensen and advised to bring a Union representative. At the meeting, Hensen questioned Prentice about two matters: her representation of Nickel and her use of official time.

On the first matter, Hensen asked Prentice whether she had offered her services to Nickel or whether he had requested them. Prentice stated that she had taken the initiative. Hensen indicated that she ought to wait for an employee to request a Union representative rather than volunteer. Prentice forcefully disagreed with Hensen's position. Hensen then questioned Prentice about her involvement in the preparation of Nickel's accident report and what she had advised Nickel to do. Prentice replied that she had advised Nickel to tell the whole truth about his involvement in the accident, and that her only involvement in the preparation of Nickel's statement was that she corrected misspellings and punctuation errors before typing his report.

Hensen then turned to the second matter, which was the main reason for his summoning Prentice to the meeting. He stated that she had misused official time by failing to obtain authorization from her immediate supervisor as required by Article 11 of the parties' Master Agreement. Prentice disputed Hensen's assertions, claiming that she had received authorization from Lieutenant Brawley verbally on the afternoon of August 9 and that the submission of written request forms had not been the established practice.

The next day, Prentice received notice that Hensen had proposed a one-day suspension based on her failure to follow proper procedure for requesting official time. Prentice prepared a written response to the proposed suspension and had Union representative Jimmy Williams deliver it to Warden Silvey's office. Williams and Silvey then had a brief informal conversation in which Williams stated that he thought it was wrong to discipline Prentice for representing Nickel, and Silvey agreed but stated that his sole purpose was to get the Union to abide by the parties' Master Agreement. Silvey further indicated that if Prentice would agree to abide by the contractual procedures, he would drop the entire matter. Shortly thereafter, Silvey summoned Prentice to his office to discuss the matter. Prentice arrived at Silvey's office accompanied by Jimmy Williams and Union president Ornelas. A discussion ensued concerning the proper contractual procedure for requesting official time, and whether Prentice had followed that procedure in representing Nickel. At the conclusion of the meeting, the

Union promised to follow the contractual provisions for requesting and using official time, and Silvey indicated that he would drop the proposed one-day suspension against Prentice.¹⁰

Discussion and Conclusions of Law

The Authority's General Counsel contends that Respondent, the Federal Correctional Institution, Safford, Arizona, violated section 7116(a)(1) and (2) of the Statute by terminating Dennis Nickel. More specifically, the General Counsel contends that the Respondent terminated Nickel, a probationary employee, because he sought the Union's assistance in defending his involvement in a vehicle accident. Section 7116(a)(2) provides that it is an unfair labor practice for an agency to encourage or discourage membership in a union by discrimination in connection with hiring, tenure, promotion or other conditions of employment.

The parties do not dispute that the termination of a probationary employee for engaging in conduct protected by the Statute would violate section 7116(a)(2) of the Statute, and that the Authority has jurisdiction to so decide. See U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Detroit Teleservice Center, Detroit, Michigan, 42 FLRA 22, 23, 51-55 (1991). See also U.S. Department of Veterans Affairs Medical Center, Long Beach, California, 39 FLRA 1347, 1355 (1991); 410th Combat Support Group, K.I. Sawyer Air Force Base, Michigan, 45 FLRA 755 (1992). The central issue in this case is whether the record evidence supports the conclusion that Nickel was terminated for discriminatory reasons. I conclude that it does not.

In Letterkenny Army Depot, 35 FLRA 113 (1990), the Authority set forth its analytical framework for evaluating alleged violations of section 7116(a)(2) of the Statute. Under the Letterkenny approach, in determining whether the

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I find it unnecessary to determine whether Silvey destroyed the papers concerning the proposed suspension, or whether he retained them. No action was ever taken against Prentice for misuse of official time; no further misuse of official time occurred after Silvey's meeting with the three Union officials. Accordingly, both sides kept their commitments. I find that these mutual commitments were reached without reference to whether the Union would waive its right to file unfair labor practice charges over Hensen's or Silvey's actions and discussions concerning Prentice.

Respondent has violated section 7116(a)(2) of the Statute, the General Counsel must establish that the employee against whom the alleged discriminatory action was taken was engaged in protected activity and that consideration of such activity was a motivating factor in connection with hiring, tenure, promotion, or other conditions of employment. Id. at 118. If the General Counsel makes this required prima facie showing, the Respondent may seek to establish, by a preponderance of the evidence, that there was a legitimate justification for its action and that the same action would have been taken even in the absence of the consideration of protected activity. Id. If the General Counsel fails to make the required prima facie showing, the case ends without further inquiry. Id. See also U.S. Department of Treasury, Internal Revenue Service, Washington, D.C., 41 FLRA 1212, 1213-14 (1991).

The record reflects that probationary employee Nickel accepted Union secretary Prentice's spontaneous offer of Union representation while he prepared a report concerning the circumstances of his vehicle accident. The first question is whether Nickel was engaging in protected activity by accepting Prentice's offer of Union assistance under these circumstances. It is not at all clear to me that he was. Thus, although Nickel was preparing a factual account of how his accident occurred, as directed by management, and was thereby being examined in connection with Respondent's investigation of the accident,¹¹ he never requested Union representation but merely accepted it when offered. Moreover, the Respondent's procedures concerning the reporting and investigation of vehicle accidents requires the employee to notify his or her supervisor immediately, which Nickel did. Indeed, the record shows that when Nickel contacted the officer in charge, Lieutenant LaBordi, the latter came at once to the accident site and asked Nickel what caused the accident; Nickel candidly stated that he had dozed off at the wheel and struck the large white boulder with the Respondent's patrol vehicle. If Nickel had wanted to engage in protected activity, he could have requested Union representation before responding to LaBordi's questions. Instead, he simply answered those questions fully and voluntarily. Then he obeyed LaBordi's order to proceed directly to the Captain's office and prepare a written accident report. Under these circumstances, it is arguable that Nickel waived his right to Union representation by freely answering LaBordi's questions which began the "examination" process.

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See U.S. Immigration and Naturalization Service, U.S. Border Patrol, Del Rio, Texas, 46 FLRA 363, 371 (1992) and cases cited.

However, even if Nickel were engaging in protected activity by accepting Prentice's offer of Union representation, I conclude that the General Counsel has failed to establish that consideration of such activity was a motivating factor in the decision to terminate Nickel. Accordingly, I conclude that the General Counsel has not established a prima facie case under Letterkenny. Thus, the credited testimony establishes that Warden Silvey decided to terminate Nickel, without discussing the matter with any other management personnel, because the factual reports in his possession indicated that the substantial damage to government property caused by the accident was attributable to Nickel's inattention to duty. Although Silvey was well aware that Nickel had been represented by Union secretary Prentice in preparing his accident report, Silvey did not consider such Union involvement in deciding to terminate Nickel. Rather, having concluded that Nickel alone was responsible for the accident through his inattention to duty, Silvey applied established Bureau of Prisons policy which calls for the termination of probationary employees who are not exonerated on the basis of the agency's investigation into the cause(s) of an accident such as Nickel's.¹²

The General Counsel contends, however, that Nickel is the only probationary employee terminated for damage to government property caused by inattention to duty. Although this is technically true inasmuch as probationary "Employee B" was terminated for lying to investigators about his responsibility for a similar vehicle accident, all this shows is that the agency viewed Employee B's dishonesty to be so serious an infraction of the Standards of Conduct governing correctional officers that it alone warranted summary termination. It does not show that Employee B would have retained his job but for the dishonesty, despite Warden

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The General Counsel argues that Silvey's Union animus is demonstrated by his refusal to consider extenuating circumstances in Nickel's case, such as the proximity of the large painted boulder to the road, as noted by Safety Manager Cash in his report. However, Silvey testified credibly that he was well aware of where the boulder was located, and therefore did not need to consider the accident scene. He was also aware that, at the time of the accident, conditions were clear and dry, and daylight visibility was good; that no other employee had ever hit that boulder with a patrol vehicle; and that Cash had attributed the cause of Nickel's accident to the inattentiveness of the driver. Accordingly, Silvey's refusal to visit the accident scene or to consider mitigating factors (as he had in other instances where circumstances such as weather were involved) does not demonstrate any Union animus on his part.

Silvey's reference to the individual's inattention to duty in the letter of termination. As the other two probationers who had vehicle accidents were completely absolved of any culpability during the accident investigations, those cases fall within the undisputed Bureau of Prisons policy towards probationers enunciated by Warden Silvey.

The General Counsel further contends that other employees who were responsible for vehicle accidents through their inattention to duty received much more lenient discipline than Nickel, and therefore discrimination towards Nickel is shown by disparate treatment which can only be attributable to the Respondent's Union animus. While it is true that other employees received reprimands and suspensions rather than terminations for similar if less serious infractions than Nickel's, those employees were nonprobationary and therefore fell into a different category. It is well settled that probationary employees may be terminated "summarily" as long as such terminations are not based on unlawful discrimination. See Department of the Navy, Naval Weapons Station Concord, Concord, California, 33 FLRA 770 (1988), relying on United States Department of Justice, Immigration and Naturalization Service v. FLRA, 709 F.2d 724 (D.C. Cir. 1983). Since probationary employees are still within the period of examination in which management must determine their fitness for duty, they may be treated legitimately in a different manner than nonprobationary employees who have already demonstrated their fitness for duty during their own probationary periods and have thereby acquired substantially greater job protections than probationers enjoy. Accordingly, the General Counsel cannot establish unlawful discrimination solely by showing that dissimilar categories of employees have been treated differently.

The General Counsel further asserts that supervisor Peterson's statement to unit employees at the rodeo several days after Nickel's termination not only constitutes an independent unfair labor practice under section 7116(a)(1) of the Statute, but also demonstrates Respondent's Union animus. While I find that Peterson's statement that Nickel probably would have kept his job if the Union hadn't muddied the waters is an independent violation of section 7116(a)(1), as alleged, because it tends to chill unit employees in the exercise of their protected rights under section 7102 of

the Statute,¹³ I further conclude that Peterson's statement does not establish Respondent's Union animus. Thus, as found above, Peterson had no involvement in Nickel's termination. He neither discussed the matter with any other management representative, including Warden Silvey, nor made any recommendations concerning the appropriate disposition of the case. Indeed, Peterson was not even at the facility while Nickel's responsibility for the vehicle accident was being investigated, and therefore he had no idea what had happened to Nickel when employee Fajardo brought the issue up at the rodeo. Under these circumstances, Peterson's statement merely constituted an expression of his own opinion, and does not demonstrate Union animus by Warden Silvey and the Respondent.¹⁴

I further reject the General Counsel's contention that Union animus is shown by the "unlawful" interrogation of Nickel and Prentice during the accident investigation. In my view, such interrogations were justified under the circumstances and thus neither constituted evidence of Union animus nor an independent violation of section 7116(a)(1) as alleged.

The first of the allegedly unlawful interrogations occurred between Nickel and Captain Williams on August 13, 1992 as part of the accident investigation. Most of Captain Williams' questions sought Nickel's explanation concerning the cause of the accident, and are not alleged to be improper. Only three questions sought information about who had prepared the accident report signed and submitted by Nickel, and what advice Union representative Prentice had given Nickel on that occasion. The reason for these questions, as explained by Captain Williams, was that Williams had doubts that Nickel had been truthful and

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In my view, such a statement made directly to Fajardo, a unit employee, and overheard by Gauthier, another unit employee, who reported the matter to Union president Ornelas, would reasonably convey to Respondent's employees generally that they should not request or accept the Union's assistance on their behalf. Leaving such an impression violates section 7116(a)(1) of the Statute even if the statement is completely untrue. See Bureau of the Census, 41 FLRA 436, 448 (1991), reversed as to other matters sub nom. Department of Commerce, Bureau of the Census v. FLRA, 976 F.2d 882 (4th Cir. 1992); Department of the Air Force, Scott Air Force Base, Illinois, 34 FLRA 956, 962 (1990).

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As I have credited Captain Williams' testimony that he never discussed Nickel's situation with Union steward White, I give no weight to the latter's claim that Williams also used the expression that the Union had "muddied the waters" in representing Nickel.

factually complete in his accident report. Because complete honesty is an indispensable quality for a correctional officer, as reflected in the Standards of Conduct applicable to Nickel and the other unit employees, including Prentice, Captain Williams inquired into the preparation of the accident report. When Nickel assured Williams that he alone had prepared the report and that Prentice had advised him to be completely truthful in preparing it, Captain Williams dropped the matter. The affidavit of that interview accurately reflected Nickel's responses to all the questions asked, and was transmitted by Captain Williams without any reference to his concerns about any reference to Captain Williams' concerns about Nickel's honesty nor any recommended disposition of the matter.

The second interrogation occurred between Associate Warden Hensen and Union representative Prentice on September 1, 1992, almost two weeks after Nickel was terminated. The main purpose for that meeting was to determine whether Prentice had misused official time in representing Nickel because the applicable procedures in the parties' Master Agreement had not been followed. This was a legitimate management inquiry, and eventually led to a meeting between Warden Silvey and the Union in which the latter promised to follow the contractual procedures in requesting and obtaining authorization to use official time.¹⁵ Hensen's second purpose in meeting with Prentice was to ascertain whether she had written Nickel's accident report or advised him to withhold information. When Prentice replied that her only involvement was to edit and type the report prepared by Nickel, Hensen dropped the matter. Again, I find these inquiries to be a legitimate exercise of management's prerogatives.

The General Counsel asserts, however, that the unlawfulness of these interrogations is established by the Authority's decisions in U.S. Department of the Treasury, Customs Service, Washington, D.C., 38 FLRA 1300 (1991) and Long Beach Naval Shipyard, Long Beach, California, 44 FLRA 1021 (1992), as well as private sector precedent such as Cook Paint and Varnish Company, 258 NLRB 1230 (1981). In my

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I find that Warden Silvey's conduct during that meeting with the Union demonstrates his lack of animus towards the Union. Thus, Silvey's meeting with Union president Ornelas, Prentice and Union representative Jimmy Williams not only was amicable but resulted in Silvey's decision to cancel Hensen's proposed one-day suspension of Prentice for her failure to follow the contractual procedures governing official time requests. Silvey's informal discussion with Jimmy Williams earlier that day similarly shows the Respondent's good faith in dealing with the Union.

judgment, these cases are all distinguishable. Thus, in Customs Service and Long Beach Naval Shipyard, the Authority found that management violated section 7116(a)(1) of the Statute by requiring a union representative to disclose, under threat of disciplinary action, the content or substance of statements made by an employee to the union representative in the course of representing the employee in a disciplinary proceeding. The Authority found that, under the Statute, an employee must be free to make full and frank disclosure to his or her union representative in order to obtain adequate advice and a proper defense. Accordingly, the Authority concluded that such communications constituted protected activity and that any interference with such protected activity violated the Statute unless the right to maintain the confidentiality of the conversations had been waived or some overriding need for the information was established. The Authority further concluded, based on the record in those cases, that there had been no waiver of protected rights because the union representatives in both instances had objected and refused to disclose the information which had come into their possession solely as a result of their being union representatives for the employees who made the disclosures to them. Only under threat of discipline did the union representatives disclose the confidential information being sought. Similarly, the Authority concluded that the respondent agencies had failed to establish an overriding need for the information requested.

In this case, by contrast, the interrogations of Nickel and Prentice did not seek the disclosure of confidential information which Nickel imparted to Prentice as a result of her representing Nickel in a disciplinary proceeding. In fact, the focus of management's inquiries was on what Prentice did as Nickel's representative and what Nickel did in connection with the accident report he submitted to Lieutenant LaBordi on the afternoon of August 9, 1992. Moreover, there was no disciplinary proceeding in progress at the time that Prentice represented Nickel, but merely an accident investigation. Further, there were no threats made to either Nickel or Prentice in order to obtain

disclosure.¹⁶ Both employees voluntarily provided whatever information was being sought, and never voiced any objections to doing so. Finally, I find that management had an overriding need for the information it was seeking, because both Captain Williams and Associate Warden Hensen had concerns about the completeness and truthfulness of Nickel's accident report and had a right to satisfy themselves that Nickel rather than Prentice prepared the report and that Prentice at no time advised Nickel to be less than completely honest in setting forth the circumstances of the vehicle accident. As previously noted, the Standards of Conduct applicable to both Nickel and Prentice required complete honesty from correctional officers, and it is undisputed that lack of candor cannot be tolerated in a correctional facility environment.¹⁷

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Although both Nickel and Prentice were required to sign printed "Form B" statements acknowledging that they could be disciplined as a result of their interviews with management representatives which were about to take place, I find that the emphasis of that printed provision--one of seven paragraphs in a page-long document--was to admonish the employees to be truthful in the affidavits they were about to give. There was never an occasion during either interview when it became necessary for the interviewer to threaten a reluctant witness with discipline unless the interviewee disclosed the information sought.

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Cook Paint and Varnish is to the same effect. There, a management representative interviewed both the employee who had been terminated and his union representative in preparation for arbitration. The National Labor Relations Board ultimately concluded, in part based on a prior court decision in that case (Cook Paint and Varnish Company v. NLRB, 648 F.2d 712 (D.C. Cir. 1981)), that the interview of the employee grievant was not an unfair labor practice, but that the interview of the grievant's union representative was a violation. In so concluding, the NLRB carefully pointed out that not all interviews of union representatives constitute unfair labor practices. Rather, only those interviews which require the union representative to disclose, under threat of discipline, confidential information obtained from the grievant solely as a result of his or her performance of union representative functions are violative of the National Labor Relations Act. Cook Paint and Varnish, 258 NLRB at 1232. As those factors are not present here, Cook Paint and Varnish does not compel a finding that Respondent's interview of Prentice constitutes a violation of section 7116(a)(1). Nor does it demonstrate that Respondent was discriminatorily motivated in terminating Nickel.

The General Counsel makes several additional contentions which do not require much discussion. Thus, it is asserted that Lieutenant LaBordi's "curtness" towards Nickel on the day after the accident compared with LaBordi's supportive attitude on the day of his accident demonstrates that Respondent's termination of Nickel was discriminatorily motivated by Nickel's acceptance of Union representation. However, Nickel's perception of LaBordi's demeanor is totally subjective. The record contains no evidence that LaBordi ever did or said anything to suggest that Respondent's actions were discriminatorily motivated. In fact, LaBordi testified credibly that his supportive statements to Nickel on the day of the accident were intended to calm down an obviously "shaken up" employee. What Nickel perceived as "curtness" the following day might simply have been LaBordi's perception that Nickel had recovered his equilibrium to the point where special treatment was no longer required. In any event, as previously noted, LaBordi had absolutely nothing to do with Nickel's termination, and certainly could not guarantee that everything would be all right (i.e., no disciplinary action would be taken) if Nickel simply told the truth about the cause of his accident.¹⁸

Finally, it is asserted that Respondent's discriminatory motivation is demonstrated by its shifting reasons for Nickel's termination. While it may be evidence of discriminatory motive for management to change the asserted reasons for its actions in certain circumstances, I conclude that no such inference is justified in this case. Thus, it is undisputed that Warden Silvey alone made the decision to terminate Nickel, and that he neither discussed the matter with nor received recommendations from any other management official before taking that action. Warden Silvey never changed his reasons for terminating Nickel: it was always Nickel's inattention to duty and damage to government property. It is true that the Respondent's attorney in this case asserted to the Authority and subsequently sought to establish at the hearing in this matter that Nickel had been untruthful in reporting the vehicle accident. However, I attribute such action on his part to a misunderstanding of Warden Silvey's reasons for terminating Nickel caused by a lack of communication between

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Similarly, I have concluded that Associate Warden Medellin never assured Nickel just prior to the start of the Board of Survey inquiry into the cause(s) of Nickel's vehicle accident that everything would work out as long as Nickel told the truth. As previously noted, Medellin could not make such assurances to Nickel inasmuch as the Board of Survey never makes recommendations to the Warden concerning the proper disposition in any accident case.

the attorney and Silvey as well as to confusion resulting from the fact that both Captain Williams and Associate Warden Hensen had concerns about Nickel's veracity--concerns not shared with or by Silvey.

Therefore, based on all of the record evidence in this case and reasonable inferences drawn therefrom, I conclude that the General Counsel has failed to make a prima facie case that the Respondent terminated probationary employee Nickel at least in part because he sought Union representation in defending his involvement in a vehicle accident while on patrol duty. Accordingly, I find it unnecessary to consider whether the Respondent has established that it would have terminated Nickel for legitimate reasons even if he had not been represented by Union secretary Prentice during the preparation of Nickel's accident report on August 9, 1992. The complaint is dismissed to the extent it alleges that the Respondent violated section 7116(a)(1) and (2) of the Statute. The complaint also is dismissed to the extent it alleges that the interrogations of Nickel and Prentice violated section 7116(a)(1) of the Statute. However, I find that the Respondent violated section 7116(a)(1) of the Statute, as alleged, by supervisor Peterson's statement in the presence of unit employees that Nickel probably would have kept his job if the Union had not muddied the waters. To remedy the unfair labor practice found, I shall order the Respondent to cease and desist from such unlawful conduct and to post appropriate notices (signed by Warden Silvey) to all employees at the Federal Correctional Institution, Safford, Arizona, as requested by the General Counsel.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Federal Correctional Institution, Safford, Arizona, shall:

1. Cease and desist from:

(a) Stating to unit employees that if the Union had not muddied the waters, probationary employee Dennis Nickel probably would have kept his job.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights assured them by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Post at its facilities in Safford, Arizona, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Warden and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the San Francisco Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, February 17, 1995, Washington, D.C.

ELI NASH, Jr.
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT state to unit employees that if the Union had not muddied the waters, probationary employee Dennis Nickel probably would have kept his job.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of rights assured them by the Federal Service Labor-Management Relations Statute.

(Activity)

Date:

By:

(Signature)

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, San Francisco Region, Federal Labor Relations Authority, whose address is: 901 Market Street, Suite 220, San Francisco, California 94103-1791, and whose telephone number is (415) 744-4000.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by ELI NASH, Jr., Administrative Law Judge, in Case No. SF-CA-30498, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

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Dated: February 17, 1995
Washington, DC