

FEDERAL EMERGENCY MANAGEMENT AGENCY Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 4060, AFL-CIO Charging Party	Cases Nos. WA-CA-30232 WA-CA-30356 WA-CA-30434 WA-CA-30581 WA-CA-30603

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 **APRIL 3, 1995**, and addressed to:

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

GARVIN LEE OLIVER
Administrative Law Judge

Dated: March 3, 1995

Washington, DC

MEMORANDUM

DATE: March 3, 1995

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: FEDERAL EMERGENCY MANAGEMENT AGENCY

Respondent

and

Case Nos. WA-CA-30232

WA-CA-30356

WA-CA-30434

WA-CA-30581

WA-CA-30603

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 4060, 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 EMERGENCY MANAGEMENT AGENCY Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 4060, AFL-CIO Charging Party	Case Nos. WA-CA-30232 WA-CA-30356 WA-CA-30434 WA-CA-30581 WA-CA-30603

Robert S. Brock
Eva S. Kleederman
Counsel for the Respondent

Daryl Adams
Christopher M. Feldenzer
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The five unfair labor practice complaints allege that during the period July 1, 1992 through March 30, 1993 Respondent took fourteen actions which interfered with the rights of Mr. Leo Bosner or discriminated against him in violation of section 7116(a)(1), (2), or (4) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, et seq. (the Statute). Respondent denied any violation of the Statute.

For the reasons set out below, a preponderance of the evidence does not support the allegations in Cases No. WA-CA-30232, WA-CA-30356, WA-CA-30581, and WA-CA-30603, and it is recommended that they be dismissed. A preponderance of the evidence supports the allegation in Case No. WA-CA-30434, that Respondent refused to reconsider Mr. Bosner's request for training because he had filed an unfair labor

practice charge, and remedial action is recommended in that case.

A hearing was held in Washington, D.C. The Respondent and the General Counsel were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs.

The General Counsel presented extensive documentary evidence and the testimony of two witnesses, Mr. Leo Bosner and Mr. Bosner's supervisor during the pertinent period, Ms. Lida Whitaker-Sheppard. Respondent also presented extensive documentary evidence, additional testimony from Ms. Whitaker-Sheppard, and testimony from Dennis R. DeWalt, John Wolz, Donald McIntyre, Robert Shea, Earline Williams, and Christopher Clifford. Based on my observation of the witnesses and their demeanor, consideration of the extensive arguments in the briefs bearing on the credibility of witnesses, and the complete record, I have credited major portions of the testimony of Respondent's witnesses in making the following findings of fact. Based on the entire record, I make the following findings of fact, conclusions of law, and recommendations.

Case No. WA-CA-30232

A. General¹

The Federal Emergency Management Agency (Respondent or FEMA) is an agency under 5 U.S.C. § 7103(a)(4). Since February 21, 1992, the American Federation of Government Employees, AFL-CIO (AFGE) has been the certified exclusive representative of an appropriate bargaining unit of Respondent's employees. Since March 31, 1992, AFGE, Local 4060, AFL-CIO (Local 4060 or Union) has been recognized as an agent of AFGE and represents certain unit employees of Respondent, including unit employees at Respondent's headquarters in Washington, D.C. No collective bargaining agreement has existed between Respondent and the Union during the relevant period.

Leo V. Bosner has been an Emergency Management Specialist with the Respondent since 1979. He has engaged in numerous representational activities protected under the Statute.

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Where the findings or legal principles discussed relate to more than one of these consolidated cases, they have been appropriately considered in each instance, but generally not repeated.

In the fall of 1991, Mr. Bosner was involved in organizing a union at Respondent's headquarters. Following the election and certification of AFGE, he became Acting President of Local 4060 in February 1992. As such, he requested to bargain with Respondent on numerous matters in early 1992 and was involved in an unfair labor practice proceeding with the Agency concerning whether he was a duly authorized representative of the exclusive representative. See Federal Emergency Management Agency, Headquarters, Washington, D.C., 49 FLRA 1189 (1994).

On May 22, 1992, Mr. Bosner testified before the Senate Appropriations Committee regarding Respondent's budget. He was critical of Agency management. He also wrote letters to Congress concerning individual employee problems and complained of management problems and low employee morale.

Mr. Bosner gave several interviews to the media in September 1992 concerning the Agency's response to Hurricane Andrew. In late 1992, he wrote to Respondent and also gave media interviews criticizing reported Agency plans for a reorganization during the period of the transition to a new administration. On March 18, 1993, Mr. Bosner, as Union head, was quoted in an article in USA Today referring to "entrenched morale problems" in FEMA.

Mr. Bosner served as Acting President of the Union until January 1993 and as President from January 1993 to June 1993.

B. Alleged Violations

1. On July 1, 1992, Respondent, by Whitaker-Sheppard and MacIntyre, directed Bosner to account for his time on that date. Respondent violated section 7116(a)(1) and (2) of the Statute by taking the action because Bosner engaged in activities protected under the Statute. (Paragraphs 10, 17, 18 of Complaint).

(a) Findings of Fact

On July 1, 1992, Respondent, by Ms. Lida Whitaker-Sheppard (Mr. Bosner's supervisor and Chief, Facilities and Equipment Branch), and Mr. Donald MacIntyre (Labor Relations Officer), directed Mr. Bosner to account for his time on that date. Both Whitaker-Sheppard and MacIntyre had been advised by a supervisor that Bosner had been engaged in apparent Union business on two occasions outside his own work area that morning. When first asked about this allegation by Whitaker-Sheppard and whether he had been performing his official duties, Bosner refused to answer. Bosner continued to refuse to answer these inquiries when questioned a second time by Whitaker-Sheppard and MacIntyre. Mr. Bosner declined the

offer of a recess to obtain a Union representative and insisted that he was not going to answer the questions because he did not want to incriminate himself.

Mr. Bosner did not inform Ms. Sheppard and Mr. MacIntyre that he had conducted the alleged Union activities while on a coffee break or his lunch period. Ms. Whitaker-Sheppard expected employees to take their lunch time around mid-day. If they desired to take the lunch period either earlier or later, the policy was they were to let her know so their absences would not be questioned. Ms. Whitaker-Sheppard had no reason to assume that Mr. Bosner was taking a lunch break at 10:30 a.m. on the day in question. It is also Agency policy that a coffee break and a lunch break cannot be combined.

Later that day, Whitaker-Sheppard sent Mr. Bosner an E-mail message requesting that he give an accounting of his time during his duty hours that morning. Mr. Bosner replied on July 6, 1992, listing his work activities with the times and stating that between 10:30 a.m. and 11:30 a.m. he took his lunch break.

The record reflects the circumstances which prompted the request that Mr. Bosner give an accounting of his time. On July 1, 1992, at about 10:20 a.m., Mr. Bosner stopped by the office of Richard Buck, the Union's Acting Vice-President and an employee of Respondent's Office of Financial Management, to pick up a letter from Mr. MacIntyre. Mr. MacIntyre had been requested by Mr. Bosner to send notices in care of Buck during this period. Buck's office was on another floor and outside Mr. Bosner's work area.

Bosner sat by Mr. Buck's desk and the two talked for two or three minutes about the letter or other Union business. Buck's second-level supervisor, John Wolz, overheard part of the conversation. Having been informed that employees could not engage in Union business during regular working hours except with advance approval, and believing that the conversation was not work related, Mr. Wolz interrupted the employees' conversation and asked Mr. Bosner whether he was conducting official business. Mr. Bosner did not reply, but Mr. Buck, when asked, responded, "No." Wolz then asked Bosner to leave. After asking for Wolz's name, Bosner left Buck's office immediately.

Between 10:30 a.m. and 10:40 a.m., Mr. Wolz advised Mr. MacIntyre and Ms. Whitaker-Sheppard that Mr. Bosner had been meeting with Mr. Buck on Union business.

In the meantime, Bosner went downstairs to secure coffee from the delicatessen. Upon returning to his office, Bosner typed a letter on his office computer to MacIntyre complaining of his treatment by Mr. Wolz and asking for an apology. Bosner delivered the letter and copies, printed on Union stationery, to the offices of MacIntyre, Wolz, and Buck at about 11:15 a.m.

Mr. Bosner testified that the activity in the offices of Mr. Wolz and Mr. Buck took place as he was beginning his coffee break and that writing and delivering the letters took place during his lunch break. He testified that Respondent's work atmosphere is generally casual, and it is not uncommon for an employee to take short breaks and have a brief conversation at the desk of another employee.

Mr. Buck returned to the work on his desk after Mr. Bosner left the area. There is no evidence that he was required to account for his time. According to Mr. Wolz, "It was a momentary . . . lapse of doing his duties."

Agency policy and regulations require that supervisors have positive knowledge of the attendance or absence of the employees they supervise and ensure that their employees comply with the policies and procedures contained within Agency instructions and manuals. Employees are required to document their leave time. To establish the work performance and work activities of an employee, the supervisor is entitled to have the employee account for such work performance.

No action was taken to discipline Mr. Bosner for his absences or refusal to answer questions.

(b) Discussion and Conclusions of Law

Section 7102 of the Statute protects each employee in the exercise of the right to form, join, or assist a labor organization, or to refrain from any such activity, without fear of penalty or reprisal. Section 7116(a)(1) provides that it is an unfair labor practice for an agency to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under the Statute.

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 Authority has stated that the framework in Letterkenny Army Depot, 35 FLRA 113 (1990) (Letterkenny) will be applied to cases of alleged discrimination under section 7116(a)(2). Letterkenny, 35 FLRA at 117. In Letterkenny, the Authority reaffirmed that:

[i]n all cases of alleged discrimination, . . . the General Counsel must establish that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment.

Id. at 118.

If the General Counsel makes the required prima facie showing, a respondent may seek to rebut that showing by establishing, by a preponderance of the evidence, the affirmative defense that: (1) there was a legitimate justification for its action; and (2) the same action would have been taken in the absence of protected activity. The General Counsel may seek to establish that the asserted reasons are pretextual. The General Counsel must establish an unfair labor practice by a preponderance of the evidence. Letterkenny, 35 FLRA at 122-23.

The record reflects that Mr. Bosner was engaged in extensive protected activity and the Respondent was aware of his activity. Although closeness in time between an agency's employment decision and protected activity may support an inference of illegal anti-union motivation, it is not conclusive proof of a violation. General Services Administration, Region IX, San Francisco, California, 40 FLRA 973, 982 (1991).

As additional evidence of Respondent's illegal motivation, the General Counsel points to the fact that Mr. Buck's action in discussing Union activities during duty time was never challenged and he was never reprimanded or scolded by Mr. Wolz.

The facts and circumstances do not demonstrate disparate treatment of a similarly situated employee. Unlike the situation with Mr. Bosner, who was engaged in activities for a considerable period outside his own work area, Mr. Buck remained at his desk in his own work area and, after the conversation with Mr. Bosner, he immediately began work again. Mr. Buck's entering into the discussion initiated by Mr. Bosner was, as stated by Mr. Wolz, a "momentary . . . lapse of doing his duties."

A supervisor is required to be knowledgeable of an employee's time, attendance, conduct, and performance. In accomplishing this legitimate responsibility, Ms. Whitaker-Sheppard, with the assistance of Mr. MacIntyre, directed

Mr. Bosner to account for his time. No official time had been negotiated or authorized by any union contract. No official time, other than that statutorily authorized, was available without prior specific approval. No official time was requested by Mr. Bosner nor approved in this matter. It was not reasonable for Supervisor Whitaker-Sheppard to assume that Mr. Bosner was on an extended coffee break and lunch period during his reported absences, and he did not offer these excuses to her.

To the extent the General Counsel may be deemed to have presented a prima facie case, the Respondent has met its burden of establishing that it had a legitimate justification for taking its action. The action would have been taken in the absence of protected activity. A preponderance of the evidence does not support the alleged violation of section 7116(a)(1) and (2) of the Statute. It is recommended that this allegation in the complaint be dismissed.

2. On July 1, 1992, Respondent, by DeWalt, asked Bosner whether he was on official (union) business at that time and told Bosner to be sure to come back to the office. Respondent's conduct violated section 7116(a)(1) of the Statute. (Paragraphs 11 and 16 of Complaint.)

(a) Findings of Fact

On the afternoon of July 1, 1992, Mr. Bosner was standing and chatting with Greg Jones, a FEMA employee and Acting Union Shop Steward, in the corridor near Mr. Bosner's office. Beyond this point in the corridor was an area of vending machines and beyond, at a considerable distance, were the elevators and restrooms. Mr. Jones did not work in Mr. Bosner's office or division.

At that time, Mr. Dennis DeWalt, then Chief of the State and Local Support Division, and Mr. Bosner's second-level supervisor, walked by returning to his office. Mr. DeWalt inquired as to whether Mr. Bosner was conducting official business. Mr. Bosner responded by stating that he was on his way to the men's room. Mr. DeWalt replied that he hoped Mr. Bosner would return right away or when he was finished.

Mr. DeWalt knew Mr. Jones had no official business to conduct with Mr. Bosner. His customary practice is to interject himself into lengthy hallway conversations and ask the participants to return to work. He was also aware that Mr. Bosner's work performance had been less than fully satisfactory and that his work was behind schedule. In addition, he had been briefed that morning by Ms. Whitaker-Sheppard concerning another supervisor in the Agency

complaining that Mr. Bosner was conducting unauthorized Union business.

(b) Discussion and Conclusions of Law

The Authority has held that the standard for determining whether management's statement or conduct violates section 7116(a)(1) of the Statute is an objective one. The question is 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 circumstances surrounding the making of the statement are taken into consideration, the standard is not based on the subjective perceptions of the employee or the intent of the employer. U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky, 49 FLRA 1020, 1034 (1994).

The circumstances do not demonstrate that Mr. DeWalt's statement or conduct would tend to coerce or intimidate Mr. Bosner in the exercise of his rights in violation of section 7116(a)(1) of the Statute. Mr. DeWalt had justified business reasons for making his work-related statements to Mr. Bosner. He was Mr. Bosner's second-level supervisor. The Union steward with Mr. Bosner, Greg Jones, was not an employee of his Division. He referenced only Agency business and not anything about Union matters. Management has the right to assign work and to instill within employees the importance of performance of that work. It is recommended that this allegation in the complaint be dismissed.

3. On August 12, 1992, Respondent, by Whitaker-Sheppard, denied Bosner's request for computer training. Respondent violated section 7116(a)(1) and (2) of the Statute by taking the action because Bosner engaged in activities protected under the Statute. (Paragraphs 10,17,18 of Complaint). (Paragraph 12, 17,18 of Complaint.)

(a) Findings of Fact

On August 12, 1992, Respondent, by Ms. Whitaker-Sheppard, denied Mr. Bosner's request for four hours of training in D-Base IV. Mr. Bosner felt that the training would be useful in his work. Ms. Whitaker-Sheppard determined that based on the amount of work and the time available to Mr. Bosner, he could spend the four hours better by compiling the required information through other means. She advised Mr. Bosner that there were other methods available for

accomplishing his work. She advised him that if he needed to access the information already existing in the data base, two co-workers could readily show him how to review the information and, if he needed to establish a data base, two other individuals in the branch could assist him. She also advised Mr. Bosner that he had not originally identified any training requirements when he advised her how he intended to complete the assignment.

(b) Discussion and Conclusions of Law

To the extent the General Counsel may be deemed to have presented a prima facie case, the Respondent has met its burden of establishing that it had a legitimate justification for denying the training. The General Counsel did not show that the reasons given by Ms. Whitaker-Sheppard for disallowing the training were invalid or pretextual. The action would have been taken in the absence of protected activity. A preponderance of the evidence does not support the alleged violation of section 7116(a)(1) and (2). It is recommended that this allegation in the complaint be dismissed.

4. On August 24, 1992, Respondent, by Whitaker-Sheppard, gave Bosner a lower performance appraisal than he had received in prior years. Respondent violated section 7116 (a) (1) and (2) of the Statute by taking the action because Bosner engaged in activities protected under the Statute. (Paragraph 13, 17, 18 of Complaint.)

(a) Findings of Fact

On July 1, 1991, Mr. Bosner received his first performance appraisal from Ms. Whitaker-Sheppard for the period March 15, 1991 through June 30, 1991. The overall rating for this period was "Fully Successful."

On August 24, 1992, Mr. Bosner received his annual performance appraisal for the rating period July 1, 1991 through June 30, 1992. The overall rating was "Minimally Satisfactory." As a result, Mr. Bosner was denied a within-grade promotion in October 1992.

Mr. Bosner's primary project during the period July 1991 to June 1992 was the development of an underground storage tank project plan. His total time at work during this period was limited as he served two days a week on grand jury duty. He also lost about one month from work altogether after he was hit by an automobile.

I credit the testimony and documentation provided by

Ms. Whitaker-Sheppard which demonstrates that, despite Mr. Bosner's authorized absences, he did not apply himself during the time he had available. He did not object to the scope of his duties and never sought further accommodation to that provided. He expressed disagreement with the course Respondent had selected in pursuing the effort, not the specific duties assigned him nor his title as project director. The evidence adduced by Respondent indicates that Mr. Bosner was inefficient in his approach to projects, slow in executing tasks, inaccurate/careless in executing tasks, unable to proceed on projects without explicit direction and extensive guidance, and unable to meet deadlines. The ten page underground storage tank project plan took Mr. Bosner almost one year to complete. The ten or so drafts of the project plan, which comprise Respondent's Exhibit 22, illustrate Mr. Bosner's performance on this project and the detailed guidance, questions, and corrections provided by Ms. Whitaker-Sheppard. This was further demonstrated by E-mail messages during the period (Respondent's Exhibit 21 (13-37)).

(b) Discussion and Conclusions of Law

To the extent the General Counsel may be deemed to have presented a prima facie case, the Respondent has met its burden of establishing that it had a legitimate justification for giving Mr. Bosner the lower performance appraisal. The General Counsel did not show that the reasons given by Ms. Whitaker-Sheppard were invalid or pretextual. The action would have been taken in the absence of protected activity. A preponderance of the evidence does not support the alleged violation of section 7116(a)(1) and (2) of the Statute. It is recommended that this allegation in the complaint be dismissed.

5. On September 9, 1992, Respondent, by Whitaker-Sheppard, denied Bosner's request for annual leave in order to conduct Union business. Respondent violated section 7116(a)(1) and (2) of the Statute by taking the action because Bosner engaged in activities protected under the Statute. (Paragraphs 14, 17, 18 of Complaint).

(a) Findings of Fact

On September 9, 1992, Mr. Bosner submitted an application for leave to Ms. Whitaker-Sheppard which requested eight hours of annual leave for September 11, 1992. Mr. Bosner included under the "Remarks" section of the application, "Union Business (AFGE 4060)." Ms. Whitaker-Sheppard denied the request that same day noting, "Priority UST [underground storage tank] work, consider after October 1."

Ms. Whitaker-Sheppard testified that her practice at this time was to grant annual leave for Union activities to the extent it did not interfere with the accomplishment of work and the meeting of deadlines. Her action on this occasion was consistent with this practice. Ms. Whitaker-Sheppard's E-mail message to Mr. Bosner of September 9, 1992 is consistent with her testimony that he had priority work to do. (Respondent's Exhibit 20 (49-51)). The documentary evidence that she had granted annual leave to Mr. Bosner for reasons which he specified as Union activities on seven occasions between January 12 and August 19, 1992 (Respondent's Exhibit 19 (646-78)) is also consistent with this practice. She had also granted annual leave to Mr. Bosner for mostly unspecified reasons on six other occasions between July 24, 1992 and August 28, 1992 (Respondent's Exhibit 19 (674-80)).

(b) Discussion and Conclusions

To the extent the General Counsel may be deemed to have presented a prima facie case, the Respondent has met its burden of establishing that it had a legitimate justification for denying the request for annual leave. The General Counsel did not show that the reasons given by Ms. Whitaker-Sheppard for disallowing the leave were invalid or pretextual. The action would have been taken in the absence of protected activity. A preponderance of the evidence does not support the alleged violation. It is recommended that this allegation in the complaint be dismissed.

6. On October 2, 1992, Respondent, by Whitaker-Sheppard, denied Bosner's request for annual leave in order to conduct Union business. Respondent violated section 7116(a) (1) and (2) of the Statute by taking the action because Bosner engaged in activities protected under the Statute. (Paragraph 15, 17, 18 of Complaint.)

(a) Findings of Fact

Mr. Bosner testified that on October 2, 1992 he "turned in" another request for annual leave for October 9, 1992. Again, Mr. Bosner included under the "Remarks" section of the leave form, "Union Business (AFGE Local 4060)". Mr. Bosner did not recall whether he gave the slip to Ms. Whitaker-Sheppard personally or put it in her in-basket. He believed he put it in her leave basket in accordance with the standard procedure. Mr. Bosner did not remember ever asking Ms. Whitaker-Sheppard about the status of the request or sending her an E-mail message concerning it. He did not ask Labor Relations Officer MacIntyre about the request.

Mr. Bosner testified that he never received a response to this request.

Ms. Whitaker-Sheppard testified that she never received the request. The leave slip also does not appear in Respondent's Exhibit 19 (601-703) covering Mr. Bosner's leave slips for the period March 1991 to March 1993.

(b) Discussion and Conclusions of Law

Based on the entire record, I credit Ms. Whitaker-Sheppard's testimony that she did not receive Mr. Bosner's application for leave for October 9, 1992. The evidence indicates that she would have acted on it if she had received it. It is also odd that Mr. Bosner did not inquire about the request in this instance, in order that it might have been located, in view of his inquiries about other matters. Therefore, a preponderance of the evidence does not establish the allegation that Respondent violated section 7116(a)(1) and (2) in this instance.

Case No. WA-CA-30356

Alleged Violations

1. On or about January 15, 1993, Respondent, by Whitaker-Sheppard and MacIntyre, charged Bosner Absent Without Leave (AWOL) for two hours. Respondent violated section 7116 (a) (1) and (2) of the Statute by taking the action because Bosner engaged in activities protected under the Statute. Para-paragraphs 11,14,15 of Complaint.)

(a) Findings of Fact

Respondent, by Ms. Whitaker-Sheppard, charged Mr. Bosner with being AWOL for two hours from 3:00 p.m. to 5:00 p.m. on January 15, 1993. Mr. Bosner failed to report back to work at 3:00 p.m. on that date following the conclusion of an authorized absence on official time while attending, and traveling to and from, a mediation session of the Federal Mediation and Conciliation Service (FMCS). Mr. Bosner was offered, but refused, the option of taking two hours of annual leave.

The record reflects that at approximately 2:30 p.m. on January 15, 1993 the FMCS mediator declared that the parties were at impasse and would have to request further services from the Federal Service Impasses Panel. When Mr. Bosner asked Mr. MacIntyre how to request the services of the Panel, Mr. MacIntyre replied that his job was not to advise Mr. Bosner, that Mr. Bosner could ask the Union.

Mr. Bosner testified that Mr. MacIntyre pointed to the door and suggested that Bosner go over to AFGE and talk to Harry Rager (thus impliedly authorizing additional administrative or official leave). I credit Mr. MacIntyre that he did not point to the door and expected that Mr. Bosner and the other employees would immediately return to duty at FEMA.

Mr. MacIntyre and two other representatives of Respondent returned to FEMA headquarters at about 3:00 p.m. along with Union representative Wilda Capo.

Mr. Bosner and Union representative Richard Buck proceeded to request the services of the Panel before returning to work. First they went to AFGE headquarters. There they completed the necessary forms to request the Panel's assistance. They then proceeded to file the request with the Panel, which was located in the same building as FEMA headquarters. They also delivered a copy to Mr. MacIntyre at about 4:45 p.m. and then returned to their duty stations.

Ms. Whitaker-Sheppard advised Mr. Bosner that he should have returned to work at 3:00 p.m., was not granted administrative leave after that time, and should submit a request for two hours of annual leave. When Mr. Bosner refused to do so, he was charged two hours AWOL.

Union representative Richard Buck was not charged with two hours leave because Labor Relations Officer MacIntyre failed to provide Mr. Buck's supervisor, John Wolz, with timely follow-up information. At the outset, Mr. MacIntyre advised Mr. Wolz that Mr. Buck had not returned promptly from the mediation session and should be charged annual leave or AWOL. When Mr. Wolz asked which it should be, Mr. MacIntyre promised to get back to him. Mr. MacIntyre became involved in other matters and failed to do so for several months. Since so much time had passed, Mr. Wolz decided not to go back and charge Mr. Buck with annual leave or AWOL. Mr. MacIntyre acknowledged that this was his error, and the failure to charge Mr. Buck was attributable to his communications problem as there was no difference between the activities of Mr. Bosner and Mr. Buck that afternoon.

(b) Discussion and Conclusions

The General Counsel does not dispute that Respondent could properly charge the two employees with annual leave or AWOL for failing to return to duty promptly following the FMCS mediation session. See Defense Mapping Agency, 18 FLRA 532 (1985). The General Counsel claims, however, that the fact that only Mr. Bosner was charged AWOL constitutes

disparate treatment. (General Counsel's Brief at 25.)

The record reflects that initially both employees were to be charged with annual leave or AWOL for failing to return to duty promptly following the FMCS mediation session. Supervisor Whitaker-Sheppard promptly charged Mr. Bosner. Supervisor Wolz was given these instructions for his employee, Mr. Buck, but, instead of acting on them, he requested further instructions from Mr. MacIntyre as to which kind of leave he should impose. Mr. Wolz ultimately decided not to impose either because of the delay in receiving a response from Mr. MacIntyre. Due to the different supervisors, their different interpretations as to what they should do and when, and the different circumstances which developed due to the time lapse, a preponderance of the evidence does not establish that charging Mr. Bosner two hours of AWOL in these circumstances constituted disparate treatment and violated section 7116(a)(1) and (2) of the Statute as alleged. It is recommended that this allegation be dismissed.

2. On or about January 25, 1993, Respondent, by Whitaker-Sheppard, gave Bosner a negative "Mid-Year Progress Review." Respondent violated section 7116(a)(1) and (2) of the Statute by taking the action because Bosner engaged in activities protected under the Statute. (Paragraph 12, 14, 15 of Complaint.)

(a) Findings of Fact

A mid-year progress review is a review of the employee's progress toward achieving the performance standards identified in the performance plan. Mid-year progress reviews are not considered performance ratings. However, if at any time during the performance period there is a negative review, meaning performance is determined to be unsatisfactory, the supervisor must give the employee written specific guidance to outline what the failures are and what needs to be improved. There is no such requirement for an employee performing at the minimally satisfactory level. Such an employee may be retained in position and provided with closer supervision and additional training. (Respondent's Ex. 3 at 1-6, 2-7; Tr. 437).

On January 25, 1993, Mr. Bosner received his mid-year progress review from Ms. Whitaker-Sheppard. The review was one paragraph long and, in pertinent part, included the following sentence:

Leo has made little progress in improving his performance since the last rating period.

Mr. Bosner took the comment to mean that his performance was still minimally satisfactory as it had been determined to be during his last rating period. Mr. Bosner testified that he questioned Ms. Whitaker-Sheppard as to whether his work was below standard or substantially late, and Ms. Whitaker-Sheppard denied that it was either. Mr. Bosner claimed that he asked Ms. Whitaker-Sheppard what her complaint was, and she replied that she wished Bosner would use more initiative in doing things over and above what he had been assigned to do. She said he should summarize items in a monthly UST bulletin. Mr. Bosner also noted this discussion on the review form which he signed January 27, 1993.

Ms. Whitaker-Sheppard acknowledged that Mr. Bosner repeatedly asked for specific information during the progress review. She testified that she had not gone through his previous six months work and itemized actions that he had not performed well, so she was not in a position to give him that kind of information at that time. She testified that she did not indicate to him that there were no instances of poor performance, but that she did not have any to give him at that time. She explained that this was progress review, not a rating, and she was giving him her evaluation of his work and not specific information.

(b) Discussion and Conclusions of Law

Ms. Whitaker-Sheppard's testimony is consistent with the description and purpose of a mid-term progress review under Respondent's regulations. The comment that he had made "little progress in improving his performance since the last rating period [minimally satisfactory]" would not constitute a "negative" performance review. It constitutes a statement that the employee is still performing at the "minimally satisfactory" and not "unsatisfactory" level. Only an "unsatisfactory" determination would have required specific guidance to outline what the failures were and what needed to be improved. The implication that the employee's current work showed some of the same deficiencies commented upon in the earlier formal rating would permit the employee to improve his performance before the appraisal period ended.

To the extent the General Counsel may be deemed to have presented a prima facie case, the Respondent has met its burden of establishing that it had a legitimate justification for the mid-year progress review given to Mr. Bosner. The General Counsel did not show that the reasons given by Ms. Whitaker-Sheppard were invalid or pretextual. The action would have been taken in the absence of protected activity. A preponderance of the evidence does not support the alleged violation of section 7116(a)(1) and (2) of the Statute. It is

recommended that this allegation in the complaint be dismissed.

3. On or about February 3, 1993, Respondent, by Whitaker-Sheppard, denied Bosner administrative time to attend an Equal Employment Opportunity (EEO) meeting with Respondent's Chief of the Office of Program Analysis and Coordination to discuss a new initiative. Respondent violated section 7116(a) (1) and (2) of the Statute by taking the action because Bosner engaged in activities protected under the Statute. (Paragraph 13,14,15 of Complaint.)

(a) Findings of Fact

A few days prior to February 3, 1993, Mr. Bosner was invited to attend an Equal Employment Opportunity meeting with Respondent's Chief of the Office of Program Analysis and Coordination to discuss a new initiative. Donald MacIntyre, Labor Relations Officer, had been previously advised by Robert Shea, who was in charge of the meeting, of plans for a meeting and of having a Union representative in attendance, but Mr. MacIntyre was not provided specific details of the time and place.

Mr. Bosner submitted a leave request to Ms. Whittaker-Sheppard on February 3, 1993 for one half hour of administrative leave on that same date, between 10:30 to 11:00 a.m., to attend the meeting. Ms. Whittaker-Sheppard checked with Mr. MacIntyre to verify whether administrative leave was authorized, as was her usual practice, and was advised by Mr. MacIntyre that he knew nothing of the meeting. Ms. Whittaker-Sheppard then verbally disapproved the leave request. Mr. Bosner did not take any further action to check with Mr. MacIntyre or Mr. Shea's office concerning the meeting.

The meeting was not held for reasons independent of Mr. Bosner and/or his availability. Mr. Shea cancelled the meeting because of scheduling conflicts with a number of other persons who were to attend. The meeting was never rescheduled because of an imminent reorganization of the directorate.

(b) Discussion and Conclusions

A preponderance of the evidence does not establish that Mr. Bosner was denied administrative time to attend an EEO meeting on February 3, 1993 because of his protected activities in violation of section 7116(a) (1) and (2) of the Statute. The evidence demonstrates that there was a communication's gap by the parties in the request for and approval of Mr. Bosner's attendance at the meeting which was

not held in any event. It is recommended that this allegation be dismissed.

Case No. WA-CA-30434

Alleged Violations

On or about February 19, 1993, Respondent, by Lida Whitaker-Sheppard, denied Union President Bosner's request for reconsideration of its denial of his request to attend a training program entitled, "Managing Sexual Harassment in Today's Workforce." Respondent violated section 7116(a) (1) and (4) of the Statute by taking the action because the Union had filed an unfair labor practice charge against Respondent concerning the denial. (Paragraphs 8-11 of Complaint.)

(a) Findings of Fact

On or about February 10, 1993, Mr. Bosner made written application for a 3-hour training program, "Managing Sexual Harassment in Today's Workforce," to be offered by Respondent on February 22, 1993. Mr. Bosner included on the "Position Title" part of the training registration form the fact that he was President of AFGE, Local 4060.

Ms. Whittaker-Sheppard disapproved the request, noting that Mr. Bosner's availability was limited to one day that week. Mr. Bosner had previously received approval for three days of annual leave and one day grand jury duty.

On February 12, 1993, Mr. Bosner wrote to Ms. Whittaker-Sheppard, withdrawing his request for annual leave -- "[g]iven the importance of the training to my functioning as union president" -- and asking her to reconsider his application for the training. Later that day, when Mr. Bosner asked Ms. Whittaker-Sheppard whether she would grant the request for reconsideration, she stated that she had not made up her mind.

Ms. Whittaker-Sheppard had drafted a response which she needed to give to Mr. MacIntyre for review. It concerned whether official time was authorized since Mr. Bosner had indicated that the training involved his functioning as Union president.

Mr. Bosner, not having received a response by the end of the day, prepared and submitted to Respondent an unfair labor practice charge (Case No. WA-CA-30403) which alleged that Respondent's refusal to grant his training request, despite his cancellation of annual leave, violated the Statute.

On February 19, 1993, Ms. Whittaker-Sheppard responded to Mr. Bosner's resubmission of his training request by

advising him that since he had elected to pursue the matter through the use of third party proceedings, "this matter must now be resolved under FLRA procedures."

On March 2, 1993, Mr. Bosner filed the unfair labor charge in this case, alleging that his request had been denied because he filed an unfair labor practice charge with the Authority.

(b) Discussion and Conclusions of Law

Section 7116(a)(4) of the Statute provides, in part, that it is an unfair labor practice for an agency to discriminate against an employee because the employee has filed a complaint under the Statute.

A preponderance of the evidence demonstrates that Mr. Bosner's request for reconsideration of the denial of his request for training on February 22, 1993 was not considered by Respondent on its merits, but was deferred, and effectively denied, because Mr. Bosner filed an unfair labor practice charge with the Authority. Respondent's action violated section 7116(a)(1) and (4), as alleged. Department of Veterans Affairs Medical Center Brockton and West Roxbury, Massachusetts, 43 FLRA 780 (1991).

Case No. WA-CA-30581

Alleged Violations

On or about March 31, 1993, Respondent, by Whitaker-Sheppard, denied Leo Bosner three hours of annual leave for "Union Business" and charged Bosner three hours AWOL. Respondent violated section 7116(a)(1) and (2) of the Statute by taking the action because Bosner engaged in activities protected under the Statute. (Paragraphs 10-13 of Complaint.)

(a) Findings of Fact

Mr. Bosner left a leave slip, dated March 29, 1993, requesting three hours of annual leave for Wednesday, March 31, 1993, in Ms. Whitaker-Sheppard's box. The leave slip noted under "Remarks" that the annual leave was for "Union Business." Mr. Bosner did not explain that he intended to use the leave to attend the Senate confirmation hearing of Respondent's director-nominee.

The practice for requesting leave in the office was that some employees handed the leave slips to Ms. Whitaker-Sheppard and others left them in her box. Mr. Bosner's normal procedure was to leave them in her box.

Agency policy requires that employees obtain the supervisor's approval of all leave requests. Ms. Whitaker-Sheppard's policy was that employee's were supposed to find out ahead of time whether requested leave was approved or disapproved. They were to either check with her personally or ascertain whether the leave slip had been signed and approved.

Mr. Bosner did not check to determine the status of the leave slip on March 29, 1993, but assumed that it was granted since he had not heard from Ms. Whitaker-Sheppard. He had jury duty the next day, March 30, 1993.

Ms. Whitaker-Sheppard discovered Mr. Bosner's leave slip in her box on March 30, 1993. She wrote on the leave slip that it was disapproved because "FY 93 Regional allocations needed to be completed" and prepared a memorandum to Mr. Bosner to this effect. Ms. Whitaker-Sheppard knew that Mr. Bosner was on jury duty that day, but had never tried to contact him there. She had his home telephone number and called there, expecting to leave a message on his answering machine. Instead, a woman answered. Ms. Whitaker-Sheppard assumed the woman was Mr. Bosner's wife and left the message with her that Mr. Bosner's leave for March 31, 1993 had been disapproved and he was expected at work the next morning.

On March 31, 1993, at 9:30 a.m., Ms. Whitaker-Sheppard prepared an E-mail message for Mr. Bosner's return. The message reviewed her actions and stated that since he had not reported for duty, he would be charged AWOL for the time absent.

Mr. Bosner attended the Senate confirmation hearing of Respondent's Director-nominee during the morning of March 31, 1993. When he returned to work he was advised by Ms. Whitaker-Sheppard that he would be charged three hours AWOL.

Another employee of Ms. Whitaker-Sheppard, Charles Powell, also attended the Senate confirmation hearing. Mr. Powell had obtained advance permission from Ms. Whitaker-Sheppard to attend the hearing by using an early lunch hour. Since the hearing lasted longer than expected, Mr. Powell submitted an annual leave request for the time. Mr. Powell did not work on the same projects as Mr. Bosner and did not have any pressing assignments due in that time period.

(b) Discussion and Conclusions of Law

To the extent the General Counsel may be deemed to have presented a prima facie case, the Respondent has met its burden of establishing that it had a legitimate justification for taking its action. The action would have been taken in the absence of protected activity. Mr. Bosner did not obtain advance supervisory approval of his leave. The supervisor, based on work-related reasons, did not grant the leave and attempted to inform him of that fact prior to the time his leave was to begin. Mr. Bosner was not treated differently from a similarly situated employee. Mr. Powell was not a similarly situated employee as he had secured advance permission to attend the hearing on his lunch hour or with leave and did not have pressing assignments at that time. A preponderance of the evidence does not establish that charging Mr. Bosner three hours of AWOL in these circumstances for his absence from work constituted disparate treatment and violated section 7116(a)(1) and (2) of the Statute as alleged. It is recommended that this allegation be dismissed.

Case No. WA-CA-30603

Alleged Violations

On or about November 2, 1992 and March 4 and March 30, 1993, Respondent, by Whitaker-Sheppard, gave Bosner clerical-type assignments not encompassed within his GS-13 position. Respondent violated section 7116(a)(1) and (2) of the Statute by taking the action because Bosner engaged in activities protected under the Statute. (Paragraphs 11-13 of Complaint.)

(a) Findings of Fact

On November 2, 1992, Ms. Whitaker-Sheppard assigned Mr. Bosner the task of updating an outdated list of state underground storage tank offices which Ms. Whitaker-Sheppard had on her computer. The assignment consisted of Mr. Bosner using a current, published list of such offices, maintained as part of his duties, to make pen and ink changes in the addresses and zip codes of the approximately 60 offices on this list. Mr. Bosner suggested to Ms. Whitaker-Sheppard that he could simply give her the published list, but she insisted that he make the changes on the copy she had provided. Ms. Whitaker-Sheppard explained that she needed to know where the changes were to be made so that she could type in the corrections to update her computer listing. The updated

computer listing would be merged into the body of letters to be sent to the various state offices.

On March 4 and March 30, 1993, Ms. Whitaker-Sheppard gave Mr. Bosner assignments to review underground storage tank registration forms prepared by a FEMA contractor for submission by FEMA to the states. The tasks required sufficient understanding of the program that they could not have been performed entirely by a clerical support person. Mr. Bosner was instructed to review the forms for internal consistency. The March 30, 1993 assignment also required that he generate a substantive transmittal letter to the states to accompany the registration forms. While the cover memoranda directed that Ms. Whitaker-Sheppard's name and title be typed on the signature block of each form, the instructions did not require that Mr. Bosner perform the typing as he attempted to do. Mr. Bosner had access to a secretary in the division and it was assumed he would delegate this part of the project. When he brought the typing matter to Ms. Whitaker-Sheppard's attention, she advised him that it was not her intention that he personally type the corrections that needed to be made.

The testimony of Mr. Christopher Clifford, Chief Classifier, FEMA Office of Human Resources Management, established that performance of an occasional clerical task is not inconsistent with a GS-13 position.

(b) Discussion and Conclusions

To the extent the General Counsel may be deemed to have presented a prima facie case, the Respondent has met its burden of establishing that it had a legitimate justification for giving Mr. Bosner the assignments on or about November 2, 1992 and March 4 and March 30, 1993 which encompassed some clerical duties. The November 2, 1992 project was a tedious project that involved identifying new information and entering the information into an existing computer document. Ms. Whitaker-Sheppard split the project into two tasks, one which she asked Mr. Bosner to do, the other which she intended to do herself. Her task was every bit as "clerical" and tedious as Mr. Bosner's. The record also establishes that Mr. Bosner misinterpreted the March 4 and March 30, 1993 assignments as primarily clerical or mechanical. They also involved his analytical skills and were necessary steps in the project. The General Counsel did not show that the reasons given by Ms. Whitaker-Sheppard were invalid or pretextual. The action would have been taken in the absence of protected activity. A preponderance of the evidence does not support the alleged violation of section 7116(a)(1) and (2) of the Statute. It is recommended that this allegation in the complaint be dismissed.

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

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

1. The Complaints in Cases No. WA-CA-30232, WA-CA-30356, WA-CA-30581, and WA-CA-30603 are dismissed.

2. The Federal Emergency Management Agency shall cease and desist from:

(a) Refusing to reconsider a request for training, or otherwise discriminating against an employee, because the employee filed an unfair labor practice charge with the Federal Labor Relations Authority.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Statute.

3. The Federal Emergency Management Agency shall also 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 Headquarters facilities 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 Director 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.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Washington Region, Federal Labor Relations Authority 1255 22nd Street, NW, 4th Floor, Washington, DC 20037-1206 in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, March 3, 1995

GARVIN LEE OLIVER
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 refuse to reconsider a request for training, or otherwise discriminate against an employee, because the employee filed an unfair labor practice charge with the Federal Labor Relations Authority.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured 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 any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Washington Region, 1255 22nd Street, NW, 4th Floor, Washington, DC 20037-1206, and whose telephone number is: (202) 653-8500.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case Nos. WA-CA-30232, WA-CA-30356, WA-CA-30434, WA-CA-30581 and WA-CA-30603, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

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Eva S. Kleederman
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Dated: March 3, 1995
Washington, DC