

OFFICE OF ADMINISTRATIVE LAW JUDGES WASHINGTON, D.C. 20424

.....INTERNAL REVENUE SERVICE .BOSTON APPEALS OFFICE .BOSTON,
MASSACHUSETTS . Respondent .. and . Case
No. BN-CA-20217.NATIONAL TREASURY EMPLOYEES .UNION AND NATIONAL TREASURY
.EMPLOYEES UNION, CHAPTER 253 .Charging Parties ...
Carol Waller-Pope, Esq. For the General Counsel

Linda P. Azmon, Esq. and Agatha L. Vorsanger, Esq. On The Brief For the Respondent

Before: ELI NASH, Jr. Administrative Law Judge

DECISION

Statement of Case

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

Upon an unfair labor practice charge having been filed by the captioned Charging Party (herein the Union) against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for the Boston Regional Office, issued a Complaint and Notice of Hearing alleging Respondent violated section 7116(a)(1) and (2) of the Statute by eliminating the acting managerial assignments previously held by an employee and by issuing that same employee a letter of reprimand because he engaged in protected activity on behalf of the Union. The Complaint also alleges that a supervisory employee made an intimidating and coercive statement to the employee in violation of section 7116(a)(1) of the Statute.

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

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

Findings and Fact

A. BACKGROUND

The National Treasury Employees Union (NTEU) is the exclusive representative of a nationwide bargaining unit of Internal Revenue Service employees. Internal Revenue Service personnel employed at the Boston Appeals Office are represented locally by NTEU Chapter 253.

Respondent employs approximately 83 employees at its Boston Office and various other post of duty offices throughout New England. Respondent's mission is to resolve tax controversies without litigation. Linda Garrard is Chief of the Boston Appeals Office. Currently there are three Associate Chiefs, each of whom supervises a group of approximately 10 - 12 appeals officers.

Eugene Peschier, Jr. is one of 38 appeals officers employed by the Respondent. Peschier has been employed by Respondent for about eight years. As an appeals officer, Peschier's primary duty is to resolve tax disputes between taxpayers and the government.

Peschier had an exemplary record prior to the issuance of the letter of reprimand at issue herein. Peschier's job performance was rated by his supervisor, Associate Chief Gerald McMahon as outstanding and was awarded a high quality step increase for the appraisal period of February 1991 - February 1992.

Peschier holds several volunteer extra duty assignments including, Quality Improvement Process team leaders, Safety Officer, On The Job Instructor for new appeals officers and President of the office Cheer Fund.

From mid-1988 through 1991, Peschier was assigned to Group 4 which was supervised by Associate Chief Gerald McMahon. McMahon and Peschier had a "very amiable" relation-ship. In McMahon's words they were "friends". They had known each other since 1972 when Peschier was a co-op student. Peschier expressed an interest in serving as acting chief, both to McMahon and others, in order to become a manager some day. McMahon says that he tried to cooperate with Peschier's aspirations and had confidence in his ability to do the job. For that reason McMahon admittedly gave Peschier a great deal of acting associate chief responsibility.

Prior to 1991, Peschier never held any office in the Union. He sought and won an office to experience labor-management relations from the labor perspective in preparation for a future managerial position. He testified that he discussed running for union office with McMahon to insure that union involvement would not jeopardize a future career in management.

Although Peschier was unopposed for the office of Secretary, the election for the office of President of the Union was hotly contested with Appeals Officer John Mullaney challenging incumbent Paul Joyce. Other incumbents Vernon Smith, Treasurer and Joe Repetto, Vice President also ran unopposed, but both supported Joyce in the election. Peschier supported Mullaney and campaigned on his behalf. Joyce had never filed a formal grievance during his tenure in office. Mullaney's campaign was based on his philosophy and experience in negotiating forcefully with management, and filing grievances and unfair labor practices when warranted. Mullaney's campaign literature reveals that Peschier was a part of the team that would be consulted before any such action would be taken.

In January 1991, after winning the election, Mullaney filed the very first formal grievance ever filed in Garrard's approximately eight year tenure as Chief. Peschier was not directly involved in the processing of the grievance. Garrard, however, testified that she viewed the grievance as a divisive, scurrilous attack on management. Garrard's February 1, 1991 response to the information request which was part of the grievance follows:

In briefing the managers on this incident, I encouraged them not to let your actions deter them from recommending Managers' Awards to deserving employees. I would not be surprised, however, if some managers may be reluctant to make the effort to do so, in light of recent events.

I recognize that members of the union have the right to elect whomever they want as officers of the union. The employees must then be prepared to deal with the consequences of their decision. . . . If you have any personal animosity toward me or any of the other managers, deal directly with us. This will avoid creating situation where an employee might get caught in the crossfire.

Such language certainly set the tone for the parties relation-ship. Garrard in a later memorandum called "Grievance" dated March 1, 1991, said, ULP's and grievances would be viewed as "attacks" on management and such "attacks" would be met with counter attacks on the Union.

Peschier took the position of the Secretary of the Union in March 1991. The Secretary's duties were primarily clerical, including the posting of notices on the Union bulletin board and maintaining Union records. In his capacity as Secretary, Peschier attended labor-management meetings with Garrard. He also served as a conduit, relaying employees' concerns and problems to the other Union officers. In a memorandum dated April 12, 1991, Peschier relayed concerns about a possible noncompetitive promotion action. Peschier's memorandum was forwarded to Garrard and it impacted, to some degree, the process Garrard ultimately followed for the promotion action. Respondent does not contest that Peschier was engaged in the above mentioned activities or that it was aware of Peschier's position in the organization. Based on the foregoing, it is found that Peschier was engaged in union activities and that Respondent was aware of Peschier's protected activity.

B. ACTING MANAGERIAL ASSIGNMENTS

Since August 1988 when McMahon began supervising him, Peschier was frequently assigned acting associate chief duties. Such assignments were extremely important to Peschier who believed they would help him achieve his long term goal of promotion to a managerial position. Respondent's witnesses did not attach as much importance to acting managerial experience on promotion potential as Peschier. Without doubt, such experience could not hurt. Furthermore, Peschier's performance of acting associate chief duties is cited favorably in his performance appraisals.

Appeals officers, primarily those who have expressed an interest, as did Peschier are assigned acting associate chief duties when ever one of the associate chiefs is absent. Acting assignments are not limited to the group to which an employee is assigned, but it is clear from the record that McMahon generously allowed Peschier to act in that capacity. McMahon's assignments were almost exclusively given to Peschier and

another appeals officer Vernon Smith. Prior to March 1991, Peschier also frequently served as acting for several other associate chiefs.

When acting as associate chief, the appeals officer assumes the associate chief's duties of assigning cases, and reviewing and approving settlement agreements prepared by employees assigned to the group. Time spent performing managerial duties is recorded by the employee on their Monthly Officer Inventory and Time Report.

Peschier's last acting assignment for McMahon was in January 1991. During this acting assignment Peschier reviewed cases submitted for approval from several employees. Upon review of one case prepared by Janet Santangelo, Peschier requested that Mullaney, who was in the corridor at the time, review the case with him. He sought Mullaney's advice because Mullaney had recently negotiated a novel settlement in a case involving a similar issue. Their review of the file, according to Peschier, included a review of documents contained in the file and a discussion of the issue. They reviewed the file together in McMahon's office for approximately 15 minutes. Peschier says, he never gave the file or any of its contents to Mullaney. Peschier felt uncomfortable with the settlement agreement and the appearance of the supporting statement so he decided to leave the case for McMahon to approve upon his return. This was only one of his options as he could have discussed the case with the appeals officer involved. Leaving the case for McMahon to approve was the first time he had done so. It appears that this option is not exercised very often. Peschier approved the other cases he reviewed during this assignment. In fairness to Peschier, it seems that he approved other cases from Santangelo at that time, but he may have left more than one of her cases for McMahon. Peschier explained to McMahon that he left the file because he felt uncomfortable confronting Santangelo with his misgivings about the settlement because Santangelo had recently been promoted to a GS-14 position that Peschier and several other employees had applied for. McMahon recalled that Peschier's only concern with the case was about the typo's in the supporting statement and does not remember any other issues about the case being raised.

Routinely, appeals officers and associate chiefs discuss issues presented in cases pending in the office among themselves. Generally, if there is an issue or area someone is unfamiliar with, they will solicit advice from a co-worker known for their expertise in the area. Such discussions often include a review of the selected documents or the entire case file. The review of the file may take place together as was done by Mullaney and Peschier, or the entire file may be given to the co-worker to review as time permits. In addition, appeals officers have provided copies of supporting statements from their files to co-workers who sought advice on a particular issue. Also, it is not unusual for an associate chief to ask an appeals officer to review a case file prepared by another employee to advise the associate chief if the settlement should be approved. In fact, McMahon had given files of other employees to Peschier for review.

C. REASON FOR REMOVING PESCHIER FROM ASSIGNMENTS TO ACTING ASSOCIATE CHIEF

Sometime in the fall of 1990, Respondent posted a vacancy announcement for a GS-14 appeals officer position. Approximately ten GS-13 appeals officers applied, including Peschier and Mullaney. McMahon recommended Peschier and pushed him for the job. Peschier, Mullaney and Santangelo were the final three in the running for the position. Santangelo, the senior appeals officer of the three, was finally selected by Garrard.

After the selection of Santangelo, Peschier and Mullaney were vocal in their dissatisfaction, believing and stating that they were more qualified for the position than Santangelo. Also, on a number of occasions the two discussed the possibility of filing grievances or Equal Employment Opportunity complaints challenging the

selection.

On November 15, 1990, Mullaney requested counselling by his immediate manager, Associate Chief Karen Hannon. In addition, Mullaney advised Hannon, he was contemplating filing a grievance or EEO complaint and requested copies of Santangelo's evaluations for the previous three years and copies of her monthly inventory reports⁽¹⁾ for the prior six months. Peschier made substantially the same request to McMahan, on the same day. The only difference between the requests was, Peschier was seeking copies of Santangelo's monthly inventory reports for twelve months, while Mullaney requested only six months. The requests were denied by the managers on November 16 and 26, 1990, respectively.

Despite the formal written denial, Mullaney persisted in his attempts to gain access to Santangelo's evaluations and monthly reports. During his November 19, 1990 counselling session with Garrard, he accused her of selecting Santangelo only because she was a woman. In addition he stated the reasons he could not accept that Santangelo was selected because her work was terrible. Again he requested copies of her evaluations and monthly inventory reports to substantiate his allegations. Garrard advised him that he was not entitled to the documents requested, that they were not relevant to the selection. Furthermore, she believed that Santangelo's evaluations were protected under the Privacy Act.

Mullaney, at one point, went directly to Santangelo to demand the information. This upset Santangelo so much that she complained to Garrard and questioned whether she had to release the information. Garrard advised her not to give the information to Mullaney.

From January 27, 1991 through February 7, 1991, McMahan and Mullaney were in San Francisco attending a class on estate taxes. McMahan and Mullaney grew up in the same neighborhood and had known each other since they were teenagers. In McMahan's words they were friends who socialize together occasionally and had belonged to the same bowling league at one time. On several occasions during the training, Mullaney brought up Santangelo's selection, and complained to McMahan that Santangelo should not have been selected because she did not have the background and technical competence that he or Peschier had. During one of these conversations, Mullaney told McMahan that he had in his possession a copy of a supporting statement which had been prepared by Santangelo. Mullaney threatened to present that supporting statement and additional supporting statements he would subsequently acquire, to upper level management (Regional Director of Appeals Kevin Morgan and Regional Counsel Agatha Vorsanger) to show that Garrard was wrong in selecting Santangelo for the Grade 14 Appeals Officer position. Mullaney asserted that Santangelo's settlement of the case was wrong, that the supporting statement was messy, that it contained pen and ink changes, and that McMahan lacked integrity for signing off on the settlement. When McMahan asked Mullaney how he came into possession of Santangelo's work product, Mullaney replied that he obtained the document from the "records section".⁽²⁾

McMahan recalled the case Mullaney was referring to. It was a case which had been reviewed by Peschier while acting as Associate Chief in McMahan's absence a few weeks earlier.⁽³⁾ Upon McMahan's return, Peschier stated that he had reviewed one of Santangelo's cases, that he had not signed off on the supporting statement, that he had a problem with the settlement proposed by Santangelo, and that he felt the supporting statement was "messy". Therefore, Peschier left the file for McMahan's review. While McMahan agreed with Peschier that the supporting statement was sloppy, he concurred with Santangelo's settlement of the case.⁽⁴⁾ McMahan apparently knew that Santangelo had some files needing "cosmetic" changes, but he told her to submit them anyway. McMahan, therefore, had the supporting statement re-typed and signed off on the settlement. The original supporting state-ment with all of the typographical errors was shredded, and the re-typed version went to the records section for storage.

Since the supporting statement with all of the typographical errors had never been forwarded to the records section, McMahon knew that Mullaney had lied about how he had obtained the file. However, since McMahon was so angry by Mullaney's accusation that he (McMahon) lacked integrity for approving the settlement, and because he felt that it was very wrong for Peschier and Mullaney to be going through and criticizing Santangelo's cases in view of the recent selection, McMahon chose to end the conversation without specifically confronting Mullaney. When McMahon spoke with Mullaney the following day, Mullaney apologized for his statements.

When McMahon returned from San Francisco, he and his supervisory aide pulled the file from the records section. As he had correctly remembered, the file contained only the re-typed version. Thus, if Mullaney indeed had a copy of the supporting statement obtained from the records section, it would be a clean copy. Further, he was certain that Mullaney would not go in to his office and take copies out of the file. After confirming his suspicions, McMahon advised Peschier of his conversation with Mullaney. Peschier listened, and although Peschier did not admit it at the time, McMahon concluded that Peschier had shown the supporting statement from the Santangelo case to Mullaney.

McMahon did not think it appropriate for Peschier to be reviewing Santangelo's work in view of the recent promotion action, therefore, he decided not to have him act as an Associate Chief for an indefinite period.⁽⁵⁾ McMahon advised Appeals Officer Vernon Smith about Peschier's disclosure, and advised Smith that he would be serving as acting associate chief in the future. In addition, McMahon discussed the events with Associate Chief Hannon, who concurred in his decision. McMahon testified that he might also have discussed Peschier's disclosure with Associate Chief Frank Collins. Nevertheless, Collins and Hannon delegated Peschier authority to act as associate chief from February 25, 1991 until March 18, 1991.⁽⁶⁾ McMahon, in a decision he most certainly regrets, felt that he had handled the situation satisfactorily and did not discuss Peschier's disclosure to Mullaney with Garrard.

In April or May 1991, McMahon had a conversation with Garrard regarding the assignment of cases. During this conversation, McMahon mentioned to Garrard that he suspected that Peschier was giving information to Mullaney. However, he did not disclose the San Francisco conversation with Mullaney to Garrard, at that time. Garrard's understanding was that McMahon suspected Peschier was providing information to Mullaney but took no action on this hint. McMahon first divulged to Garrard the specific facts regarding Peschier's disclosure on July 11, 1991. Peschier also had approached Garrard that same day to discuss his concerns about not receiving acting associate chief assignments. Garrard did not seem to know why he was not receiving the assignment and appeared to be as "puzzled" as Peschier over the matter. Peschier suggested to Garrard, he believed the reason he was not receiving acting assignments was that he had displeased his associate chief by not approving a settlement submitted by Santangelo in January 1991. A few weeks earlier, Mullaney and National Treasury Employees Union, Chapter 253 Vice President Repetto met with Garrard and advised her that Peschier had not been receiving acting assignments. Peschier stated that he had reviewed one of Santangelo's cases, was not totally familiar with all of the pertinent law, and did not feel comfortable with the settlement of the case as presented. He informed Garrard that he had "consulted with another appeals officer who he knew to have addressed a similar issue." Garrard asked Peschier whether Mullaney knew whose case was being discussed. Peschier replied that he did not show the file to Mullaney, but since he had the case file open on his desk "Mullaney could have read upside down" and seen the name of the appeals officer assigned to the case. Garrard told Peschier that she could not understand why McMahon would be upset by his actions, and that she would speak to McMahon about it. Based on this conversation with Peschier, Garrard believed that McMahon had been mistaken regarding his suspicions about Peschier. The credited evidence shows that Garrard did not know the real reason why Peschier was not receiving the acting assignments when they talked on July 11, 1991.

After Peschier left her office, Garrard went to McMahon's office to discuss Peschier's anxiety. She told McMahon the gist of her conversation with Peschier. McMahon became extremely upset. He pulled the case

file at issue out of his desk, and proceeded to tell Garrard, for the first time, about his conversation with Mullaney in San Francisco. Justifiably, Garrard asked why McMahon had not told her earlier. McMahon testified that he considered the two to be his "friends" and tried to handle the situation without getting them in trouble. McMahon responded that he thought he could handle it himself. Then and there Garrard admonished McMahon for not notifying her earlier. Garrard informed him that this was a very serious matter, that he should have told her as soon as it happened, and that she was going to notify the Regional Director of Appeals of what had occurred.

Garrard immediately contacted the Internal Revenue Service's Internal Inspection function ("Inspection") on July 11, 1991 to relate the alleged incidents.⁽⁷⁾ After discussing the events, Garrard and Inspection agreed that the matter should be handled administratively by her, and that if she later discovered that a violation of 18 U.S.C. § 1001 or 26 U.S.C. § 6103 had taken place, she would contact Inspection again.⁽⁸⁾ Since Garrard did not think that either Peschier or Mullaney had committed any criminal acts and/or released tax information outside the office, she saw no reason to contact Inspection again. She was however, satisfied that the two had gotten together with the file for personal rather than taxpayer reasons.

The following day, Mullaney went to Garrard's office twice to discuss Santangelo. On both occasions, Mullaney announced that he would no longer be involved in any further discussions regarding Santangelo, and that he had advised several other appeals officers that he would no longer discuss her selection. Mullaney also stated he could not believe that Garrard had not known about "the case". Thereafter, Mullaney spoke with Peschier, and advised him that Garrard had raised concerns about their review of the case. Based on his conversation with Mullaney, Peschier went to see Garrard on July 24, 1991. Garrard questioned Peschier again regarding the extent of his review with Mullaney. This time Peschier admitted that he made the entire file available to Mullaney.⁽⁹⁾

Garrard viewed the disclosure of Santangelo's file, Mullaney's subsequent conversation with McMahon and Peschier's July 11, 1991 false statement as serious breaches of integrity. Hence she concluded some sort of discipline was appropriate. Garrard reasonably believed that Peschier committed three separate violations of the Internal Revenue Service Rules of Conduct, Document 7098. The first, and most serious offense, was the false statement made by Peschier on July 11, 1991, that his statement to Garrard concerning whether he made the entire file available for Mullaney's review. Such false statement, it was alleged is in violation of Rule 214.5 of the Internal Revenue Service Rules of Conduct, Document 7098, and the Department of Treasury Minimum Standards of Conduct, 31 C.F.R. Part 0.735-55.⁽¹⁰⁾

The second offense, in Garrard's view, was his disclosure of tax information to Mullaney. The Internal Revenue Manual, Disclosure Handbook, Section (22)42, Subsection 1, provides in pertinent part:

. . . Service personnel should not have unlimited access to returns and return information. . . .

Service employees may access returns and return information when there is a "need to know"

the information for their tax administration duties. . . . Before disclosing returns or return

information to other Service personnel, employees should satisfy themselves that the recipient

has an official need for the information. . . . This provision does not prohibit Service employees

from exchanging information to seek advice about legal, technical, or procedural issues in a

specific case. . . . However, when information is exchanged to get legal, technical or procedural

assistance . . . Service employees should not disclose taxpayers' identities unless necessary. . . .

While Boston Appeals Office associate chiefs have occasionally consulted other appeals officers to discuss a case, such consultations are normally made with appeals officers in the associate chief's group. An associate chief would consult an appeals officer outside of his or her group only when the issue in the case involved an area of law where a specific appeals officer outside his/her group had expertise; *e.g.*, estate and gift tax, valuation of tax shelter issues.⁽¹¹⁾ At the time of the disclosure, Peschier and Mullaney were not members of the same group. Furthermore, Santangelo's case did not involve an area of law where Mullaney had any exclusive expertise.⁽¹²⁾ In addition, since Peschier had already concluded after his initial review that he would not sign off on the case, there was no official need subsequently to disclose the file to Mullaney. I find it incredible that Mullaney just happened to be there when Peschier reviewed the file. In any event, Peschier, when all the circumstances are revealed, at the very least, used bad judgment in reviewing the file with Mullaney, who Peschier could not help but know, had a sharp axe to grind over the Santangelo promotion. Peschier, had other options such as discussing the case with either Vernon Smith or Santangelo, researching the law himself, or leaving the file for McMahan to review. Therefore, Garrard could have reasonably concluded that Peschier's disclosure of tax information was unauthorized and that his July 11 statement was in violation of Rule 214.8 of the Internal Revenue Service Rules of Conduct.

Garrard also could have reasonably believed that Peschier had misused his position as acting associate chief by disclosing Santangelo's work product to Mullaney. Peschier indicated to management on a number of occasions that he was interested in pursuing a career in management. In order to assist him in his career goals, management permitted him to act as an associate chief on numerous occasions. Having done so, Peschier was familiar with his obligations as a management official. However, he breached those obligations when he called Mullaney into his office and disclosed Santangelo's work product to him knowing fully that Mullaney was boldly seeking any information he could possibly get on Santangelo in order to overturn her promotion. By so doing so, Peschier, obviously misused his position as acting associate chief.

Garrard testified that she applied the factors set out by the Merit Systems Protection Board in determining the type of discipline to impose. Douglas v. Veterans Administration, 5 M.S.P.B. 313 (1981).⁽¹³⁾ Garrard also considered the fact that Peschier had been placed in a highly trusted position, and had breached the trust that management had placed in him. Moreover, when questioned about it by the head of the office, Peschier lied. Although Peschier had worked for the Internal Revenue Service for approximately 20 years, and had apparently never been disciplined during that time, the disclosure to Mullaney appeared to be deliberate. Garrard obviously felt that Peschier could be rehabilitated, and that the discipline imposed should not be punitive, but rather should put him on clear notice that his actions were wrong. Garrard considered suspending Peschier from duty and pay, but concluded that a suspension would be too harsh. She also considered orally admonishing Peschier. However, since she viewed Peschier's acts to be a serious breach of integrity, she concluded that an oral admonishment would not properly convey the seriousness of his offenses. According to Garrard, she finally concluded that a letter of reprimand would be appropriate.

Mullaney was also issued a letter of reprimand which charged him with making a false statement to McMahan regarding the manner in which he obtained information on Santangelo's work product, and for receiving tax information in an unauthorized manner and using the formation to cause dissension and discord in the office. Garrard also considered suspending Mullaney, however, since Mullaney had committed the acts six months earlier (January 1991), and because he had evidently been so obsessed with Santangelo's selection,

she concluded that a letter of reprimand would be the appropriate type of discipline.

Finally, with regard to McMahon, Garrard orally admonished him on two occasions for his failure to notify her earlier. In addition, Garrard lowered McMahon's annual evaluation, and denied him a merit pay bonus due to his failure to bring the disclosure to her attention at an earlier date.⁽¹⁴⁾ Since McMahon had told her the entire story when confronted, and appeared to be extremely remorseful, Garrard concluded that the two oral admonishments, the denial of merit pay, and lower evaluations would be sufficient discipline for his actions.⁽¹⁵⁾ The actions of Garrard, in disciplining all three individuals involved, including the manager are consistent with her belief that this was a serious matter. Thus, she did not appear to pick and choose Peschier because of any union activity, but did so because she felt that his participation in this serious matter warranted discipline.

D. THE ALLEGED COERCIVE STATEMENT

Garrard made her determination as to the type of discipline to impose during mid-August, 1991. The letters of reprimand were issued to Peschier and Mullaney on September 16, 1991. On October 3, 1991, the Union filed a grievance on behalf of Mullaney. By letter dated October 4, 1991, Peschier responded to the letter of reprimand. On or about October 17, 1991, Peschier went to McMahon's office to discuss several matters. The record clearly shows that Peschier and McMahon were friends and that Peschier often discussed matters with McMahon, including whether he should run for union office. Both also testified as to the honesty and light-heartedness of these conversations between "friends." Peschier testified that he was unable to recall any direct quotes from the conversation. However, he stated:

I remember saying to Gerry that Linda had said at least two office meetings that it was her belief that during the months prior to that . . . during 1991, that . . . she was hoping to post two Grade 14 positions in the office at the first of the fiscal year, which would have been -- which did begin October 1st.

I asked Gerry, in the conversation we were talking about the promotions and the fact that they hadn't been posted yet; and I said to him, I wonder if it's because she doesn't want to give them to John and myself who were next on the promotion list, et cetera, et cetera.

Peschier did not testify regarding McMahon's response to his assertion about the promotion actions. However, Peschier testified that during the course of the conversation" he said to McMahon "Geez, I wonder when all of this is going to end." Peschier testified that McMahon responded "March 1994". Since Peschier "didn't make a connection," he said that he asked McMahon "What do you mean March 1994?" According to Peschier, McMahon allegedly replied "That's when the next union election is." At hearing, McMahon did not recall having this discussion with Peschier.

Analysis and Conclusions

In order to go forward with a case the General Counsel need only make a prima facie showing that there was protected activity and that such activity was a motivating factor in a respondent's discriminatory treatment of an employee. The burden then shifts to the respondent to show by a preponderance of the evidence that there was legitimate justification for its action and the same action would have been taken even in the absence of protected activity. Letterkenny Army Depot, 35 FLRA 113 (1990). A prima facie showing under this case equates to proof by a preponderance of the evidence only where the respondent offers no evidence. Hence, the burden of proving an unfair labor practice occurred always rests solely on the General Counsel.⁽¹⁶⁾ Thus a prima facie case can tumble to earth with the force of a falling meteor, but the thrust from that fall must come from the respondent's case.

In this case Respondent met its burden by a preponderance of the evidence to show that there was justification for the action that it took and that the same action would have been taken in the absence of protected activity. I credit the testimony of McMahon and Garrard. McMahon's testimony is particularly revealing and supports Garrard's account. It is also noted that while Respondent sought to call Mullaney as a rebuttal witness, neither side saw fit to call him regarding his participation revolving around reviewing the Santangelo file. Not even Peschier who certainly benefited from McMahon's friendship, kindness and generosity through the years can dispute McMahon's version of events. While I credit McMahon, there is no sympathy for his relative inaction in this matter. The record bears out that his friendship with both Peschier and Mullaney caused him to mishandle a matter for which McMahon was admonished, lost a merit increase and had his performance evaluation lowered. Neither Peschier nor Mullaney suffered short term losses equal to McMahon's. With respect to Garrard's credibility, it would be extremely difficult to discredit her version of what occurred since the record clearly shows that immediately upon discovering what occurred concerning the Santangelo file, she acted in a reasonable manner and not only took action against union adherents, but against everyone involved. Furthermore, Mullaney's statement to Garrard that he would not discuss the matter with other appeals officers any longer, shows at a minimum he was talking to others, one of whom without doubt was Peschier, and could have led her to reasonably conclude that the talk about the promotion and the other activities going on around it may have reached divisive proportions. Her actions, in my view were consistent, reasonable and do not appear to be driven by any union or protected considerations.

In crediting McMahon a different story than the General Counsel would have us believe unravels. It is a jaded tale of bitterness because a female employee received a promotion that males thought they should have. Indisputably, there were appeals officers who were displeased with the Santangelo selection to the GS-14 position, notably Mullaney and Peschier who were her closest competitors for the position. The interesting thing by all accounts is that each thought he should have been selected. Both sought to have the promotion overturned and it appears that they were indeed resentful about not being promoted instead. There was a frenzy of activity going on around this promotion and all of it could not be characterized as constructive. Not only did they seek to have an adjustment through normal channels, it seemed, at least, that they used Peschier's position of acting associate chief to gain access to a work, which at least Mullaney used for purposes other than its intended use. I do not believe for an instant that Mullaney just popped up when Peschier was reviewing Santangelo's files. Since it was clear that Peschier and Mullaney were both eager to have Santangelo's promotion overturned, it is not hard to see why McMahon and Garrard would have arrived at the conclusions about Peschier's participation in disclosing the file that they in fact did. One does not have to determine that these two made the right decision, but only whether they made a decision which was reasonably based and could serve as justification for their disciplinary action.

Continuing with McMahon's account, Mullaney complained to him about Santangelo's selection while on a training session. Further, Mullaney disclosed that he was in possession of a copy of a supporting statement which had been prepared by Santangelo which he threatened to present along with other supporting statements to upper management to show that Garrard was wrong in selecting Santangelo to the GS-14 position. McMahon asked how Mullaney came into possession of the work product and was told that Mullaney had

obtained it from the record section. Not believing this and because he felt it was wrong for Peschier and Mullaney to be going through and criticizing Santangelo's cases in view of the recent selection, McMahon did not confront Mullaney at that time.

A summary investigation by McMahon after he returned from San Francisco confirmed, in his mind, that the file in the record section was different from the one that Mullaney said he had in his possession. He thus was reasonably sure Mullaney had lied to him. Having determined that Peschier had reviewed the file while acting as an associate chief, McMahon then talked with Peschier about his conversation with Mullaney. Although Peschier did not admit showing the supporting statement to Mullaney, McMahon was convinced, as any reasonable person would have been, that Peschier had shown the supporting statement to Mullaney. Instead of taking any action against Peschier, McMahon decided that it was inappropriate for him to be reviewing Santangelo's work and therefore, decided not to have him act as associate chief for an indefinite, but unspecified period. This decision, clearly made out of friendship to both Mullaney and Peschier, and his desire not to get them in trouble, was to cost him. McMahon then, as the record shows, advised others, including supervisors and an appeals officer, but not Peschier, of his decision to withhold the acting situations from Peschier.⁽¹⁷⁾ In fact, McMahon never told Peschier the reason why he removed him from the acting position. McMahon's credited testimony in this matter, in my opinion, puts to rest any contention by Peschier or Mullaney that they were using the Santangelo file for legitimate taxpayer purposes or even for protected activity. It is found that Peschier was initially removed from acting assignments for an indefinite period of time because McMahon felt that Peschier had done something wrong in his review of the Santangelo file with Mullaney.

The case might well have ended here had not Peschier, who was ably orchestrating his career, become concerned about his lack of assignments as acting associate chief. Clearly he had asked supervisors about the situation and received no satisfactory answers. Had he thought about it a little the answer was obvious, for on July 24, 1991 after an earlier meeting with Garrard, he admitted for the first time, that he had revealed the entire file to Mullaney. If nothing more, this revelation supports Respondent's position that Peschier's earlier statement to Garrard concerning his participation in the review of the Santangelo file was less than straight-forward.

The General Counsel's theory of the case does not hold up in the wash. The General Counsel asserts that McMahon acted on "suspicion" that Peschier had done something wrong. This record clearly shows that McMahon made an investigation of what he felt was a serious matter, which in my view, required a stronger action than he took. He arrived at a conclusion that any reasonable man would have arrived at, i.e., Mullaney and Peschier were sharing taxpayer information that they should not have since they appeared to be using it for personal rather than income tax purposes. Finally, Peschier's admission to Garrard on July 24, 1991 proved his suspicion correct. In fact, Peschier had several opportunities to set the record straight both with McMahon and Garrard before any action was taken. Even at the hearing, Peschier was guarded about his part in the matter, stating he did not give the file to Mullaney "alone".

The argument that Mullaney and Peschier's review of the Santangelo case file was not an improper act, as already noted, is strained. The Disclosure Handbook presented by Respondent clearly states that tax information is to be disclosed on a "need to know" basis and that Peschier, as already noted, did not review the file, but he showed it to Mullaney, who then used a portion to argue with McMahon that Santangelo should not have been promoted to the GS-14 position. Mullaney's use of the file in this manner was certainly not to conduct taxpayer business. No matter what their initial intent in reviewing the file may have been, there is a clear inference from the record that the two ended up using the supporting statement for personal reasons. Given the fact that Mullaney, at least, was on a mission to unseat Santangelo from her promotion, and all the

circumstances indicate that Peschier was on that same mission, I cannot find that Peschier innocently showed the file to Mullaney for the purposes that he testified to at the hearing. Accordingly, it is found that Peschier disclosed the Santangelo file to Mullaney for personal rather than work reasons and that such disclosure was an improper use of the file.

The General Counsel questions the appropriateness of the letter of reprimand to Peschier. While in agreement with Peschier that he was not being investigated about the Santangelo matter at that time, it was he who initiated the conversation with Garrard on July 11, 1991, in an attempt to discover why he was not getting acting assignments. Rather than Garrard misleading him as the General Counsel asserts, it appears to be the other way around. Garrard clearly was puzzled by what was going on, but did ask Peschier if he had shown Mullaney the file. Peschier admittedly told her he had not shown the file to Mullaney and that Mullaney could only know who the file belonged to if he read it upside down. Peschier's remark is characterized by the General Counsel as facetious. Although it might have been humorous to him at the time, when all the facts were in, he changed his position on July 24 saying that he had shown the file to Mullaney. Indeed he said one thing at one time and something else at another time. With the shifting positions Garrard could reasonably conclude that Peschier was less than candid and was seeking to cover up his showing the file to Mullaney. Fundamentally, this certainly would cause one's veracity to be challenged. In the total circumstances of this case, it is my view that Peschier's inconsistencies regarding whether he showed the file to Mullaney could reasonably form the basis for Garrard reprimanding him for making a false statement.

Similarly, the General Counsel's argument that Peschier should not have been reprimanded for "an unauthorized disclosure of tax information" is rejected. Little needs to be said about this argument since it has already been found that Peschier and Mullaney were not reviewing this file for tax administration purposes, but for personal reasons. It is my view, their use of the file to discredit the selection of Santangelo was not an authorized use. Furthermore, the General Counsel presented no persuasive reason why Mullaney and Peschier should be allowed to rummage through another employees work product for their own personal reasons. Finally, there is no merit in the claim that discipline for misusing the position of acting associate chief because of "unauthorized disclosure of tax information was used by Mullaney to create dissension or discord in the Boston Appeals Office," was not appropriate. One example of Mullaney's use of the information was to tell a supervisor that he had no integrity for his part in the Santangelo selection. Further-more, Mullaney had obviously been talking up the promotion with appeals officers, for he unsolicitously told Garrard that he would do it no longer. Based on what is obvious about his and Peschier's positions on the promotion, it is hardly likely that he would use his knowledge of the file to create harmony in the office. In any event, the record is clear that the two were not reviewing the file for tax administration purposes and that any other use is barred. Peschier cannot now claim that he was unaware of what damage might be done by his showing the file to Mullaney. Furthermore, even McMahon, Peschier's "friend", after his conversation in San Francisco, recognized that Peschier's actions were not proper use of the file or the acting associate chief position. Unfortunately he did nothing about it. Therefore, it is found the portion of the reprimand for unauthorized disclosure was reasonably arrived at and is supported by the evidence.

Nor is it found that the removal of Peschier from the acting associate chief positions by Garrard or any of the associate chiefs until January 1992 was improper. The record clearly demonstrates that Peschier was removed from the acting position without even a hint of discrimination from the time McMahon thought he was acting improperly in February for an indefinite and unspecified period. Further, it is my view that Peschier breached a trust while serving in that capacity. Having lost confidence in Peschier as far as protecting tax payer information certainly can form the basis for such action. Moreover, based on all the circumstances, including the fact that Respondent reasonably believed that he attempted to cover up his folly, I see nothing improper in its removing him from such assignments for the reasons it stated and for an indefinite period which ended in January 1992. Accordingly, it is found that Respondent in this case, met its burden by a

preponderance of the evidence to show that there was justification for the actions it took against Peschier and that the same action would have been taken in the absence of protected activity.

In light of all the foregoing, it is found that Respondent did not violate section 7116(a)(1) and (2) of the Statute by eliminating the acting managerial assignments previously held by Peschier and by issuing him a letter of reprimand because he was engaged in protected activity.

Peschier also contends that McMahon told him on or around October 17, 1991, in response to a question from Peschier regarding how long the tense atmosphere in the office would continue, McMahon allegedly stated "March 1994" which was the date union officer terms expire. In this one-on-one situation McMahon does not recall making the statement, however, he does not deny that it was made. The test applied here is whether under the circumstances, the statement tends to coerce or intimidate employees in the exercise of section 7102 rights under the Statute, or whether employees could reasonably draw a coercive inference therefrom. U.S. Department of Agriculture, Forest Service, Chattahoochee-Oconee National Forest, Gainesville, Georgia, 45 FLRA 1310 (1992). The circumstances herein, in my opinion show no coercive inference could be drawn from this statement. Without question, Peschier and McMahon had been friends for sometime. The two had engaged in light-hearted and joking conversations on numerous occasions. It is my view that this was not a serious conversation, but merely a probing by Peschier to find out what McMahon knew about some upcoming promotions or potential promotions. While I cannot discredit Peschier, basically because McMahon does not deny making the statement, I nonetheless find it improbable that McMahon would be keeping track of when Union elections were held or that he had any interest in those elections at all. If we are to believe Peschier, McMahon advised him that running for Union office would not be detrimental to him less than a year before. Also, McMahon was Peschier's mentor through the years and where serious questions were asked, gave serious answers including answers on Peschier's running for Union office. Here Peschier was in McMahon's office allegedly shining his shoes and for the most part speculating about promotions, an area which is clearly shown not to be in McMahon's control. While I find that the statement attributed to McMahon would be violative of the Statute in most circumstances, the total circumstances here do not warrant finding it in violation of section 7116(a)(1). More importantly, I do not think it would effectuate the purposes and policies of the Statute to find a violation where as here a supervisor has taken some legitimate corrective action against the employee only a short time before the alleged statement was made. Therefore, it is found that the remark allegedly attributed to McMahon did not violate section 7116(a)(1) of the Statute.

Accordingly, based on all of the above, it is recommended that the Authority adopt the following order:

ORDER

It is hereby ordered that the complaint in Case No. BN-CA-20217 be, and it hereby is, dismissed in its entirety.

Issued, March 30, 1993, Washington, DC

ELI NASH, JR.

Administrative Law Judge

1. Monthly inventory reports contain a listing of all cases assigned to an appeals officer. The reports also include such information as the name of the taxpayer, the date on which the case was assigned to the appeals officer, the number of hours spent working on the case and the date the case was closed.
2. When cases are fully closed they are stored in the records sections.
3. By memorandum dated January 4, 1991, McMahon designated Peschier Acting Associate Chief for the periods January 4, 10, 11, 17, and 18, 1991. This was the first time that McMahon delegated acting authority to Peschier subsequent to Santangelo's promotion in November 1990.
4. McMahon recalled that the case involved a business versus non-business bad debt. Santangelo's supporting statement contained a discussion of the facts surrounding the bad debt and a very thorough discussion of the law.
5. In Respondent's Exhibit 15, NTEU concedes that the reason why Peschier was denied acting assignments was due to his disclosure of Santangelo's file to Mullaney.
6. Peschier began to receive acting associate chief assignments again in January 1992, and has continued to receive acting assignments.
7. Inspection is responsible for investigating accusations of criminal misconduct by IRS employees. Should the allegations be substantiated, Inspection refers the case to the Department of Justice for possible criminal prosecution.
8. 18 U.S.C. § 1001 provides in pertinent part that "[w]hoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements or representations, shall be fined not more than \$10,000 or imprisoned not more than five years or both." 26 U.S.C. § 6103 prohibits the disclosure of taxpayer information unless specifically authorized by Title 26.
9. At hearing, Peschier testified that during this second meeting Garrard advised him that "she had concerns because the file had been of Janet's, and that Janet had beaten John and myself out for . . . a promotion back some months before. And she was concerned that perhaps, given the sensitivity of that situation, that I should not have reviewed that file with John."
10. Internal Revenue Service Rule of Conduct 214.5 provides: "Employees will not intentionally make false or misleading verbal or written statements in matters of official interest. § 0.735-55 of Treasury Minimum Standards of Conduct provides in pertinent part that "Employees shall avoid making false, misleading or ambiguous statements deliberately or willfully, whether orally or written, in connection with any matter of official interest. . . ."

11. Only a few appeals officers in the Boston Appeals office have expertise in estate and gift tax matters and/or tax shelters.
12. Peschier testified that he had consulted with Mullaney because he was aware that Mullaney had worked out a unique settlement in a "similar type of case" a few weeks earlier. However, Peschier could have consulted with Vernon Smith, a member of his group, who had handled business versus non-business bad debt issues in the past. Moreover, Peschier testified that Mullaney had previously described his closing agreement to him in detail, that they discussed the issue in Mullaney's case, and his proposed settlement. Having done so, Peschier probably would have known that the issue in Mullaney case was not similar to the issue in Santangelo's case.
13. Douglas, supra, requires that the agency officials consider the following factors in determining the appropriate type of disciplinary action: (1) the nature of the seriousness of the offense; (2) the employee's job level and type of employment; (3) the employee's past disciplinary record; (4) the employee's length of service; (5) the notoriety of the offense; (6) the employee's ability to be rehabilitated; (7) the consistency of the penalty; (8) the adequacy and effectiveness of alternative penalties.
14. Merit pay bonuses range from \$1,500 to \$2,500.
15. In contrast Peschier received a letter of reprimand, his annual evaluation was not lowered, and he was **granted** a high quality step increase (approximately \$1,500).
16. The General Counsel sought to establish that Garrard was hostile to the Union from the time it began to file grievances. Proving such hostility is not a necessary element of a violation under Letterkenny, supra. While such animus certainly helps prove motivation, a violation most certainly can be found without its being present. Since there is no allegation that the three statements made by Garrard are themselves violative of the Statute, the undersigned finds it unnecessary to make a specific finding in that regard. It should be noted however, that these statements when viewed in the total context of this record could or could not be found coercive in nature. In refusing to rule on the specific issue, it is noted that this office has a long record of Union representation and that other bargaining unit representatives who served in the capacity of union representatives encountered none of the so-called hostility that was allegedly directed at Peschier. Unquestionably, the General Counsel would argue that the previous union representatives did not file grievances or pursue unfair labor practices, but neither did Peschier.
17. In either April or May 1991 McMahon first mentioned to Garrard his suspicion that Peschier was giving information to Mullaney. He did not tell her about his San Francisco conversation with Mullaney or his discovery upon his return. Since it appeared to be only a suspicion, Garrard did nothing about it at the time.