OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C.

UNITED STATES AIR FORCE

FAIRCHILD AIR FORCE BASE

FAIRCHILD AFB, WASHINGTON

Respondent

and Case No. SF-CA-60597

NATIONAL FEDERATION OF

FEDERAL EMPLOYEES, LOCAL 11

Charging Party

Lt. Col. Karla R. Burton For the Respondent
Tim Sheils, Esq. For the General Counsel
Before: ELI NASH, JR. Administrative Law Judge

DECISION

Statement of the Case

This proceeding arose under the Federal Service Labor-Management Statute (herein called the Statute) and the rules and regulations of the Federal Labor Relations Authority (herein called the Authority). The proceeding was initiated by an unfair labor practice filed on July 8, 1996 by the National Federation of Federal Employees, Local 11 (herein called the Union) against the United States Air Force, Fairchild Air Force Base, Washington (herein called the Respondent). A Complaint and Notice of Hearing issued in the matter on November 26, 1996. The Complaint alleged that Respondent violated section 7116(a)(1) and (2) of the Statute by the issuance of a June 4, 1996 letter of a reprimand to

employee Danny E. Spiller.

A hearing was conducted on the Complaint in Spokane, Washington, at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Timely briefs were filed by the parties 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 of fact, conclusions and recommendations:

Findings of Fact

At all times material herein, the Union was the exclusive representative of a bargaining unit of employees at Respondent's facility.

At all times material herein, Danny E. Spiller was employed by Respondent as a mechanic in its Vehicle Maintenance Shop (herein called the Shop) and was also a Union steward who represented employees in that shop. Spiller is one of four civilians employed along with 3-4 military mechanics in the Shop. I credit Spiller that in his approximate 24 years of employment at Respondent's facility he had not been disciplined.

At all times material, Master Sergeant Donald Breton was the supervisor of the Shop. Spiller was under Breton's supervision.

Sometime in 1993, prior to Breton's arrival at the Shop in the summer of 1995, Spiller was one of the subjects of an unfair labor practice complaint that was successfully litigated by the General Counsel. *Fairchild Air Force Base*, Cases Nos. SF-CA-20011, 20020 (OALJ) 93-33, affirmed without precedence, June 17, 1993.

When Breton arrived at the Shop, sometime in the Summer of 1995, he apparently unilaterally rearranged the Shop. Spiller, brought the alleged changes to the attention of Union officials', who in turn met with Breton. Former Union president Michael Sveska recalled the meeting with Breton concerning the rearrangement and testified that, Breton essentially became upset with the Union's challenge to his authority as a supervisor. According to Sveska, he sought to explain that under the agreement and laws, the Union had a right to be involved in the change prior to its happening. Breton denied that he knew who took the matter to

the Union but does not deny that he was upset when the Union became involved with the Shop rearrangement.

Spiller testified that sometime prior to April 25, 1996, he and a coworker Chuck Hanley discussed a "scanner" training session that was scheduled for Saturday, April 27, 1996. According to Spiller, Hanley told him that he [Hanley] was going to another training session that Saturday and he thought Spiller ought to attend the "scanner" training. During the course of the conversation, Spiller learned that Hanley had arranged with Breton to take a later day off in return for going to the Saturday class.

It is essentially uncontested as to what occurred on the morning of April 25, 1996, when Breton asked Spiller if he would be willing to go to the "scanner" class on Saturday. Spiller indicated that he would not mind going to the class. He informed Breton however that because it was such short notice the two of them could wait until later to work out Spiller's time off for the training. Spiller, of course was looking for an arrangement similar to that Hanley told him that he had made with Breton. Breton apparently offended at this suggestion, lashed out at Spiller with a stream of profanity which need not be repeated here and talked about the responsibility to get training on his own time and going the extra mile. The conversation was spirited and may have lasted for as long as 30 minutes. Given the facts that Spiller indeed had been the victim of unlawful treatment at the hands of some of Respondent's supervisors, had been asked to work on a Saturday without compensation despite the fact that he knew others were receiving compensation and, Breton had initiated the use of profanity, the outburst by Spiller seems restrained. Spiller, however, admittedly told Breton that he, "was tired of getting fucked by Breton and by management." There the conversation ended.

The record in this matter shows that other employees in the Shop regularly used language similar to Spiller's. It also revealed that other civilian employees and contractors have used profanity and cursed Breton over work related matters and were not disciplined by Breton. Thus, one cannot escape the conclusion that profanity was indeed commonplace in the Shop.

A few hours later, Breton returned and told Spiller that he had written Spiller up, meaning that he had written a 971 entry to place in Spiller's personnel file. Spiller informed Breton that he intended to contact the Union.

On the afternoon of April 25, 1996 Spiller sought to contact the Union's president, but was unable to reach him on that date. Subsequently, on April 30, 1996 Spiller was able to meet with Kruse and they prepared a grievance related to the 971 entry and presented the

grievance to Breton.

The grievance went from the first step to the parties grievance panel, where it was recommended by the panel, which is composed of one union, one management and one neutral that ". . . all of this 971 entry be removed and replaced by the employee's counsel on inappropriate language with the supervisor, to which we all agreed." It appears that the handling of the grievance was accepted and that the grievance was resolved through the action of the panel to reflect that Spiller should receive a 971 entry for the cursing of a supervisor.

On May 10, 1996, some fifteen days after the confrontation with Spiller and 10 days after the Union had given him the grievance, Breton issued a proposed Letter of Reprimand to Spiller, asserting that Spiller's conduct during the argument had been inappropriate. On June 4, 1996, Breton issued a Letter of Reprimand to Spiller chastising him for his "filthy language and angry confrontational demeanor." The Union filed the underlying unfair labor practice charge in this proceeding, challenging the letter or reprimand.

Conclusions

a. The instant unfair labor practice charge is not barred under section 7116(d) of the Statute.

Respondent claims that the issue herein is barred by section 7116(d) of the Statute since the issue in this unfair labor practice case was first raised in a Union grievance filed on June 13, 1996 or prior to the filing in the unfair labor practice matter here on or about July 1, 1996. *U.S. Department of Defense, Marine Corps Logistics Base, Albany, Georgia and American Federation of Government Employees, Local 2317*, 37 FLRA 1268 (1990) (*MCLB, Albany*). The examination of the matter does not end simply because the underlying facts are the same. It is particularly clear, in this case that the legal theories advanced in the June 13, 1996 grievance and the unfair labor practice charge were substantially different. Thus, the theory supporting the June 13, 1996 grievance as testimony of the Union suggests was to "preserve the sanctity and integrity of the grievance process" while the theory of the July 1, 1996 unfair labor practice charge, as well as the Complaint is that the Letter of Reprimand was issued in retaliation for Spiller's participation in protected activity. In this regard, it was uncontested on the record that the Union has previously sought to have the "double jeopardy" issue resolved within the machinery of the contract where it felt "that it was wrong for there to be both an entry in the individual's 971 file and also in the decision

to [discipline]." Therefore, this is not an issue that was unique to Spiller, but one that the Union previously sought to advance through the contractual machinery. Furthermore, the grievance of June 13, 1996 specifically noted Breton's removing the "existing 971 entry and replac[ing] it with the Panel recommendation . . . and that [Breton] was attempting to make a travesty of the grievance procedure by taking the additional action of the Letter of Reprimand after the Grievance has been resolved." Thus, the theory of the grievance appears to be to prevent what the Union testified to as "double jeopardy" under the grievance procedure and its attempt to protect the sanctity of the grievance process.

Notwithstanding that the June 13, 1996 grievance sought the removal of the Spiller Letter of Reprimand and a suspension of action against Spiller for the April 25, 1996 971 entry, it also sought a broader remedy related to the grievance procedure, as well as labor-relations training for Breton when dealing with civilian employees. Thus, it specifically includes the notion that Respondent was misusing the process here, to send chilling messages to employees who engage in protected activity. Clearly therefore, the remedy sought in the grievance is broader than that requested in the Complaint.

The section 7116(d) bar issue in this case is whether the subject matter of the unfair labor practice is the same issue that is the subject matter of a grievance. *U.S. Department of the Army, Army Finance and Accounting Center, Indianapolis, Indiana and American Federation of Government Employees, Local 1411*, 38 FLRA 1345, 1351 (1991) (*Army Finance*), *petition for review denied sub nom. American Federation of Government Employees, AFL-CIO v. FLRA*, 960 F.2d 176 (D.C. Cir. 1992). *Olam Southwest Air Defense Sector (TAC), Point Arena Air Force Station, Point Arena, California*, 51 FLRA 797 (1996) (*Point Arena*). In *Point Arena* the Authority found that where the legal theories advanced in the grievance and unfair labor practice charge were not substantially similar, the filing of the grievance did not bar the filing of the unfair labor practice charge under section 7116(d) of the Statute. The Authority made this finding even though the grievance and the unfair labor practice arose from the same set of factual circumstances (factual predicates) and both matters requested bargaining as remedy there was no 7116(d) bar. The Authority was guided by the holding in *Army Finance* where the court stated that in "each case, the determination whether a ULP charge is barred by an earlier-filed grievance requires examining whether 'the ULP charge arose from the same set of factual circumstances as the grievance and the theory advanced in support of the ULP charge and the grievance are substantially similar.' Only if both requirements are satisfied is a subsequent action barred by a former one."

Here it appears that the June 13, 1996 grievance and the unfair labor practice allege different legal theories; the respective actions are based on different factual predicates; and, furthermore each seeks a

different remedy. *Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 43 FLRA 318, 325-26 (1991); (*MCLB, Albany*).

As already noted, the theory of the grievance and the supposition advanced in support of the unfair labor practice charge are not substantially similar. Since both requirements are not satisfied, here it is my view that there is no bar in this case. In regard to the respective legal theories, the grievance asserts the institutional right of the Union to preserve the integrity of the grievance process by not using that process to punish an employee twice for the same offense.

Consequently, it is found that the grievance in this case sought to preserve the sanctity of the contract while the unfair labor practice sought to establish a statutory violation based on discriminatory conduct, i.e., issuing a Letter of Reprimand to an employee because he or she was engaged in protected activity. The gist of the grievance being that the matter had already been resolved before the Letter of Reprimand issued so Spiller was being unjustly punished on two occasions for the same offense.

Finally, the factual predicates and the remedies sought in the respective actions would necessarily be different for the grievance seeks a remedy that the parties will not misuse the contractual machinery while the unfair labor practice seeks only to have the Letter of Reprimand expunged from Spiller's records and does not deal with the grievance machinery at all.

Accordingly, it is clear in this case that the factual predicate of the grievance as already expressed dealt with how the parties are to look upon the grievance procedure while the factual predicate of the unfair labor practice differs.

Based on the foregoing it is found that there is no section 7116(d) bar in this matter.

b. Respondent violated section 7116(a)(1) and (2) of the Statute by reprimanding Danny E. Spiller.

Respondent asserts that the General Counsel failed to meet its burden of proving that an unfair labor occurred herein. Respondent urges that there is no showing in this case that the Letter of Reprimand was motivated by the filing of a grievance. *Letterkenny Army Depot*, 35 FLRA 113 (1990).

The General Counsel, on the other hand, contends that the whole of Spiller' protected activity is involved here not just his filing of one grievance. Thus, it is asserted that Spiller was issued a Letter of Reprimand in this matter, not only because he filed a grievance, but because he has been a longtime member of the Union, who also served as a steward and officer in the local. Furthermore, it argues that his involvement in *Fairchild, supra*, as well as his reporting Breton to the Union causing him to become embroiled in controversy over a challenged 1995 rearrangement shortly after Breton had arrived at the Shop. Finally, of course, just before Breton decided to reprimand Spiller, Spiller filed a grievance against Breton.

Letterkenny, supra, places the burden of proving that an employee against whom an alleged discriminatory action is taken was engaged in protected activity and that consideration of such protected activity was a motivating factor in connection with hiring, tenure, promotion and other conditions of employment. Where the General Counsel meets its burden of proof, a respondent still has the opportunity to prove by a preponderance of the evidence, 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. Of course, the General Counsel may seek to establish that the asserted reasons are pretextual. *Letterkenny*, 35 FLRA at 122-23.

Each of the *Letterkenny* factors is present in this case. As already noted, Respondent chose to rely on what it deemed to be a lack of motivation on Breton's part to discriminate against Spiller because he filed a grievance. The defense that Respondent had no motivation to discriminatorily issue a Letter of Reprimand to Spiller rests on the credibility of Breton and two other management witnesses, Michael Gendron and Warren Greenwood, who claim that the reprimand was discussed before the grievance challenging the 971 entry had been filed. These two ignore, however Breton's admission that he may have known, prior to deciding on the Letter of Reprimand, that Spiller was considering filing a grievance. Furthermore, their claims are not supported by any documentation that predates the grievance. Finally, Respondent disregards the fact that Spiller's protected activity did not begin with the grievance; it began with his earlier protected activity and was followed by Spiller's challenge of Breton's unilateral change of the Shop work space.

With regard to whether the burden of proving that a violation of the Statute occurred, it is clear that Spiller engaged in protected activity over a lengthy period of time. Although Respondent contends that Breton was "oblivious" to Spiller's protected activity, the record shows that Respondent and its supervisors were well aware of those protected activities and those very supervisors and managers were individuals that Breton obtained advice on how to handle Spiller in this instance.

Moreover, it is abundantly clear and well documented in *Fairchild, supra* that especially upper management in the Shop not only was hostile to the Union, but to Spiller. Thus, Spiller had already been told: (1) that employees who filed grievances may lose, even if they won the grievance; and (2) on an occasion when Spiller noted that there had been insufficient documented evidence to justify a grievant's discipline, "if documentation is what you want, documentation is what you are going to get." *Fairchild*, at 3. Additionally, Spiller and a coworker much the same as here were found to have been discriminated against by the issuance of 971 entries in retaliation for their protected activity. In the earlier case, Respondent also tried to get Spiller removed as a steward by telling the Union president that the head of the Shop could not get along with Spiller and also complained that Spiller had been "working against us." There it was also said by Respondent that Spiller had only been a decent union steward so long as he did not file grievances.

In addition to this general atmosphere of hostility, Breton also demonstrated his specific hostility toward the Union. Thus, it is undisputed that Breton became upset when the Union challenged his authority to make unilateral rearrangements in the Shop in 1995.

In proving a discrimination allegation, evidence of motive may be found such as a respondent's attempt to justify its actions during the course of investigation and at the hearing with different and changing rationales. See *United Stated Air Force, Dyess Air Force Base*, 3 FLRA 809, 819 (1980). Here, Breton claimed that the reason he disciplined Spiller was because of his improper language -- he says so in the proposed and final letters of a reprimand. However, this was not Breton's initial choice of reasons. Even though he denied it at hearing, a fair reading of the original 971 entry shows that Breton first claimed to be upset with Spiller's hesitancy in unconditionally accepting the training assignment. Here the different and changing rationales present sufficient reason for the undersigned not to credit Breton in this matter.

In my opinion, the harshness of the Letter of Reprimand for a first offense helps demonstrate that any reason asserted by Respondent for this punishment is pretextual.[(1)] It is worthy of noting again that what Spiller challenged, both by arguing and by his rough language, was Breton's unwillingness to concede to Spiller something to which he has a legal right: to be compensated for attending a Saturday training. Furthermore, not only was Spiller merely asserting a legiti-mate right, he did not actually curse Breton, rather he cursed his fate -- legitimate in feeling that he was "being fucked" (i.e., not being assured that if he went to the Saturday class he would be compensated). And finally, the context of this conduct minimizes its impact: this occurred in a mechanic's shop, after all, not in a convent.

Another method of proving motive is to compare the treatment of the discriminates with that accorded to similarly situated employees who did not engage in union activities, i.e., to show evidence of disparate treatment. See also, *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 37 FLRA 161, 172-75 (1990). The Authority has explained which factors are to be considered in deciding whether disparate treatment occurred. *Pension Benefit Guaranty Corporation*, 47 FLRA 595, 599-600 (1993).

Here, there is an abundance of evidence of disparate treatment. At the outset, Breton has never disciplined any other employee for using rough language. In this regard the record revealed, Breton tolerated a considerable amount of abuse and profanity from other civilian employees under his supervision without taking any action against them. Further, it is strange, to me, that an individual would open a conversation with profanity and then seek to punish someone who responded to that profanity with profanity. Also, Respondent, only once in its history, has ever given another employee both a Letter of Reprimand and a 971 entry for the same incident -- and Union is currently challenging that action. What is more important, compared with those employees who have received letters of reprimand in the past, Spiller's alleged misconduct is minor.(2)

It is my view that, at the very least Breton simply was not satisfied with the 971 entry once he knew that Spiller would challenge him in the grievance process. Breton sought advice from individuals who were clearly hostile to Spiller because of his protected activity. Then Breton responded by punishing Spiller again, by giving him the Letter of Reprimand and this Letter of Reprimand should be deemed as retaliation for protected activity.

In the circumstances of the case, the undersigned finds that the General Counsel met its burden of proof when it showed by a preponderance of the evidence that Spiller was engaged in protected activity and that protected activity was the motivation for the Letter of Reprimand issued to him on June 4, 1966. It is also found that Respondent did not prove by a preponderance of the evidence that there was a legitimate justification for its action herein. Nor did it show that the same action would have been taken in the absence of protected activity.

Based on the foregoing, it is found that Respondent violated section 7116(a) (1) and (2) of the Statute by issuing the June 4, 1996 Letter of Reprimand to Spiller. It is therefore, recommended that the Authority adopt the following:(3)

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the United States Air Force, Fairchild Air Force Base, Washington, shall:

1. Cease and desist from:

(a) Disciplining an employee for engaging in conduct that is protected by the Federal Services Labor-Management Relations Statute such as filing a grievance under the negotiated grievance procedure.

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

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

(a) Rescind the Letter of Reprimand issued to Danny E. Spiller concerning an April 25, 1996 encounter that Spiller had with a supervisor and remove the above referenced Letter of Reprimand from all files it maintains.

(b) Make Danny E. Spiller whole for any loss of pay he may have incurred as a result of the above referenced Letter of Reprimand.

(c) Post at its 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 Commanding Officer, 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 other materials.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the San Francisco Region, Federal Labor Relations Authority, 901 Market Street, Suite 220, San

Francisco, CA 94103-1791, in writing within 30 days of the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, June 27, 1997

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ELI NASH, JR.

Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

WE NOTIFY OUR EMPLOYEES THAT:

The Federal Labor Relations Authority has found that Fairchild Air Force Base violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

We hereby notify our employees that:

WE WILL NOT reprimand an employee such as Danny E. Spiller

for filing a grievance under the negotiated grievance, or otherwise discriminate against Danny E. Spiller or any other employee because the employee has engaged in activities protected by the Federal Service Labor-Management Relations Statute.

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

WE WILL rescind the Letter of Reprimand issued to Danny E. Spiller concerning an encounter he had with a supervisor and to remove any reference to the reprimand from our files.

WE WILL make Danny E. Spiller whole for any losses he may have incurred as a result of the above reprimand.

_____

(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, 901 Market St., Suite 220, San Franisco, CA 94103-1791, and whose telephone number is: (415) 356-5000.

1. Additionally, the General Counsel raised other reasons that it deemed Respondent's defense as pretextual, however Respondent does not rely on those reasons and, I therefore deem it unnecessary to make specific detailed findings with respect to those assertions. They are as follows: (1) Breton's unexplained failure to consider a lower penalty for this first-time offender; (2) Breton's unexplained failure to review Spiller's record before deciding on the punishment, a Letter of Reprimand; (3) Breton's admission that his decision to reprimand Spiller would not have been different if he had known about *Fairchild*, even though he implied in the Letter of

Reprimand that if he had known that Spiller had received unfair treatment from management in the past that he would take that into account.

2. A number of exhibits were entered showing Respondent's discipline of other employees by Letter of Reprimand. Only one of those exhibits involved conduct where profanity was used as a basis for the discipline. That instance, in my opinion, involved crude vulgarity rather than profanity and appears to be conduct which is far more serious in nature than the cursing by Spiller.

3. The General Counsel's uncontested motion to correct the record is granted.