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

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3354, AFL-CIO Respondent and	Case No. DE-CO-90981
OPAL LANG Charging Party	

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. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **MAY 29, 2001**, 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: April 27, 2001
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
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MEMORANDUM DATE: April 27, 2001

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3354, AFL-CIO

Respondent

and Case No. DE-CO-90981

OPAL LANG

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(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 motions, exhibits, and correspondence filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges OALJ

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WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3354, AFL-CIO Respondent and	Case No. DE-CO-90981
OPAL LANG Charging Party	

Joe Goldberg
Counsel for the Respondent

Nadia N. Khan
Timothy J. Sullivan
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that the American Federation of Government Employees, Local 3354, AFL-CIO (the Respondent), violated section 7116(b)(1), (2), and (8) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7116(b)(1), (2), and (8), by acting in an arbitrary, discriminatory, or a bad faith manner in the implementation of a Fair Labor Standards Act settlement agreement between the Union and the U.S. Department of Agriculture, Rural Development, St. Louis, Missouri. The conduct and consequences of this action allegedly resulted in disparate treatment of bargaining unit employees. The complaint further alleges that the

Respondent violated section 7116(b)(1), (2), and (8) of the Statute by discriminating against unit employees, based on considerations of membership or status in the Union, in the implementation of the settlement agreement. The Respondent denied any violation of the Statute.

For the reasons explained below, I conclude that a preponderance of the evidence does not establish a violation of the Statute and recommend that the complaint be dismissed.

A hearing was held in St. Louis, Missouri. The Respondent and General Counsel were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses. The Respondent and General Counsel filed helpful briefs. Based on the entire record[1], including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The Parties

The Respondent, American Federation of Government Employees, Local 3354, AFL-CIO (the Union), is a labor organization under 5 U.S.C. § 7103(a)(4), the exclusive representative of two units of employees appropriate for collective bargaining at the U.S. Department of Agriculture, Rural Development, St. Louis, Missouri (the Agency).[2] One unit consists of employees of the Centralized Servicing Center. The second unit consists of employees of Operations and Management. Opal Lang is an employee under 5 U.S.C. § 7103(a)(2) and is in the Operations and Management unit.

The Grievance

On January 16, 1998, the Union filed a grievance on behalf of all bargaining unit employees against the management of each of the bargaining units where the Union

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[1] The transcript (Tr.), pages 9-252, is corrected as set forth in the parties' Joint Stipulation of Corrections to Hearing Transcript (Jt. Exh. 2) and at Tr. 147, lines 10 and 11, according to the ruling at Tr. 259, lines 15 through 24.

[2] As of February 1999, the Union represented six bargaining units of employees of the U.S. Department of Agriculture, Farm Service Agency.

served as the exclusive representative, including Operations and Management. The grievance alleged that bargaining unit employees were improperly classified as exempt from the Fair Labor Standards Act (FLSA). Therefore, the employees were not being paid overtime at the appropriate rate of time and a half.3 As relief, the Union requested, among other things, that the employees be made whole, including back pay, interest and treble damages for all hours worked during the past six years as overtime, compensatory time, or credit hours in lieu of overtime, and that the employees be reclassified as nonexempt from the FLSA.

Settlement Negotiations

In approximately January 1999, representatives of the Agency and the Union began settlement discussions. Chris Kunz, Labor Relations Specialist, James Sparks, Personnel Officer, and, occasionally, Deborah Petry, Personnel Management Specialist participated in the settlement discussions for the Agency. Steve Hollis, President, served as the primary negotiator, and in his absence, Bill Klug, Kathleen Dwiggins, and Ernestine Kelly served as contacts for the Union.

On or about February 2, 1999, the Union distributed a proposed settlement and an accompanying memorandum to the employees affected by the FLSA grievance. The memorandum encouraged employees to return an attached ballot to vote on whether to accept the settlement or proceed to arbitration. The memorandum cautioned that only the votes of Union members would count in the decision making process. The memorandum also stated, "If you are not currently a member, you can complete the attached SF-1187 [Request for Payroll Deductions for Labor Organization Dues] to join, and your vote will be counted." (G.C. Exh. 8).

The February 2 vote was the only vote that was conducted concerning settlement. Hollis, as chief executive officer of the Union, signed off on the final agreement after considering the modifications requested by members and nonmembers and further negotiations.

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According to Hollis, the employees who were classified as exempt under the FLSA held Grade 9 or above positions. As a result of being exempt, the employees' overtime pay was capped at the rate of Grade 10, step 1.

Settlement Agreement

On February 5-6, 1999, Operations and Management, through Sparks, and the Union, through Hollis, entered into a memorandum of agreement to resolve the FLSA grievance. Pursuant to the terms of the agreement, the Agency agreed that all affected bargaining unit employees below the GS-13 level would be changed from FLSA exempt to nonexempt, thereby entitling them to time and a half pay for overtime worked. The Agency also agreed to compensate unit employees who worked officially approved overtime or compensatory time between January 16, 1996 and the date of the agreement. Compensation ranged from $250.00 to $4,000.00, and was divided into five categories depending on the number of officially approved overtime and compensatory time hours worked by employees. (G.C. Exh. 3).

The agreement established a procedure for implementing the agreement. It provided that bargaining unit members had 30 days from the date of the agreement to submit their documentation to the Union in support of their claim and that the Union had 45 days from the date of the agreement to submit the information to Human Resources. (G.C. Exh. 3). The latter provision was proposed by the Union so that the Union would have some role in the claims procedure in order to provide assistance to employees in gathering and submitting their documentation.

The agreement further provided that the Agency would pay claims *in seriatim* and not to exceed a sum total of $75,000.00 for all FLSA resolution costs for calendar years 1992 through February 6, 1999. The parties agreed to a cap of $75,000.00 because there was uncertainty about the amount of claims for overtime that existed which was caused by a lack of automated payroll records for the year 1996.

The agreement also provided that the Union and its bargaining unit members agreed not to file or pursue any future grievances, claims, appeals, unfair labor practice charges, complaints, or litigation for any event relative to the January 16, 1998 grievance other than the alleged violation of the memorandum of agreement.

Union Decision on Taking Claims

Hollis testified that after the settlement agreement was signed, he, Klug, Dwiggins, and Kelly determined the manner in which employees' claims would be processed. They determined that since claims would be paid by the Agency *in seriatim*, and $75,000 might not be enough money to pay all of the claims, the Union would have to be careful that the process was first come, first served, and based upon employee initiative. They decided that employees would be required to come to the Union office to submit their documentation and would also be required to complete a survey, similar to one used to solicit input from the bargaining unit once or twice a year.

There were two types of surveys - one designed for Union members and one designed for non-Union members. The Union representatives knew, for the most part, which employees were members of the Union. Both types of surveys contained questions such as, "What issues are most important to you?" and "How can you help us work on these issues . . . ." The survey for non-Union members also asked, "Will you join AFGE Local 3354 by signing the Request for Payroll Deduction of Labor Organization Dues, giving your support, financial and personal, to AFGE for the purpose of strengthening our collective bargaining and political action?" "If you answered NO, please tell us why?" (G.C. Exh. 13 & 14).

The Union Notifies Unit Employees of the FLSA Settlement Agreement and Claims Procedures

On February 16, 1999, the Union issued a memorandum to Operations and Management employees entitled "Your Union Continues to Increase Your Income!" The publication stated that the majority of dues-paying AFGE members had voted to settle the grievance on overtime and compensatory time. A copy of the settlement agreement was attached. The memorandum explained that in the future all bargaining unit employees below the GS-13 level would be classified as nonexempt under the FLSA Act and that affected employees covered by the grievance would receive one-time payments in lieu of back pay and damages as explained in the agreement. Employees were informed that, in order to submit official documentation of overtime and compensatory hours worked, the Union's offices at 1520 Market and 4300 Goodfellow would be staffed the next day, February 17, 1999 from 9:00 a.m. until 1:00 p.m., and that only the 1520 Market Union office would be open on February 18 and 19, 1999 at the same times. The

memorandum stated that employees should contact Steve Hollis or Bobby McCoy "for more information, or if you cannot come to the Union Office during one of the above-stated times." The memorandum concluded by listing other "pay increases . . . produced by AFGE" and stated that dues should be paid by all employees, GS-10 and above, and that "the right thing to do is to join with your co-workers, most of whom are below the GS-9 level and didn't even benefit from this overtime grievance, to add your membership and financial contribution to [the Union]." (G.C. Exh. 9).

Hollis was responsible for desk dropping the memorandum to all of the 114 affected unit employees. He conducted desk drops on February 16, 1999 at the 4300 Goodfellow location and the 2350 Market location. At the 1520 Market location, Hollis obtained the assistance of Ernestine Kelly to desk drop in her work area and Glen Wellington, a Union member and part-time Union steward, for the information technology area.

Union Accepts Documentation From Night Shift Employees

Hollis accepted the documentation of three night shift unit employees prior to 9:00 a.m. on February 17, 1999 so they would not have to return at that time. The three night shift employees were Charles Bridges, Ramon Soto-Pinto, and Lee Hunter. Bridges, a 3:30p.m. to 11:30 p.m. employee, made the request about 6:00 p.m. on February 16. Soto-Pinto and Hunter, midnight shift employees, made the requests about 6:30-7:00 a.m. on February 17. The first two employees, Bridges and Soto-Pinto, were Union members and were not asked to complete a survey because, according to Hollis, he did not have any surveys available at the time. Hunter was given a survey which she completed, along with a SF-1187 form, which she promptly completed and returned to Hollis.

Agency Requests Union to Receive Documentation at 2350 Market Street Location

About 8:00 a.m. on February 17, Hollis was called by Supervisor Brian Rozel and asked if the Union could send a representative to 2350 Market Street to collect employees' documentation so the employees would not have to come to the 1520 Market Street location. Hollis agreed. The Union had

accommodated employees in this way in the past since they were located away from the main building.

Hollis contacted Delores Ivy and asked that she collect the documentation at 2350 Market Street. Ivy agreed. Ivy arrived at the Union office about 8:45 a.m., passing a line of five to ten employees outside the Union office. Hollis explained to her the procedures to be followed while collecting employee documentation at 2350 Market Street and had Ivy complete the survey and documentation for an employee in line, Carol Townsend. Hollis also collected Ivy's survey and documentation.

Ivy returned to 2350 Market Street with the employees from that location who were already in line at 1520 Market Street. They were Bonnie Lewis, John Brake, Juanita Otey, Brenda Richards, Larry Eschenbrenner, and Michael Huddle.

Document Collection at 1520 Market Street

Bill Klug, one of Hollis' designated helpers, arrived at the Union office shortly before 9:00 a.m., dropped off his documentation, completed a survey, and then left to take care of some work, promising to return to help later. Hollis' Union helpers' Kelly, Dwiggins, and Harrell-Davis arrived at 9:00 a.m., and Hollis also asked Bill Dallas, a former Union president who was in line, to provide his documentation, fill out a survey, and stay and assist in collecting documentation.

As there was a line of employees outside of the Union office at 9:00 a.m., Hollis recorded the names and telephone numbers of 21 of the 1520 Market Street employees so that they could return to their offices and be called back in order after Hollis and his helpers were ready to receive their documentation. Hodgson, Lang, Unfried, and Cline were listed as numbers 17 through 20. (Resp. Exh. G).

Hollis or the other Union representatives called the employees back in the order they appeared on the list, with the exception of Hodgson, who was away from his desk when Hollis called him.

By 9:15 a.m., Hollis had collected the documentation from eight employees, including the three night shift employees (Bridges, Soto-Pinto, & Hunter), four Union

representatives (Klug, Dwiggins, Dallas, & Ivy), and, as noted, Ivy, before departing for 2350 Market with employees from that location, had collected the documentation of Carol Townsend (dues payer), one of the employees in line. (Jt. Exh. 1). Hollis numbered these surveys one through eight. (Resp. Exh. J).

At approximately 9:30 a.m., Kelly provided him with the surveys of five employees: Patricia Doerr, Diane Shaw, Pat Carroll or Mary Ernst, Kelly, and Edna Harrell-Davis. All of these employees were dues payers. Hollis explained to Kelly that the surveys had to be given to him when completed so that the stacks of surveys and documentation would reflect when they were received. Hollis continued to collect the surveys and numbered each one as he received them.

Hollis did not record the time he received each survey. For reference points, Hollis recorded the time on Rhonda Bossomo's survey (number 18) at 10:00 a.m., the time on Patricia Garrett's survey (number 27) at 10:30 a.m., and the time on Sandra Bowe's testimony (number 32) at 11:00 a.m. (Resp. Exh. J).

Just before 10:30 a.m., Hollis received a call from unit employee Lena Milton who said she did not receive the Union's communications. She asked to bring her documentation in the next day. Hollis agreed and noted Milton's name on the top of Garrett's survey. Milton joined the Union when she delivered her documentation the next day.

The Union continued to collect documentation at 1520 Market until 11:15 a.m. when the last employee, Judith Pratt, submitted her documentation. There was a total of 38 employees who submitted their documentation at the 1520 Market Street location. (Resp. Exh. J).

Opal Lang, Virgil Cline, Steve Hodgson, and Michael Unfried Submit Their Documentation at 1520 Market Street

Opal Lang testified that on February 19, 1999 shortly before 9:00 a.m., she and three co-workers, Steve Hodgson, Michael Unfried, and Virgil Cline, all nonmembers, went to the 1520 Market Union Office. Lang observed Union representatives Hollis, Kelly, and Dwiggins in the office.

Hollis told the employees to wait a minute while he got a pad and pencil to take their names and telephone numbers because the Union representatives were not ready to receive documentation. According to Lang, Hollis then returned with a five by two inches white pad. Hollis recorded Lang's name and telephone number. Cline then wrote his name and telephone number on the paper.

When showed Respondent's Exh. G, where Cline's name appeared as the second to the last name on this list of 21 employees, Cline testified that the handwriting used to record his name was not his own. Cline did not dispute that the list was made up in the order of those persons who appeared at the Union office on the morning of February 17.

While Lang waited for the other employees to provide their names and telephone numbers, she observed that about 15 to 20 employees were in line outside of the Union office, including Bonnie Lewis and Debra Risk. The four employees Lang, Cline, Hodgson, and Unfried returned to their office to wait for the Union's call.

Hollis called Lang at her desk and told her to return to the Union office with her documentation. Lang testified she received the call at approximately 9:50 a.m. Hollis recorded Patricia Garrett, a nonmember who was paid, at 10:30 a.m., and Lisa Reilmann, another nonmember who was the last paid, as coming after Garrett. He recorded Lang as submitting documentation after Reilmann. Cline was called last and did not recall the time, but believed that Lang was called about 10 or 10:30 a.m. From all the evidence, I credit Hollis' testimony and find that Lang's documentation was taken after 10:30 a.m. and after Reilmann.

When Lang returned to the Union office, she met with William Dallas who accepted her documentation. Dallas asked her to complete a survey for nonmembers. Lang testified that Hollis was the Union representative who processed her documentation. However, William Dallas, Union steward, testified that he was the Union representative who accepted Lang's documentation, and he identified his own handwriting on her survey. I credit Dallas' testimony.

In response to the membership question, Lang checked "no," indicating that she did not want to join the Union. The Union representative then recorded the total number of

overtime hours Lang was claiming on the survey and Lang initialed and dated it. The interview lasted approximately four to five minutes. The time she submitted her documentation was not recorded. Before leaving the Union office, Lang was asked to tell Unfried to come down to the Union office.

After Unfried submitted his documentation, he informed Cline that it was his turn to submit his documentation. Cline returned to the Union office and met with Edna Harrell-Davis, Union representative. Davis accepted Cline's documentation and then presented him with a survey. Davis asked Cline if he wanted to join the Union and he said no. After completing the survey, Cline was asked to send Hodgson down to the Union office to submit his documentation, which he did.

None of the four employees was paid from the proceeds of the settlement agreement. Cline testified that the time he submitted his documentation was not recorded by the Union representative. Hollis recorded Sandra Bowe at 11:00 a.m. and Cline and Hodgson as submitting documentation after that employee.

Mary Ann Ivanovich Submits Her Documentation at 1520 Market

Mary Ann Ivanovich, a nonmember, did not receive a copy of the February 16, 1999 publication from the Union announcing the collection of documentation, although she acknowledged that she normally receives the regular Union newsletter and other memoranda issued by the Union to all bargaining unit employees. After being shown the publication on February 17 Ivanovich collected her supporting documentation and proceeded to the 1520 Market Union office.

Ivanovich testified that she arrived at the Union office, between 10:00-10:30 a.m. Ivanovich met with Union representative Edna Harrell-Davis, who reviewed Ivanovich's documentation. Harrell-Davis asked her to complete a survey. When asked whether the survey was required, Ivanovich was told by Davis, "[Y]ou have to fill out the survey to ensure your place in line," and that the number on the survey indicated the order in which claims would be considered. In response to the membership question on the survey, Ivanovich checked "No," stating that she did not

want to join the Union at that time, but was planning to join soon and had recently contributed to the Union. Davis then placed a number (30) on the top of the survey and Ivanovich wrote the number of overtime hours she was claiming on the bottom of the survey and initialed it.

Ivanovich was not paid from the proceeds of the settlement agreement. She was recorded as submitting documentation after Lang, discussed above, number 29.

Judith Pratt Submits Her Documentation at 1520 Market

Judith Pratt, another nonmember, testified that on February 17, 1999, she decided to submit her documentation although she thought she might receive just a minimum amount. She was well aware of the grievance and the first come, first served rule through Union representative Kathy Dwiggins who worked in her section. Pratt gathered her documentation around lunch time and took it to the 1520 Market Union Office. (Hollis confirmed that Pratt arrived around 11:15 a.m. and was the last person interviewed that day at 1520 Market Street.)

When Pratt arrived at the Union office, no one else was in line. She met with Dwiggins who took her documentation and asked her to complete a survey. Like Ivanovich, Pratt marked "No" to the question asking her to join the Union. Later, Dwiggins asked Pratt whether she wanted to join the Union. Pratt said, "No," and was then asked by "Judy" whether she would like to join the Union. She again replied "No," and "Judy" asked if she would mind if asked why. Pratt explained that she did not agree with a lot of the things the Union did and just was not interested in joining. Pratt testified that, at that point, "a person in back . . . another Union representative . . . his name is Kevin," stated, "Oh, people are always here to have their hands out when money is being given out, but they're not interested in paying up anything. They want to ride on the shirt tails or the coat tails of the Union."

Pratt's claim was not one of those paid under the settlement agreement.

Document Collection at 2350 Market Street

As noted above, Ivy returned to 2350 Market Street with the employees from that location who were already in line at

1520 Market Street. They were Bonnie Lewis, John Brake, Juanita Otey, Brenda Richards, Larry Eschenbrenner, and Michael Huddle.[4]

Ivy arrived at the 2350 Market location at 9:30 a.m. and was given an office to use. Bonnie Lewis (dues payer) and Joyce Ebenrek (dues payer) were the first employees processed.
As other employees started coming in the room, she decided to place a sign-in notice on the door so employees would not have to stand around and wait. Each employee then notified the next employee on the list after submitting his/her documentation.

Ivy asked Ebenrek if Linda Buffington was at work. Upon learning that Buffington was sick, Ivy called her at home around 10:00 a.m. Buffington asked if she could bring her documentation the next day and Ivy agreed. Later, Jacqueline Harris informed Ivy in person that she had left her documentation at home. Ivy told her that she could also bring it the next day. (Buffington was a Union member at the time, while Harris was not. Harris did complete SF-1187 to become a member the next day, February 18, 1999. Both Buffington and Harris' claims were paid from the proceeds of the settlement agreement.)

Ivy finished collecting documentation at 11:00 a.m. She maintained the documentation and survey forms in the order in which they were received from the employees and took them back to Hollis at 1520 Market Street for the consolidated compilation of the list of claimants. Ivy did not otherwise record the times that each claim was submitted. A total of 16 claims was collected at 2350 Market Street.

Ching Ying Sloan Submits Her Documentation at 2350 Market Street

Ching Ying Sloan, a nonmember, received the Union notice on February 16. She was ready to proceed to 1520 Market Street about 9:00 a.m. on February 17 when she and

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[4] Lewis, Brake and Richards were dues payers. Otey joined the Union later that day. Eschenbrenner and Huddle remained nonmembers. All of these employees' claims were paid (Jt. Exh. 1; G.C. Exh. 6).

other employees were told by a supervisor that the Union was sending a representative to 2350 Market.

When Delores Ivy, Union representative, arrived, the employees, including Sloan, were told to sign their names on a list outside of Ivy's office so they could be called one at a time. Sloan signed her name after Jeffery Senter (nonmember).

Senter called Sloan for the next interview sometime between 10:00 and 11:00 a.m. Ivy reviewed Sloan's documentation and asked that she complete a survey. Ivy asked Sloan whether she was a Union member and Sloan said she was not. Ivy then asked Sloan if she would like to consider joining the Union. Sloan again said, "No."

After her interview, Sloan was asked to, and did, inform the next employee, Rhoda Rice (dues payer), that it was her turn to be interviewed. Later, Sloan asked Jackie Harris if she had turned in her documentation. Harris informed Sloan that she would have to go home to get it. (As reflected above, Harris received permission from Ivy to turn in her documentation the next day at which time she also joined the Union.)

Both Rice and Harris, but not Sloan, were paid from the proceeds of the settlement agreement.

Document Collection at 4300 Goodfellow Street

Bobbie Jean McCoy, a Union Vice President, opened the Union office at 4300 Goodfellow between 8:30 and 8:45 a.m. on February 17, 1999. Seven employees arrived at 9:00 a.m. and she processed their claims in the order in which they came. The last employee was processed at 9:45 a.m.

The Union Compiles a Master List

At approximately 2:00 p.m. on February 17, 1999 Hollis met with Ivy and McCoy to compile a master list of employees who were entitled to claims under the FLSA settlement agreement. The representatives agreed to place the three night shift employees and the Union's volunteers at the top of the master list. They also agreed that Milton, Buffington, and Harris would be added to the list. These

employees had received permission to submit their documentation the next day.

Patricia Garrett was recorded by Hollis as submitting her documentation at 10:30 a.m. at the 1520 Market Street location. Therefore, they agreed to place other employees from the three locations on the list according to where they fell before or after Patricia Garrett. The first come, first served basis was then determined by when the employees submitted their documentation. They agreed that all seven employees who had submitted their documentation at the 4300 Goodfellow location, from 9:00 a.m. to 9:45 a.m., would be on the master list prior to Garrett. Ivy went through the stack of surveys she had collected to identify those employees from 2350 Market Street who had initially arrived at 1520 Market before 9:00 a.m., and they agreed that most of the employees who submitted their documentation at the 2350 Market location would be on the list prior to Garrett.

The first 14 employees added to the list were from the 1520 Market location. They included Klug, Ivy, Dwiggins, Dallas, Kelly and Harrell-Davis (Union members and document collection volunteers), who had submitted their documentation by 9:10 a.m. The names of Klug, Ivy, Dwiggins, and Dallas were followed by the three night shift employees, Bridges and Soto-Pinto (both Union members), and Hunter (who became a Union member that day). The first employees in line at 1520 Market, Townsend (Union member) and Bozada (who became a Union member after speaking to Hollis about it later at lunch that day), Carroll, Shaw, and Ernst (Union members) and Kelly, and Harrell-Davis (Union members and document collection volunteers) were then added.

Seven additional employees were added to the list, alternating between the claims from the 2350 Market and the 1520 Market location. From 2350 Market, the claims of Ebenrek, Brake, and Lewis (all members) and Otey (nonmember) were added. From 1520 Market, the claims of Doerr, Merriweather, and Bossomo (all members) were added. Next, two employees from 4300 Goodfellow were added, Burt (member) and Sedlacek (nonmember). Another employee from 1520 Market was added, Cole (member), then two more 4300 Goodfellow employees were added, Shieber (nonmember), and Barber (member), followed by another 1520 Market employee, Compton

(member), then another 4300 Goodfellow employee, Hill (member).

Hollis tried to insert two or three employees from 1520 Market for each employee from 4300 Goodfellow or 2350 Market because the 1520 Market location processed more claims in the same time period. As noted, 1520 Market took a total of 38 claims, 2350 Market took 16 claims, and 4300 Goodfellow took seven claims.

Hollis testified that because they were getting close to the 10:30 a.m. time frame, he added five employees from 2350 Market, Richards, Gay Lang, Risk, Rice (all members) and Huddle (nonmember). This was followed by one employee from each location, Neiman and Eschenbrenner (both nonmembers) and McCrary (member).

Buffington (member, sick at home) was then added because Ivy recalled that she spoke to Buffington after meeting with Eschenbrenner. Two more 1520 Market employees were inserted Anderson (nonmember) and Wagner (member). The last employee from 4300 Goodfellow was then added, Undersinger (nonmember).

Next added were two more 1520 Market employees, Swanson and Thomas (both members). Harris (nonmember who joined the Union the next day) was then added since Ivy recalled talking to her after Eschenbrenner.[5] Two more 1520 Market employees were added, Bell (nonmember who joined the Union two days later) and Milton (nonmember who joined the next day). Ivy then inserted Schroeder (nonmember) from the 2350 Market pile. Next, were two more 1520 Market employees, Garrett and Reilmann (both nonmembers). (Reilmann was the last employee on the master list to be paid from the $75,000 total allocated by the Agency). Then, two 2350 employees were added, Senter and Sloan (both nonmembers). Ivy had indicated that she was "pretty positive" that employees Senter, Sloan, and Stemmons had submitted their documentation after 10:30 a.m., so they should be on the list after Garrett. Opal Lang (nonmember) from 1520 Market was added. Then, the last employee from 2350 Market, Stemmons (nonmember) was added. The remaining nine employees were all from 1520 Market and included Ivanovich,

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[5] As noted, Sloan testified that she spoke to Harris and encouraged her to submit her documentation after she (Sloan) was interviewed.

Unfried, Bowe, Elders, Cline, Hodgson, Kun, Tekotte, and Pratt (all nonmembers).

The above-information, according to Hollis, was entered into a spreadsheet on the Union's computer. Sixty-one employees were on the list at the end of February 17, 1999 and the total amount of claims exceeded the cap of $75,000.00.[6]

The following day, Hollis testified that he met with the other Union representatives and they decided to continue to collect documentation from employees. Seventeen additional claims, all from nonmembers, were submitted on February 18 and 19, 1999 bringing the total number of claims submitted to 78.

Hollis, Ivy, and McCoy testified that the Union membership status of the employees was not a factor in the compilation of the list submitted to the Agency and, except for the special circumstances identified, they adhered to the first come, first served criterion.

Subsequent Efforts to Increase Total Payment

After February 17, 1999, several Union representatives visited the Personnel Office and spoke to Personnel Officer Sparks about raising the $75,000.00 cap. A telephone conference with Sparks and Leonard Hardy, Associate Administrator of Operations and Management, also took place on February 19, 1999.[7] At the end of this discussion, Hardy said the agreement stood as signed. Sparks stated

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[6] Hollis had previously stated in an affidavit during the investigation of the case by the General Counsel that "[a]fter the master list was compiled approximately one week later I calculated where the cut off would be. I was surprised to discover that allotted money did not compensate all or most employees."

[7] Chris Kunz, Labor Relations Specialist, testified that the conversation with Sparks and Hardy and Union representatives took place on February 16th as reflected in his notes. I credit the testimony of Hollis, Ivy, and McCoy that the telephone conference involving Hardy took place on February 19th. Ivy and McCoy, who were present on the conference call, did not have any contact with the Agency concerning the matter prior to February 17th.

that the intent of the settlement had not been to make all of the employees whole, but to provide some settlement money and fashion a resolution so that from that day forward all GS-12s and below would receive time and a half for overtime. Sparks proposed that the categories of payment could be adjusted so that more employees could be paid from the allotted amount.

The Agency's proposal was not accepted by the Union. According to Ivy, the matter of changing the categories was discussed, but it was considered that any change would have to be voted on by the membership of the Union and some employees might not be willing to take less money. She denied that any consideration was given to employees' Union membership status in such a discussion.

The Union Submits a List of Eligible Unit Employees to the Agency

On March 4, 2000 the Union submitted the employees' supporting documentation to the Agency. As a cover to the documentation, the Union provided a three-page list which contained the names of 114 employees. The names of the first 78 employees were placed in numerical order and beside their names were columns which provided the number of hours worked by each employee and a dollar value of those hours. (G.C. Exh. 4; Jt. Exh. 1).

Upon receipt of this information, the Agency reviewed the claims and categories of employees according to the settlement agreement. The claims exceeded the cap of $75,000.00 with the 48th employee. That employee was paid only the amount left ($1250 of $2500 claimed).

Forty-eight employees listed on the Union's March 4, 1999-list were paid. The remaining 30 employees who had submitted supporting documentation were not paid. The processing of claims and the issuance of payments took place from June through August 1999.

Of the 48 employees whose claims were paid, 38 were Union members at the time the Union submitted its list to the Agency and 10 were not members of the Union. Eight of the 38 employees joined the Union between February 2 and 19, 1999. All 30 employees whose claims were not processed were not members of the Union. (Jt. Exh. 1; G.C. Exh. 4). The

Union was aware at the time it submitted the list that only nonmembers would not be paid.

Some Employees Inquire About the Implementation of the FLSA Settlement Agreement

In August 1999 Ivanovich asked Hollis if all Union members were compensated and only nonmembers were not paid. Hollis responded that there were nonmembers who were paid, including Scott Neiman who received $4000. Hollis stated, "Would you believe he has not joined the Union?"

Ivanovich also asked Hollis what he was doing about her upgrade to a GS-13. Hollis replied that it was all in the Union newsletter, which, he said, she receives and should have read. Hollis took her in the Union office to show her the article regarding computer specialist upgrades. Ivanovich testified that the article contained words to the effect that "if you want help . . . then join the Union," and Hollis also told her words to the effect that "we really couldn't be wasting time with someone who isn't paying dues" and that "the Union members were first priority."

On cross-examination, Ivanovich was shown the newsletter article, but she could not identify any language which could be interpreted in the manner she cited. (Resp. Exh. B).

Union Issues Memorandum Regarding Grievance/Settlement

On August 20, 1999 the Union issued a memorandum to the Operations and Management employees entitled "A Real Life Story With a Moral." The memorandum described the efforts Hollis had allegedly made to obtain assistance in pursuing the FLSA overtime grievance. It stated, in part:

> Since I was heavily involved . . . I asked the other officers and stewards to decide who would take on this case, research it, and file the necessary grievance. No one did . . . A couple of stewards openly stated that they really didn't want to do all that work for higher graded employees who won't pay union dues. My own observation is that others felt that way too. For those who may not be aware of it, a majority of employees, GS-9 and below, have always paid dues

> and been solid union members. Among the GS-11 and above employees in RD [Rural Development], only about one-third are union members . . . . Finally, in January 1998, I filed the grievance on behalf of all Local 3354 bargaining units. . . . (G.C. Exh. 10).

In describing the settlement and the list of eligible employees submitted to Operations and Management, the memorandum stated, in part:

> When management offered a settlement of the grievance, which included a cap on the total payment of $75,000, this proposed settlement was circulated to all affected union members for a vote. They voted to accept the settlement rather than continue to arbitration.[8] Having this knowledge that the settlement included a cap on the total payments, many union members also contacted the union - in advance of the general letter to bargaining unit employees, to make arrangements to have their claims processed at the top of the list.[9] These requests were accommodated, especially for those employees who worked on second or third shift, or otherwise would not be available for the "cattle call" when all affected bargaining unit employees would bring their claims to the Union Office.
>
> As for the way the list was finally compiled, the Union members who worked on this case did their best to be fair to everyone in compiling the list on a seriatim basis, as specified in the Settlement Agreement. The list was compiled based on when the paperwork, including the Union survey,

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8 Hollis testified that the only vote that was conducted pertained to a proposed February 2, 1999 settlement offer; that, as a result of the modifications requested by members and nonmembers and further negotiations, he, as chief executive officer, signed off on the final agreement.

9 Hollis testified that by "many" employees, he was referring to the three night shift employees who submitted their documentation early, Bridges, Soto-Pinto, and Hunter and the employees who assisted in the collection of employees' documentation.

> was completed. In some cases, this differed, but only slightly, from the order in which people lined up at the Union Office door. We also had to do our best to insert the employees who submitted their claims at the Goodfellow Union Office and the 2350 Market location, with those who submitted their claims at the 1520 Market Union Office.
>
> As a result, most, but not all, affected union members were high enough on the seriatim list to receive payments in lieu of actual overtime compensation. Quite a few non-dues-paying members did receive payments . . . .
>
> Some may disagree, but I believe the moral of this story is obvious - If more higher-graded employees would join and become active in the Union, future opportunities to improve the pay, benefits, and working conditions of higher-graded employees will be acted on sooner . . . we would be able to hire attorneys, when needed, to prosecute such cases . . . they would at least be able to have full knowledge, voice, and vote on issues affecting their working conditions, such as whether to accept a settlement with a cap, or to go to arbitration. (G.C. Exh. 10; footnotes added).

Some Employees Question Explanation

Employees Ivanovich, Pratt, Cline, Sloan, and Lang testified that the description of the claims process in the Union's August 20, 1999-memorandum was different from what was conveyed in the Union's February 16, 1999-memorandum. These employees understood that the process would be first come, first served, beginning at 9:00 a.m. on February 17, 1999 not that the priority of claims would be determined by when employees were interviewed and turned in their documentation and survey or that priority would be given to employees who made arrangements in advance to submit their documentation.

Discussion and Conclusions

Statutory Duty of Fair Representation

Section 7114(a)(1) of the Statute provides, in part:

> An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

See National Air Traffic Controllers Association, MEBA/AFL-CIO, 55 FLRA 601, 604 (1999)(*NATCA*).

The Standard Where Union Membership Is Not a Factor

In *National Federation of Federal Employees, Local 1453*, 23 FLRA 686, 691 (1986), the Authority stated:

> Based upon the clear language of the Statute and the applicable legislative history, we find that where union membership is not a factor, the standard for determining whether an exclusive representative has breached its duty of fair representation under section 7114(a)(1) is whether the union deliberately and unjustifiably treated one or more bargaining unit employees differently from other employees in the unit. That is, the union's actions must amount to more than mere negligence or ineptitude, the union must have acted arbitrarily or in bad faith, and the action must have resulted in disparate or discriminatory treatment of a bargaining unit employee. (footnote & citation omitted).

The Supreme Court, in *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 44 (1998)(*Marquez*), reaffirmed its holding that "a union breaches the duty of fair representation when its conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith." The Court held concerning the "arbitrary" prong:

> [In Air Line Pilots Ass'n v. O'Neill, 499 U.S. 65, 67 (1991) [w]e held that under the "arbitrary" prong, a union's actions breach the duty of fair representation "only if [the union's conduct] can be fairly characterized as so far outside a 'wide range' of

> reasonableness' that it is wholly 'irrational' or 'arbitrary.'" 499 U.S. at 78, 111 S.Ct. 1127 (quoting Ford Motor Co. v. Huffman, [345 U.S.] at 338, 73 S.Ct. 681)). This "wide range of reasonableness" gives the union room to make discretionary decisions and choices, even if those judgments are ultimately wrong. In Air Line Pilots, for example, the union had negotiated a settlement agreement with the employer, which in retrospect proved to be a bad deal for the employees. The fact that the union had not negotiated the best agreement for its workers, however, was insufficient to support a holding that the union's conduct was arbitrary. 499 U.S. at 78-81, 111 S.Ct. 1127. A union's conduct can be classified as arbitrary only when it is irrational, when it is without a rational basis or explanation. Ibid.

Id. at 45-46.

The Alleged Arbitrary Actions

The General Counsel claims that the evidence establishes that the Union acted arbitrarily or in bad faith when it implemented the settlement agreement, and, as a result, bargaining unit employees were treated disparately with respect to the processing of their overtime claims. Specifically, the General Counsel contends that the Union (1) gave priority to the claims of approximately twelve employees; (2) collected documentation from employees at three locations, but failed to record the times that these employees submitted their documentation; (3) failed to provide employees with adequate notice of the deadline for submitting their documentation; (4) failed to follow its announced principle of first come, first served; (5) failed to maintain lists of employees who arrived at the three collection sites; (6) failed to make advance arrangements for a Union representative to be present at the 2350 Market Street location to collect documentation; and (7) waived the

rights of bargaining unit employees to pursue related grievances alleging that the Agency violated the FLSA.

Alleged Priority to Some Claims

With regard to the allegation that the Union gave priority to the claims of approximately twelve employees, the record reflects that Hollis accommodated the requests of three night workers so they would not have to return to work after their shift. He also accepted just after 9:00 a.m. the documentation of the six individuals who were needed to assist him in collecting documentation from other employees.

As to the last three bargaining unit employees (Buffington, Harris, and Milton), the Union's explanation for placing them on the list, but accepting their documentation later, also has a rational basis. Buffington was sick and asked to bring her documentation the next day. Harris left her documentation at home and requested to bring it the next day. Milton did not receive the Union's notice because she had changed bargaining units and requested to bring the documentation the next day. The Union notice of February 16 had instructed employees to contact the Union "if you cannot come to the Union Office during one of the above-stated times." (G.C. Exh. 9).

Alleged Failure to Record the Times that Employees Submitted Their Documentation

It would have been "better" had the Union recorded the time each employee submitted documentation at each location. However, the testimonies of the three Union witnesses support the conclusion that, except for those individuals discussed above, the Union organized and utilized a plan to merge the three separate document groups into the master list in an organized fashion and in the order of submission. Certain key times were used in making up the master list, the 9:00 a.m. to 9:30 a.m. period, the 10:00 a.m. period, and the 10:30 a.m. and after period. The record reflects that Hollis did record the times on certain surveys at 10:00 a.m., 10:30 a.m., and 1l a.m. as an aide to merging the documents.

From the testimony of Ching Ying Sloan, a nonmember who was not paid, it appears likely that she submitted her

documentation before Rhoda Rice, a member, who was paid. However, Hollis testified that in compiling the master list Ivy said she was "pretty positive" that Sloan and two other individuals had submitted their documentation after 10:30 a.m. (and, as a result, were not paid). It is noted that Ivy included three nonmembers as submitted before 10:30 a.m. (Huddle, Eschenbrenner, and Schroeder). Therefore, if Sloan should have been listed before Rice, I conclude that this was mere negligence or ineptitude on the part of the Union, and a preponderance of the evidence does not establish that it was done deliberately, arbitrarily, or in bad faith.

Alleged Failure to Provide Employees with Adequate Notice of the Deadline for Submitting Their Documentation

The Union gave only one day's notice of the date for submitting documentation. However, as noted, the Union's notice instructed employees to contact the Union "if you cannot come to the Union office during one of the above-stated times." The Union accommodated bargaining unit employee Milton, who claimed not to have received the notice, and Linda Buffington, who was on sick leave. Ivanovich learned of the filing late and filed her claim at 11:15 a.m. Hollis testified that he would have also accommodated Ivanovich in the same manner as Milton if she had informed him that she had not learned of the notice until late on the filing date.

Alleged Failure to Follow the Announced Principle of First Come, First Served

Understandably, some employees were confused by the Union's "first come, first served" principle. The Union was generally not prepared or adequately staffed with volunteers to take each employee's survey and documentation when he or she arrived at the Union office. There is no doubt, from the high pinnacle of hindsight, that the process could have been more effectively and efficiently planned and administered. At two locations, in order that the employees could return to work and avoid long waits, the Union had to compile a list, or have the employees sign up and be called in turn later to complete the documentation. Thus, generally, the "first come, first served" principle was interpreted by the Union to be fulfilled when the employee completed the survey and documentation. The Union was then faced with the task of merging into a master list the claims

from three locations by its "first come, first served" principle.

Based on the testimony of Hollis, Ivy, and McCoy as to the manner in which the claims were taken and the master list prepared, and the findings in this regard set out above, I conclude that the Union's actions in attempting with both method and application to follow its policy of "first come, first served," were made in good faith and were not so far outside a wide range of reasonableness as to be irrational and, therefore, arbitrary.

Alleged Failure to Maintain Lists of Employees Who Arrived at the Three Collection Sites

The Union did initially maintain a list of employees in line at its busiest site, the Union office at 1520 Market Street, kept a sign-in register at 2350 Market Street, and took the seven employees in order of arrival at the 4300 Goodfellow Street location. The record reflects that, except as noted, the Union kept track of persons submitting information at each site by keeping the documents in order of receipt.

Failure to Make Advance Arrangements for a Union Representative to Collect Documentation at the 2350 Market Street Location

The Union did not make advance arrangements for a Union representative to collect documentation at the 2350 Market Street location, and some employees made their way some eight blocks to the 1520 Market Street location as initially required. A document collection point was established at 2350 Market Street at 9:30 a.m. at the request of the Agency, and the employees who had traveled to 1520 Market accompanied the Union representative back to 2350 Market for processing.

Alleged Waiver of the Rights of Bargaining Unit Employees to Pursue Related Grievances Alleging that the Agency Violated the FLSA

The settlement agreement negotiated by the Union provided for the FLSA nonexempt status of every member of the bargaining unit below GS-13. It also provided for the payment of $75,000 to members of the bargaining unit. In

exchange, the Union agreed not to pursue FLSA grievances and claims of bargaining unit employees for FLSA back pay only for that period before the date of the settlement agreement. (G.C. Exh. 3).

As recognized by both the Agency and the Union, in view of the paucity of pay records and the uncertainties of the outcome of the arbitration, the main goal of the settlement of the grievance was not to make all employees whole, but to provide some settlement money and, at the same time, fashion a remedy so that from that time forward GS-12s and below would receive FLSA entitlement. Some 114 bargaining unit employees received FLSA nonexempt status.

Recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities, the Union's decision to settle on this basis, following its examination of the merits and the risks of proceeding, was well within the Union's wide range of reasonableness and had a rational basis. *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 78 (1991); Marquez, 525 U.S. at 45-46.

The seven Union actions alleged by the General Counsel are not without a rational basis or explanation. A preponderance of the evidence does not establish that, taken singly or viewed collectively, the Union acted arbitrarily or in bad faith and, as a result, treated bargaining unit employees disparately with respect to the processing of their FLSA claims.

The Standard Where Union Membership Is a Factor

The Authority assesses allegations that a union has discriminated on the basis of union membership using a two-step analysis: (1) whether the union's disputed activities were undertaken in the union's role as exclusive representative; and (2) second, whether the union discriminated on the basis of union membership. *NATCA*, 55 FLRA at 604.

The Union's Role

The Union argues that it does not have exclusive control over FLSA claims. A Federal employee has the direct statutory authority under 29 U.S.C. § 216(b) to bring an

FLSA action in state or Federal court regardless of the actions of the Union.

The fact that an employee may choose a representative other than the Union for litigation of FLSA claims in court, where the Union does not have exclusive representation, does not change the Union's role in this case concerning the FLSA grievance processing where its authority under section 7121 of the Statute was exclusive. The Authority has consistently found that a union acts as the exclusive representative of all unit employees, members and nonmembers alike, with regard to all stages of grievance processing, and, consequently, has a duty of fair representation, and that it violates section 7114(a)(1) of the Statute if it breaches that duty. *American Federation of Government Employees, Local 3615, AFL-CIO*, 53 FLRA 1374, 1387 (1998); *National Treasury Employees Union and U.S. Department of the Treasury, Internal Revenue Service, 38 FLRA 615, 623 (1990) (collecting cases).*

Alleged Discrimination Based on Considerations of Membership

In *American Federation of Government Employees, Local 1345, Fort Carson, Colorado (In Trusteeship) and American Federation of Government Employees, AFL-CIO*, 53 FLRA 1789 (1998), and American *Federation of Government Employees*, AFL-CIO and *American Federation of Government Employees, Local* 1164, 53 FLRA 1812 (1998), the Authority reaffirmed that the burden shifting framework set out in *Letterkenny* Army Depot, 35 FLRA 113, 117-23 (1990) (*Letterkenny*) applies to cases alleging that a union discriminated against an employee on the basis of union membership, when the union contends that its actions were based on legitimate motives. Under *Letterkenny*, the General Counsel has, at all times, the overall burden of establishing by a preponderance of the evidence that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency's or union's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment. If the General Counsel establishes a *prima facie* case, the burden shifts to the Union. The Union has the burden to establish by a preponderance of the evidence, as an affirmative defense, that: (1) there was a legitimate justification for its action; and (2) the same action would have been taken even in the absence of protected activity or previously-occurring activity.

The Union specifically negotiated the right to collect the documentation of claims from employees which were then to be paid by the Agency "*in seriatim*," clearly a condition of employment. The General Counsel contends that the Union discriminated against 30 nonmembers, who exercised their protected right to refrain from joining the Union, by causing their claims not to be paid. The General Counsel points out that all the Union members (38 of the 48), claims were paid; that eight employees joined around the time their claims were collected; Union members were singled out for preferential treatment; and only the nonmembers' claims were not paid. As further evidence of the Union's discriminatory motive, the General Counsel claims that the Union made extensive efforts to solicit members from among employees who would benefit from the grievance; required employees to become members before they could vote on a resolution of the grievance; required a separate survey form for nonmembers which asked them if they would join the Union or, if not, to "please tell us why"; and made hostile statements in the Union's August 20, 1999-memorandum to employees and to others.

The numbers cited by the General Counsel of nonmembers who were not paid are suspicious. However, suspicion is not evidence and speculation is not proof. *U.S. Department of the Air Force, Seymour Johnson Air Force Base, Goldsboro, North Carolina*, 50 FLRA 175, 182 n.9 (1995). Ten nonmembers are also among the 48 on the master list who were paid. Their presence is not explained by the alleged malice, nor is the Union's attempt after the collection of claims to secure an increase in the $75,000 cap, an increase which would have paid additional claims of nonmembers.

The record reflects that the Union was constantly organizing and soliciting membership. The General Counsel cites no requirement that a union reduce its ongoing organizational efforts after it has gained a significant benefit for the bargaining unit. Concerning the requirement that employees become members before their vote would be counted on the issue of whether to accept a settlement of the grievance, it is well established that unions are permitted to exclude nonmembers from polls taken to determine the union's positions in negotiations. *NATCA*, 55 FLRA at 605.

With regard to the alleged hostile statements in the Union's August 20, 1999-memorandum, the General Counsel points to Hollis' statements concerning Union stewards' grumbling over doing "all that work for higher graded employees who won't pay union dues." These statements were explained in the memorandum as made when the Union president was seeking volunteers to research the prospective grievance, not during the processing of the claims. Hollis' statement concerning "many Union members being accommodated in advance" referred to the shift workers and document collection volunteers. The hostile statement to Judith Pratt, a nonmember, when she stated that she was not interested in joining the Union, came from a person she identified as "a person in back of me, another Union rep . . . his name is Kevin." "Kevin" was not further identified or shown to have any official role in the collection of documentation. I do not credit the alleged hostile statement by Hollis to Mary Ann Ivanovich. Ivanovich was shown on cross-examination to have misinterpreted a Union newsletter article as containing a statement to the effect "if you want help . . . then join the Union."

The Union presented the detailed testimony of persons responsible for gathering documentation and claims at the three sites and merging them into the master list of persons to be paid by the Agency *in seriatim*. Its efforts were far from perfect but, as found above, the Union had a rational basis for giving priority to some members who assisted with the collection or could not turn in their documentation at the designated time. I credit the testimony of Hollis, Ivy, and McCoy as to the sequence of the claims, except as noted, and that Union membership played no part in the priority given or in the gathering and collation of documents or construction of the master list.

As the Union demonstrated, by a preponderance of the evidence, that there was a legitimate justification for its action and that it would have taken the same action in the absence of consideration of protected activity, it is unnecessary to determine whether the General Counsel established a *prima facie* case under *Letterkenny*. *U.S. Department of the Treasury, Internal Revenue Service, Austin Compliance Center, Austin, Texas*, 51 FLRA 629, 630 n.* (1995); *Department of the Navy, Naval Facilities Engineering Command, Western Division San Bruno, California*, 45 FLRA

138, 154-55 (1992)(Member Armendariz concurring in relevant part).

Based on the above findings and conclusions, it is concluded that a preponderance of the evidence does not support the alleged violations, and it is recommended that the Authority issue the following Order:

ORDER

The complaint is dismissed.

Issued, Washington, DC, April 27, 2001.

GARVIN LEE OLIVER
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. DE-CO-90981, were sent to the following parties:

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DATED: APRIL 27, 2001
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