



**FEDERAL LABOR RELATIONS AUTHORITY**  
Office of Administrative Law Judges  
WASHINGTON, D.C.

OALJ 13-12

DEPARTMENT OF THE AIR FORCE  
20<sup>TH</sup> FIGHTER WING  
SHAW AFB, SOUTH CAROLINA

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 1872, AFL-CIO

CHARGING PARTY

Case No. AT-CA-10-0054

Brent S. Hudspeth  
For the General Counsel

Capt. Kyle T. Abraham  
For the Respondent

John R. Sammons  
For the Charging Party

Before: CHARLES R. CENTER  
Chief Administrative Law Judge

**DECISION**

**STATEMENT OF THE CASE**

This case arose under the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7101-7135 and the rules and regulations of the Federal Labor Relations Authority (the Authority), Part 2423.

Based upon an unfair labor practice charge filed by the American Federation of Government Employees, Local 1872, AFL-CIO (Union), an amended complaint and notice of hearing was issued on October 4, 2010, by the Regional Director of the Atlanta Region. The complaint alleges that the Department of the Air Force, 20<sup>th</sup> Fighter Wing, Shaw Air Force Base (AFB), South Carolina (Respondent), violated § 7116(a)(1) and (2) of the Statute by

terminating probationary employee Misty Kelley<sup>1</sup> in response to her engaging in protected activity, and violated § 7116(a)(1) of the Statute by making statements in the presence of Kelley that employees were going to the Union too much and that the Respondent had to stop employees from going to the Union. (G.C. Ex. 1(c)). The Respondent filed a timely answer in which it denied violating the Statute. (G.C. Ex. 1(d)).

A hearing on the matter was conducted in Sumter, South Carolina, on December 7, 2010. At the hearing, all parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The General Counsel and the Respondent filed post-hearing briefs which I have fully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, I find that Misty Kelley was not terminated for engaging in protected activity; and the Respondent did not make statements in the presence of Ms. Kelley about employees going to the Union too much and a desire to stop such activity. In support of these determinations, I make the following findings of fact, conclusions of law, and recommendations.

#### FINDINGS OF FACT

The American Federation of Government Employees, Local 1872, is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent. (G.C. Ex. 1(c) & (d)). The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. (*Id.*)

Misty Kelley was hired by the Respondent as a probationary employee in May 2009. (Tr. 174). She was hired as a Child Youth Program Assistant, CY1702-01 (CY-1)<sup>2</sup> flex employee working in the Child Development Center (CDC) at Shaw AFB. (Tr. 95-96, 176-79; R. Ex. 2). As a flex employee, she worked part-time on an as needed basis and was relieved of duties and released to go home before the regular full-time employees when child to employee ratios within an assigned room dropped to the point that only the full-time employee was needed. (Tr. 95-96).

On July 27, 2009, Misty Kelley was informed that she was being separated from her position during her probationary period effective July 28, 2009. (R. Ex. 5). The termination letter explained that she was being separated because she failed to demonstrate the conduct and character traits necessary for the satisfactory performance of her duties, as evidenced by her repeated practice of staying on the clock after being instructed to clock out when employee to child ratios no longer required her presence in the assigned classroom. (*Id.*)

<sup>1</sup> Misty Kelley testified as Misty Henry at the hearing because her name changed as a result of subsequent marriage, however, for consistency with the other documents in the record she will be referred to as Misty Kelley throughout this decision. (Tr. 20).

<sup>2</sup> Throughout the hearing, witnesses interchanged CY-1, 2 & 3 with CC-1, 2 & 3.

The record demonstrates that on more than one occasion after being told to clock out when her presence was not required because the ratio of children to employees had dropped, Kelley either lingered in the classroom, went to other classrooms and offered assistance or otherwise looked for other employees engaged in work and offered to help them with their duties. (Tr. 105, 117, 140-42, 222). This allowed Kelley to remain on duty and to continue accruing paid time, thus extending the hours of her workday after she was instructed to conclude her flex workday. (Tr. 105-06, 117, 140-42, 222).

## DISCUSSION

### Position of the Parties

#### General Counsel

The General Counsel alleges that Misty Kelley was terminated not because she was improperly extending her work hours, but because she made multiple requests to meet with the president of the Union about her dissatisfaction with the grade at which she was started when she went to work as a Child Youth Program Assistant CY-1. (G.C. Br. 17-18). In the view of the General Counsel, it was a series of requests for official time to meet with the Union president that started on or about July 21, 2009, that prompted the Respondent to terminate Kelley on July 27, 2009. The General Counsel argues that terminating Kelley in response to this protected activity violated § 7116(a)(1) and (2) of the Statute. (G.C. Br. 24, 26). The General Counsel also contends that Kelley overheard her immediate supervisor complain to the CDC director that employees were going to see the Union too much and that the director needed to stop such trips. (G.C. Br. 25). The General Counsel alleges that this constituted a separate violation of § 7116(a)(1) of the Statute. (G.C. Br. 25, 26).

#### Respondent

The Respondent asserts that as a probationary employee, Misty Kelley was properly terminated because she failed to follow orders and procedures related to clocking out from duty. (R. Br. 13-15). The Respondent contends that Kelley never once asked for official time to see the Union president, let alone the multiple occasions cited by the General Counsel, and that she was not party to any conversation in which her supervisor complained about bargaining unit employees meeting with the Union and expressed a desire that the meetings needed to be stopped. (R. Br. 13-16).

#### Credibility

This case turns upon the credibility of witnesses who tell widely divergent stories about the facts that are in dispute. With respect to those facts, the General Counsel's witnesses consisted of Misty Kelley, Union president John Sammons, and in rebuttal Union steward Vivian Hodges. The Respondent's witnesses consisted of CDC managers Julie Denton, Paula Currier, and Yulanda Richardson, and human resources employee Judy Burchell. The version of events related by the witnesses does not involve some simple

shading of the facts. The divergence of the stories told by the witnesses leads to the inescapable conclusion that someone is lying. After considering all the testimony, the demeanor of the witnesses, their motive to misrepresent and consistency or lack thereof, I find that the most likely source of facts that cannot be relied upon in this case is the terminated probationary employee, Misty Kelley.

The Authority will not overrule a judge's credibility determination unless a clear preponderance of all relevant evidence demonstrates that the determination was incorrect. *U.S. Dep't of the Air Force, 12<sup>th</sup> Flying Training Wing, Randolph AFB, San Antonio, Tex.*, 63 FLRA 256, 259 (2009); *24th Combat Support Group, Howard AFB, Republic of Pan.*, 55 FLRA 273, 279 (1999). Credibility determinations may be based on a number of considerations including, but not limited to: (1) the witness's opportunity and capacity to observe the event in question; (2) the witness's character as it relates to honesty; (3) prior inconsistent statements by the witness; (4) the witness's bias or lack thereof; (5) the consistency of the witness's testimony with other record evidence; (6) the inherent improbability of the witness's testimony; and (7) the witness's demeanor. *U.S. Dep't of Commerce, NOAA, Nat'l Ocean Serv., Coast & Geodetic Survey, Aeronautical Charting Div., Wash., D.C.*, 54 FLRA 987, 1006 n.11 (1998) (citing *Hillen v. Dep't of the Army*, 35 M.S.P.R. 453, 458 (1987)). With respect to witness demeanor, the Authority has recognized that only the judge has the benefit of observing the witnesses while they testify, and, accordingly, the Authority attaches great weight to a judge's determinations based on demeanor. *Dep't of the Air Force, AFMC, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 55 FLRA 1201, 1204 (2000) (*Warner Robins AFB*). Where a party raises exceptions to credibility determinations based on considerations other than witness demeanor, the Authority will review those determinations based on the record as a whole. (*Id.*).

#### The Requests for Official Time Allegation

Misty Kelley testified that after discovering on July 20, 2009, that she needed to complete training modules to advance beyond the grade of CY-1 she went to Paula Currier and Julie Denton on July 21, 2009, and asked for time to go meet with the Union. (Tr. 27, 54-55, 65). Kelley claims that on the next day, she again asked Paula Currier about going to see the Union and although Currier allegedly asked why she needed to go, her request was not accommodated. (Tr. 28). Kelley then testified that on July 23, 2009, after she had a meeting with Currier and Richardson about an incident involving her not clocking out on the previous day, she made a third request of Currier to go meet with the Union which was not provided. (Tr. 31-37).

Julie Denton testified that she was on annual leave July 21-23, 2009, and did not go into the CDC on those dates. (Tr. 107). Denton also testified that as a matter of practice, an employee who wanted to go see the Union never had to explain why they were going, they just had to document their absence. (Tr. 100, 124). Denton testified that when she was on leave, last minute scheduling changes became the responsibility of Paula Currier. (Tr. 99-100). Paula Currier testified that Kelley did not request to go meet with the Union at any time during the week of July 20<sup>th</sup>, explaining that Denton would have left instructions had

Kelley made a request on Monday, July 20, and that as the person handling scheduling for Denton while she was on leave July 21, 22, and 23, 2009, Kelley made no request directly to her. (Tr. 138, 143-44). Denton also testified that Kelley never asked her for assistance in obtaining official time so she could meet with the Union. (Tr. 108).

There are several reasons for my finding that Kelley's claim of making three requests to meet with the Union on July 21, 22, and 23, 2009, is not credible, the first of which is that her recollection that the first request was made at the front desk of the CDC in the presence of Denton and Currier is improbable given the fact that Denton was on leave and not present at the facility on July 21, 2009. Furthermore, as a terminated probationary employee, Kelley is using this unfair labor practice proceeding to contest a termination that would otherwise not be subject to grievance or appeal. (Jt. Ex. 1). Thus, she has a considerable pecuniary interest in prevailing in this forum which provides a significant bias or motive to misrepresent the facts to her advantage. More importantly, she has repeatedly demonstrated a propensity to manipulate facts and to be less than fully honest when it might serve her purpose.

The first example of this in the record stems from her confusion over her marital status in the declarations submitted to the Respondent. In a Declaration for Federal Employment executed on April 21, 2009, she represented in response to question 14 that she was the spouse of Steven Kelley, who was in the Army. (R. Ex. 1). She also listed Dustin Henry, who was in the Air Force and whom she subsequently married, as another relative without indicating how she was legally related to him at that time.<sup>3</sup> (*Id.*). Nonetheless, in response to question 14 in a subsequent Declaration for Federal Employment executed two weeks later on May 6, 2009, she indicated that she had no relatives working in the Federal government, listing neither Steven Kelley nor Dustin Henry as spouse or relative. (*Id.*).

During her testimony, Kelley denied that her inclusion of Steven Kelley as an active duty Army spouse on the first Declaration was done in an attempt to gain the benefit of a hiring preference for military spouses because she thought such a preference was available only to those with spouses assigned overseas. (Tr. 48). However, that claim is simply not plausible given her prior experience as a military spouse and her propensity to spend time in the Civilian Personnel Office at Shaw AFB. (Tr. 223). More importantly, when asked when her marriage to Steven Kelley ended, she initially testified twice that the divorce was final in November 2008, which meant that Steven Kelley was not her spouse when the Declaration was executed in April 2009. (Tr. 76-77). She first attempted to explain his inclusion by claiming that she still thought of him as family because he was the father of her child. (Tr. 76-77). When confronted with the idea that a divorce in November 2008, meant he was not legally her spouse when she completed the first Declaration, she changed her testimony to indicate that they were only separated in April 2009, when she completed the Declarations

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<sup>3</sup> In AF Form 971-NAF dated May 14, 2009, Dustin Henry is identified as Kelley's fiancée. (R. Ex. 4).

and that the divorce was finalized in November 2009. (Tr. 76-77). Of course that would mean that the Declaration executed on May 6, 2009, was inaccurate because it declared that she had no relatives working for the Federal government. Kelley's alteration of her testimony when confronted with this inconsistency exhibited a demeanor of evasiveness and thus, her testimony was less credible than other witnesses. Given that Dustin Henry was identified as her fiancée in a document created by the Respondent on May 6, 2009, (R. Ex. 4), and that she indicated on page five of a Questionnaire for Public Positions also completed on that May 6, 2009, that she was divorced and had no spouse (R. Ex. 13), I conclude that the second Declaration and Questionnaire were accurate, and that in April and May 2009, Misty Kelley was not married to either Steven Kelley or Dustin Henry. Thus, the inclusion of their names on the first Declaration was a falsehood intended to garner favor, if not an outright preference when her application was considered by reviewing officials with military affiliations. Furthermore, given her clear demarcation of box 5-Divorced on page 5 of the Questionnaire when boxes 3 and 4 presented her with the opportunity to indicate that she was either separated or legally separated at the time she executed the document, I find her testimony indicating that she was only separated in the spring of 2009, and was still involved in the legal process that resulted in a final divorce in September 2009, was a lie proffered under oath.

However, Kelley's misrepresentation of her spousal status was not the only falsehood perpetrated by her in the course of seeking employment with the Respondent. In addition to the misleading first Declaration, the Questionnaire for Public Trust she completed on May 6, 2009, also inquired about her police record. (R. Ex. 13). Question 20 on that document posed the following question:

In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s)? (Leave out traffic fines of less than \$150.) If you answered "Yes", explain your answer(s) in the space provided.

In response to that question, Kelley checked the box indicating "No". (R. Ex. 13). However, a criminal record inquiry conducted on December 6, 2010, revealed that Kelley was arrested and charged in Louisville, Kentucky, with two counts of Identity Theft on June 20, 2005, which was well within the 7 year time period covered by Question 20 of the Questionnaire. (R. Ex. 15). Although Kelley attempted to explain her failure to list the arrest and charges as justified because the charges were subsequently dropped and someone in the past had told her that disclosure was not required because she was not tried or convicted of the charges, she admitted that no one from the Respondent provided such guidance, nor did she seek clarification from the Respondent about the question or her obligation to disclose her arrest. (Tr. 45-48, 68-73). She also acknowledged that the form gave her the opportunity to explain the facts and circumstances surrounding the arrest but she elected to not do so because she thought the arrest and charges had been expunged from her record. (Tr. 72-73).

Given Kelley's propensity to present or exclude facts in a manner that benefitted her and the deceptive demeanor she exhibited at the hearing when confronted with inconsistencies in her testimony, it is difficult to give much weight to her version of events concerning whether or not she requested official time to meet with the Union on multiple occasions and was refused each time. However, her lack of credibility is not the only basis for rejecting her claims. In fact, equally persuasive in drawing the conclusion that Kelley's version of events has little merit is the fact that the Respondent as a matter of practice, routinely granted other employees official time to meet with the Union and did so during the week Kelley alleges she faced so much resistance.

As the assistant director for the CDC, Julie Denton was the primary person responsible for scheduling employees. (Tr. 94). In addition to their annual and sick leave, this included any employee's use of official time for meeting with the Union. (Tr. 100). The typical method involved them making a request and Denton asking them to complete an official time report. (Tr. 100-01, 113-14, 125, 130). The official time report would indicate how much official time was needed and when the employee wanted to use it. (Tr. 100-01, 125, 130; R. Ex. 7 & 9). While the initial request could not always be accommodated due to scheduling conflicts, they typically worked out a time for which the use of official time could be granted. (Tr. 101-02, 113-14). Whenever the time allotted was insufficient, the Union would call the CDC and let them know that they were running late and how much longer they would not be available to return to work at the CDC. (Tr. 146-47, 151-52, 197-98). During the week in question, Union Steward Vivian Hodges and another bargaining unit employee were granted official time to meet with the Union president on another matter unrelated to Kelley. (Tr. 146-47, 151-52, 197-98, 231-32; R. Ex. 9 & 10). As the Respondent submitted multiple documents that are consistent with Denton's testimony (R. Ex. 7, 8 & 9), it is clear that the Respondent had a regular system in place for the granting of official time and followed that system during the week Kelley alleges she has so much difficulty. Thus, Kelley's claim that the Respondent denied her oral requests for official time on multiple occasions is not credible.

In an attempt to bolster the credibility of Kelley, the General Counsel also called Union president John Sammons, who testified that Kelley called him during the week in question to complain that she was being denied use of official time. (Tr. 82). However, that does little to bolster Kelley's credibility as it only repeats what Kelley told him about what was going on at the CDC, and I have determined that Kelley was not a credible source. Sammons had no independent opportunity to see or hear Kelley make such requests and his testimony merely repeated what Kelley told him. Further, Sammons testified that Kelley told him that Paula Currier was the supervisor who was ignoring her requests and his advice to Kelley was to go directly to Currier's supervisor, Yolanda Richardson. (Tr. 58, 82). However, Kelley elected to disregard that advice and admitted that she never directly asked Richardson for official time. (Tr. 67). Her failure was confirmed by Richardson. (Tr. 200). While that failure is difficult to understand given that the advice came from her Union president, the failure is not fully explained by the reticence she expressed at the hearing related to her getting in trouble on July 23, 2009. (Tr. 67). According to Sammons, he told

Kelley to go to Richardson during their first conversation on July 21 or 22 when her only problem was the dispute over classification of which Richardson was already aware and predated the subsequent incident over her not clocking out. (Tr. 82). Nonetheless, Kelley elected to maintain a situation where it was only her word against Currier's as to whether or not she asked for official time, a pattern of behavior that is more consistent with an employee looking to create a claim rather than one interested in getting resolution to a legitimate problem. Equally confounding is that despite the presence of a Union steward at the CDC and Kelley's regular interactions with her, Vivian Hodges never submitted a request for official time on behalf of Kelley during the week of July 20, 2009. (Tr. 25, 35-36, 234).

Sammons also testified that in April or May 2010, he had a telephone conversation with Richardson during which she admitted that she knew Kelley wanted to come and see the Union concerning her issue with pay. (Tr. 83). However, that conflicts with both the testimony of Kelley, who admitted that she never asked Richardson for official time and the testimony of Richardson who denied talking with Sammons about Misty Kelley in April or May 2010, and indicated that Kelley never asked her for official time. (Tr. 196, 200). Given Kelley's admission that she never asked Richardson for official time, I give little weight to Sammons' testimony about Richardson's alleged admission made nearly a year later.

For the reasons outlined above, I find that the claim by Misty Kelley that she requested and was denied official time to meet with her Union president on multiple occasions from July 21, 2009 through July 23, 2009, is not credible. Thus, the allegation that she was terminated for making such requests must fail.

#### The Union Meetings Need to Stop Allegation

Paragraph 11 of the General Counsel's amended complaint alleges that:

"the Respondent, through Currier, made statements to Richardson, in the presence of Kelly (sic), that employees were going to the Union too much; that this caused her, Currier, scheduling problems; and that they, the Respondent, had to stop employees from going to the Union so much."

(G.C. Ex. 1(c)).

In an effort to prove this allegation, the General Counsel again primarily relies upon the less than credible testimony of Misty Kelley. (Tr. 37-41, 61-63). While the testimony of Kelley was confusing as to whether this incident happened on July 23rd or 24th, her most reliable recollection, placed the incident on the morning of July 24, 2009, because during cross examination she remembered it happening on a Friday, the day after she was counseled about not clocking out. (Tr. 61-63). She testified that if during direct examination she indicated she overheard the conversation on July 23, she got the dates backwards and that July 23, was the date she had the conversation in Richardson's office about being disrespectful, while testifying with certainty that Friday July 24, was when she overheard



Currier and Richardson talking. (Tr. 62). She also indicated that the incident happened early in the day. (Tr. 62). That the alleged incident supposedly happened on July 24, was also corroborated by John Sammons, who sent an email to Richardson about such an incident on that date, although his email indicated that it occurred that afternoon. (Tr. 90; R. Ex. 14).

Kelley testified that when her prior room assignment fell below ratio that morning she went to Richardson's office to see what she should do. (Tr. 37). She testified that while she was standing in the doorway, Paula Currier rushed by her and told Richardson that she needed to talk with Richardson right away, that the Union had called and there was a problem with the schedule. (Tr. 38). Currier then closed the office door while Kelley waited outside. (Tr. 38). Kelley indicated that when they emerged, Richardson told her everything was okay and that she needed to go back to her previous room assignment. (Tr. 39). At that point, Kelley alleges that Richardson and Currier were walking down the hallway behind her, but that she could overhear them talking and she heard Currier tell Richardson that they needed to stop people from going to the Union because their meetings were taking too long and that it caused too much of a confusion with everybody's schedule and they needed to stop people from doing it. (Tr. 39). She also indicated Richardson shushed Currier after she made the statement. (Tr. 39).

Currier recalled the events of July 24, 2009, in a much different fashion. In her testimony, she indicated that although Denton was back from annual leave on that Friday, she was covering scheduling that morning while Denton was on her lunch break when Richardson approached her and informed her that John Sammons had called and that the two employees who were at a meeting with him would be fifteen minutes late from their scheduled return time. (Tr. 146-47, 151-52). Upon learning this, Currier went to the two employees whom the late running employees were supposed to relieve and informed them that they would need to delay their lunch break by an additional fifteen minutes until the late employees returned from their appointment. (Tr. 146-47, 151-52). Currier then returned to her normal duties when about an hour later one of the extended employees called and told her that the replacement had not yet arrived and asked how much longer it would be before a lunch break would be provided. (Tr. 146-47, 151-52). At that point, Currier approached Richardson at the front desk of the CDC to see if the Union had called back to indicate there was going to be further delay in the return of the employees and was told no. (Tr. 146-47). According to Currier, it was at that time that she expressed some displeasure to Richardson stating that it would be nice if they could get phone calls letting them know people were going to be late from their appointments because it messes up the schedule when people are late and don't call. (Tr. 146-47). Currier testified that while she uttered her complaint in the presence of Paulette Steinle who was working the front desk, she did not make any statement about stopping people from going to the Union and that Misty Kelley was not in the area nor could she have heard her conversation without being seen because the hallways were angled and she could see all the way to the first classroom door of each. (Tr. 146-49).

Yolanda Richardson testified that earlier in the day, before Union president Sammons sent her the email on July 24, 2009, he called to inform her that two employees with whom he was meeting were going to be about fifteen minutes late in returning to the CDC. (Tr. 197-98). Upon receiving that call, she informed Paula Currier who made arrangements

to cover for the employees who were going to be late. (Tr. 198-99). While Richardson confirmed that Currier had to make an additional schedule adjustment later that morning, she thought Currier accepted it as part of the job and denied that Currier made any reference to needing to stop meetings because they caused scheduling problems. (Tr. 199, 201). Richardson also confirmed that the conversation occurred at the front desk of the CDC in the presence of Paulette Steinle and that Misty Kelley was not in the area. (Tr. 199). In his testimony, John Sammons confirmed that he spoke with Yolanda Richardson on Friday, July 24, 2009, and he made no reference to speaking with Paula Currier for the purpose of giving notice that the two CDC employees with whom he was meeting would be returning later than their scheduled time. (Tr. 85).

Aside from the general lack of credibility exhibited by the General Counsel's primary witness with respect to this allegation, I give little weight to the version of events related by Misty Kelley because the facts are inconsistent with the testimony of three other witnesses, including the other witness called by the General Counsel. Yolanda Richardson, Paula Currier and John Sammons all testified that it was Richardson who was called by Sammons on the morning of Friday, July 24, 2009. (Tr. 85, 146-47, 151-52, 198-99). This clearly contradicts and is inconsistent with the testimony of Kelley who described a drama involving Currier rushing through Richardson's door and proclaiming "I need to speak to you right now; I need to speak to you right now. That was the Union on the phone and we have a problem." (Tr. 38). Kelley was the only witness to indicate that it was Currier who received the call from the Union about employees running late, and while dramatic, her recital of the events was not consistent with the testimony of other more credible witnesses.

Furthermore, even if one disregards her testimony that Currier was reacting to a call from the Union and presumes that the call which prompted Currier's visit to Richardson was actually from one of the held over employees, the idea that Kelley, who was reporting to Richardson because she was not needed in her prior room assignment due to a drop in the employee to child ratio would simply be sent back to a room where she was not needed while Richardson and Currier scrambled to find replacements for two employees who were now almost an hour past their scheduled lunch break makes so little sense that it borders upon the absurd. Thus, I give little weight to the version of events outlined by Kelley.

The General Counsel attempted to bolster the credibility of Kelley through the testimony of John Sammons along with the email he sent to Richardson at 4:23 p.m. on July 24, 2009, in which he reports that Paula Currier was overheard that afternoon telling Richardson that she needed to stop bargaining unit members from coming to the Union because it was messing the schedules up. (Tr. 83-86; R. Ex. 14). However, his testimony and email does little to corroborate Kelley because Sammons was merely repeating what Kelley supposedly told him. The fact that Kelley relayed her version of the events to him does not make her version any more credible. Furthermore, while Sammons recalls that Kelley called him to report this incident in the afternoon of July 24, 2009, Kelley, Currier and Richardson all testified that it happened in the morning. (Tr. 37, 62, 84-86). Thus, her report to him was not contemporaneous with the events she was allegedly reporting. Of course, her

calling Sammons later that afternoon would make more sense if she was telling him an embellished tale about an event that she did not witness but only heard about after the fact from a coworker actually at the scene when it happened, like Steinle. (Tr. 146-49, 199-200).

The General Counsel also called Union steward Vivian Hodges who testified that when she went to Paula Currier on the morning of July 24, 2009, to asked for official time so she and Kimberly Hibbert could met with Union president Sammons later that morning, Currier "rolled her eyes and said that we needed to stop this, this -- you going to the Union because it was interfering with her schedule and she would have to find somebody to cover us." (Tr. 230-31). Of course, after allegedly making this statement, Hodges testified that Currier left her desk to find someone to schedule in their place and the record contains an Official Time Report indicating that Hodges was awarded three hours of official time that morning. (Tr. 231; R. Ex. 9).

While the testimony of Hodges provides some reason to question Currier's testimony that she never would stop anybody from going to the Union because that was their right, (Tr. 147), it does not make Kelley any more credible. If Currier uttered that statement to Hodges, the fact that the steward made nothing more of the comment and that the alleged speaker behaved in a manner inconsistent with the statement by reworking the schedule so that Hodges' use of official time was possible leads me to conclude that the statement did not interfere with, restrain, or coerce any employee in the exercise of rights granted by the Statute. Further evidence of the innocuous nature of any such statement is demonstrated by the fact that official time was authorized by the Respondent on July 24, 27, 28, and 29, 2009. Thus, if a statement that use of official time needed to be stopped was made on the morning of July 24, 2009, it was certainly not acted upon or carried out, nor did it discourage the Union from seeking official time. (R. Ex. 9).

For the reasons outlined above, I find Misty Kelley's testimony that she heard Paula Currier tell Yolanda Richardson that employees were going to the Union too much, that it caused scheduling problems, and that Richardson needed to stop employees from going to the Union is without merit. Thus the General Counsel's allegation related to that claim must fail.

### CONCLUSIONS OF LAW

In an unfair labor practice proceeding, the burden of proof rests with the General Counsel who has the burden to present evidence in support of the complaint, and such evidence must prove the allegations made in the complaint by a preponderance of the evidence. *Letterkenny Army Depot*, 35 FLRA 113, 117 (1990).

In this case the General Counsel presented evidence related to two unfair labor practice allegations, one a violation of § 7116(a)(1) and (2), the other a violation of § 7116(a)(1). As proof of the allegations the General Counsel relied upon the testimony of Misty Kelley, whom the General Counsel alleged was terminated because she attempted to exercise her rights under the Statute and who supposedly overheard statements by a management official that interfered with, restrained, or coerced an employee in the exercise

of their rights under that Statute. Having determined that the testimony of Kelley was not credible, I find that the General Counsel has not proven the allegations made in the complaint by a preponderance of the evidence. In fact, I find that the General Counsel did not establish that Kelley ever asked for official time nor did it establish that she overheard a conversation in which Paula Currier asserted that employees needed to be stopped from meeting with the Union because it interfered with established schedules.

Furthermore, I find that as a probationary employee, the termination of Misty Kelley was proper and justified on the basis of her failure to clock out when instructed to do so and her repeated efforts to pad her work hours by what she described as "riding the clock". (Tr. 43). Finally, I find that Kelley's failure to report her arrest and charges on the Questionnaire for Public Service completed on May 6, 2009, would be a separate and independent basis for removal from Federal employment even if her performance during her probationary period had been exemplary. *McClain v. Office of Personnel Mgmt.*, 76 M.S.P.R. 230 (1997).

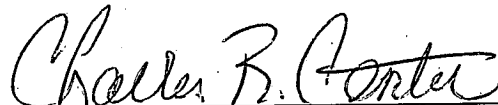
### RECOMMENDATION

I find that the General Counsel failed to establish that the Respondent violated § 7116(a)(1) and (2); and failed to establish an independent violation of § 7116(a)(1) of the Statute as alleged. Accordingly, I recommend that the Authority issue the following Order:

### ORDER

It is ordered that the complaint be, and hereby is, dismissed.

Issued, Washington, D.C., March 29, 2013



CHARLES R. CENTER  
Chief Administrative Law Judge