FEDERAL LABOR RELATIONS AUTHORITY OALJ 15-47
Office of Administrative Law Judges
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN SERVICES INDIAN HEALTH SERVICE, PHOENIX AREA OFFICE PHOENIX, ARIZONA RESPONDENT AND LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, INDIAN HEALTH SERVICE NATIONAL COUNCIL, LOCAL 1386 CHARGING PARTY	Case No. DE-CA-12-0199

Michael Farley
For the General Counsel

James F. Abrusci
Moira A. McCarthy
For the Respondent

Gwen Williams
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), part 2423.

On February 27, 2012, the Laborers' International Union of North America, Indian Health Service National Council, Local 1386 (Charging Party/Union) filed an unfair labor practice charge against the Department of Health and Human Services, Indian Health Service, Phoenix Area Office, Phoenix, Arizona (Respondent). (G.C. Ex. 1(a)). On November 20, 2012, the Union filed an amended charge. (G.C. Ex. 1(b)). On November 21, 2012, the Regional

Director of the Denver Region of the FLRA issued a Complaint and Notice of Hearing alleging that the Respondent violated § 7116(a)(1) and (2) of the Statute when the Respondent terminated bargaining unit employee Jaclyn Delgarito because she had engaged in protected union activity. (G.C. Ex. 1(c)). The Respondent timely filed an Answer to the Complaint in which it admitted certain allegations but denied others, including the allegation that it violated the Statute. (G.C. Ex. 1(d)).

A hearing was held on March 14, 2013 in Phoenix, Arizona. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The General Counsel and the Respondent timely filed post-hearing briefs, which I have fully considered.

Based on the entire record, 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 Respondent is an agency under § 7103(a)(3) of the Statute. (G.C. Ex. 1(c) & (d)). The Laborers' International Union of North America (LIUNA), Indian Health Service National Council is a labor organization under § 7103(a)(4) of the Statute and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Indian Health Service. (*Id.*). The Union is an agent of LIUNA for the purpose of representing bargaining unit employees at the Respondent. (*Id.*).

Jaclyn Delgarito worked as a Medical Support Assistant in the Accounts Receivable (AR) Department at the Respondent from April 26, 2010 until January 20, 2012. (Tr. 34-35). At the time of her termination, she was in the final months of her two-year probationary period. (Tr. 34). The AR Department receives incoming medical insurance payments and posts them to patient accounts. (Tr. 36). At all relevant times, Lori Aguilar supervised the thirteen employees of the AR Department and was Delgarito's direct supervisor. (Tr. 36, 68).

On the morning of November 22, the Union hosted a meeting in a conference room across the hallway from Delgarito's work area to discuss the Union's representational work. (Tr. 41, 79-81). Delgarito and four of her coworkers attended the meeting. (Tr. 43). Delgarito testified that she left for the meeting around 8:40 a.m. (Tr. 42). She admits that she did not request permission in advance to attend the meeting, but testified that she intended to use her fifteen-minute morning break to attend. (Tr. 41-42).

Aguilar testified that she started looking for and gathering employees for a staff meeting at 8:30 a.m. or so and could not find three people, including Delgarito. (Tr. 158-59, 174). At 9:10 a.m., Aguilar emailed Stephanie Carrillo, Human Resources (HR) Representative. (Tr. 159-

60, 177; G.C. Ex. 25). In the email, Aguilar said that she had wanted to have a short meeting but that employees were at a Union Meeting, and no one requested leave. (Tr. 177; G.C. Ex. 25). She asked what she should do. (*Id.*).

At some point, the employees returned to work, escorted by Kenneth Weeks, a Union Steward. (Tr. 44, 85). Aguilar testified that the employees returned at around 9:45 a.m. (Tr. 160). Delgarito testified that she thought she had only been absent from the worksite for between fifteen and thirty minutes. (Tr. 45).

Weeks went into Aguilar's office, where Douglas Ward, the manager of the finance department was also present. (Tr. 116, 160). Weeks sought permission to continue the meeting. (Tr. 117, 161, 219). Aguilar or Ward denied the request. Aguilar characterized Weeks as extremely hostile during the meeting. (Tr. 207; G.C. Ex. 21). She said that he was yelling and behaving as though it was not the employees' fault. (Tr. 207-08). Ward also characterized Weeks as very adversarial. (Tr. 232). After the meeting, at 10:18 a.m., another Union Representative, Anne Susan, requested official time for the employees to attend the meeting later in the day, and Aguilar approved the request. (Tr. 89, 161; G.C. Ex. 12).

Aguilar testified that after the meeting, she spoke to Carrillo in HR and told her that she was going to mark the missing employees absent without leave (AWOL). (Tr. 161). Aguilar testified that she asked Carrillo what other action she could take, and, that after further discussion, Aguilar decided she would issue a formal reprimand to the employees. (Tr. 161-62).

At 11:20 a.m., Aguilar notified the employees by email that she was marking them AWOL. (Tr. 164; G.C. Ex. 6). In the email to Delgarito, Aguilar explained that at 8:45 a.m. she wanted to hold a quick huddle with all the staff but Delgarito was not at her desk. (G.C. Ex. 6). Aguilar explained that, per the collective bargaining agreement (CBA), it is Delgarito's responsibility to request official leave for Union activity. She explained that because of Delgarito's "failure to follow proper procedures," Aguilar was charging her AWOL from 8:45 – 9:45 for time she was away from her duty station without authorization. (*Id.*). She then quoted the policy on official time from the CBA, and concluded, "[i]n the future, please ensure you follow these procedures when attending any type of Union meeting, etc." (*Id.*).

The next day, on November 23, Weeks sent several emails to management and filed a grievance and information request on behalf of the employees who had been marked AWOL. At 11:39 a.m., he emailed Ward, copying Aguilar, about the official time issue. (G.C. Ex. 18). He asked whether the Respondent was operating a detention facility and accused management of "union busting." (*Id.*). At 11:59 a.m., Weeks wrote to Ward, asking for a written response as to why the earlier official time request was refused. (G.C. Ex. 17). At 1:18 p.m., Weeks filed a grievance about the AWOLs, alleging that the time charged AWOL was inconsistent with the facts, not appropriate, meant to frighten the employees and to create a hostile, unproductive work environment. (G.C. Ex. 23). At 1:20 p.m., Weeks submitted a data request under the Statute for

information related to the grievance. (G.C. Ex. 19). At 7:20 p.m., Weeks emailed Aguilar about his "investigation of what is happening" at the Phoenix Area Office and questioned her about an email she had sent, which he referred to as a "dictatorial 'direct order.'" (G.C. Ex. 22).

In notes Aguilar took shortly before terminating Delgarito, Aguilar noted that on November 23, after she received the Union's grievance and data request, she spoke to Carrillo about "options for disciplinary actions and termination." (Tr. 171, 204, 206; R. Ex. 2). Aguilar testified that her notes represented her recollection of the events in the correct chronology and were accurate as to what she felt she needed to document. (*Id.*).

On the following Monday, after the Thanksgiving weekend, the Union announced that it was appointing Delgarito union steward. (Tr. 90; G.C. Ex. 8). The Union copied the Respondent's Counsel on the email. (*Id.*). Delgarito also testified that she met with Aguilar in early November 2011 and told Aguilar about her interest in becoming a Union Steward. (Tr. 39). Aguilar said that she thought Delgarito had come to her in the early days of December and informed her that the Union had asked her to be a Steward. (Tr. 197, 198).

Two days later, Aguilar denied the Union's grievance because the employees "did not follow the procedures set forth in the negotiated CBA for Procedures for Requesting Official Time for Employees." (G.C. Ex. 24). She said that the employees had been appropriately charged AWOL for the period they did not comply with the proper procedure. (*Id.*).

At some point, after she had made the decision to reprimand the employees, Aguilar learned that Delgarito was a probationary employee. She said people were out of the office for Thanksgiving and she had talked to Carrillo a few times about the status of the reprimands. (Tr. 166). Then, Carrillo informed her that Delgarito was still within her probationary period, and that because of that, Carrillo said that Aguilar could not give Delgarito a letter of reprimand. (*Id.*). The other two employees did ultimately receive letters of reprimand. (Tr. 166-67).

According to Aguilar's notes, on December 1, Aguilar discussed disciplinary action and termination with Carrillo and "asked about if we had good grounds and would they sustain." (R. Ex. 2; Tr. 171). In early December, Aguilar testified that she received a draft termination letter from Carrillo. (Tr. 167). The letter was dated December 5, and someone wrote at the top "mgt made decision to proceed w/termination." (R. Ex. 1; Tr. 168, 209).

On December 9, Weeks and Ward discussed the AWOL grievance, and Ward agreed to reverse the AWOLs. (G.C. Ex. 23). Aguilar's notes for this day say that she discussed with Ward and Carrillo that the AWOLs would be reversed, but that the disciplinary actions should still go forward. (R. Ex. 2).

On December 13, the Union asked the Respondent to update Delgarito on a bargaining issue, and on December 22, the Union informed the Respondent that Delgarito would attend a labor-management partnership meeting. (G.C. Ex. 14 & 15). The Union copied Aguilar and Ward on these emails. (*Id.*).

Over a month later, on January 20, 2012, Aguilar called Delgarito into the office and terminated her employment. (Tr. 54). Aguilar testified that the delay between deciding to terminate Delgarito and delivering the decision was because she asked Carrillo to verify whether Delgarito was in fact probationary, which took a few days, and then there were the holidays, and a moratorium on taking any action against the employee. (Tr. 168).

Delgarito and Aguilar have different recollections of the termination meeting. According to Delgarito, Aguilar said that she did not know Delgarito personally, but Delgarito has only been with the Indian Health Service for a short period of time and there may be things that she is not aware of. (Tr. 54). Aguilar said that she likes to go by the rules and follow policy and procedures, and that her supervisor, Ward, is from the private sector and wanted to make a lot of drastic changes. (*Id.*). Aguilar said that Ward does not understand how government is run and wants to make it into how the private sector runs. (*Id.*). According to Delgarito, Aguilar then said that she understands that Delgarito is a union steward and Aguilar is all for the union and how they protect employees, but she does not agree with the tedious complaints they make and that they try to get away with things. (Tr. 54-55).

Delgarito also testified that Aguilar said that she understands that the AWOL was reversed and that there was a grievance made, but, that "this is what happens when you roll with the Union; they get you in trouble when you follow these people." (Tr. 55). Aguilar said that she had no other choice but to terminate Delgarito that day. (*Id.*). Aguilar then gave Delgarito the option to resign in lieu of termination. (*Id.*). Aguilar said that if Delgarito was terminated, she would be barred from government employment for three years, and it would follow her forever. (*Id.*). Aguilar said that there was nothing she could do about the decision, that it is final, and that she consulted with HR and the lawyers and that if Delgarito ever wanted to fight it, it would have to be in front of a Judge. (Tr. 56).

Delgarito wrote to a Union Representative on January 22, recounting the meeting. (G.C. Ex. 10). Her notes were largely consistent with her testimony at the hearing. (*Id.*). The notes say that Aguilar said that she "is all for Union and how they protect employees but feels that some of the things they complain about [are] tedious and they try to get away with things that they are not suppose[d] to be doing such as obeying policy and rules." (*Id.*). Her notes also stated that Aguilar said, "This is what happens when you role [sic] with the Union and follow people, they get you in trouble so you better be careful." (*Id.*).

Aguilar did remember telling Delgarito at the January 22 meeting that she followed the rules. (Tr. 170). She remembered saying that she was hired to do a job and put in the department because there was a problem with work not getting done and that Ward expected her to do her job. (*Id.*). She testified that she probably said that she could not suspend or take any other action against Delgarito because she was in her probationary period. (*Id.*). She recalled saying that there are negative consequences to a termination on your record. (Tr. 194). She denied offering Delgarito the option to resign. (*Id.*). Aguilar denied saying anything about the Union or that if you follow people you are going to get in trouble. (Tr. 170). She later said she may have said that the Union has a place in the organization and that she supports Union activities. (Tr. 195). Aguilar testified that she says that to everybody. (*Id.*).

In the letter terminating Delgarito's employment, Aguilar said that the action was necessitated as a result of Delgarito's misconduct, specifically her failure to follow proper procedures for requesting official time. (G.C. Ex. 9).

Aguilar testified about her reason for terminating Delgarito, rather than taking a lesser action. She said that if Delgarito had been gone for twenty or thirty minutes, she may have counseled her, rather than terminating her. (Tr. 199, 203). She testified that the negative consequences increase with the amount of time the employee is away from the work area. (Tr. 193). She also said that, as a general matter, she does not make it her job to know where employees are at every minute of the day and that she does not monitor break times. (Tr. 182-83, 185, 187-88). In this instance, based on the seriousness of the offense, specifically the amount of time Delgarito was away from the office, and given that Aguilar had been told that a formal reprimand was not an option, she decided to terminate Delgarito. (Tr. 166-67, 171).

Tyson Redhorse, Employee/Labor Relations Specialist, testified about the Respondent's process for deciding on an appropriate disciplinary action. He said that in counseling supervisors, specialists go across the area, take all the similar or same circumstances, and try to apply the same disciplinary action across the board. (Tr. 247). Redhorse reviewed the terminations of probationary employees in the three-year period surrounding the termination and was not able to identify an offense that was comparable to the offense Delgarito was terminated for. (Tr. 243-46).

Prior to her termination, Delgarito never received any negative personnel action or disciplinary action, and was never counseled for poor performance or counseled about her use of time, other than in the November 22 email. (Tr. 37, 53).

The General Counsel placed into the record documented incidents where a probationary employee was AWOL in the Phoenix Area Indiana Health Service. According to the records, the Respondent charged sixty-seven employees AWOL for at least one incident that was longer than an hour from 2009 to 2012. (G.C. Ex. 2). Many employees were AWOL on multiple occasions and for many hours. (*Id.*). The Respondent did not terminate any of these employees between 2009 and 2012. (G.C. Exs. 2, 4).

The Respondent terminated around seventeen probationary employees for AWOL or attendance-related offences between 2009 and 2012. (G.C. Ex. 4). In the letters terminating their employment, most of the supervisors noted that they had warned, counseled or previously discussed the issues with the employees. (*Id.*). The Respondent did not terminate any employees for a single incident of failing to comply with leave-requesting procedures or a single incident of AWOL. (G.C. Ex. 4). It counseled employees, warned them or placed them on leave restriction for failing to request leave and/or AWOL in the same period. (G.C. Ex. 3). Of the probationary employees it discharged for non-attendance related infractions, all of the discharge letters contained more than one charge. (G.C. Ex. 4).

POSITIONS OF THE PARTIES

General Counsel

Applying the *Letterkenny* burden-shifting test for analyzing claims of discrimination, *Letterkenny Army Depot*, 35 FLRA 113, 117-23 (1990) (*Letterkenny*), the General Counsel argues that the Respondent violated § 7116(a)(1) and (2) of the Statute when it terminated Delgarito based on consideration of her protected activity.

The General Counsel first argues that Delgarito was engaged in significant protected activity, including serving as a Union representative, attending a Union meeting, seeking and receiving Union assistance, and having a grievance pursued on her behalf by the Union.

Next, the General Counsel argues that Delgarito's protected activity was a motivating factor in her termination. First, the General Counsel argues that Aguilar's statements in the termination meeting demonstrate union animus and hostility to protected activity and support an inference of unlawful motivation. *U.S. Dep't of VA, Golden Gate Nat'l Cemetery, San Bruno, Cal.*, 59 FLRA 956, 959 (2004) (*VA Golden Gate*) (Cabaniss dissenting in part); *EEOC, San Diego Area, San Diego, Cal.*, 48 FLRA 1098, 1108 (1993). The General Counsel argues that Aguilar drew a connection between Delgarito's involvement with the Union and the decision to terminate her when she suggested that being a Union steward who "rolls with the Union" resulted in Delgarito's termination. The General Counsel argues that Delgarito's testimony was credible based on her "quietly assured manner" and that she made no effort to color her testimony. On the other hand, the General Counsel argues that Aguilar testified in a shaky manner and admitted to lying on the stand when she admitted that, although she wrote that Delgarito "refused to sign" her performance appraisal, she never gave the appraisal to Delgarito.

Second, the General Counsel argues that Union Representative Weeks' "scorched earth" approach to dealing with management likely rankled Ward and Aguilar and created feelings of hostility and resentment towards Weeks, LIUNA and Delgarito. In the General Counsel's view, terminating Delgarito was Aguilar and Ward's way of having the "last laugh."

Third, the General Counsel argues that the timing suggests that the Respondent had an unlawful motive. *U.S. DOD, U.S. Air Force, 325th Fighter Wing, Tyndall AFB; Fla.*, 66 FLRA 256, 261 (2011) (*Tyndall AFB*). On November 22, 2011, not long after the union meeting, Aguilar counseled Delgarito for the alleged absence and for failing to abide by the contract provisions concerning requesting official time, and notified her that she was being charged AWOL. Aguilar did not terminate Delgarito until January 20, 2012. Aguilar's own chronology of the events show that she spoke to human resources about the terminations and discipline after the Union filed the grievance and after the Union elevated the grievance to the second step. Moreover, Delgarito's personal involvement with the Union increased between November 22 and January 20. She became a steward and the Union designated her to work on union projects. Delgarito's increasing union activity likely caused Aguilar to reconsider her original decision to counsel Delgarito and to instead pursue termination.

Fourth, the General Counsel argues that Aguilar's failure to correct and mitigate Delgarito's absence when she failed to go across the hallway and ask her to return to work after she learned she was gone demonstrates that Aguilar intended to give Delgarito and the other employees "enough rope so they could hang themselves."

Fifth, the General Counsel argues that Delgarito was treated disparately to similarly situated employees. *Indian Health Serv., Crow Hosp., Crow Agency, Mont.*, 57 FLRA 109, 114 (2001) (*IHS Montana*) (Chairman Cabaniss dissenting). The Respondent charged eighty-nine probationary employees AWOL between 2009 and 2012 in the Phoenix Area IHS, with the average employee absent for 16.28 hours. Yet, the Respondent did not terminate any of these employees. And of the probationary employees whom the Respondent terminated for leave-related offenses, the Respondent frequently counseled the employees before terminating them, even in instances where the employees had very high accumulated AWOL hours. The General Counsel notes that the Respondent did not remove anyone for failure to follow proper procedures for requesting official time in the three-year period.

Finally, the General Counsel argues that the Respondent did not establish its affirmative defense that it had a legitimate justification for the termination and would have terminated Delgarito in the absence of her protected activity. *See Letterkenny*, 35 FLRA at 119. The Respondent's action was disproportionate to the alleged offense of failing to request official time. Further, there has been no other removal action comparable to Delgarito's. She is the only employee who has been removed for failure to follow official time procedures and for an AWOL-based action not connected to an absence from the workplace for a specific time. Lastly, her removal, when compared to the removal of the other probationary employees, was based on the most insignificant reasons.

Respondent

The Respondent argues that the General Counsel did not present a prima facie showing that the Respondent removed Delgarito for engaging in protected activity. As an initial matter, the Respondent argues that Delgarito's protected activity was minimal. She attended a union meeting and was included in a group grievance that the Union filed on her behalf. While she was a union steward, the General Counsel did not present evidence that she represented other unit employees in that capacity. The Respondent argues that Delgarito's limited exercise of protected rights does not cloak her with immunity from otherwise legitimate and justified management actions. *See USDA, Food & Nutrition Serv., Alexandria, Va.*, 61 FLRA 16 (2005).

Further, the Respondent argues that the General Counsel has not proven that Aguilar was motivated by union animus. Aguilar decided to remove Delgarito before the Respondent settled the union grievance, and she terminated Delgarito, not based on her union activity, but based on the severity of the offense of failing to follow the official time-requesting procedures. The Respondent also argues that Aguilar had decided to take disciplinary action against Delgarito *before* she learned that the Union had appointed Delgarito a union steward. The Respondent argues that Aguilar credibly testified that she never made any reference to the Union in the January 20 meeting with Delgarito. And Aguilar's record of approving official time for union activity demonstrates her lack of animus. The Respondent rejects the General Counsel's argument that Weeks' adversarial demeanor motivated the action and argues that Weeks' inflammatory rhetoric and unsubstantiated claims of union busting do not evince union animus. Finally, Ward's willingness to rescind the employees' AWOL charges despite believing that the evidence demonstrated that they were AWOL, is inconsistent with the argument that the removal was motivated by union animus.

The Respondent also argues that it would have removed Delgarito for failing to follow procedures in the absence of consideration of any protected activity. First, it argues that it had a legitimate justification for the action because Delgarito met with the Union during her tour of duty for approximately one hour, well beyond her fifteen minute break, and failed to follow the procedures for requesting official time in violation of the CBA. The Respondent argues that Delgarito was fully aware of the procedures for requesting official time because: (1) the CBA is available on the Respondent's intranet; (2) Delgarito was provided the opportunity to attend orientation where the Union introduced employees to the CBA; and (3) she presumably familiarized herself with the official time-requesting procedures before becoming a union steward.

The Respondent also argues that AWOL and failure to follow leave requesting procedures are separate offenses and that the Respondent's decision to rescind the AWOL does not eviscerate Delgarito's misconduct and the charge of failing to follow official time-requesting procedures. *Valenzuela v. Dep't of the Army*, 107 M.S.P.R. 549, ¶¶ 9-10 (2007) (*Valenzuela*).

Finally, the Respondent argues that it has previously removed probationary employees for comparable offenses. The Respondent argues that the appropriate comparison is probationary employees in the Phoenix Area Indian Health Service that it removed between 2009 and 2012 for failure to follow procedures. The Respondent argues that it removed twelve probationary employees during probation for failing to follow procedures. The Respondent also argues that requiring employees to be counseled or placed on leave restriction would nullify the statutory requirement that agencies terminate probationary employees if they fail to demonstrate their qualifications.

ANALYSIS AND CONCLUSIONS

To establish a claim of discrimination under the Statute, the General Counsel must establish that: (1) the affected employee was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment. *Letterkenny*, 35 FLRA at 117-18; *Dep't of VA Med. Ctr., Brockton & W. Roxbury, Mass.*, 43 FLRA 780, 781 (1991) (*VA Brockton*); *GSA, E. Distrib. Ctr., Burlington, N.J.*, 68 FLRA 70, 73 (2014) (*GSA*) (Member Pizzella dissenting). If the General Counsel makes this showing, then the respondent may seek to establish the affirmative defense that: (1) there was a legitimate justification for its action; and (2) the same action would have been taken in the absence of protected activity. *GSA*, 68 FLRA at 73.

Delgarito Engaged in Protected Activity

As to the first prong, I find that Delgarito was engaged in protected activity. Attending a union meeting, filing grievances under a contractual grievance procedure, and otherwise seeking and accepting union assistance and representation concerning conditions of employment falls within the ambit of protected activity. *See Dep't of the Navy, Portsmouth Naval Shipyard*, 7 FLRA 766, 777 (1982). Delgarito attended the union meeting that led to her discharge, accepted the Union's vociferous representation, and agreed to be party to a Union grievance. (Tr. 64). She also became a Union Steward before her termination, and it is well established that serving as a union official is protected activity. *Dep't of the Air Force, Warner Robins Air Logistics Ctr., Warner Robins AFB, Ga.*, 52 FLRA 602, 615 (1996). Thus, there is little doubt that Delgarito engaged in protected activity before her discharge.

Protected Activity Motivating Factor

I also find, based on the record as a whole, that Delgarito's protected activity was a motivating factor in the Respondent's decision to terminate her employment. As part of proving unlawful motive, the General Counsel may seek to establish that the Respondent's asserted reason for taking the action was not the real reason for the action or was pretextual. *Tyndall AFB*, 66 FLRA at 261; *IHS Montana*, 57 FLRA at 113. The Authority also considers the timing

of management's action to be significant in determining whether the respondent was motivated by the employee's protected activity. *See U.S. Dep't of VA Med. Ctr., Leavenworth, Kan.*, 60 FLRA 315, 319 (2004); *U.S. Dep't of Transp., FAA*, 64 FLRA 365, 368 (2009) (*FAA*).

For the reasons more fully set forth below, I find that the Respondent's reliance on Delgarito's single minor offense to end her employment was pretextual in light of the evidence that, over a three-year period, no other probationary employees were discharged for a like offense and many committed similar infractions. The Respondent's convoluted explanation for the action did little to dispel the inference of unlawful motive. Moreover, I credit Delgarito's testimony that Aguilar commented about the Union and Delgarito's protected activity during the meeting to end her employment, and drew a direct connection between her protected activity and the termination. Also, I find that the Respondent's delay in effectuating the termination was suspect in light of Delgarito's increasing union activity in between the union meeting and her discharge.

As an initial matter, I find that the evidence that Delgarito was treated differently than similarly situated employees supports a finding that the Respondent's reason for terminating her was a pretext. Clear disparity in treatment that is unexplained is compelling evidence of pretext. *See IHS Montana*, 57 FLRA at 114; *U.S. Dep't of HHS, SSA, Balt., Md.*, 37 FLRA 161, 172 (1990); *U.S. Dep't of Transp., FAA, El Paso, Tex.*, 39 FLRA 1542, 1553-54 (1991).

The linchpin of disparate treatment analysis is the similarly situated status of the employees being compared. *Pension Benefit Guar. Corp. v. FLRA*, 967 F.2d 658, 667 (D.C. Cir. 1992). Here, Delgarito was a fully successful employee with no prior disciplinary record of any kind, including no record of prior time and attendance issues. (Tr. 37, 53; G.C. Ex. 26). The Respondent's sole explanation for Delgarito's discharge was her failure to follow the proper procedures for requesting official time to attend a union meeting – a relatively minor offense. *See Jackson v. Dep't of the Navy*, 52 M.S.P.R. 1, 3 (1991) (one instance of unauthorized absence is of limited seriousness).

The parties agree that the employees comparable to Delgarito are other probationary employees within the Phoenix Area Indian Health Service between 2009 and 2012.[1] The parties disagree, however, about the comparable offenses. The Respondent argues that the comparable offense is "failure to follow procedures," while the General Counsel argues it should be "failure to request official time." I find that the comparable offenses are time and attendance-related: AWOL and failure to follow leave requesting procedures.[2] The Respondent has not described,

[1] The General Counsel subpoenaed records of probationary employees in the Phoenix Area HIS. It appears some employees from the Tucson IHS were inadvertently produced. I do not consider those records.

[2] I note that the Merit Systems Protection Board (MSPB) considers the charges of AWOL and "failure to follow leave-requesting procedures" so similar that they are "merged" into one offense when based on the same absence and set of facts. *See McNab v. Dep't of the Army*, 121 M.S.P.R. 661, ¶4 n.3 (2014).

nor is it apparent, how offenses such as failing to follow procedures for charting patients, drawing specimens, or identifying patients, which relate to patient care, are comparable to a failure to request permission for official time. But even if "failing to follow procedures" was a comparable offense, no probationary employee was terminated for a single incident of failing to follow procedures in the three-year period. (G.C. Ex. 4). In fact, no other probationary employee was terminated for a single incident of any kind in the relevant timeframe. (*Id.*).

Further, many other employees had committed a like offense. An agency's decision to take severe action against an employee for a single infraction in contrast to its condonation of numerous violations shows disparate treatment. *See IHS Montana*, 57 FLRA at 114; *Dep't of the Navy, Navy Resale Sys., Field Support Office, Commissary Store Grp., Norfolk, Va.*, 16 FLRA 257, 265-66 (1984) (discipline for a violation that had been committed with frequency by almost every other employee without disciplinary action suggests disparate treatment). Here, the Respondent marked eighty-nine probationary employees AWOL in the relevant three-year period, and sixty-seven were AWOL for at least one absence over one hour long. (G.C. Ex. 2). Many employees were marked AWOL on multiple occasions and for many hours or days, yet the Respondent did not terminate any of these employees in the same three-year period. (*Id.* at 2 & 3).

Of those employees the Respondent did terminate for attendance-related infractions, all committed more than one offense and most were absent without leave for multiple full days. (G.C. Ex. 4). In contrast, the Respondent has, on several occasions, counseled probationary employees for attendance offenses. (*Id.* at 3 & 4). Thus, the records shows that the Respondent ordinarily takes no action against probationary employees for a single workplace absence, and to the extent it takes any action at all, that action is counseling.[3] That the Respondent opted to terminate Delgarito here strongly suggests that the Respondent was motivated by her protected activity.

The disparate severity of the sanction was also a departure from the Respondent's own disciplinary policy. *IRS, Phila. Serv. Ctr.*, 54 FLRA 674 (1998) (finding a departure from consistent practice evidence of pretext). Redhorse, the Respondent's Employee/Labor Relations Specialist, testified that in determining what action to take against probationary employees, the Respondent looks across the area and considers similar or the same circumstances and tries to apply the same disciplinary action across the board. (Tr. 247). Redhorse reviewed the termination letters of all the probationary employees the Respondent terminated in the three years surrounding Delgarito's termination and could not identify a like offense. (Tr. 243-46).

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[3] That the other two employees received letters of reprimand rather than counseling does not detract from the evidence of disparate treatment. Those employees were also union stewards who were absent from the workplace for attending the same union meeting and were party to the Union's grievance.

I also find that the Respondent's reasons for the action were inconsistent and not supported. *IRS, Phila. Serv. Ctr.*, 54 FLRA at 674 (discrediting supervisor's reasons for taking the action supports pretext); *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 782 (8th Cir. 2013) (finding implausible, false, or shifting reasons for a termination support finding of pretext). The Respondent removed Delgarito's AWOL charge when it settled the Union's grievance on her behalf, but it then terminated her for the same incident. The Respondent argues that the charges of AWOL and "failure to follow proper procedures" for requesting official time are separate. But the AWOL notification itself said that it was "[b]ecause of [Delgarito's] failure to follow proper procedures," and Aguilar initially denied the Union's grievance because the employees "did not follow the procedures set forth in the negotiated CBA for Procedures for Requesting Official Time for Employees." (G.C. Ex. 6, 24).

Moreover, Aguilar testified that she would have counseled Delgarito if she had been gone from the workplace for a shorter period of time, and that, in her view, the severity of punishment is correlated to the length of the absence. (Tr. 183, 193, 199, 203). But the Respondent excused Delgarito's absence from the workplace and only terminated her for not asking for official time to attend the Union meeting, a singular offense, that would not seem to increase in severity based on the length of the Union's meeting. Further, Aguilar's testimony on the severity of the offense was undercut by her testimony that she does not "make it [her] job to know where [her employees are] at every minute of the day[]" and repeated insistence that she does not keep track of the length of her employees' breaks. (Tr. 182-83, 185, 187).

Finally, I find that the absence of evidence that the Respondent investigated the charge or sought to get Delgarito's side of the story supports a finding a pretext. *U.S. Dep't of Commerce, NOAA, Nat'l Ocean Serv., Coast & Geodetic Survey, Aeronautical Charting Div., Wash., D.C.*, 54 FLRA 987 (1998) (*NOAA*); *see also Lucky Cab Co.*, 360 N.L.R.B. No. 43, slip op. at 6 (2014). In order to prove an offense of failure to follow official time procedures, the Respondent explains that it must show that the employee was on notice of the procedures for requesting official time. *Cf. Valenzuela*, 107 M.S.P.R. at 553; *Allen v. U.S. Postal Serv.*, 88 M.S.P.R. 491 ¶10 (2001). The Respondent provided no evidence that it ever asked Delgarito if she was aware of the procedures for requesting official time, and it relies only on weak circumstantial evidence to purportedly show awareness. And when Aguilar counseled Delgarito, Aguilar sent Delgarito the procedures for requesting official time, suggesting that Aguilar thought at that time that Delgarito may not have been aware of them. (G.C. Ex. 6). Taken together, the evidence establishes that Delgarito's failure to request official time was not the real reason for the action, but was pretextual.

I also find that Aguilar's statements about the Union in the meeting to end Delgarito's employment support a finding that the Respondent was motivated by Delgarito's protected activity in terminating her employment. A responsible official's statements drawing a direct connection between protected activity and an adverse action create an inference of unlawful motive. *See FAA*, 64 FLRA at 369; *Dep't of the Air Force, Ogden Air Logistics Ctr., Hill AFB, Utah*, 35 FLRA 891, 900 (1990) (*Hill AFB*).

The Respondent disputes Delgarito's description of the termination meeting, but I generally credit her account based on the consistency of her testimony and her demeanor. *See U.S. Dep't of the Air Force, 12th Flying Training Wing, Randolph AFB, San Antonio, Tex.*, 63 FLRA 256, 259 (2009); *NOAA*, 54 FLRA at 1006 n.11 (citing *Hillen v. Dep't of the Army*, 35 M.S.P.R. 453, 458 (1987)). Delgarito's account was specific, plausible, and corroborated by notes drafted near the time of the event. Her testimony was forthright and unhesitating. Aguilar's testimony, on the other hand, was reluctant, inconsistent, and more self-serving.

I specifically credit that Aguilar said during the termination meeting that she is all for unions and how they protect employees, but she does not agree with the "tedious" complaints they make and that they "try to get away with things." (Tr. 54-55; G.C. Ex. 10). I also credit that she said something to the effect that when you "roll with" the Union and follow people, they get you in trouble. (Tr. 55; G.C. Ex. 10). In this context, Aguilar's statements suggest that Delgarito's "rolling with" the Union and its tedious complaints and grievance led to her termination. Implicit is that if Delgarito had not "rolled with" the Union, she may have faced lesser discipline or no discipline at all. *U.S. Dep't of the Air Force, 62nd Airlift Wing, McChord AFB, Wash.*, 63 FLRA 677, 677 (2009) (statement to the effect that discipline might have been less severe had the employee represented himself violated the Statute). Taken together, these statements draw a direct connection between Delgarito's protected activity and her termination and support a finding of unlawful motive. *FAA*, 64 FLRA at 369; *USDA, U.S. Forest Serv., Frenchburg Job Corps, Mariba, Ky.*, 49 FLRA 1020, 1032-33 (1994) (*Forest Service*); *Hill AFB*, 35 FLRA at 900.

Finally, I find that the timing of the action supports a finding that the Respondent was motivated by Delgarito's protected activity in discharging her. The Authority has long considered the timing of a management action significant in determining whether a party has established a prima facie case of discrimination under § 7116(a)(2) of the Statute. *Tyndall AFB*, 66 FLRA at 261; *FAA*, 64 FLRA at 368; *see also U.S. Dep't of the Navy, Naval Aviation Depot, Naval Air Station Alameda, Alameda, Cal.*, 38 FLRA 567, 568 (1990) (*Naval Air Station*); *Hill AFB*, 35 FLRA at 900; *U.S. Customs Serv., Region IV, Miami Dist., Miami, Fla.*, 36 FLRA 489, 497 (1990). Specifically, the Authority considers the proximity in time of an agency's action in conjunction with the facts and circumstances to determine whether a preponderance of the record evidence supports finding a violation. (*Id.*). Evidence of protected activity in between counseling an employee for an infraction and imposing discipline for the same infraction, may suggest unlawful motive. *IHS Montana*, 57 FLRA at 114.

The Respondent's testimony about the timing of its decision to terminate Delgarito was inconsistent. Based on the record evidence and credibility of the witnesses, I find that Aguilar initially decided to mark Delgarito and the other employees AWOL for their absence from the workplace, and subsequently, after the Union filed a grievance and sent a series of antagonistic

emails to Aguilar and Ward, they decided to take more severe disciplinary action against the employees.[4] That Aguilar did not contemplate discipline until after the Union filed the grievance suggests unlawful motive. (*Id.*). *See Naval Air Station*, 38 FLRA at 581-82.

Even if I were to credit Aguilar's testimony that she decided to take more severe disciplinary action against the employees almost immediately, the credible evidence establishes that her decision to terminate Delgarito came later, at least in the following week, and that her decision on all of the actions was not final until, at the earliest, December 1.[5] Thus, Aguilar decided to terminate Delgarito, as opposed to taking a lesser action, such as counseling her, shortly after the Union informed the Respondent that it was making Delgarito a Union Steward.

I also note that the decision to terminate Delgarito and reprimand the other employee was never truly firm until the date the actions were delivered; at any point, the Respondent could have made a different decision. *See VA Brockton*, 43 FLRA at 788 (noting that one normally does not wait three weeks to initiate discipline, and that in the absence of protected activity, it is unclear that the respondent would have actually pursued further disciplinary action). Based on the foregoing, the timing of the action in relation to Delgarito's escalating union activity supports the inference that the Respondent was motivated by Delgarito's protected activity in pursuing and ultimately deciding to terminate her.

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[4] I do not credit Aguilar's testimony that she decided to discipline Delgarito before she notified Delgarito that she was marking her AWOL. (Tr. 161-65). First, the AWOL email itself reads like a self-contained response to the event and gives no hint that future disciplinary action was contemplated. (G.C. Ex. 6). After describing the misconduct and delivering the punishment, it concludes with an admonition that Delgarito should make sure to follow the correct procedures in the future. Second, Aguilar's testimony on this subject was hesitant and was not corroborated by Respondent's HR representative, Carrillo, whom the Respondent neglected to call. Third, Aguilar's own notes said that after the Union filed the grievance, Aguilar was still discussing "options for disciplinary actions and termination" with Carrillo, suggesting that she had not made any disciplinary decisions at that point. (A. Ex. 2; Tr. 204, 171).

[5] Aguilar's notes state that on December 1 she asked human resources about the termination and "if we had good grounds and would they sustain," and on December 9, Aguilar, Ward and HR discussed that the AWOLs would be reversed and the "the disciplinary actions should still go forward." (A. Ex. 2). While I find these notes themselves are of limited probative value because it appears they were prepared to provide HR with support for the disciplinary action, I find they are somewhat more reliable than Aguilar's testimony on the timeline, which was unclear. (Tr. 171; A. Ex. 2). I do not find the draft termination letter conclusive proof of when Aguilar decided to terminate Delgarito. Aguilar testified that she received it in early December, but at some point, presumably after it was written, someone wrote "mgmt. made decision to proceed w/ termination," suggesting a delay between drafting and the decision. (Tr. 167; A. Ex. 1). Timing closer to December 9 is also more consistent with Aguilar's explanation for the delay. (Tr. 168).

Because I have found that the Respondent's reason for the discharge was pretextual, and the Respondent has not identified any other reasons for the discharge, I necessarily reject the Respondent's affirmative defense that it had a legitimate justification for the action and would have taken the same action in the absence of Delgarito's protected activity. *See Letterkenny*, 35 FLRA at 120.

Even if I were to consider the Respondent's affirmative defense, I would reject it. Under *Letterkenny*, the pertinent inquiry is not whether there were reasons that might have supported the Respondent's decision, but rather whether a preponderance of the record evidence demonstrates that the Respondent would have taken the same action in the absence of consideration of the protected activity. *VA Golden Gate*, 59 FLRA at 960. For the reasons more fully described above, I find that the Respondent has failed to establish that it would have terminated Delgarito for a single incident of failing to follow official time-requesting procedures in the absence of consideration of her protected activity. *Forest Service*, 49 FLRA at 1032-33. I specifically reject any argument that the Respondent had to terminate Delgarito, rather than reprimand her as it did the other employees, because of her probationary status. First, I note that termination is extraordinary more severe than a reprimand. And the Respondent has provided no information about the other employees, such as their past disciplinary records or prior counseling or warnings. Second, it is not clear that the Respondent would have even reprimanded the other employees were it not for consideration of their protected activity. Third, the evidence shows that although the Respondent *could* theoretically terminate a probationary employee for such a minor offense, it *does not* terminate probationary employees for like offenses, and it ordinarily seeks to be consistent in meting out punishment. The fact that probationary employees can be terminated without cause does not permit the Respondent to terminate them for an unlawful reason. *IHS Montana*, 57 FLRA at 114. If the Respondent could avoid liability for terminating a probationary employee for engaging in protected activity by simply proffering a reason for the action, the statutory protection for probationary employees would be eviscerated. The Respondent must prove its affirmative defense and it has not done so by a preponderance of the evidence.

REMEDY

The Authority normally remedies unlawful discharges in violation of § 7116(a)(1) and (2) by a return to the status quo ante, including a requirement that a respondent offer reinstatement to the affected employee and make the employee whole for any losses suffered. *U.S. Geological Survey & Caribbean Dist. Office, San Juan, P.R.*, 50 FLRA 548, 552 (1995); *IHS Montana*, 57 FLRA at 114.

Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the Department of Health and Human Services, Indian Health Service, Phoenix Area Office, Phoenix, Arizona, shall:

1. Cease and desist from:

(a) Terminating the employment of, or otherwise discriminating against Jaclyn Delgarito, or any other bargaining unit employee, because the employee engaged in activity protected by the Statute.

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

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Rescind the action terminating the employment of Jaclyn Delgarito and offer her immediate and full reinstatement to her former position or a substantially equivalent position, without prejudice to her seniority and other rights and privileges.

(b) Make Jaclyn Delgarito whole, in accordance with the Back Pay Act, 5 U.S.C. § 5596(b) and consistent with other applicable laws and regulations, for any losses she incurred as a result of her unlawful termination, by providing her with back pay and lost benefits and privileges, with interest and appropriate differentials, from the date of her discharge, until the effective date of the offer of reinstatement, less any amount earned through other employment during this period.

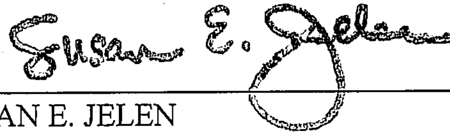
(c) Expunge from all Indian Health Service records mention of the termination or the incidents that gave rise to the termination of Jaclyn Delgarito.

(d) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Phoenix Area Director, Phoenix, Arizona, and shall be posted and maintained for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(e) In addition to physical posting of paper notices, Notices shall be distributed on the same day, to employees electronically, by email, posting on an intranet or internet site, or other electronic means, customarily used to communicate with employees.

(f) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, Denver Region, Federal Labor Relations Authority, in writing, within thirty (30) days of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., September 11, 2015



SUSAN E. JELEN
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF

THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Health and Human Services, Indian Health Service, Phoenix Area Office, Phoenix, Arizona, violated the Federal Service Labor-Management Relations Statute (Statute) and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discriminate against Jaclyn Delgarito, or any other bargaining unit employee, in connection with hiring, tenure, promotion, or other conditions of employment because the employee has engaged in activities protected by the Statute.

WE WILL rescind Jaclyn Delgarito's termination as a Medical Office Assistant and offer her immediate and full reinstatement to her former position or a substantially equivalent position, without prejudice to her seniority and other rights and privileges.

WE WILL make Jaclyn Delgarito whole, consistent with applicable laws and regulations, for any losses she incurred as a result of her unlawful termination.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured by the Statute.

____
(Agency/Respondent)

Dated: ____________ By: ______________________________
(Signature) (Title)

This Notice must remain posted for sixty (60) consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Denver Regional Office, Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 446, Denver, CO 80204, and whose telephone number is: (303) 844-5224.