



FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
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DEPARTMENT OF NAVY
AVIATION SUPPORT DETACHMENT NORFOLK

RESPONDENT

AND

NATIONAL ASSOCIATION OF INDEPENDENT
LABOR, LOCAL 18

CHARGING PARTY

Case No. WA-CA-13-0568

Douglas J. Guerrin
For the General Counsel

Lauren Muha
For the Respondent

Laura O'Reilly
For the Union

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

It is a violation of § 7116(a)(1) and (2) of the Statute to take action against an employee for engaging in protected activity. In this case, a probationary employee was newly appointed to the position of Chief Steward of her Union. She used a small amount of official time and was counseled shortly thereafter. Three months later, she was removed from her position, before the end of her probationary period. Because the evidence revealed a positive labor-management relationship and insufficient protected activity to trigger animus, and because the employee was failing to perform some of the basic requirements of her job, I find that her protected activity was not a motivating factor in the Respondent's decision to remove her from her position.

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute (the Statute), Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101-7135, and the Rules and Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. part 2423.

On July 2, 2013, the National Association of Independent Labor, Local 18 (Local 18 or the Union), filed an unfair labor practice charge against the the Department of the Navy, Aviation Support Detachment (ASD) Norfolk (the Agency or Respondent). GC Ex. 1(a). After investigating the charge, the Regional Director (RD) of the FLRA's Washington Region issued a Complaint and Notice of Hearing on January 31, 2014, on behalf of the FLRA's General Counsel (GC). The Complaint alleges that the Agency violated § 7116(a)(1) and (2) of the Statute by removing probationary employee Kione D. Davies from her position as a Supply Technician because of her protected activity as the Union's Chief Steward. GC Ex. 1(c). The Respondent filed its Answer to the Complaint on February 10, 2014, denying that it violated the Statute. GC Ex. 1(d).

A hearing was held in this matter on March 25, 2014, in Norfolk, Virginia. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The GC 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 make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. The Union is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of a bargaining unit of the Respondent's employees. The Respondent and the Union are parties to a collective bargaining agreement covering the employees in that bargaining unit. GC Exs. 1(c) & 1(d).

ASD manages repairable parts for aircraft used by the U.S. Navy. It consists of three branches, the Repairables Management Branch (RMB), the Component Control Section, and the Supply Response Section. The RMB maintains inventories of parts for 194 Navy aircraft. Tr. 90-92. A certain number of parts are allocated to the base, and that number must be maintained in order to keep aircraft working and ready to accomplish their missions. Tr. 191-95. Three Supply Technicians, also referred to as Item Managers (IMs), monitor the inventories of these aircraft components. Tr. 17, 19, 61, 64-65. They order parts, check to make sure the correct number of parts are on site, and follow up with suppliers. Tr. 18, 191-92. If the inventory of a particular part is short, it is the Supply Technician's

responsibility to order more, and to follow up by email or by phone if it is not delivered when expected. Tr. 181-82, 194-95. All of the parts needed to maintain a single type of aircraft are kept together in a "Pool Code," and a Supply Technician is assigned to oversee the inventory of parts for each Pool Code. Tr. 18-19, 60, 72.

ASD uses three computer programs to manage inventories. ERP tracks finances, NALCOMIS tracks the locations of repairable parts at the repair site, and OneTouch shows the status of parts. Tr. 20-21, 61-62. A Repairable Stock Requisitional Status Report (RSRSR) is used to manage inventories – it shows which parts are on hand in which locations, which parts are needed, and whether it is necessary to follow up with parts suppliers about the status of orders. Tr. 181-82.

Kione Davies was hired as a Supply Technician in RMB on August 27, 2012. Tr. 16. Initially, she was supervised by Patricia Zyliak, the Repairables Manager for ASD. Tr. 27-28. Fernando Amarillo, the Inventory Management Supervisor, had been on "unallocated duty" when Ms. Davies arrived at RMB, but he became Davies's first-line supervisor and Zyliak became Davies's second-line supervisor on October 3, 2012. Tr. 27-28, 188-89; Resp. Ex. 1, at 3. Davies worked with two other Supply Techs: Skip Monroe, who had worked in RMB for about four years, and David Whyte, who started there about a month before Davies and was also in a probationary status. Gene Mettler was their Lead Supply Technician. Tr. 17, 64-65; Resp. Ex. 1.

Davies testified that she had little experience with aircraft supply maintenance before she took this position. While on active duty in the Navy, she had worked in positions that were similar in some respects to her job at ASD, but each had somewhat different requirements and expectations. Tr. 26-27. According to Davies, Whyte had been in his civilian position for less than a year, but had done "expediting" in the military, which she described as similar to what they did in RMB, but "civilians do something a little different." Tr. 17.

Davies received informal training from Zyliak, Monroe, Mary Walker (a former IM who was experienced with Pool Codes and in the use of NALCOMIS and ERP), and Terry Watkins (a supervisor in another building). Davies claims she requested formal training for ERP and NALCOMIS, but she had to wait a couple of months to go to an ERP seminar. She could not gain access to the ERP system until she completed the seminar.¹ Tr. 29-30. There was no formal training for NALCOMIS or OneTouch. Tr. 30.

¹ Davies's testimony was disputed by Karen McCarthy, a supervisor who handles civilian personnel matters for ASD, who claimed that Davies was late in completing online training for ERP and would not have been able to perform assigned ERP duties without it. Tr. 150-51. McCarthy's testimony is at least partially supported by an email from Karen Brinster, an ERP training official, advising Davies on March 6, 2013, that she had been given the training materials in November 2012, and that if she did not take the course by March 8, those assigned duties would be removed. Resp. Ex. 5; Tr. 151, 165. Amarillo testified that Davies had not been using ERP because she had not been trained to use it, but that this would not have prevented her from performing her work. Tr. 226-28.

Davies became the Union's Chief Steward on February 21, 2013.² Tr. 31; Jt. Ex. 2. At that time, the civilian personnel office sent an email message to all supervisors and managers, notifying them of Davies's position with the Union. Tr. 141. But Davies engaged in very little Union activity. Her official time records show that she made two requests for official time, for a total of 3 ½ hours. She sought to take 2 ½ hours each week to meet with Union President Olds and learn about the Union; Amarillo approved her request, but she used that time only once, on February 27. Tr. 33; Resp. Ex. 4. Davies testified that she did not take any more of the weekly time, because Olds told her that Amarillo did not really want her to do Union work. Tr. 33-34. On March 5, Davies met once with bargaining unit employee Mary Walker, who was having trouble with a second-line supervisor. After that meeting, Davies contacted Olds, who worked with McCarthy and the supervisor, and the situation was resolved. Davies had no other involvement with that issue, and she described no other Union activity. Tr. 32; Resp. Ex. 4. However, she noted that after she became a steward, she started having problems at work. She stated that managers treated her differently, and her responsibilities were shifted. Tr. 34. She claims that during her first few months at RMB, no one complained to her about her performance, conduct, or leave usage. Tr. 30-31.

Civilian personnel official Karen McCarthy testified that she meets with Union President Olds at least once each week, and they are generally able to resolve problems informally. Tr. 147. McCarthy described the labor-management relationship at ASD as "very effective." Tr. 149. She stated that Davies never attended any labor-management meetings or grievance discussions, nor did Davies file any grievances. Tr. 148. McCarthy testified that Davies's position as a Union official did not come up during conversations about her performance. Tr. 149. Amarillo knew Davies was a Union Steward. He approved her requests for official time, but was not aware that she conducted any Union business, other than her one meeting with Walker. He claimed that he bore no hostility toward the Union and had been a Union member in the past. Tr. 212-13. Mettler testified that he was not aware that Davies was a Union steward. Tr. 185. Lt. Junior Grade Melanie Flynn, the Division Officer for RMB, who replaced Zyliak as Davies's second-line supervisor in January, knew that Davies was the Chief Steward. She stated, however, that she did not deal directly with the Union, except to approve official time occasionally when Amarillo was unavailable. Tr. 104-05.

As a Supply Technician, Davies had two basic areas of responsibility. The first was Pool Codes. Initially, she managed inventories of parts for Pool Code 4, the E-2 Aircraft, assuring that stocks were ordered and available. If parts had been on order for a long time but had not been received, she was to call or email the supplier to expedite delivery. Davies asserted that the E-2 was an older aircraft, which made parts management more complicated because components were harder to obtain and it took longer to receive them. Tr. 18-20. Flynn acknowledged that the E-2 is an older aircraft, and a few parts are difficult to locate, but that overall there is "a good pipeline for their components." Tr. 126.

² All dates hereafter are in 2013, unless otherwise noted.

Flynn testified that in late 2012, ASD management became concerned with the inventory data from RMB; the unit was not meeting its effectiveness goals, and Zyliak's explanations for the problems did not seem accurate. Tr. 95, 100-04. When Zyliak was transferred out of RMB in January, Flynn and Amarillo began to analyze the data relating to improving the availability of parts and supplies, and they identified ways that they could get the necessary parts more effectively. Tr. 95-96, 103-04. Some of the problems in the branch appeared to be attributable to Davies. Tr. 104, 106-07, 117-18. Flynn began questioning Amarillo and Mettler almost immediately about Davies's inventory maintenance and follow-up. Amarillo studied the RSRSR reports and saw that certain aircraft parts were overdue, but Davies had not contacted anyone to expedite delivery. He also saw inaccuracies in Davies's inventory counts. Tr. 197-201, 203. He spoke with Davies about these issues, but he testified that her performance did not improve. Tr. 106-09, 200, 209. Problems were also identified with other employees, including Whyte, the other probationary employee, but they felt his production numbers were better than Davies's. Tr. 110-12.

Davies's second responsibility was tire management. Daily, she went to three locations – the tire maintenance shop, a warehouse, and a shed – to count aircraft tires. The tire shop was located in the building where she worked; the shed was just outside that building; and the warehouse was five to ten minutes away. Tr. 22-24. Davies compared her counts with the numbers of tires recorded in ERP and NALCOMIS. Tr. 21-22. Initially, all three of the Supply Technicians did tire counts, but by mid-September 2012, Mettler assigned this duty exclusively to Davies. Tr. 25, 171-72.

Like Pool Codes, tire management became an area of concern for Davies's supervisors. Mettler testified that it took the Supply Techs about 2 ½ hours to complete the tire counts, but when Davies assumed full responsibility for them, she needed 3 ½ to 4 hours to get the job done. Tr. 171, 174. Mettler believed this interfered with her other work. He became aware of this sometime in January and spoke to Davies about it. She explained that she was going slowly because she was preparing for an inspection and wanted to be sure her counts were accurate.³ Tr. 44. Mettler accepted that explanation, but when the inspection was over, she continued to perform the task just as slowly. Tr. 175. Mettler also testified that he believed Davies was socializing too much. Tr. 176-77. The Supply Techs work in cubicles next to each other, and he could hear her phone conversations, many of which were not work related. He also thought that she socialized during the time she was out completing her tire counts. He believed that, if she spent more time at her desk, she would focus better on her other duties. Tr. 176-77, 203. Mettler said that he spoke with Davies about these issues, but did not document their discussions. Tr. 186, 202. Flynn testified that the managers were also concerned about Davies's lack of accuracy. Tr. 127.

³ This account is supported by the testimony of Zyliak, who said that she had instructed Davies to concentrate on tire inventories, including daily counts, in preparation for the inspection. Tr. 76-78.

On March 28, Amarillo reassigned the tire counts from Davies to Whyte, who was able to complete the job most days in about 2 ½ hours. Tr. 176, 208. Davies testified that Amarillo did not meet with her or explain this change of duties, nor did he counsel her about inventory management.⁴ Tr. 40. She said that, sometime in April, Amarillo sent an email message to all of the Supply Techs, encouraging them to expedite orders and to follow up. Tr. 43-44.

To replace her tire inventory duties, Davies was assigned Pool Codes 2 and 6. Davies testified that Pool Code 2 is small and not very active. Pool Code 6 is more difficult and, in time, that assignment was transferred away from her because “no one is really able to expedite those items.” Tr. 42. Ultimately, her work consisted of Pool Codes 2 and 4. Flynn asserted that the exchange of duties – removing Davies’ responsibility for tire management and adding Pool Codes 2 and 6, was a “comparable” trade. Tr. 127. She stated that Pool Code 2 is the most difficult, but noted that Davies was never counseled about it. Tr. 128.

At the hearing, Respondent’s witnesses offered considerable testimony, but almost no supporting documents (other than General Counsel Exhibit 2 and Respondent Exhibit 3), regarding their discussions and the actions they took before terminating a probationary employee. Flynn testified that she and Amarillo spoke on a number of occasions about Davies’s performance, and Flynn briefed the Supply Officer, Lt. Commander Glover, starting sometime in late January or early February, about the problems in the branch. Tr. 105-06, 108-09. Flynn also asserted that Amarillo did everything he could to assist Davies and get her performance to an acceptable level, as both she and Amarillo were concerned for Davies as a single mother. Tr. 107-08, 214. She claims Amarillo offered Davies on-the-job training, met with her for some focused discussions, and had several informal conversations. Tr. 112-13. Eventually, this led them to address the question of whether Davies, as a probationary employee, was “the right fit” for a long-term position. Tr. 106. Flynn also contacted McCarthy, who sought guidance from the Human Resources Office, both by phone and by email, concerning the procedures for terminating a probationary employee. Tr. 131-32, 165-66. Glover, Flynn, McCarthy, and Amarillo all participated in the discussions of whether to retain Davies. Tr. 108-09, 132-33.

Likewise, despite witnesses’ repeated descriptions of Davies’s shortcomings, and despite the numerous reports and spreadsheets generated by RMB, the Respondent provided no documents to show that Davies was underperforming, or that her co-workers were performing better. Zyliaik testified that an employee’s poor performance would be reflected

⁴ The precise form of Amarillo’s counseling of Davies is unclear. Amarillo initially testified that he held a meeting with Davies on March 28, to advise her that her tire management responsibilities were being reassigned and to discuss other inventory issues, but he later clarified that he merely told her about the tire inventory change on that date, and that he explained the reasons for the change on April 9. Tr. 208-10. He made a record of the various times he counseled Davies, and this record lists “verbal counseling” or “instruction” on March 20 and March 28, but not on April 9. GC Ex. 2 at 2. McCarthy also kept a list of all ASD employees who had been counseled or disciplined, and it shows Davies received verbal counseling or instruction on March 20, March 28, and April 9, for a variety of performance issues. Resp. Ex. 3 at 2.

in their Pool Code reports. Tr. 74. If the range and depth of parts on hand declined, that would signal to the supervisor that something was wrong and needed to be checked.⁵ Zyliak explained that a supervisor could check the Pool Code reports as often as necessary. Tr. 75. Mettler testified that he created an ad hoc report that compared information generated by NALCOMIS and ERP, and he used it to address inconsistencies. Tr. 172-73. Amarillo learned by reviewing the RSRSR reports that Davies had not contacted anyone to expedite delivery of overdue parts, and that there were disparities in her counts. Tr. 199-200, 203. Flynn, who set in motion the Agency's examination of Davies' work, was alerted to Davies' performance deficiencies by analyzing the data, particularly reports about E-2/C-2 (Pool Code 4). Tr. 117-18.

Sometime in April or May, management officials met and decided that Davies's employment should be ended. Tr. 115-16. Amarillo presented Davies with her termination notice on June 14, effective June 28. Jt. Ex. 1 at 1. McCarthy and Olds were present when they met. Tr. 49. The notice stated that Davies's "performance and conduct as a Supply Technician has been unsatisfactory and inconsistent with the organization's expectations." Jt. Ex. 1 at 1. The letter further asserted that she was counseled "numerous times" about her "performance, leave usage, and misconduct[]" and that after careful consideration, her termination was found to be "for such cause." *Id.*

Davies's perspective is quite different. She testified that, although she had little experience with inventory management, her training was primarily on the job. Tr. 29-30. She claimed that Amarillo was not helpful, laughing and asking why she didn't know something rather than answering her questions; consequently, she stopped seeking assistance from him. Tr. 51. When she received her termination notice, she was surprised. She testified, "I was like – because I had to ask them what counseling because I never got counseled to my knowledge. I know Andy talked to me about the things, but I didn't know that was a counseling." *Id.* She argued that she had never been given a performance evaluation, so she questioned how she could be informed at this point that she was not doing a good job. Tr. 50. She said she had received an evaluation only once, when she had been on the job for just two months; this was from Zyliak, when Amarillo took over as her supervisor. Tr. 50. Amarillo testified that he had been on sick leave in November 2012, so he did not conduct a mid-term review, as he thought someone else had taken care of it. Tr. 214. McCarthy testified that this review should have been completed in January, but it was not. Tr. 160, 164.

Davies asserted that Amarillo never met with her about emailing item managers to follow up on parts requisitions. Tr. 43. She recalls only one meeting with Amarillo, on March 20. She did not recognize that discussion as a counseling session. Tr. 51. She testified that both of her children had been sick on March 19, causing her to use sick leave that day and about half of the next. Tr. 37. She came to work that afternoon, and Amarillo showed her a printout of her leave usage. He asked for a letter from the doctor, which

⁵ Zyliak explained that "range" refers to all of the parts needed to maintain an aircraft, and "depth" refers to the quantity of each part on hand. Tr. 71-72.

surprised her because such documentation is only required for sick leave of three days or longer, and she had not taken more leave than she had earned.⁶ She retrieved a doctor's letter from her car. When she returned, she was upset, and the meeting ended shortly thereafter. Tr. 38-39. Davies testified that Amarillo said nothing to her about socializing or training. Tr. 39.⁷ She had no recollection of having been counseled at any other time. Tr. 51.

David Whyte, the other probationary employee in the unit, received a letter of counseling for "Inappropriate Behavior" on July 22, just before his probationary period ended. The Agency determined that, because he was a good performer, they would keep him in the unit. According to McCarthy, there have been no further disciplinary issues with Whyte. Tr. 135-37; Resp. Ex. 3. Flynn testified that she was more comfortable with Whyte's performance than she was with Davies's, because he maintained a better inventory and followed up with suppliers more. Tr. 111-12. No evidence of Whyte's "inappropriate behavior" or documentation of his job performance was entered into evidence.

POSITIONS OF THE PARTIES

General Counsel

The GC argues that the Respondent violated § 7116(a)(1) and (2) of the Statute by terminating the employment of probationary employee Kione Davies, because of her activities as a Union steward. It initially notes that Davies became the Chief Steward of Local 18 on February 21, and that this constitutes protected activity. Davies requested official time twice, the second time on March 5, just two weeks before she was counselled by Amarillo. The GC asserts that, prior to that date, no one had raised any concerns with Davies about her performance, conduct, or use of leave. Citing *Dep't of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 55 FLRA 1201, 1206 (2000) (*Warner Robins II*), the GC argues that timing alone may be sufficient to warrant an inference of discriminatory motive. GC Br. at 10.

Even if timing, by itself, was not sufficient to infer a discriminatory motive, the GC argues that the Agency gave only pretextual reasons for terminating Davies. *Id.* at 10-11. The GC observes that the Agency offered no evidence to support its claims that Davies was

⁶ Amarillo admitted that Davies did not use any unearned leave. Tr. 219.

⁷ General Counsel Exhibit 2, Amarillo's list of his counseling sessions with Davies, describes a discussion on March 20 regarding leave usage, training, and socializing; and a discussion on March 28, advising her of the reassignment of her tire management duties and encouraging her to email item managers to follow up on the status of stock. Respondent Exhibit 3, the list maintained by McCarthy, reflects that Davies was counseled on March 20, March 28, and April 9. Amarillo testified that he met with Davies on March 20, because he was concerned that she was taking leave when she had not earned much, and that her absences affected other employees. Tr. 205-07. He also asserted that he told her that day that he wanted her to email suppliers about outstanding parts, and that he talked to her about her socializing. Tr. 207-10. He stated that he did not ask her for a letter from her doctor, but she offered it on her own. Tr. 219. Amarillo noted that Davies continued to have problems with leave usage. Tr. 207.

deficient in the areas of performance, leave usage, or misconduct, or that her performance was worse than that of Whyte or Monroe. Additionally, the GC argues that Whyte and Monroe were more experienced than Davies and had completed different types of assignments than hers, so she should not be held to the same expectations. *Id.* at 11. Further, the training Davies received was inadequate, most of it on the job, with only a single formal course. Finally, the GC describes a number of problems in the RMB organization, with Zyliak and Amarillo both facing consequences for serious performance issues. *Id.* at 11-12. Given all of these factors, the GC argues that it has established a prima facie case of discrimination.

The GC further submits that the Respondent failed to prove that it had a legitimate justification for terminating Davies' employment. Again, the GC asserts that the Respondent offered no evidence to demonstrate that Davies's performance or conduct was unsatisfactory, or that it compared unfavorably with the work of the other Supply Techs. The Agency did not even give Davies a performance evaluation or otherwise document her alleged performance deficiencies, nor did it show that Davies socialized too much or abused leave, since she only used leave that she had already earned. *Id.* at 13-14.

Regarding Amarillo, the GC urges that his testimony was not credible, because several of his statements were contradicted by Flynn. *Id.* at 12-14. Amarillo's testimony regarding his alleged counseling sessions with Davies were inconsistent with his written descriptions of the counseling, and with McCarthy's records. The GC also questions whether Amarillo actually wrote his notes (GC Ex. 2) contemporaneously with the counseling sessions, as he claimed (Tr. 216), because they include references to events that took place in April and May. GC Br. at 14.

Finally, any claim that the Agency would have terminated Ms. Davies even if she had not engaged in any protected activity is speculative and not supported by the record. RMB management treated a similarly situated employee, David Whyte, differently than Davies, even though Whyte was also a probationary employee and had been counseled for inappropriate behavior. *Id.* at 14-15.

As a remedy for the Respondent's unfair labor practice, the General Counsel seeks an order requiring the Agency to restore Davies to her position as a Supply Technician, make her whole for any losses incurred as a result of her termination, including back pay with interest. The GC also requests that the Agency be ordered to post a notice of its unfair labor practice, both on bulletin boards at the Aviation Support Detachment Norfolk and electronically to all bargaining unit employees. *Id.* at 15-16.

Respondent

The Respondent asserts that it did not violate the Statute. It argues first that although Davies became the Union's Chief Steward on February 21, she was not so actively involved as to create animosity with managers in RMB. She used a very limited amount of official

time and worked with only one employee on an issue that was ultimately resolved by the Union President. Moreover, the evidence showed that the relationship between the Union and RMB management was constructive. Resp. Br. at 2, 7.

Regarding Davies's performance, the Respondent argues that in January 2013, managers noticed issues with Pool Code 4. Amarillo reviewed reports and observed that Davies had provided inaccurate information on the tire inventory, which eventually led Amarillo to reassign that work to another employee. *Id.* at 3. Further, despite Amarillo's counseling, Davies failed to increase the number of emails and phone calls she made to obtain parts that had been ordered, and her overall performance did not improve significantly. *Id.* at 3-4, 6. The Agency also insists that Davies used an unreasonable amount of time to complete her tire inventories, and socialized excessively. This interfered with the time she needed to review reports and complete her other responsibilities. Her counterparts were accomplishing more, in less time, than she was. *Id.* at 5.

The Respondent argues that despite counseling sessions on March 20, March 28, and April 9, and despite assistance from others, Davies was unable to manage her workload, necessitating that tire management be reassigned, and that other employees work harder to compensate for her failure to improve. Ultimately, this affected the ability of COMNAVAIR to meet its mission requirements. *Id.* at 6-7.

Under all of these circumstances, the Respondent argues that it had a legitimate reason for removing Davies from her position, and that it would have taken the same action in the absence of her protected activity. *Dep't of the Air Force, Warner Robins Air Logistics Ctr., Warner Robins AFB, Ga.*, 52 FLRA 602, 605-06 (1996) (*Warner Robins I*).

ANALYSIS AND CONCLUSIONS

As an initial matter, it is well established that an agency may remove a probationary employee without cause. *Dep't of the Navy, Naval Weapons Station Concord, Concord, Cal.*, 33 FLRA 770, 771 (1988) (citing *U.S. Dep't of Justice, INS v. FLRA*, 709 F.2d 724 (D.C. Cir. 1983)). However, that fact does not permit an agency to terminate a probationary employee for engaging in protected activity. *Indian Health Serv., Crow Hosp., Crow Agency, Mont.*, 57 FLRA 109, 114 (2001) (*Indian Health*). At the time of her removal, Davies was in the tenth month of her probationary period.

Under § 7116(a)(2) of the Statute, it is an unfair labor practice "to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment[.]" In *Letterkenny Army Depot*, 35 FLRA 113, 117-18 (1990) (*Letterkenny*), the Authority established the framework for determining whether an agency action violates § 7116(a)(2). The GC always bears the burden of establishing, by a preponderance of the evidence, an unfair labor practice was committed. *Id.* at 118. First, the GC must show: (1) that the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) that 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. *Id.* If the GC is successful, it has established a prima facie case of discrimination. The burden then shifts to the agency to demonstrate, by a preponderance of the evidence: (1) that there was a legitimate justification for its action; and (2) that the same action would have been taken even in the absence of protected activity. *Id.*

Davies engaged in protected activity.

Under the first prong of the *Letterkenny* test, it is clear that Davies was engaged in protected activity. The Authority has long recognized that serving as a union official and requesting official time to perform representational duties constitute protected activities. *Am. Fed'n of Gov't Employees, Local 2595*, 68 FLRA 293, 295 (2015); *Warner Robins I*, 52 FLRA at 615. Davies took the position of Chief Steward of Local 18 on February 21, and supervisors were notified of Davies's position. She used a total of 3 ½ hours of official time in the ensuing four months. One of those hours was for the purpose of meeting on March 5 with a bargaining unit employee, whose issue was subsequently resolved by Olds and McCarthy. Although she requested 2 ½ hours weekly for meetings, and Amarillo approved that time, she used it only once, on February 27. Tr. 31-33. Although this is certainly a small amount of Union work, it does satisfy the first element of the test.

The evidence fails to establish that Davies's protected activity was a motivating factor in the Agency's decision to terminate her employment.

As for the second part of the *Letterkenny* test, I find that the GC has not established that the Agency was motivated by the small amount of protected activity engaged in by Davies to take action against her. The Authority has long considered the timing of a management action significant in determining whether a prima facie case of discrimination has been established under § 7116(a)(2). *See U.S. Customs Serv., Region IV, Miami Dist., Miami, Fla.*, 36 FLRA 489, 495 (1990). However, while the proximity in time between an agency's employment decision and an employee's protected union activity may support an inference of illegal anti-union motivation, it is not conclusive proof of unlawful motivation, or of a violation; rather, it must be evaluated within the totality of the evidence. *Warner Robins II*, 55 FLRA at 1205-06; *U.S. Dep't of Labor, Wash., D.C.*, 37 FLRA 25, 37 (1990) (*DOL*).

I note that the evidence reveals virtually no hostility toward the Union in general, or Davies in particular, among ASD or RMB officials. The only hint of this was Davies's testimony that she did not use the weekly official time approved by Amarillo because Olds told her that Amarillo did not really want her to do Union work. Tr. 33-34. This is hearsay, twice removed, and I do not consider it reliable or persuasive. The GC could have called Olds to testify, not only about Amarillo's purported statement, but also about any other indication that one or more officials at the Agency were hostile to the Union. Olds did not

testify, however.⁸ On the other hand, in un rebutted testimony, McCarthy described the labor-management relationship at RMB as “very effective.” Tr. 149. She testified that she and Olds meet weekly and are usually able to resolve issues informally. Davies herself indicated that Olds and McCarthy quickly resolved the one grievance Davies worked on, and there was no hint that Davies’s work on that grievance generated any hostility. Amarillo stated that, other than Davies’s official time, he was unaware that she was involved in any other Union activity. He said that he was not hostile toward the Union and had been a Union member in the past.⁹ Tr. 212-13. In light of this evidence, I find an absence of anti-union animus among Agency officials. *See U.S. Dep’t of Hous. & Urban Dev., Columbia Area Office, Columbia, S.C.*, 21 FLRA 698, 710 (1986) (although the agency’s decision not to select a union official for a position was subjective, the absence of anti-union animus supported a finding that it was not discriminatory).

As discussed above, Davies’s protected activity was minimal. She used a small amount of official time on February 27 and March 5, but otherwise was not engaged in Union business in a significant way. The GC makes much of the fact that Amarillo’s counseling of her on March 20 occurred only two weeks after she had used an hour of official time. But there is not the slightest scintilla of evidence to suggest why that one-hour meeting would have aroused management’s ire. On the other hand, the evidence reflects that even before Davies became a Union steward, Flynn and higher management had been concerned about production problems in the unit; had been trying to identify the sources of the problems; and had moved a manager (Zyliak) out of the unit. It seems much more likely that Amarillo and Flynn were motivated by these production problems, rather than by Davies becoming a Union steward.

Accordingly, since the evidence indicates that the overall labor relationship was healthy, and management officials said or did nothing to indicate their displeasure at Davies’s Union activity, I am not persuaded that a new chief steward, who simply requested a small amount of official time, triggered antagonism leading to her removal. The evidence fails to establish that Davies’s protected activity was even a slight motivating factor in the Agency’s decision to remove her from her position. *See DOL*, 37 FLRA at 37.

The evidence fails to show that the reasons given by the Agency for terminating Davies were pretextual.

In establishing an unlawful motive, the GC may seek to show that the Respondent’s asserted reason for taking its action against the employee was pretextual. The existence of a prima facie case is determined by considering the evidence in the record as a whole, not just the evidence presented by the GC. *U.S. Dep’t of Def., U.S. Air Force, 325th Fighter Wing, Tyndall AFB, Fla.*, 66 FLRA 256, 261 (2011). Here, the GC argues that the Respondent

⁸ I do not draw any adverse inference from the failure to call Olds, but the uncorroborated hearsay testimony of Davies on this point has no probative value.

⁹ While I recognize that such testimony is self-serving, and in most situations I give it little weight, it appears here to be consistent with the other evidence as a whole.

furnished no evidence that Davies's performance was inadequate, that the other two Supply Techs performed better, or that she had problems with leave usage and misconduct. Thus, the GC submits, the Respondent's reasons for removing Davies from her position were pretextual. GC Br. at 10-11.

The GC's argument in this regard relies primarily on Zyliak's testimony, which is problematic for several reasons. First, Zyliak's actual words were considerably more measured than the GC claims. Although she did not recall having issues with Davies's leave or misconduct, she blandly described Davies's performance as "good – for the amount of time that she had been there. . . . Her listings were no better or no worse than anybody else that had been there on a comparable amount of time." Tr. 66. Moreover, Zyliak supervised Davies for only a month, hardly enough time to fully assess the quality of this new employee's work. When Amarillo returned, Zyliak became Davies's second-line supervisor until she was moved out of the unit entirely in January, shortly before Davies became involved with the Union. Tr. 28, 58-59; Jt. Exs. 4 & 5. More importantly, Zyliak's opinion of Davies's performance is of limited value in understanding the Agency's decision to remove Davies, because Flynn and higher officials at the Agency had already decided that Zyliak herself was a source of at least some of the unit's problems. Flynn was charged with addressing the inventory and other problems in RMB, and once Zyliak was moved out of the unit, Flynn sought to correct problems that Zyliak had overlooked.¹⁰ Starting in late January or early February (before Davies became a steward), the managers in RMB started monitoring Davies much more closely. Thus, I find the GC's claim, that there was a connection between Davies's protected activity and the Agency's complaints about her work, to be without merit.

The GC argues further that the Respondent submitted no evidence at the hearing to show Davies' deficiencies in the areas of performance, leave usage, or misconduct. GC Br. at 10-11. While it is true that there was no documentation quantifying Davies's deficiencies, the testimony of several Agency officials was sufficient to establish that the Agency was concerned about the quality of Davies's work, perhaps as early as January 2013. Flynn testified in detail that she came into the RMB in January knowing there were serious problems. Tr. 94-99. She had been directed by Lt. Commander Glover to improve the effectiveness, accuracy, and transparency of the Branch. Tr. 103-04. Her testimony reveals that she believed she needed to repair the damage done by Zyliak, and as she conducted a "deep analysis" of the data, she saw discrepancies, especially in Davies' counts. Tr. 95-97, 103-04. Flynn, Mettler, McCarthy, and Amarillo testified consistently about these problems. They began discussing them in January or February 2013. Tr. 117-18, 132, 175-76, 203. Generally, their testimony establishes that they were not satisfied with Davies's performance.

¹⁰ While I comment on the existence of this dispute between Agency management and Zyliak, I do not take sides as to who is correct. I have no way of knowing whether Flynn and other Agency officials were justified in blaming Zyliak for the unit's failure to meet effectiveness goals, but recognizing the Agency's perspective on this issue helps to explain its treatment of Davies more persuasively than Davies's protected activity.

Although Amarillo was not particularly clear or detailed as to when he counseled Davies or what he told her, and Davies may not have understood those discussions as formal counseling, his testimony was amply corroborated by other managers. This established that they were not satisfied with Davies's performance in a variety of areas, and that Davies was made aware of their concerns in the months leading up to her termination. Mettler testified that he made the decision to remove tire maintenance from her areas of responsibility, because she worked too slowly and socialized too much. Tr. 175-76. This corroborated Amarillo's testimony on these points. I find that the Respondent furnished sufficient evidence to establish that, as early as January 2013, they considered Davies' work to be inaccurate and inefficient.

The record further demonstrates that Amarillo counseled Davies about these deficiencies. Both Amarillo and McCarthy kept records of counseling and disciplinary actions, and those records indicate that Davies was counseled about her use of sick leave, socializing, and training on March 20, and about her tire maintenance duties and expediting requisitions on March 28. GC Ex. 2 at 2; Resp. Ex. 3 at 2. Amarillo's records also reflect his view that she was not sending enough emails regarding the status of requisitions, and that she was "not meeting her goal of improving the range and depth of the pool code she managed." GC Ex. 2 at 3. This corroborates his testimony on the same point. Tr. 199-200, 204, 217-18. On March 6, the Agency's coordinator for ERP training sent an email to Davies, advising her that she was several months overdue in completing the online training that was required to activate her ERP account, and warning her that her ERP duties would be if she did not complete the training by March 8. Resp. Ex. 5. This contradicts Davies's claim that she requested ERP training but did not receive it. While it is unclear just how important this training was for Davies to perform her work, I consider her failure to complete the online training as evidence that supports the Agency's underlying argument that she had not been managing her work assignments properly.

Under these circumstances, I find the Respondent's evidence sufficient to establish that Davies's performance was not satisfactory, and that the Agency's justifications for its actions were not pretextual.

The General Counsel asserts that Davies was treated less favorably than Whyte, who was given a letter of counseling just before the end of his probationary period but was nonetheless allowed to attain career status. Tr. 135-27; Resp. Ex. 3 at 2. Disparate treatment that is unexplained, except as retaliation for protected activity, supports a finding that an agency's reason for taking its action was pretextual. *Indian Health*, 57 FLRA at 114; *Dep't of Transp., FAA, Boston Air Route Traffic Control Ctr., Nashua, N.H.*, 11 FLRA 318, 329 (1983) (finding disparate treatment where Union official was treated much more harshly than other employees who traded leave days with each other). In this case, however, the different treatment is explained, and retaliation is not a satisfactory alternative explanation. Thus, I find the evidence does not show that the Agency engaged in disparate treatment by removing Davies from her position while elevating Whyte to career status. First, as discussed above, there is no evidence of anti-union animus at the Agency. Second, the record reveals only the bare facts about Whyte – that he was a probationary Supply Tech who was

counseled for "inappropriate behavior" near the end of his probationary period. The Agency offered un rebutted testimony that Whyte was a better worker than Davies and that the behavior he was counseled for was simply an isolated incident. Tr. 135-37, 175-76. In this context, I cannot attribute a discriminatory motive to the Agency's treatment of Davies and Whyte.

The record as a whole makes it clear that the Agency's dissatisfaction with Davies was due to her work performance, and that this occurred at a time when RMB management was trying to correct some systemic problems affecting its overall effectiveness. The reassignment of a senior manager in the months prior to Davies's termination demonstrates that the problems were much broader than Ms. Davies, but in that environment it is understandable that the Agency would be hesitant to retain a probationary employee who had not significantly improved her performance deficiencies over a period of months.


Based on the foregoing, I find that the evidence is insufficient to support the allegation that the Agency removed Davies from her position because of her protected activity. I conclude that the General Counsel failed to prove a prima facie case of discrimination, and that in any case, the Respondent demonstrated legitimate justification for its action.

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

ORDER

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

Issued, Washington, D.C., December 14, 2015


RICHARD A. PEARSON
Administrative Law Judge