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

U.S. CUSTOMS SERVICE ST. LOUIS, MISSOURI Respondent	
and RONALD M. SIMONS Charging Party/Individual	Case No. DE-CA-70590

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to pursuant to 5 C.F.R. § 2423.34(b).

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

Any such exceptions must be filed on or before **MARCH 9, 1998**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

GARVIN LEE OLIVER
Administrative Law Judge

Dated: February 5, 1998
Washington, DC

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

MEMORANDUM DATE: February 5, 1998

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: U.S. CUSTOMS SERVICE
ST. LOUIS, MISSOURI

Respondent

and Case No. DE-CA-70590

RONALD M. SIMONS

Charging Party/Individual

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed is the Respondent's motion for summary judgement and the General Counsel's motion in opposition thereto.

Enclosures

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

U.S. CUSTOMS SERVICE ST. LOUIS, MISSOURI Respondent	
and RONALD M. SIMONS Charging Party/Individual	Case No. DE-CA-70590

Susan Flood, Esquire
Counsel for the Respondent

Hazel E. Hanley, Esquire
Counsel for the General Counsel

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint, issued September 30, 1997, and the Respondent's answer, dated October 24, 1997, reflect the following uncontested facts:

> Ronald M. Simons, an employee of the Respondent and a member of a bargaining unit represented by the National Treasury Employees Union (NTEU), filed a grievance which was resolved by a dispute resolution panel on May 9, 1997, pursuant to Article 31 of the NTEU-Respondent collective bargaining agreement.
>
> On May 12, 1997, Simons wrote a memorandum to T.A. Galantowicz, the Respondent's Port Director in St. Louis,

Missouri, protesting the resolution of his grievance.

On May 13, 1997, Galantowicz conducted a meeting with Simons on the subject of Simons' memorandum, and told Simons words to the effect that his memorandum about the grievance resolution was impertinent, insolent, contemptuous, and unprofessional. At the conclusion of the meeting, Galantowicz gave Simons a copy of Simons' May 12 memorandum and a buck slip dated May 12 signed by Galantowicz stating words to the effect that Simons' memorandum about the grievance resolution was impertinent and insolent.

After the May 13, 1997 meeting, Galantowicz issued a buck slip to Simons dated May 12, 1997 attached to which was a two page handwritten "Note to File" dated May 13, 1997, stating words to the effect that Simons' reaction to the grievance resolution was impertinent, insolent, contemptuous, and unprofessional. Simons received the buck slip and "Note to File" memorandum through internal mail distribution on or about May 13, 1997.

The complaint alleges, in effect, that the Respondent, through Galantowicz, conducted the May 13, 1997, meeting and issued the buck slip and "Note to File" memorandum because Simons engaged in protected activity by filing a grievance and protesting the resolution of that grievance. The complaint alleges that the Respondent's conduct violated section 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116 (a)(1) and (2). In the alternative, the complaint alleges that the conduct of the Respondent, in conducting the May 13, 1997 meeting and issuing the buck slip and "Note to File" memorandum, independently violated section 7116(a)(1) of the Statute.

The Respondent's answer admitted the factual allegations, as noted, but denied that the Respondent took the actions because Simons was engaged in protected activity or that it had violated the Statute.

Motion for Summary Judgment

The Respondent forwarded a motion for summary judgment to the Regional Director on December 22, 1997. Pursuant to section 2423.22(b) of the Authority's Regulations, 5 C.F.R. § 2423.22(b) (1996), the Regional Director referred the motion to the Chief Administrative Law Judge, and it was assigned to the undersigned for disposition pursuant to 5 C.F.R. § 2423.19(k)(1996).[1]

The Respondent contended "that there are no genuine issues of material fact relative to the meeting and subsequent correspondence between management representatives and [Simons], and that the undisputed facts indicate that no coercive or discriminatory behavior occurred." The Respondent submitted a statement of facts concerning Simons' grievance, the grievance procedure, the disposition of the grievance, Simons' May 12, 1997 memorandum, the May 13, 1997 meeting, the Port Director's [Galantowicz'] buck slip and notes of the meeting, and an unfair labor practice charge. The Respondent attached five documents consisting of: (1) the Article 31, Dispute Resolution Procedure; (2) the May 9, 1997 final decision on the grievance by the dispute resolution panel;
(3) the May 12, 1997 memorandum of Simons; (4) the May 12, 1997 buck slip of Galantowicz; and (5) the May 13, 1997 Note to File.

The Respondent argued from the facts and documents, in essence, that Simons sent a letter that, far from being an exercise of a protected right, was a repudiation of the negotiated grievance process and of the result obtained by his labor organization and management; that management did not engage in coercive behavior when the Port Director met with Simons; that Simons was simply told that the tone of his memo was impertinent, insolent, and contemptuous, and management was free to react to that intemperate tone; that, as to substance, he was told that the grievance had been concluded in accordance with the national agreement, that the Union and management had resolved the matter, which was binding on all parties, and that he was free to continue to pursue that issue with his legislator or in other forums, and management acknowledged a legitimate safety concern raised by the employee; that nothing that occurred in the

[1] Section 2423.21(b) of the Authority's revised Regulations, issued July 31, 1997, which applies to complaints issued after October 1, 1997, provides, in part, that prehearing motions shall be filed directly with the Administrative Law Judge. As noted, this complaint was filed on September 30, 1997 and the old regulation is applicable here. See 62 Fed. Reg. 46,175 (1997).

meeting or in the correspondence interfered with, restrained, or coerced Simons in the exercise of his rights or encouraged or discouraged membership in a labor organization by discrimination, and no reasonable employee would have believed a message of coercion was being conveyed.

The General Counsel's Response

Counsel for the General Counsel filed a response opposing the Respondent's motion for summary judgment and requesting that the parties be ordered to proceed with the hearing scheduled for January 13, 1998.[2] Counsel for the General Counsel asserts that there are material facts in dispute.

Specifically, Counsel for the General Counsel does not challenge the documents submitted by the Respondent, but claims that the Respondent failed to include the First Amended Charge, which she attaches as G.C. Ex. 1(b).[3] Counsel for the General Counsel also contends that the meeting on May 13, 1997 and the two memoranda constitute a course of conduct in violation of section 7116(a)(1) and (2) and that "Respondent's rendition of the meeting conflicts with that of the General Counsel," and that "[t]his is not Mr. Simons' account of the May 13, 1997 meeting."

As the First Amended Charge, G.C. Ex. 1(b), is now part of the file and may be considered for its value under Rule 56(c)[4], Counsel does not explain how a genuine issue of

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[2] On January 7, 1998, the Chief Administrative Law Judge issued an order postponing the January 13, 1998 hearing pending further order and disposition of the Respondent's motion for summary judgment.

[3] The First Amended Charge filed by Mr. Simons alleges that Respondent violated the Statute by conducting the May 13, 1997 counseling and by issuing the employee the two memoranda relating to the counseling and the grievance.

[4] Rule 56(c) provides, in part, "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

material fact is presented in this regard.[5] Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56 (c), except the mere pleadings themselves. Counsel for the General Counsel has failed to affirmatively present supporting material by affidavit or non-affidavit materials, as allowed by the Rule, which would set forth Mr. Simons' account of the May 13, 1997 meeting to demonstrate a genuine issue of material fact in this regard.

Counsel for the General Counsel insists that a "hearing is required in order for the General Counsel to show all of the facts and circumstances;" that "the General Counsel must call Mr. Simons to establish those facts and circumstances;" that "a motion for summary judgment is not appropriate in cases involving Respondent's motive or intent;" and the "General Counsel is entitled to cross-examine the Port Director to establish his motivation or intent in maintaining a note about Mr. Simons in any file."

Although motions for summary judgment in cases involving intent and credibility are to be resolved with "added rigor," Sarsha v. Sears, Roebuck & Co., 3 F.3d 1035, 1038 (7th Cir. 1993), a court should neither "look the other way" to ignore genuine issues of material fact nor "strain to find" material fact issues where there are none. Mechnig v. Sears, Roebuck & Co., 864 F.2d 1359, 1363-64 (7th Cir. 1988). Counsel cites no authority for her position that a motion for summary judgment is not otherwise appropriate in cases involving motive and intent, I am unaware of any, and the recent cases of Yarnevic v. Brinks, Inc., 102 F.3d 753, 757-58 (4th Cir. 1996), Remileh v. INS, 101 F.3d 66, 67 (8th Cir. 1996), and Meister v. Georgia-Pacific Corp., 43 F.3d 1154, 1159 (7th Cir. 1995) are to the contrary, holding that summary judgment should not be denied simply because issues of motive or intent are involved.

The Supreme Court has emphasized that "Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis." Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

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[5] The General Counsel enclosed other formal documents as G.C. Exs. 1(a) through 1(d), consisting of the charges, the complaint, and the answer.

In U.S. Equal Employment Opportunity Commission, 51 FLRA 248, 253 (1995), relied on by Counsel for the General Counsel to support her position that a hearing is necessary in this instance, the Authority held that summary judgment was not appropriate in that case because "the Respondent presented testimony disputing a number of factual assertions made by the General Counsel." As noted, Counsel for the General Counsel has failed to support her assertions by affidavit or by any of the other kinds of evidentiary materials listed in Rule 56(c).
The school-ground retort "not so" does not create a material issue of fact. Cf. Fuentes v. Perskie, 32 F.3d 759, 766 (3rd Cir. 1994).

The disposition of cases by motions for summary judgment has a long history in administrative law generally and in the Authority in particular. See State of California National Guard, 8 FLRA 54, 60-61 (1982). The Authority reiterated recently in Department of Veterans Affairs, Veterans Affairs Medical Center, Nashville, Tennessee, 50 FLRA 220, 222 (1995) that:

> "[m]otions for summary judgment filed with Administrative Law Judges pursuant to section 2423.19 of our Regulations serve the same purpose and have the same requirements as motions for summary judgment filed with United States District Courts pursuant to Rule 56 of the Federal Rules of Civil Procedure." Department of the Navy, U.S. Naval Ordnance Station, Louisville, Kentucky and Local Lodge 830, International Association of Machinists and Aerospace Workers, AFL-CIO, 33 FLRA 3, 4-6 (1988), rev'd on other grounds sub nom. Department of the Navy, U.S. Naval Ordnance Station, Louisville, Kentucky v. FLRA, No. 88-1861 (D.C. Cir. Aug. 9, 1990). Consistent with courts' interpretations of Rule 56, a party opposing a motion for summary judgment cannot rely on its pleading alone, but must show by affidavits or otherwise that there is a genuine issue of material fact. For example, Brown v. Chaffee, 612 F.2d 493 (sic) 504 (10th Cir. 1979).

Section 2423.27(b) of the Authority's revised Regulations, issued July 31, 1997, which applies to complaints issued after October 1, 1997, is to the same

effect and provides, in part, that "[r]esponses may not rest upon mere allegations or denials but must show, by documents, affidavits, applicable precedent, or other appropriate materials that there is a genuine issue to be determined at the hearing." As noted, this complaint was filed on September 30, 1997 and the previous regulation and precedent are applicable here. See 62 Fed. Reg. 46,175 (1997).

The Supreme Court stated in Celotex Corp. v. Catrett, 477 U.S. at 322-23:

> Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rules of Civil Procedure 50(a). . . ." *Anderson v. Liberty Lobby, Inc.*, [317 U.S. 242] at 250."

Essential Elements of the General Counsel's Case

The General Counsel has alleged a violation of section 7116(a)(1) and (2) and an independent violation of section

7116(a)(1). Section 7102 of the Statute protects each employee in the exercise of the right to form, join, or assist a labor organization, including the right to act as a labor organization representative, or to refrain from any such activity, without fear of penalty or reprisal. Section 7116(a)(1) provides that it is an unfair labor practice for an agency to interfere with, restrain, or coerce any employee in the exercise by the employee of such right. Section 7116(a)(2) provides that it is an unfair labor practice for an agency to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment.

The Authority has held that the standard for determining whether management's statement or conduct violates section 7116(a)(1) of the Statute is an objective one. The question is whether, under the circumstances, the statement or conduct would tend to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement. Although the circumstances surrounding the making of the statement are taken into consideration, the standard is not based on the subjective perceptions of the employee or the intent of the employer. U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky, 49 FLRA 1020, 1034 (1994).

Under the Authority's analytical framework for resolving complaints of alleged discrimination under section 7116(a)(2) of the Statute, the General Counsel has, at all times, the overall burden to establish by a preponderance of the evidence that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment. Letterkenny Army Depot, 35 FLRA 113, 118 (1990). The General Counsel must make the required showing in order to withstand a motion to dismiss. Federal Emergency Management Agency, 52 FLRA 486, 490 n.2 (1996). However, satisfying this threshold burden also establishes a violation of the Statute only if the respondent offers no evidence that: (1) there was a legitimate justification for its action; and (2) the same action would have been taken even in the absence of protected activity. Where the respondent does so, the General Counsel may seek to establish that those reasons are pretextual. Letterkenny, 35 FLRA at 120.

Analysis of Proof of Essential Elements

The undisputed statement of facts and the unchallenged documents reflect that responsible management and Union officials resolved Mr. Simons' grievance on May 9, 1997 after receiving the recommendations of a dispute resolution panel. This decision was binding on all parties in accordance with Article 31, Section 10 of the National Agreement and no further appeal process, such as arbitration, was available.

Despite the finality of the grievance resolution, Mr. Simons' memorandum of May 12, 1997 to Port Director Galantowicz reargued the merits of the grievance and, among other things, stated:

> The findings and decisions are not acceptable. It is my belief this matter is outside the control of the local customs port for any type of resolution. This whole matter reeks of a local Customs Service cover-up. The whole matter and position of management in St. Louis Customs makes no logical sense. The positions of St. Louis Customs are not in conformity with the Customs Service, Headquarters policies. It is my thought this matter must be forwarded to U.S. Senator John Ashcroft in my behalf to the Office of Commissioner or Deputy Commissioner for investigation and resolution. My main concern is, could the lack o[f] consideration of Officer safety at the Port of St. Louis result in another Calexico shooting?6

The Port Director replied on the same day with a transmittal and routing slip attached to Mr. Simon's letter on which he wrote in longhand:

> I find your memo to be impertinent and insolent. If you have serious questions about the running of this port, then you ought to try <u>constructive</u> criticism and team playing. The dispute findings resulted from a panel review consisting of your peers, and supervisors not involved with the dispute. Those findings were referred to NTEU and

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6 The "Calexico shooting" referred to a shooting incident involving Customs officers at the southern land border port of Calexico, California.

> myself, and we accepted 2 out of 4. In accordance with Art. 31, Sect. 10, Step 3A of the National Agreement, a binding decision has been reached -- and your dispute is settled.

The Port Director then told Mr. Simons, through his supervisor, that he would like to meet with him to discuss the letter. The meeting took place on or about May 13, 1997. Present were Port Director Galantowicz, Mr. Simons, and a non-management employee, Dawna Kutz. The meeting was memorialized in notes by the Port Director during the meeting.

The Port Director stated that the tone of Mr. Simon's memo was impertinent, insolent, and contemptuous. He also stated that, as to substance, the dispute had been reviewed by a panel of Simons' peers and management in accordance with the National Agreement. Management and the Union had reached agreement, and according to Article 31, Section 10, Step 3A of the agreement, the decision was binding on all parties. The Port Director also stated that if Simons felt compelled to write his legislators or pursue the issue in other forums, he was welcome to do so. The Port Director said that Mr. Simons had raised a significant point about the importance of officer safety, and that the Port Director would be receiving a video about a shooting incident at a Customs port at the Southern border, and he would be asking Mr. Simons and others to review it to see what needed to be done locally regarding overall officer safety.

Prior to Mr. Simons' departure, the Port Director handed him a copy of the memo Simons had sent together with a copy of the Port Director's transmittal slip ("buck slip"), and a copy of the Port Director's notes of the meeting. The Port Director added that Article 3, Section 6 of the National Agreement states: "The parties recognize that employees and managers shall conduct themselves in a professional and business-like manner, characterized by mutual courtesy, in their day-to-day relationships," and that this is how he expected people to treat each other in the port.

On or about May 13, 1997, Simons received, through internal mail distribution, copies of the May 12, 1997 transmittal slip and a two page handwritten "Note to File" memorandum dated May 13, 1997 prepared by Port Director Galantowicz. The "Note to File" contained Galantowicz's statements at the meeting as reflected above. In addition to the statement, "I told him that the tone of his memo was impertinent, insolent and contemptuous," the "Note to File"

reflects that Galantowicz stated immediately thereafter, "I stated that the effective running of this Customs Office relied on the integrity, honesty, openness, hard work and teamwork of the staff."

Based on the pleadings, the Respondent's undisputed statement of facts, and the unchallenged documents on file, and giving the nonmoving party (the General Counsel) the benefit of all favorable interferences, as long as they are reasonable, Jones v. Merchants National Bank & Trust Company of Indianapolis, 42 F.3d 1054, 1057 (7th Cir. 1994), I conclude that the General Counsel has failed to make a sufficient showing on an essential element of the case with respect to which he has the burden of proof.

In the May 12, 1997 transmittal slip, the May 13, 1997 meeting, and the May 13, 1997 "Note to File" Port Director Galantowicz told Simons words to the effect that his May 12, 1997 memorandum was "impertinent, insolent, and contemptuous." However, the May 13, 1997 meeting and the May 13, 1997 "Note to File" make clear that Port Director Galantowicz is referring to the "tone" of Simons' memo. This is a valid justification for the statements. Not only does Simons call the final decision in the matter, arrived at jointly by NTEU and management, "not acceptable," but he reargues the matter, claims that the "whole matter reeks of a local Customs Service cover-up" and "makes no logical sense." It is not unreasonable that the Port Director would see such statements, in light of the finality and courtesy provisions of the National Agreement, as "impertinent" (defined as "not constrained within established or proper limits, esp. of manners or good taste," *Websters II New Riverside University Dictionary*" (1984)), "insolent" (defined as "presumptuous and abrasive in speech or manner," *Id.*), and "contemptuous" (defined as "feeling or showing contempt; scornful," *Id.*).

The General Counsel has not made a sufficient showing that the Respondent's asserted reasons for taking the allegedly discriminatory action were motivated by consideration of protected activity. Mr. Simons' letter did not represent a part of any grievance procedure provided for in the National Agreement, it was not written by a union representative or on behalf of a labor organization, and was Mr. Simons' attempt to devise his own remedy outside the bounds of what had been negotiated between his representative and management. Even giving the General Counsel the benefit of the inference that Mr. Simons was engaged in protected activity under section 7102 of the Statute, on the theory that his letter protesting the

resolution of his grievance was related to his right to file and process grievances, the General Counsel has failed to make a sufficient showing that the Respondent's asserted reasons for taking the allegedly discriminatory action (the "tone" of the memorandum) are pretextual. It is noted that in the meeting and in the May 13, 1997 "Note to File" the Port Director made clear that, with regard to the substance of Simons' memo, the decision on the grievance was binding on all parties under the National Agreement, but if he "felt compelled to write his legislators or raise the issue in other fora, he was welcome to it."

Based on the Respondent's statement of undisputed facts and the unchallenged documents, I also conclude from the above circumstances that the General Counsel has not made a sufficient showing that the statement or conduct alleged would tend to coerce or intimidate the employee from filing grievances pursuant to the negotiated agreement, or that the employee could reasonably have drawn a coercive inference from the statement or conduct.

There is no genuine issue for trial "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). "[M]ere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Id. at 252.

Rule 56(e) specifically provides that "When a motion for summary judgment is made and supported as provided by this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits, or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Based on the pleadings and unchallenged documents on file, there is no genuine issue as to any material fact and the Respondent is entitled to a judgment as a matter of law.

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

The Respondent's motion for summary judgment is granted. The complaint is dismissed.

Issued, Washington, DC, February 5, 1998.

GARVIN LEE OLIVER
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that copies of this **DECISION** issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. DE-CA-70590, were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT — **CERTIFIED NOS:**

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REGULAR MAIL:

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Dated: February 5, 1998
Washington, DC