

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

DEPARTMENT OF VETERANS AFFAIRS NORTH FLORIDA/SOUTH GEORGIA VETERANS HEALTH CARE SYSTEM GAINESVILLE AND LAKE CITY, FLORIDA Respondents and FREDRICK L. BRITTAIN	Case Nos. AT-CA-90535 AT-CA-00167
And AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1976 Charging Parties	

NOTICE OF TRANSMITTAL OF DECISION

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

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

Any such exceptions must be filed on or before **AUGUST 30, 2000**, 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: July 31, 2000
Washington, DC

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

MEMORANDUM

DATE: July 31, 2000

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
ADMINISTRATIVE LAW JUDGE

SUBJECT: DEPARTMENT OF VETERANS AFFAIRS
NORTH FLORIDA/SOUTH GEORGIA
VETERANS HEALTH CARE SYSTEM
GAINESVILLE AND LAKE CITY, FLORIDA

Respondents

and
CA-90535

Case Nos. AT-

CA-00167

AT-

FREDRICK L. BRITTAIN

And

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 1976

Charging Parties

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
00-46
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

OALJ

DEPARTMENT OF VETERANS AFFAIRS NORTH FLORIDA/SOUTH GEORGIA VETERANS HEALTH CARE SYSTEM GAINESVILLE AND LAKE CITY, FLORIDA Respondents	
and FREDRICK L. BRITTAIN And AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1976 Charging Parties	Case Nos. AT-CA-90535 AT-CA-00167

Kathleen C. Freeble
James A. Mantia
Counsel for the Respondent

James Stinchcomb, Representative
AFGE, Local 1976

Sherrod G. Patterson
Ruth Pippin Dow
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

Fredrick L. Brittain (Brittain) filed the original and amended charge in Case No. AT-CA-90535 on May 12, 1999 and on December 22, 1999 respectively, against North Florida/South Georgia Veterans Health Care System, Lake City Division (Respondent).¹ The American Federation of Government Employees, Local 1976 (the Union/Local 1976), by Brittain as steward, filed the original charge in Case No. AT-CA-00167 on November 22, 1999 against Respondent, and Brittain amended this charge on December 22, 1999.²

¹ G.C. Exhs. 1(a), 1(b), 1(e), 1(f) and 1(l).

² G.C. Exhs. 1(c), 1(d), 1(g), 1(h) and 1(i).

The consolidated unfair labor practice complaint, issued by the Atlanta Regional Director for the Federal Labor Relations Authority, alleges that the Respondent violated section 7116(a)(1), (2) and (4) of the Federal Service Labor-Management Relations Statute (the Statute), as amended, by initiating and maintaining a formal criminal investigation into bargaining unit employee Fredrick Brittain's alleged removal of Union documents from the Union's office; by revoking Brittain's arrest authority and confiscating his police badge, weapons, and identification cards; by reassigning Brittain to various positions outside the Respondent's Lake City Police and Security Department (Police Department); and by proposing the removal of Brittain from the position of police officer for conduct unbecoming a police officer.

Respondent's answer admitted that Brittain was employed as a police officer at its Lake City Police Department; that Robert Owen, System Chief of Police; Captain Milt Gordon and Captain Larry Steven Hedgepath were supervisors or management officials; and that on or about May 10, 1999 the Respondent, by Hedgepath, at the direction of Owen, revoked Brittain's arrest authority and confiscated his police badge, weapons, and identification cards.

Respondent admitted that, beginning on or about May 11, 1999 the Respondent, by Owen, detailed³ Brittain to a series of different positions, all of which were outside the Respondent's Lake City Police Department. Respondent also admitted that, on November 19, 1999, Owen proposed to remove Brittain from the position of Police Officer for conduct unbecoming of a police officer; however, it denied the characterization that, on or about May 7, 1999, the Respondent, by Owen and Gordon, initiated and maintained a formal criminal investigation into Brittain's alleged removal of documents from the Union's office. Respondent also denied that, before and after the commencement of the investigation, Brittain was engaged in, and/or was engaging in, activity protected under the Statute; that it was aware of Brittain's protected activity; or that any of its conduct was motivated by Brittain's protected activity.

Two days before the hearing, on February 1, 2000, Respondent issued a decision on the proposed removal. Respondent served the decision on Brittain on

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Counsel for the General Counsel's motion to amend G.C. Exh. 1(j), to change the word "reassigned" to the word "detailed" in ¶ 17 of the Consolidated Complaint was granted. (Tr. 1225).

February 3, 2000, the first day of the hearing. The decision permanently reduced Brittain in grade and reassigned him from police officer, GS-6, to the position of materials handler, WG-6907-5, in the Acquisition and Material Management Service, Lake City Division of Respondent, effective February 13, 2000. The decision sustained the reasons stated in the proposed removal and the charge of conduct unbecoming of a police officer. (ALJ Exh. 1).⁴

Respondent moved to dismiss the consolidated complaint in a prehearing motion, and at the beginning of the hearing, and at the conclusion of the General Counsel's case-in-chief. The Respondent contended that the Authority lacked jurisdiction, pursuant to 5 U.S.C. § 7116(d), and that the MSPB had sole jurisdiction.⁵ The General Counsel opposed the motions. I declined to rule on the jurisdictional issue at the hearing, reserving a discussion of that issue and the factual substance of the case for this decision. (Tr. 73; Tr. 854).

For the reasons set forth below, I conclude that the Authority has jurisdiction and that a preponderance of the evidence establishes that the Respondent violated the Statute in all respects as alleged except that relating to the Respondent's preliminary investigation.

A hearing was held in Gainesville, Florida. The Respondent, AFGE Local 1976, and the General Counsel were represented and afforded a full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and the General Counsel filed helpful briefs, and the proposed findings have been adopted were found supported by the

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Respondent's brief states that Brittain filed an appeal of his demotion before the Merit Systems Protection Board (MSPB), Docket Number 0752-00-0410-I-1, dated February 3, 2000 and, along with his appeal, filed a motion to hold the MSPB case in abeyance until judgment in this Authority case. Brittain's appeal form, attached as Exhibit A to Respondent's brief, states that he reserves the right to possibly assert a violation of 5 U.S.C. § 2302(b)(9), reprisal for the exercise of protected Union activities.

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G.C. Exh. 1(o), ¶ 23; Tr. 44-47, 63-69, 848-50.

record as a whole.⁶ In making the foregoing findings, I have credited major portions of the testimony of Fredrick Brittain, Cheryl Burton, James Stinchcomb, Marilyn Kelly, Norman Clark, and Larry Hedgepath. Their testimony was mutually corroborative, consistent with the surrounding circumstances, and their recollections were forthright and convincing. Based on the entire record⁷, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The Parties

At the times material to the complaint, Charging Party, Fredrick Brittain, was employed by Respondent at its Department of Veterans Affairs (VA) Medical Center, Lake City, Florida, as a police officer, GS-6, under the Police and Security Service. Brittain had been a police officer with the VA for approximately fifteen years at Lake City and other VA facilities. During Brittain's tenure with the VA, he never received any disciplinary action until the events involved in this case.

Brittain was a member of AFGE, Local 1976. AFGE is the exclusive representative of a nationwide unit of employees, including those of Respondent, and Local 1976 is an agent of AFGE for representing certain employees of the Respondent at its Lake City facility. AFGE delegates to its regional offices the responsibilities for overseeing the Locals within each region. Local 1976 is within the jurisdiction of the AFGE Fifth District headquarters.

Chief Robert Owen became head of Respondent's Police and Security Service in July 1998. He is located at Respondent's Gainesville, Florida Medical Center. He had a good relationship with the Unions at other VA facilities where he had been employed (Tr. 857), and considered his relationship with Peggy Dukes, president of Local 1976, also to be non-adversarial. (Tr. 858-60). Dukes did not file any

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The General Counsel's motion to strike the Respondent's brief as untimely is denied. The time limit is waived under the extraordinary circumstances presented, the extremely brief period involved, and the fact that no prejudice resulted. 5 C.F.R. § 2429.23(b).

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Page 718, line 7 of the transcript is corrected to read, "This is not a petition to revoke subpoenas."

unfair labor charges during her thirteen year tenure as president of Local 1976. (Tr. 1358-59).

VA police officers enforce Federal laws and VA rules under the authority of title 38 U.S.C. § 901 and 902 on property under the charge and control of the VA. (Tr. 168; Resp. Exh. 6b, 13). The Union office is located on VA property.

Protected Activity--Respondent's Reaction

Brittain became an active Union steward in May 1998. He became a member of the Union audit committee in 1998 and, in June 1998, was elected to the bargaining committee. Respondent was aware of Brittain's protected activity. Brittain represented employees in grievances and filed unfair labor practice charges. He discussed Union-related issues with Human Resources Personnel, with his supervisor, Captain Larry Hedgepath, and with Chief Owen and Captain Gordon (Tr. 206-12).

In August 1998, some of the officers complained to the Union that Hedgepath was working overtime hours that should have been offered to them first. Brittain and Burton raised the issue with Hedgepath daily, warning him that they would file unfair labor practice charges and/or grievances if the issue was not resolved. (Tr. 680-84). Hedgepath viewed Brittain's concerns as "harassment," and, as noted below, complained to Union president Dukes. (Tr. 687-88).

Hedgepath kept Chief Owen informed of what was going on in Lake City with Union representatives Brittain, Burton and Clark. (Tr. 685, 1003). Hedgepath testified that Owen made his opinions about the Union clear. Owen told Hedgepath that he didn't have any stewards in Gainesville at that time, that stewards did nothing but cause him problems, and that the Union representatives in Lake City, specifically Brittain and Norman Clark, were "Union terrorists." (Tr. 686). Hedgepath testified that Gordon and Owen made the

"Union terrorist" comment about Brittain and Norman Clark at least three times.⁸ (Tr. 688) (G.C. Exh. 45).

Owen made other comments about Brittain and Clark. In explaining to Hedgepath about how best to deal with Brittain and Clark, Owen admitted using the comment, "dilute the gene pool."⁹ (Tr. 923-25). Hedgepath heard Owen make this comment in the May to June 1998 time frame (Tr. 720); and again, in August 1998 (G.C. Exh. 45; Tr. 721-28); and again, in September 1998 (G.C. Exh. 47; Tr. 724-26). Owen also promised Hedgepath, several times, that "he would get [Hedgepath] officers [in Lake City] that [he] could trust." (Tr. 720).

Owen also admitted calling Brittain a "rogue" or a "rogue policeman." Owen testified, "I felt that Fred Brittain was acting in a rogue capacity for his own self-interests." (Tr. 926-27). Owen acknowledged that he was referring to the complaint by Peggy Dukes, described below, and felt "this was a rogue activity . . . it had really no basis . . . to involve anything other than for his own self-interests." (Tr. 927). Hedgepath heard Owen use the term "rogue" when referring to Brittain and Burton as late as April 12, 1999. (G.C. Exh. 53; Tr. 711-19).

Brittain and Hedgepath discussed other Union-related issues, such as the promotion potential to sergeant for Lake City police officers (Tr. 663-69) and the location for the annual police officer physicals. (Tr. 914-16). In addition, from December 1998 to December 1999, Brittain filed numerous unfair labor practice charges on the Union's behalf on a

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At the hearing, Owen admitted these statements. He testified that his opinion of "what Fred Brittain and what Norman Clark were doing is acting like terrorists [Owen's definition: "to promote themselves and their own self interests"] and were not really representing the Union in an honest and laudable undertaking by those people. I don't think any of their actions were laudable." (Tr. 922-23). Of course, the common meaning of "terrorist" is that set out in Webster's II New Riverside University Dictionary (1984) defining "terrorism" and "terrorist" as relating to the "Systematic use of violence, terror, and intimidation to achieve an end."

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Owen testified that he made this comment to mean "bringing diversity into your group," obtaining minorities and persons of different ages and geographical areas. (Tr. 925-26). Given the context described by Hedgepath, I find that Owen meant reducing the strength of the Union stewards by obtaining different personnel.

variety of issues.¹⁰ He continued to take part in discussions with management over changes in working conditions. For example, Owen wanted to implement a policy in Lake City that would require that there be three police officers on duty before an officer/Union steward could take official time to handle a representational matter. The policy was not negotiated with the Union at Lake City. Local 2779 (Gainesville) had agreed to the proposal and, after the integration, Owen proposed to initiate the same policy in Lake City, without bargaining with Local 1976. Practically speaking, there were only two officers on duty seven days a week, twenty-four hours a day. Implementation of the policy meant, in effect, that no official time would be granted for police officer stewards at Lake City. There were two Union stewards in Lake City (Brittain and Norman Clark) at the time and another steward in Gainesville. Owen made a comment at the meeting, that, in his opinion, three police officers as stewards was too many. (Tr. 256-66, 510).

The Union pointed out that, even though the two facilities were integrated, Local 1976 was separate and distinct from Local 2779, for purposes of negotiating working conditions in Lake City. (Tr. 260-61). On February 22, 1999, Owen sent an e-mail to Brittain regarding the policy, stating, in part: "These procedures will be followed. . . . Remember that police officers are charged with the protection of life and property. This comes way above in [priority] to Union business. Permission will be first obtained in all instances to leave one's Post." (G.C. Exh. 19). On April 12, 1999, Brittain filed an unfair labor practice charge over the implementation of the policy. (G.C. Exh. 20; Tr. 264-66).

On April 23, 1999, Chief Milton Gordon of the Gainesville division chastised Brittain and Norman Clark for filing unfair labor practice charges dealing with overtime and representation, for going outside the Police Department to "air our dirty laundry," and involving outsiders. (Tr. 279-81, 508-09; G.C. Exh. 22).¹¹

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G.C. Exh. 20; Tr. 263-64; G.C. Exh. 20(a), Tr. 306-10; G.C. Exh. 21; Tr. 268-69; Resp. Exh. 25 & 25(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k) & (l); Tr. 268-88 and 116-93.

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Gordon admitting making such a statement to Captain Hedgepath, but denied making it to bargaining unit employees. (Tr. 1031). As noted, I have credited the accounts of Brittain and Clark.

Local 1976's Constitution and Bylaws and Brittain's Requests for Information from Local 1976 President

Local 1976's Constitution, Article V, FINANCIAL RECORDS AND REPORTING, Section 5, provides:

Section 5. All books, records and financial accounts shall at all times be open to the inspection of the National Officers or accredited representative of the National Executive Council and any duly authorized and accredited representative of the local. See National Constitution, Article XIX, Section 7.

(G.C. Exh. 10 (Local Constitution/Bylaws); G.C. Exh. 2 (AFGE National Constitution)). Section 18 of Local 1976's bylaws also provides:

Section 18. . . . All expenditures authorized by the Executive Board will be reported in writing at the next regular meeting of the local. Upon request, a copy of such report will be made available to any member in good standing of the local. (G.C. Exh. 10).

Brittain made several written and verbal requests to Local 1976 president Dukes and treasurer Thompson to gain access to financial documents and other Union records. On or about July 8, 1998, Brittain prepared a written e-mail to Dukes, a copy of which he hand-delivered to her at the regular meeting and read aloud to the Union members present. The letter protested Dukes' cancellation of training for new bargaining committee members scheduled for July 1998 and asked that Dukes provide him with the minutes of all Union meetings and Union finance reports from July 1997 to that time. Brittain received no response to the request. (G.C. Exh. 3; Tr. 213-14).

On July 9, 1998, Brittain sent another e-mail to Dukes and Thompson requesting that an independent audit of the Union's finances be prepared. He received no response from Dukes. (Tr. 216-17; G.C. Exh. 4).

On July 9, 1998, Brittain sent a third e-mail request to Thompson asking for a copy of the minutes of all Union meetings, regular or special, from July 1997 through June 1998 (Tr. 218-19; G.C. Exh. 5). On July 26, 1998, Brittain sent a fourth e-mail to Dukes requesting copies of Union minutes and Union financial reports from January 1993 through July 1998. Dukes responded, by e-mail, "WILL FORWARD TO SECRETARY . ." Brittain received no other

response to this request from Dukes or Thompson. (Tr. 219-21; G.C. Exh. 6).¹²

National Union Receives Allegations of Local 1976
Mismanagement of Funds and Requests Evidence

During 1998, AFGE National Representative James Stinchcomb, Fifth District headquarters, received numerous allegations from Union members that: (1) Dukes had become a "kind of dictator;" (2) the Union democratic process was not being followed at Local 1976; (3) Dukes had been seen taking boxes of documents out of the Union office late at night; and (4) there was an embezzlement of funds. (Tr. 146-48). When Union Steward, Cheryl Burton, advised Stinchcomb (and other National Union officials) of her suspicions of these matters, Stinchcomb and others advised Burton that before anything could be done, they would need evidence. (Tr. 148, 453). Stinchcomb instructed Burton to make copies of documents for him so that he could conduct an audit of the Local's finances. (Tr. 146).

Accordingly, Burton, with Stinchcomb's authorization, began to remove documents from the filing cabinet or the top of a desk in the Union office, make copies elsewhere, and return them to the Union office. This occurred over a period of months, both during office hours and after office hours. Burton had an authorized key to the Union office. Dukes and Union treasurer Thompson were present on some occasions when she removed documents, but they did not object. The cabinet was unlocked when she removed documents, and was unlocked generally prior to sometime in late 1998. After that date, she removed documents only when the cabinet was unlocked by Dukes or Thompson. Burton copied meeting minutes, canceled checks, telephone records, telephone bills, and bank statements. Burton did not copy

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Initially, Thompson testified that he did not remember Brittain ever making a specific request for financial or other records. (Tr. 81). Later, Thompson acknowledged that Dukes may have told him that Brittain wanted to see the financial reports and the minutes. Thompson testified, "Mr. Brittain should have come to the office [if] it was interesting enough for him to ask about it. He knew where the records were in the office and he knew that he had an opportunity to come in and look at the records. I didn't necessarily have to get with him to let him know where the records were." (Tr. 101).

any medical documents.¹³ (Resp. Exh. 5, p.79; Tr. 453-81). In early November 1998, Burton, gave copies of the Union financial documents (the documents) that she copied from the Union office to Stinchcomb and Brittain. (Tr. 457).

Stinchcomb testified that Burton was an authorized person to hand over the records to him; that Union records could be removed for copying and brought back, particularly if "we think that there's something wrong and we're trying to protect the integrity of the Local;" (Tr. 151) that any member of the Local has access to those records, or is supposed to; that the records belong to the Union membership, not Peggy Dukes or any other officer or the U.S. Government; and that the question of access to the records "is an internal Union problem, not an external one." Stinchcomb testified that "that's what we've been consistently pushing for when dealing with the Agency [concerning this matter]." (Tr. 149).

Brittain explained at the hearing that, "She [Burton] just came down to the office one day and said she had these documents and wanted to give me a copy of them." Until then, Brittain did not know that Burton had the documents. There were no personal medical documents in the package Brittain received. (Tr. 231-34).

Brittain studied the documents, found several discrepancies, and used them to support charges he brought against Dukes under Article XVIII, Section 3 of the AFGE constitution. (Tr. 234; G.C. Exh. 2, p.18). On November 12, 1998, Brittain sent a letter to the Executive Board of Local 1976, requesting an immediate investigation of Dukes and Thompson for mismanagement, embezzlement and misappropriation of funds, as well as other violations. (G.C. Exh. 11; Tr. 234-37, 552).¹⁴ The Executive Board appointed Jeffrey Clark as chairperson of the committee charged with the internal Union investigation. In December 1998, Brittain turned over the documents to Jeffrey Clark. (Resp. Exh. 5; Tr. 552-56).

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A one page medical record concerning Dukes was later slipped under the door of Avis Tidwell. Tidwell turned it over to the Union investigating committee, referred to below.

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On November 12, 1998, Brittain also sent a letter to AFGE Vice President Blaylock (G.C. Exh. 12). On January 20, 1999 Brittain sent letters to AFGE President Harnage and Vice President Blaylock, reiterating the charges contained in the November 12th correspondence. (G.C. Exh. 17).

At about this same time, on November 18, 1998 Captain Hedgepath sent an e-mail to Local President Dukes complaining about Brittain. Hedgepath said, "I do not intend to allow Off. Brittain to continue [to] create a hostile environment for me or to continue to harass me using his union stewardship." (G.C. Exh. 48; Tr. 683-84).¹⁵ Again, on November 19, 1998 Hedgepath sent a detailed letter to Dukes complaining about Brittain and demanding that "something be done" about what he perceived to be Brittain's harassment. (G.C. Exh. 49; Tr. 687-88). On the same date, Dukes removed Brittain as a Union steward.¹⁶ (G.C. Exh. 14).

Dukes First Mentions the "Alleged Break-In" to Hedgepath

On November 30, 1998 Dukes stopped Captain Hedgepath in the hallway to tell him that someone had gone into the Union office and broken into the file cabinet. Hedgepath walked to the Union office with her. Once inside, Dukes pointed to the top drawer of one of the filing cabinets. Hedgepath asked her to open the drawer and she did. It was not locked and Hedgepath observed no indications of forced entry. Dukes said nothing was missing but the files were "just messy." Dukes advised Hedgepath that she believed Fred Brittain and Cheryl Burton had gone into the office and removed documents and put them back in the cabinet to try to find information to remove her from office. Dukes said she was going to be investigated by the Union. (Tr. 694-99; Resp. Exh. 20A, 20B).

Dukes told Hedgepath that Thompson and Burton had keys to the Union office, but that "everybody has access, they have keys, or we let them in." Dukes also told Hedgepath that the on-duty police officer also carried a great grand master key, which would unlock the Union's office door.

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Dukes testified that she had problems with Brittain, including his refusing to meet with her and using the Union for his own ends, in addition to complaints from Hedgepath that Brittain was "disruptive" at meetings. According to Dukes, Brittain's behavior and proposed termination were discussed at an Executive Board meeting on November 8, 1998. (Tr. 1266-68, 1285; Resp. Exh. 29).

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After Brittain's "removal" as a steward, he continued to represent employees in grievances and other representational matters. Brittain also remained a member of the Audit Committee and participated in the 1999 first quarter audit of the Union's finances. (G.C. Exh. 18; Tr. 244-45, 252-55).

Dukes did not file a written report, or request that Hedgepath initiate an investigation into the "messy" state of the files at this time. However, Hedgepath notified Chief Owen and Captain Gordon of this conversation. (Tr. 695-98).

On December 19, 1998 Burton checked the file cabinet to see if the minutes of the last meeting had been typed, but she found the drawer locked. This was the first time that Burton had ever found the file drawer locked. Brittain and Union steward Kelly also testified that the file cabinet drawers were never locked prior to this time. (Tr. 229-30, 451, 472 475-76, 612-14).

Duke's Second Report About the Alleged Break-In

On January 4, 1999, Dukes told Captain Hedgepath that three EMS employees who worked in the area of the Union office at night told her that they had seen a police officer and Cheryl Burton there late in the evening, around 9:00 or 9:30

p.m.¹⁷ In this conversation, Dukes also mentioned that Eddie Dorch, a retired VA locksmith, may have been there too. Dukes said that someone had removed Union checkbooks and other paperwork from a locked file cabinet as they were out of order and "messy." Dukes told him that only she and the Union treasurer, Sam Thompson, had keys, they always locked the drawer when leaving or at night.¹⁸ She said she had placed a piece of tape over the drawer, but when she came in the office later, the tape was broken. However, Hedgepath did not see any tape residue. Hedgepath advised

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Hedgepath asked Dukes to give him the names of the three EMS employees she mentioned, so that he could verify her report, but Dukes never did. Later, Gordon also asked Dukes for the names of these EMS employees, but again, Dukes did not provide the names. (G.C. Exh. 51; Tr. 699-702). Dukes testified, at first, that she never identified the EMS employees' names to Hedgepath or Gordon; then said she thought she did. She did not offer the names at the hearing. (Tr. 1348-49).

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Dukes and Thompson testified to this effect at the hearing. Thompson was retired and spent only three or four hours a week at the Union office. Dukes testified that she and Thompson had to exercise some control over the documents, that they had, under the Union's constitution, a responsibility for safekeeping the documents. Brittain agreed that Thompson was the custodian of financial records. (Tr. 87-88, 295-96, 425, 1272-73; G.C. Exh. 10).

Chief Owen and Captain Gordon of the allegations. (Tr. 699-703; G.C. Exh. 51; Resp. Exh. 20B).

Thereafter, Chief Owen sent Captain Gordon, his investigator from the Gainesville office, to speak to Dukes and Thompson and to investigate the claim. (Tr. at 878-79). Dukes identified Fred Brittain and Cheryl Burton as potential suspects who had removed and copied documents. She stated that her suspicions were based upon the need of those two persons to obtain documents to present in a pending AFGE internal investigation into her conduct. She identified Fred Brittain because he had preferred the charges against her and had turned over documents to Jeffrey Clark as chairperson of the committee charged with the internal Union investigation. Dukes advised Gordon that the evidence presented to the committee were copies of cancelled checks and other records that were kept in her locked file cabinet. Dukes alleged that Fred Brittain had part in the removal and copying of documents from the Union office without her or Thompson's knowledge. (Tr. 902, 1035, 1039; Resp. Exh. 5 at 10, 14).

On January 21, 1999, during a Union meeting, Dukes accused the entire membership of being "a bunch of thieves." Dukes accused Burton of taking Union documents from the filing cabinets and stated that she would begin to lock them. Dukes said that all of her stewards were a bunch of damn thieves, and she "wasn't about to give them a key." (Tr. 154, 616; G.C. Exh. 43, 44).

Delay in the Commencement of Gordon's Criminal Investigation

When Dukes advised Marilyn Walker of the Fifth District AFGE office that there had been a "theft" in the Union office involving documents in the possession of the Local investigating committee, Walker advised Dukes to report it to the police after the Local committee investigation was completed. (Tr. 1308-10). The police investigation was put on hold while the Local investigation was going on. Chief Owen decided it would be inappropriate to proceed and relevant evidence would be unavailable. Owen advised Dukes that when the Local investigation was over, she should put in writing that she wanted an investigation and why. (Tr. 889, 894, 1038).

On February 18, 1999 Dukes copied Hedgepath on an e-mail that she sent to Gordon, regarding the pending internal investigation. The e-mail states:

[from Dukes to Gordon] -- I spoke with Steven this AM. . I told him the hold up is from the

committee, I was told I could not have any copies of any materials until the investigation was over. It was scheduled for this past Monday to close but was cancelled. Meeting has not been rescheduled . . . There is a time frame on this of 120 days which began on 11/23/98. Will keep you informed. . . Thanks . . .

[from Gordon to Dukes] -- PEGGY - - LET ME BOUNCE THIS PAST THE CHIEF. HE MAY HAVE AN ALTERNATE PLAN THA[T] WE CAN MOVE ON WHILE WE AWAIT THE INFORMATION. I'LL KEEP IN TOUCH. THANKS.
(G.C. Exh. 52).19

Resolution of Local 1976 Investigation

On March 11, 1999, Dukes and Thompson agreed to the "Terms of Resolution" prepared by the Local Executive Board as a result of the internal Union investigation. The committee found "probable cause" that the offenses alleged by Brittain were committed, but allowed Dukes and Thompson

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At first, Gordon denied having any contact with Dukes between the time he met her in January 1999, and the time she formerly requested that the investigation be initiated. (Tr. 1084). When shown G.C. Exh. 52, Gordon admitted that he "may have had a conversation" with Dukes, but he doesn't recall what he meant by the term "alternative plan." (Tr. 1085). Dukes also categorically denied having any contact with Gordon during this time frame; but after being shown G.C. Exh. 52, she remembered the contact. Like Gordon, Dukes does not remember the reference to an "alternative plan." (Tr. 1349-51).

to retain their positions by agreeing to adhere to proper procedures in the future.²⁰ (Resp. Exh. 14).

The Formal Criminal Investigation is Initiated

On April 13, 1999 Dukes sent a letter to Chief Owen requesting "a full investigation/conviction of all parties involved," in the actual or attempted theft of government or personal property, the making of false or unfounded statements, and violation of the Privacy Act. Dukes claimed that the evidence presented to the Union investigative committee by Fred Brittain had been maintained in a locked file cabinet in the Union's office and that "[i]t appears that the entire checkbook and other official business had been removed and copied by Officer Brittain." The letter accused Brittain and Burton of having been seen in the Union's office after hours and weekends by other staff. (G.C. Exh. 35).

On April 28, 1999 Hedgepath requested that the internal Union committee chairperson, Jeffrey Clark, turn over the

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The AFGE Fifth District and AFGE National Office took further action against Dukes. As a result of the preliminary audit of Local 1976 financial records in November 1998 and a detailed audit in January 1999 by AFGE National Representative Stinchcomb, AFGE National Vice-President Blaylock, on September 1, 1999 suspended Dukes from the office of Local 1976 President and served her with charges preferred by the AFGE Fifth District. An AFGE trial committee appointed by the AFGE National President conducted a trial on the charges on December 8, 1999. Dukes was found guilty of five charges, namely continuing to allow checks to be written to cash, making unauthorized expenditures, permitting questionable expenditures and a personal loan, failing to order an audit once a year, and failing to assure the preparation of an annual budget. Dukes was found not guilty of two charges, including one relating to the instant matter, that of charging fellow members with breaking and entering the Union's office which resulted in a criminal and internal investigation. Pursuant to the trial committee decision, AFGE National President Harnage suspended Dukes from membership and barred her from holding any office in AFGE for five years, effective January 18, 2000. As of the date of the hearing, Dukes was considering appealing the decision. (Tr. 152-57, 1331-32; G.C. Exh. 60). Pending further resolution of the matter and Local elections, Stinchcomb is currently the point of contact for the Local. Stinchcomb has appointed Marilyn Kelly as the point of contact in his absence, and she has appointed Fred Brittain and Norman Clark as stewards. (Tr. 183).

Union documents to him for Respondent's use in the criminal investigation. Jeffery Clark did so. (Tr. 557-58).

Gordon and Hedgepath Interview the Witnesses

The official record of Gordon's investigation was memorialized in a Uniform Offense Report (UOR) (G.C. Exh. 58; Resp. Exh. 5), prepared by him, and made up of a series of reports of contact²¹ by Gordon and Hedgepath.²² Hedgepath served as an observer. (Tr. 1038).

At the hearing, several witnesses disavowed some of the information/statements attributed to them in the UOR: Yelling (Tr. 640-45); Dorch (Tr. 124-27); N. Clark²³ (Tr. 511-19). Most significant is Gordon's account of the interview of Cheryl Burton in the UOR, which states:

[Burton] did admit to letting herself and Officer Brittain into the Union office on several occasions and that Officer Brittain had removed documents she declined to identify. [She] insisted, however, that she and Officer Brittain

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The following persons were interviewed: Dukes (on January 6, 1999 UOR, p.4 and 6); J. Clark (on May 10, 1999 UOR, p.6); Burton (on May 6, 1999 UOR, p.6-7); Brittain (on May 7, 1999 UOR, p.7); N. Clark (on May 5, 1999 UOR, p.7); Tidwell (on May 13, 1999 UOR, p.8); Yelling (UOR, p.7); and Dorch, (UOR, p.7).

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Gordon testified that Hedgepath, as a participant in the investigation, was given a chance to review the draft and make changes in it before the final was printed. (Tr. 1054). Hedgepath testified that he made pen and ink corrections to the draft (Tr. 738, 741-42), but that his changes were not incorporated into the final document. (Tr. 754).

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Gordon's UOR reported that when Officer Norman Clark asked Brittain how he had obtained the documents used against Dukes, Brittain had replied "you don't want to know." (Resp. Exh. 5 at p.11). At hearing, Clark testified the correct term he identified to Gordon as Brittain's was "you don't need to know." (Tr. 519). Clark also testified that Gordon's statement in the UOR that he (Clark) "was aware of the evidentiary documents and had been shown the documents by Officer Brittain" (Ibid) was "a lie." (Tr. 517). Clark testified that Gordon informed him during the interview that he (Gordon) was convinced that Clark, Burton, and Brittain had planned "the conspiracy and down-throw of Peggy Dukes." (Tr. 514).

has a "right" to the documents.²⁴ (Resp. Exh. 5 at 5-11).

Gordon questioned Burton with Steward Marilyn Kelly in attendance. According to Burton, Gordon told her that she was "the culprit." Burton told Gordon that, upon the advice of the AFGE Fifth District office counsel, she would not answer questions concerning internal Union business, but would answer questions she felt comfortable with. (Tr. 461-62).

Gordon asked Burton why she broke into the Union office and stole the documents and then he explained his opinion of why she did it. Gordon told Burton that she committed these alleged acts, "[f]or the sole purpose of overthrowing the current president, Peggy Dukes." Burton testified: "[t]he one statement that I did make was one of the questions, had I ever permitted anyone else access to the Union office, and my response was that as part of my duties, I had, on numerous occasions, allowed numerous employees into the Union office, which was part of what all stewards and all officers did" Burton did not admit to removing the documents. (Tr. 463-64).

Kelly corroborated Burton's account of Gordon's interview. About this meeting, Kelly testified: "Milt Gordon was asking most of the questions. He asked Cheryl did she go into the Union -- break into the Union office and she said no, she had a key which was around her neck, and she showed him the key." Burton said that she let a lot of people into the Union's office, including Brittain, and that she had removed documents from the office before; however, Burton did not make the statement in the UOR attributed to her, i.e., that "Officer Brittain had removed documents" or that "[Burton] declined to identify what they were." (Tr. 620-24).

Captain Hedgepath also corroborated Burton's account of Gordon's interview. Hedgepath testified that Burton never said that Brittain removed documents from the Union's

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Gordon testified to this at the hearing. (Tr. 1042-43).

office that she declined to identify.²⁵ According to Hedgepath, Burton acknowledged that "they" had gone into the Union's office because they had a right to be in the Union's office and a right to the documents, but nothing was ever said or admitted about taking the documents or copying the documents. According to Hedgepath, the statement in the UOR attributed to Burton was a misrepresentation of her testimony. (Tr. 738-42).

The UOR notes that during an interview of Officer Brittain "he promptly invoked his rights under Miranda and the Weingarten rulings." The report goes on to say:

Based upon Ms. Burton's admissions and Officer Brittain's possession of documents removed without authorization from the Union office, Ms. Burton's knowledge of the documents and the need for those documents to support the charges brought against Ms. Dukes by Officer Brittain that a conspiracy was entered into by Officer Brittain and Ms. Burton to obtain the documents. This was accomplished through a burglary of the Union office by Officer Brittain and Ms. Burton in which the documents were stolen, copied and eventually returned to their rightful place. (Resp. Exh. 5 at 5-11).

Throughout the criminal investigation, Hedgepath and Gordon kept Owen informed, on a daily basis, regarding the interviews and if there were any problems. (Tr. 733-34, 890).

Brittain's Arrest Powers Suspended; His Police Badge, Identification, and Weapons Card Removed; and He is Detained Outside the Police Department

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Hedgepath, not particularly an ally of Brittain's, and who, in fact, initially complained to Dukes about Brittain's aggressive Union activity, was a very forthright witness who contradicted his superiors in several respects. Respondent has pointed out that Hedgepath may have done so out of resentment against Chief Owen because of actions Owen has taken concerning Hedgepath. I have taken this and other factors identified by Respondent into consideration in assessing Hedgepath's credibility, but found his testimony credible in light of other testimony and all of the surrounding circumstances.

On May 10, 1999 Owen suspended Brittain's arrest powers "pending the resolution of the criminal investigation."²⁶ (G.C. Exh. 28). Brittain turned in his badge and weapons card the next day and was detailed to the Acquisition and Material Management Service for two weeks where he folded towels and scrubbed out feeding tubes. At that time, he asked to be reassigned to Prosthetics. Chief Owen advised Union Steward Marilyn Kelly that he had no problem with the move as Brittain would probably only be in Prosthetics a few days because he was going to be indicted by the U.S. Attorney's Office for burglary and theft of documents. (G.C. Exh. 30; Tr. 299-320).

Brittain was detailed two subsequent times. He received the same pay as he had previously, but he did not work any overtime. Brittain had worked approximately twenty hours a week in overtime as a police officer. During the detail period, Brittain lost the night differential pay, the holiday pay, and the Sunday premium pay that he would have received had he still been working overtime as a police officer. (Tr. 319-22).

Respondent Contacts State and Federal Law Enforcement Officials

Chief Owen advised Captain Hedgepath that he believed that the individuals identified committed the alleged crimes and that he would pursue the matter to its fullest extent and request termination in all three cases (Brittain, Burton and Clark) (Tr. 746-47). Prior to the completion of the investigation, Owen also advised Hedgepath that he would settle for nothing less than the termination of Brittain. (Tr. 765).

Contact With the State Attorney's Office

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Owen testified, and presented documentary evidence, that he "routinely" removed the arrest authority of police officers pending resolution of investigations and that other police officers have been detailed, reassigned, or demoted where appropriate. (Resp. Exh. 1, 2, 15; Tr. 928-45). However, the record reflects that Owen did not detail one officer, a non-Union member, pending resolution of the matter. And, contrary to Owen's testimony that this was because the matter was a misdemeanor and the individual had not been arrested and all charges were subsequently dropped, the General Counsel showed that the individual had been arrested, the matter was a felony, and the officer continued to conduct police training with a dangerous weapon. (Tr. 690-93, 930-32, 976-79, 1012-13; G.C. Exh. 66).

In July/August 1999 time frame, Gordon and Hedgepath met with Assistant State Attorney Tom Coleman to talk about possible state criminal violations against Brittain. After discussing the matter with a colleague in an adjoining county (to avoid the appearance of a conflict of interest), Coleman stated that the matter would best be handled by a Federal prosecutor, if it should be held at all, because there did not appear to be any proof of any crime committed. In addition, Coleman informed the VA officers that it was possible that the suspects could claim status as whistleblowers since they were attempting to uncover crimes committed by Dukes, had a right to be in the office, and had been told by higher Union officials that they had a right to the documents. (Tr. 747-53; Resp. Exh. 20A, B).

Contact With the U.S. Attorney's Office

Subsequently, Gordon and Hedgepath presented the case to Assistant United States Attorney (AUSA) Lisa M. Page. Page did not comment at that time, other than to ask questions, make notes, and remark that she would contact her boss. (Tr. 753-57, 1060).

Hedgepath advised Gordon after the meeting that he did not think the U.S. Attorney would take the case and it should be handled as an ethics issue. Gordon stated that the Chief would never do that because he wanted to make the case and get Brittain and Clark out of the service. (Resp. Exh. 20A, B).

Following the meeting, AUSA Page telephoned Hedgepath. Page stated that there did not appear to be any Federal laws violated and that, if the case went to trial, it would have very little jury appeal. (Tr. 753-57).

The Administrative Board

On July 7, 1999 Owen sent a letter to his superior, System Director Elwood J. Headley, requesting that an administrative board be formed. The letter was prepared based on what Hedgepath and Gordon told Owen about their conversations with AUSA Page. (Tr. 898-99, 972-75). Owen's memo stated:

1. It is requested that you form an Administrative Investigative Board to review the evidence obtained during a criminal investigation involving an illegal entry and removal of documents in the Union Office (AFGE), located at Lake City Division.

2. Captain Milt Gordon concluded the criminal investigation and presented the evidence to the U.S. Attorney's Office in Jacksonville, Florida. The U.S. Attorney's Office reviewed the evidence and communicated with Captain Gordon to present the case for administrative action. This communication stated that a crime had been committed, but due to a lack of jury appeal, the case was referred back to this agency for administrative action.

3. The complete investigative file will be turned over to the Administrative Investigative Board by Captain Gordon for their review and conclusion to the case. (G.C. Exh. 65; Tr. 974).

On July 27, 1999, AUSA Page mailed her decision to Gordon. It states:

Thank you for presenting the subject matter to our office. We have carefully reviewed the alleged unauthorized entry into a locked file cabinet in the Union office at the VA Hospital, Lake City and the subsequent copying of the documents by VA Police Officer Fred Brittain and Cheryl Burton. Officers Brittain and Burton then reportedly presented the documents obtained from the file cabinet to an internal committee that was investigating the Union President for unlawful activities. When questioned about this, Officer Brittain took the Fifth Amendment; Burton admitted her involvement.

We recognize that this is a serious matter. However, as there is concurrent jurisdiction at the VA Hospital, we believe it may be more appropriate for the state to handle this matter as Officers Brittain and Burton have not violated any federal laws.

Additionally, it may be difficult to obtain a federal conviction. Officers Brittain and Burton were permitted access to the Union office, just not to the cabinet. Moreover, they presented these documents to an internal committee that was investigating the Union President for unlawful activities. Lastly, had they made the proper request, they could have obtained the documents legally.

Accordingly, I am recommending a federal prosecutive declination to my supervisors for the reasons outlined above. (Jt. Exh. 1).

Gordon showed Owen the AUSA's letter dated July 27th, stating that the matter was serious, but that no violation of Federal law had been committed. Owen did not advise Headley of this determination. He did not feel it was germane at this time, although in requesting that the board be formed he had informed Headley that the U.S. Attorney had determined that "a crime had been committed, but due to a lack of jury appeal, the case was referred back to this agency for administrative action." Gordon was Owen's source of this letter; however, Gordon did not recall AUSA Page advising him to "present the case for administrative action." (Tr. 1098).

Owen said he did not advise the Board about AUSA Page's letter, but that Gordon did. (Tr. 973-74). Contrary to Owen's representation, Gordon did not inform the Board about the existence of this letter. Gordon was questioned by the Administrative Board before he received AUSA Page's letter. He advised the Board that the U.S. Attorney's Office had conveyed to him that Brittain had committed a crime. (Tr. 1099). After he received AUSA Page's letter, Gordon did not feel it material to the Board's investigation to correct his earlier testimony. In defense of his actions, Gordon testified that he thought the Board had already concluded its investigation. (Tr. 1098-1102, 1060-63).

The Administrative Board Investigation

Chaplain Glenn Busby was appointed the head of the four-member panel. (Tr. 1109). The investigation was authorized by System Director Headley on July 13, 1999 and the board's final decision was issued on July 30, 1999. (G.C. Exh. 33, 65). According to Busby, before they conducted interviews with witnesses, they "studied" Gordon's UOR. (Resp. Exh. 5; Tr. 1111-12). Busby also testified that, in reaching their ultimate conclusion, they used the UOR and the information obtained from their interviews with Brittain, Jeffrey Clark, Norman Clark, Tidwell, Yelling, Dorch, Gordon, Dukes, and Thompson. Busby did not attempt to interview Burton, because she had already left VA employment, but did interview Dorch, who also had left VA employment. (Tr. 1112, 1115).

Brittain testified before the Board that he received the internal Union documents from Burton; that he did not have knowledge of where Burton obtained them; that he did not break into or steal anything and that he had a right to the documents. (Resp. Exh. 17). AFGE National

Representative Stinchcomb represented Brittain before the Board. Stinchcomb advised the Board that the matter concerned strictly internal Union documents and that he would not let Brittain answer any questions about the documents themselves or internal Union business. (Tr. 157-58, 176-80).

The Board ultimately recommended that Brittain no longer be allowed to perform the duties of a VA police officer because he acted in a manner unbecoming of a professional law enforcement officer by joining in a conspiracy to illegally enter and remove documents from a locked file cabinet in the Union office. The Board expressed the opinion that "the whole incident occurred due to strife within the union. The problems apparently began when Brittain was terminated as a union steward sometime in November of 1998 ["at the request of the VA Police and Security Service"]." (G.C. Exh. 33, p.2, 4).

The Proposed Removal of Brittain

On September 28, 1999 Owen prepared a memo to Headley requesting that a proposed removal letter be prepared for Officer Brittain. The memorandum stated:

1. It is requested that a proposed removal be prepared in the matter of VA Police Officer Fredrick L. Brittain. This request is based on the findings of a criminal investigation and the recommendations presented by the Administrative Board.
2. In or about December 1998, Officer Fredrick L. Brittain in consort with another did enter into a conspiracy to commit a criminal act of burglary for the purpose of obtaining certain documents related to charges preferred against AFGE Local 1976 President Peggy A. Dukes. This act is a clear violation of Florida State Statute 777.04 (3): Attempts, solicitation, and conspiracy.
3. In or about December 1998, Officer Fredrick L. Brittain did commit the act of burglary by entering without authorization into the offices occupied by AFGE Local 1976 at the VA Medical Center, Lake City, Florida. This act is a clear violation of Florida State Statute 810.02(4)(a): Burglary.
4. In or about December 1998, Officer Fredrick L. Brittain did commit the act of theft by removing

certain documents, the property of AFGE Local 1976, and removed them to a remote location for the purpose of making facsimiles. This act is a clear violation of Florida State Statute 812.014 (1) (b): Theft.

5. In or about December 1998, Officer Fredrick L. Brittain did commit the act of surreptitious opening by entering without authorization into the offices and file cabinets occupied and under the control by AFGE Local 1976. This act is a clear violation of 38 C.F.R. [§] 1.218(b) (42).

6. Officer Fredrick L. Brittain is in clear violation of the State of Florida Standards of Ethics for Law Enforcement Officers. (G.C. Exh. 67; Tr. 983-87).

Despite the references to "clear" violations of Florida statutes and the criminal investigation, Owen did not refer in the memorandum to his contacts with the state and federal authorities. Owen received permission to issue the letter, and on November 19, 1999 issued the proposed removal letter to Brittain stating the following as the basis for the removal:

1. This is to notify you that it is proposed to remove you from your position of Police Officer, GS-083-6, based on the following:

You are charged with conduct unbecoming a police officer.

a. On January 6, 1999, Peggy Dukes, then President of AFGE Local Union 1976, reported to Police and Security Service that a file cabinet she kept locked in the Union offices, located within the hospital facility of the Lake City VA Medical Center, had been broken into. She had left a white label on the right, lower corner of the top drawer of the file cabinet. This is where the checkbook receipts and financial logs are kept. Ms. Dukes stated that only two persons had keys to the cabinet at that time, herself and Sam Thompson, Secretary/Treasurer of the local Union. On July 23, 1999, during a later Board of Investigation, Jeffrey Clark, a Union member, stated that he received copies of Union documents from you, including checking records which were identified by Ms. Dukes as being among those kept in the locked cabinet. Ms. Dukes and Mr. Thompson

stated that you did not request copies of the documents from them, nor were documents requested through normal Union procedures. Therefore, these documents were surreptitiously obtained by you or by you in concert with others, and copied without permission.

b. In the investigation of Police and Security Service, Officer Milt Gordon, attended by Officer Steve Hedgepath, interviewed Cheryl Burton, a former VA employee and Union Steward. She admitted that she went with you into the Union offices several times and that you had removed Union documents. At the time, you were not a Union Steward or official, nor were you acting in furtherance of a police investigation. Thus, you acted without authority.
(G.C. Exh. 34).

Adverse Action Review

On December 16, 1999 Senior Labor Relations Specialist Patricia A. Poore prepared an Adverse Action Review of Brittain's proposed removal for Systems Director Headley. In making her recommendation, she was not aware of the U.S. Attorney's letter concluding that Brittain did not violate any Federal law, or that Brittain was a member of the Union audit committee or the bargaining committee, or of a Union member's rights under the Union constitution or bylaws. Poore telephoned Dukes for her input, but did not attempt to contact Brittain or Burton. (G.C. Exh. 68; Tr. 1197-1211).

Decision on Proposed Removal

As noted above, nine months after Brittain's arrest authority was suspended, and his badge, identification and weapons card were removed (on May 10 and 11, 1999); three months after the proposed removal letter was issued (on November 19, 1999); and two days before the hearing (February 1, 2000), Respondent issued a decision on the proposed removal permanently reducing Brittain in grade and reassigning him from Police Officer, GS-6, to the position of Materials Handler, WG-6907-5, in the Acquisition and Material Management Service, Lake City Division of Respondent, effective February 13, 2000. (ALJ Exh. 1).

Discussion and Conclusions

Jurisdiction

In *United States Small Business Administration, Washington, DC*, 51 FLRA 413 (1995), the Authority reexamined previous Authority precedent interpreting the statutory bar set forth in the first sentence of section 7116(d): "Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section." The Authority stated, in part, as follows:

In light of the *Commerce* decision,²⁷ we take this opportunity to clarify how the Authority will apply its *Army Finance*²⁸ test in cases analogous to *Bureau of Census I*.²⁹ Where an employee has attempted to raise related issues both in an unfair labor practice proceeding and under either an appeals procedure or a negotiated grievance procedure, we will apply the *Army Finance* test in order to determine whether to invoke the jurisdictional bars set forth in section 7116(d). We will examine the subject matter of the ULP charge to determine if the factual predicate and legal theory are the same as the matter raised in the appeals procedure or grievance.

In this examination, however, we will no longer follow *Bureau of Census I* insofar as that decision held that the legal theories upon which an unfair labor practice allegation is based are different from the legal theories underlying a removal proceeding before the MSPB merely because different statutory review provisions are applicable in each instance. The *Commerce* decision held that the legislative history underlying the enactment of the CSRA discussed above--to avoid potentially inconsistent results

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Department of Commerce, Bureau of the Census v. FLRA, 976 F.2d 882 (4th Cir. 1992).

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U.S. Department of the Army, Army Finance and Accounting Center, Indianapolis, Indiana and American Federation of Government Employees, Local 1411, 38 FLRA 1345 (1991) petition for review denied sub nom. *AFGE, Local 1411 v. FLRA*, 960 F.2d 176 (D.C. Cir. 1992).

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Bureau of the Census, 41 FLRA 436 (1991) rev'd, 976 F.2d at 882 .

between Authority and MSPB decisions—compels this determination. As the Fourth Circuit noted, an employee may raise an affirmative defense before the MSPB that the agency committed a “prohibited personnel practice” under 5 U.S.C. § 2302. *Commerce*, 976 F.2d at 890. We agree with the Fourth Circuit and conclude that in some circumstances the same legal theory that can be raised as a “prohibited personnel practice” under 5 U.S.C. § 2302(b)(9) can also be raised as an “unfair labor practice” under 5 U.S.C. § 7116(a). Accordingly, when the factual predicate of the ULP and the statutory appeal is the same, and the legal theory supporting the statutory appeal has been or could properly be raised to the MSPB, we will decline to assert jurisdiction over the unfair labor practice pursuant to section 7116(d).

Consistent with *Commerce*, we will apply this rule only in cases when the matter raised in the ULP allegation ripens into or is inseparable from the matter appealable to the MSPB. *Commerce*, 976 F.2d at 889-90. Additionally, unlike the Authority’s statutory jurisdiction to review unfair labor practice allegations of, and grant relief to, individuals and labor organizations, 5 U.S.C. §§ 7103(a)(1) & 7118(a)(1), (7), the MSPB’s statutory jurisdiction is limited, under 5 U.S.C. § 7701(a) & (b)(2)(A), to reviewing appeals by, and granting relief to, employees or applicants. *Reid v. Dept. of Commerce*, 793 F.2d 277, 282 (Fed. Cir. 1986) (“[I]t would be contrary to the plain and unequivocal language of [5 U.S.C. § 7701(a)] to say that the term ‘employee’ . . . encompasses a labor organization[.]”). Accordingly, we will decline jurisdiction in cases where the ULP focuses on the rights of an individual employee; conversely, we will assert jurisdiction when the ULP focuses on the union’s institutional interest in protecting the rights of other employees. See *Commerce*, 976 F.2d at 889; *cf. Army Finance*, 38 FLRA at 1353 (construing and applying second sentence of section 7116(d), where individual employee is actually the aggrieved party in the ULP action, employee cannot maintain separate action in the form of a grievance). (footnotes added), 51 FLRA at. 421-22.

In reviewing the Authority’s decision, the court stated in *Wildberger v. FLRA*, 132 F.3d 784 (D.C. Cir. 1998), in part, as follows:

We can find no quibble with the Authority's rule, insofar as it is limited to circumstances where (1) the complaining employee has raised all of the issues that underscore his unfair labor practice charges in his appeal before the MSPB; (2) these issues are within the compass of the MSPB's jurisdiction; and (3) the MSPB has not declined jurisdiction over any of the claims raised by the employee. Consistent with the test articulated by the Authority in *Army Finance* and affirmed by this court in *Local 1411* [*Local 1411 v. FLRA*, 960 F.2d 176 (D.C. Cir. 1992)], the question of whether a complaining employee raises the "same issues" in both proceedings does not focus on whether the action was proposed or definite, but rather on whether the issues raised in the appeal arose from the same set of factual circumstances as the unfair labor practice complaint and the theory advanced in support of the unfair labor practice charge and the appeal are substantially similar. Cf. *Army Finance*, 38 F.L.R.A. at 1350-51, affirmed sub nom. *Local 1411*, 960 F.2d at 178.

Our holding is limited to the facts of this case. We decline to endorse the Authority's rule more broadly, because, frankly, we are unsure just how the rule might be applied in situations not raised in this case. *Id.* at 790-91.

. . . .

Where the employee did not raise the issues underlying his unfair labor practice charges before the MSPB, the question of whether his unfair labor practice charges could be or should be subsumed into his MSPB appeal, or whether instead they are sufficiently separate to preserve the FLRA's jurisdiction over them notwithstanding the MSPB appeal, are questions that must be addressed by the FLRA in future cases. *Id.* at 795.

The court found that the Authority properly held that it lacked jurisdiction over two of the unfair labor practice charges because Wildberger had raised them, and the MSPB had considered them, in his MSPB complaint. However, the court found that the Authority did not lack jurisdiction over Wildberger's disparate treatment complaint because the MSPB did not consider and indeed declined jurisdiction over one of the legal theories raised in the unfair labor practice complaint. This matter was remanded to the Authority for

consideration on the merits. See *U.S. Small Business Administration, Washington, DC*, 54 FLRA 837 (1998) (*SBA II*) (decision and order on remand).

I conclude that the complaint is not barred by section 7116(d).³⁰ Given the nascent status of Brittain's MSPB appeal, the record does not clearly indicate that the issues alleged as unfair labor practices in this proceeding (e.g., the criminal investigation, revocation of police authority, reassignment to various other positions) will be raised in Brittain's appeal before the MSPB or what action the MSPB can or will take concerning them. For example, the MSPB has previously held that it is without jurisdiction to review a reassignment, such as the series of details in the instant case, not involving a loss of pay. *Dreker v. United States Postal Service*, 711 F.2d 907 (9th Cir. 1983).³¹ Further, Union institutional interests are present in this case. The Union is a Charging Party, represented by a national representative. The national representative also represented Brittain in his proceedings before the Respondent and contended there that the issue of access to Union records was an internal Union problem and not one for the Respondent. (Tr. 149, 157-58, 176-80). The General Counsel also contends that the Respondent's interference with the Union's own institutional process is inherent in the actions it has taken against Brittain; that Respondent chose sides in an internal Union dispute and took personnel actions against the faction it disfavored. (G.C. Brief at 53-55).

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Proceeding to the merits, as I did on the jurisdictional issues in the Wildberger case, may also avoid the necessity of a possible remand to this Office. *SBA II*, 54 FLRA at 837.

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The Respondent argues that if events preceding the proposed removal (in January or May 1999) are severable and cannot be brought before the MSPB, then the *amended* charge (AT-CA-90535) of December 22, 1999 was filed over six months after the alleged unfair labor practice and is untimely under section 7118(a)(4)(B) of the Statute. This contention is untenable. The allegations in the *amended* charge (G.C. Exh. 1(e)) and complaint bear a relationship to the *original* charge (May 12, 1999; G.C. Exh. 1(a)), are closely related to the events complained of in the *original* charge, and are based on events occurring within the six-month period preceding the *original* charge, the standards required by the Authority. *U.S. Penitentiary, Florence, Colorado*, 53 FLRA 1393, 1402-03 (1998) (collecting cases).

Alleged Violations

Section 7116(a)(1) of the Statute provides that it shall be an unfair labor practice for an agency to interfere with, restrain, or coerce any employee in the exercise of any right provided by the Statute. Consistent with the findings and purpose of Congress as set forth in section 7101, section 7102 of the Statute sets forth certain employee rights including the right to form, join, or assist any labor organization freely and without fear of penalty or reprisal and that each employee shall be protected in the exercise of such right. Section 7116(a)(2) of the Statute provides that it shall be 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's Analytical Framework

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. As a threshold matter, the General Counsel must offer sufficient evidence on these two elements to withstand a motion to dismiss. However, satisfying this threshold burden also establishes a violation of the Statute only if the respondent offers no evidence that it took the disputed action for legitimate reasons. Where the respondent offers evidence that it took the disputed action for legitimate reasons, it has the burden to establish, by a preponderance of the evidence, as an affirmative defense that: (1) there was a legitimate justification for its action; and (2) the same action would have been taken even in the absence of protected activity. *United States Air Force Academy, Colorado Springs, Colorado*, 52 FLRA 874, 878-89 (1997); *Federal Emergency Management Agency*, 52 FLRA 486, 490 n.2 (1996); *Letterkenny Army Depot*, 35 FLRA 113, 118 (1990).

The General Counsel Met the Threshold Burden

The record reflects that Brittain was involved in protected activity as a Union steward and member, and that the Respondent knew of such activity. Brittain represented employees in grievances, filed unfair labor practice

charges, and met with management to discuss working conditions.

Brittain's legitimate inquiries into the leadership style and financial integrity of the Local were also protected under the Statute. The Authority has held that an employee has a right under section 7102 of the Statute to speak out for or against the management or policies of a union. *AFGE, Local 2419*, 53 FLRA 835 (1997); *AFGE, Local 3475, AFL-CIO*, and *U.S. Department of Housing and Urban Development, New Orleans, Louisiana*, 45 FLRA 537, 549 (1992).

Respondent knew of Brittain's grievances and unfair labor practice activities. Moreover, management was made aware of Brittain's protected activity concerning his internal Union complaint against Dukes. It was this internal Union complaint which prompted Duke's allegations against Brittain to the police, that Brittain had removed and copied documents from a locked cabinet in the Union's office to support the charges he presented against her.

The General Counsel also satisfied the threshold burden of showing that consideration of such activity was a motivating factor in the alleged unfair labor practices. This was shown by the fact that Brittain was active and aggressive in pursuing his representational activity and could have been considered a thorn in management's side, unlike Union president Dukes who got along fine with the police and filed no unfair labor practice charges. *United States Forces Korea/Eighth United States Army*, 11 FLRA 434, 436 (1983). The General Counsel also showed the presence of anti-union animus toward Brittain and his faction of the Union in particular. See *United States Department of Transportation, Federal Aviation Administration, El Paso, Texas*, 39 FLRA 1542, 1551 (1991). Chief Owen referred to Brittain as a "Union terrorist," advised Hedgepath that the way to deal with Brittain and another Union representative was to "dilute the gene pool," and commented that three police officers as stewards were "just too many." The investigating officer, Captain Gordon, also criticized Brittain for filing unfair labor practice charges, for going outside the Police Department to "air our dirty laundry" and involving outsiders.

Respondent's Defenses

The Respondent contends that it took the disputed actions for legitimate reasons, 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.

The Criminal Investigation

The Respondent has shown that there was a legitimate justification for its action in conducting a criminal investigation into Brittain's alleged removal of documents from the Union office and that the same action would have been taken even in the absence of protected activity. The Union office is located on VA property, and the VA police have authority to enforce Federal laws and VA rules on property under the charge and control of the VA. The investigation was in response to a request for an investigation by Union president Dukes who alleged an "actual or attempted theft of government property or of personal property on VA premises." Dukes alleged that Brittain had removed and copied financial and other records from a locked file cabinet and that only she and the Union treasurer had access to the cabinet. These were serious allegations, and it was the clear responsibility of the Respondent to at least do a preliminary investigation to determine the facts surrounding the allegations.

Brittain's Arrest Powers Suspended; His Police Badge, Identification, and Weapons Card Removed; He is Detailed Outside the Police Department; and Removal Proposed

The Respondent has not shown by a preponderance of the evidence that it had a legitimate justification for suspending Brittain's arrest powers; removing his police badge, identification, and weapons card; detailing him outside the police department; and proposing his removal, and that the same action would have been taken even in the absence of protected activity.

The justification for the Respondent's actions was that Brittain had removed documents from a locked cabinet in the Union office without authority or using proper process, and this constituted conduct unbecoming of a police officer. The record reflects that Brittain, as a member of the Union's Audit Committee, had requested financial and other records from Dukes without success. The documents in question were actually removed from an unlocked cabinet in the Union's office by Cheryl Burton, who had a key to the Union office, and was removing, copying, and replacing the documents with the permission of a national representative of the Union who had received allegations against Dukes. Burton gave copies of the documents to the national representative and to Brittain. Brittain received and used them in pursuing an internal Union complaint against Dukes pursuant to Article XVIII, Section 3 of the AFGE

constitution. In doing so, Brittain was engaged in protected activity as a member of the Union audit committee and as a Union member, and there is no indication that in this situation he was acting in any manner in the capacity of a police officer.

The Respondent points out that Chief Owen relied upon the report of Captain Gordon (who, according to credited testimony of Burton, Hedgepath, and Kelly, erroneously reported that Burton admitted that Brittain removed documents); and Burton did not come forward with a full explanation until this proceeding. It is perhaps unfortunate that Burton, Brittain, and others were not more forthcoming in the police investigation. However, it is noted that they were being advised by the AFGE Fifth District to assert that they had a right to the documents and that the matter of access to Union records concerned internal Union business. This was an understandable position given the continuing AFGE investigation of the management of Local 1976 and the suspicion at the time that the Respondent was supporting the Union leadership of Dukes.

The facts set out, including the erroneous report of Captain Gordon concerning Burton's statement, the misstatements by Gordon and Owen concerning the conclusion of the U.S. Attorney to the Systems Director and the Administrative Board, the emphasis on the "overthrow of the current president," and the anti-union animus noted, establish by a preponderance of the evidence that the actions to remove Brittain's police power were taken to rid the police department of Brittain, the "Union terrorist," rather than for misconduct.

It is concluded that the Respondent violated section 7116(a)(1) and (2) of the Statute as alleged, by revoking Brittain's arrest authority, confiscating his police badge and weapons and, identification cards; detailing him outside the police department; and proposing his removal.³² The General Counsel seeks a posting at both the Gainesville and Lake City facilities, back pay, restoration to duty, and expungement of adverse records for Brittain, and a nontraditional remedy in the form of labor relations

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The complaint also alleges a violation of section 7116(a)(4). The General Counsel has not urged a finding of that violation in the brief, and it appears to have abandoned that alleged violation. In view of the result reached, and the remedy imposed, I find it unnecessary to determine whether Respondent's conduct was also in violation of section 7116(a)(4) of the Statute.

training for Chief Owen and Captain Gordon. The proposed remedies would effectuate the purposes and policies of the Statute. Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the Department of Veterans Affairs, North Florida/South Georgia Veterans Health Care System, Gainesville and Lake City, Florida, shall:

1. Cease and desist from:

(a) Discriminating against Fredrick Brittain, or any bargaining unit employee, for engaging in representational activities on behalf of the American Federation of Government Employees, Local 1976, the agent of the exclusive representative of its employees, or exercising the right to speak out for or against the policies or leadership of the Union.

(b) In any like or related manner, interfering with, restraining, or coercing its 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) Expunge all personnel records relating to the revocation of Fredrick Brittain's police authority on or about May 10, 1999, subsequent details, and proposed removal and restore him to his former police officer position with all rights and privileges.

(b) Consistent with law and regulation, compensate Fredrick Brittain for pay, allowances, and differentials which the employee would have received if the details beginning on or about May 11, 1999, had not occurred. Back pay shall be in accordance with the Back Pay Act, 5 U.S.C. § 5596, as amended, and shall include the payment of interest.

(c) Order System Chief Robert Owen and Captain Milt Gordon to attend labor-relations training, to be provided by the Federal Labor Relations Authority, Atlanta Regional Office, within a reasonable amount of time following the decision in this matter.

(d) Post at its facilities in Gainesville and Lake City, Florida, 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 Systems Director and the Chief of Police and Security Service, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other 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) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Atlanta Regional Office, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

3. The allegation that the Respondent violated the Statute

by conducting a criminal investigation into Brittain's alleged removal of documents from the Union office is dismissed.

Issued, Washington, DC, July 31, 2000.

GARVIN LEE OLIVER
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 Veterans Affairs, North Florida/South Georgia Veterans Health Care System, Gainesville and Lake City, Florida, violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discriminate against Fredrick Brittain, or any bargaining unit employee, for engaging in representational activities on behalf of the American Federation of Government Employees, Local 1976, the agent of the exclusive representative of our employees, or exercising the right to speak out for or against the policies or leadership of the Union.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, expunge all personnel records relating to the revocation of Fredrick Brittain's police authority on or about May 10, 1999, his subsequent details and proposed removal, and we will restore him to his former police officer position with all rights and privileges.

WE WILL, consistent with law and regulation, compensate Fredrick Brittain for pay, allowances, and differentials which he would have received if the details beginning on or about May 11, 1999, had not occurred. Back pay shall be in accordance with the Back Pay Act, 5 U.S.C. § 5596, as amended, and shall include the payment of interest.

WE WILL, provide System Chief Robert Owen and Captain Milt

Gordon additional labor-relations training by the Federal Labor Relations Authority, Atlanta Regional Office.

(Activity)

Date: _____ By: _____

(Signature)
(Title)

This Notice must remain posted for 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, Atlanta Regional Office, Federal Labor Relations Authority, whose address is: Marquis Two Tower, 285 Peachtree Center Avenue, Suite 701, Atlanta, GA 30303, and whose telephone number is: (404) 331-5212.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case Nos. AT-CA-90535 & AT-CA-00167, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT

CERTIFIED NOS:

Sherrod Patterson, Esquire
Ruth Pippin-Dow, Esquire
Federal Labor Relations Authority
Marquis Two Tower, Suit 701
285 Peachtree Center Avenue, NE
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P168-060-205

Kathleen Freeble, Esquire
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REGULAR MAIL:

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President
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CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: JULY 31, 2000
WASHINGTON, DC