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

DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER LEAVENWORTH, KANSAS Respondent	
and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1765 Charging Party	Case No. DE-CA-01-1043

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 her 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. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **MARCH 8, 2004**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20424

SUSAN E. JELEN
Administrative Law Judge

Dated: February 6, 2004
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: February 6, 2004

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
LEAVENWORTH, KANSAS

Respondent

and Case No. DE-CA-01-1043

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1765

Charging Party

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

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

DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER LEAVENWORTH, KANSAS Respondent	
and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1765 Charging Party	Case No. DE-CA-01-1043

Matthew L. Jarvinen, Esquire
For the General Counsel

Michael E. Anfang, Esquire
For the Respondent

Sandy Bond
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an unfair labor practice charge filed on September 7, 2001, by the National Federation of Federal Employees, Local 1765 (the Union) against the Department of Veterans Affairs Medical Center, Leavenworth, Kansas (the Respondent). On July 26, 2002, the Regional Director of the Denver Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing alleging that the Respondent violated Section 7116 (a)(1) and (5) of the Federal Service Labor-Management Relations Statute when, on August 20, 2001, its Chief Nurse for Primary Care, Nelson Dean, reassigned bargaining unit Registered Nurses Betsy Penberthy and Erika von Morrison from the Respondent's Medical-Surgical Unit to other units without providing the Union with prior notice or an opportunity to bargain to the extent required by law. The complaint further alleged that the Respondent's August 20,

2001 detail of Penberthy violated Section 7116(a)(1) and (2) of the Statute as the action was initiated because of Penberthy's protected conduct in seeking representational assistance from the Union.

A hearing was held in Kansas City, Missouri. The parties appeared with counsel and were given an opportunity to present evidence and to cross examine witnesses. This Decision is based upon careful consideration of all of the evidence, including the demeanor of witnesses, as well as of the post-hearing briefs submitted by the parties.

Statement of the Facts

The National Federation of Federal Employees (NFFE) is the exclusive representative of a bargaining unit of Department of Veterans Affairs (DVA) employees, and NFFE Local 1765 is an agent of the NFFE for the purposes of representing a bargaining unit of professional employees, including Registered Nurses (RN's) at the Respondent's DVA Medical Center in Leavenworth, Kansas. [1] Sandy Bond, employed by the Respondent as a Recreational Therapist, has served as Union President of Local 1765 for 19 years. (G.C. Exs. 1(b) and 1(c); Tr. 5-6, 153-154) [2]

Betsy Penberthy has worked at the Respondent's Leavenworth facility for approximately 22 years, and since 1993 as an RN. Erika von Morrison has been employed as an RN at the Respondent's Leavenworth facility for close to 21 years. Both Penberthy and von Morrison had worked on the Medical-Surgical Ward on Unit A2 for several years prior to the August 20, 2001 reassignments which form the basis of the Complaint. Penberthy had worked on A2 since 1993, and von Morrison had worked there dating back approximately 19 years. Nelson Dean has served as the Chief Nurse for

[1] The Respondent's facility in Leavenworth is now one of two DVA Medical Centers which comprise the DVA's Eastern Kansas Health Care System. The other facility is located in Topeka, Kansas. While NFFE Local 1765 represents professional employees at the Leavenworth facility, including Registered Nurses (RN's), the American Federation of Government Employees represents non-professional employees, including Licensed Practical Nurses (LPN's) and Nursing Assistants (NA's). (Tr. 20, 154, 206-207)

[2] References to the transcript will be designated by "Tr." followed by the appropriate page and line numbers. General Counsel Exhibits will be referred to as "G.C. Ex.", Joint Exhibits will be referred to as "Jt. Ex.", and Respondent Exhibits will be referred to as "R. Ex." followed by the appropriate exhibit numbers.

Primary Care for the DVA's Eastern Kansas Health Care System beginning on April 9, 2000, and Audrey "Sandy" Hogan became the Respondent's Associate Director of Nursing in mid-2000. (Tr. 15-17, 186-187, 205-206)

Penberthy's Protected Activity

Penberthy became a member of the Union in January 2000. She did contact the Union on several occasions, as noted below, but was never a steward or representative of the Union. In January 2000, employees on A2 were concerned about the staffing levels of the unit. Penberthy drafted a memorandum regarding insufficient staffing on A2. She showed the draft to Bond, the NFFE local president, as well as to AFGE, the representative of LPNs and NAs. Following this review Penberthy asked the staff on A2 and A3 to sign the memorandum. Nearly all of the nursing staff, including 15 RNs, signed the memorandum. (G.C. Ex. 2; Tr. 17-20, 120-121)

Penberthy then presented the memorandum to Dean, Hogan, who was the Quality Assurance and ADP Coordinator, and Van Tuyl, a nursing manager, and arranged a meeting to discuss the topics identified in the memorandum on January 25, 2000. In attendance at the meeting were Dean, Van Tuyl, Susan Shaw (then the Associate Director of Nursing), Bond, Penberthy and a few other RN's. During the 45 to 60 minute meeting, Penberthy described the issues identified in the memorandum and asked Dean what he planned to do about them. (Tr. 21-22, 24-25, 121-122, 163-165)

Penberthy then hand-delivered the signed memorandum (which was actually dated January 20, 2000) to several high-level management officials, including the Medical Center Director, the Chief of Staff, the Medical Director of Primary Care, Dean as Director of Nursing and the Nurse Manager of A2 and A3. Because of the lack of response from management, Local 1765 President Bond also forwarded the memorandum to the offices of Senator Brownback and Congressman Ryan. Bond received a February 16, 2000 response from Congressman Ryan's office indicating that his office and Senator Brownback's office were coordinating their efforts to address the concerns raised in Penberthy's memo. Among other things, Congressman Ryan's letter stated that their offices had contacted Edgar Tucker, then the Respondent's Director and were seeking to schedule a meeting with the Respondent's "CEO," Pat Crosetti. [G.C. Exs. 2 and 19; Tr. 25-26, 165-167)

As a result of Penberthy's memo (which included a specific request for a meeting "to include our local

unions"), a meeting was convened on the afternoon of February 11, 2000. In attendance were Dr. Poulouse (then the Chief of Staff), Rob McDivitt (then the Associate Director), Dr. Jim Sanders (then the Associate Medical Director for Primary Care), Dean, Shaw, Labor Relations Specialist Karyn Waters, Van Tuyl, Penberthy, Polly Green (then the NFFE Local 1765 Chief Steward), and about five other Nursing Staff from A2 and A3. Dr. Poulouse opened the meeting with a few words about the memorandum, agreeing that it contained good recommendations. Dr. Sanders then took over, with Penberthy acting as the spokesperson for the Nursing Staff. Over the course of the one-hour meeting, Dr. Sanders, Dr. Poulouse and Mr. McDivitt assured the assembled staff that plans had been developed to alleviate the concerns described in the memo, including the hiring of additional staff. They indicated that it would take some time, but management was working on it. McDivitt even acknowledged that management had probably cut too many nursing positions over the years. Dean did not say much during the meeting, making comments only when questions were directed toward him by one of the doctors. The one occasion when Penberthy looked over at Dean, she noticed that Dean was glaring at her. This was echoed by Green, who testified without contradiction that Dean appeared to be extremely angry, as his arms were crossed and he kept glaring at Penberthy with what Green described as "looks that could kill." (Tr. 26-28, 144-147) Although it took a period of several months, Penberthy's memo and the February 11, 2000 meeting eventually resulted in the closure of A3, thereby relieving some of the pressure on the nursing staff to provide patient care. (Tr. 28-29)

Beginning in July 2000, Penberthy, as an RN, served on the Accreditation Compliance Team (ACT) established in the Rehabilitation Medicine Service to prepare for an upcoming accreditation survey. She participated in monthly one hour meetings with ACT until August 2001. Penberthy also was involved in the Spinal Cord Injury Clinic (Clinic), a monthly 4-hour clinic designed to deal with the special needs of spinal cord injury victims. She was appointed in 1997 and was asked to continue when it became the Clinic. (Tr. 29-32). Despite Penberthy's efforts to keep nurse management informed of these scheduled meetings, both the ACT and Clinic times were continually left off the posted work schedule. This meant that the Charge Nurse was not aware that Penberthy would be absent from A2 during these activities when making work assignments. Other arrangements would have to be made to cover the work. (Tr. 32-34)

Penberthy brought these matters to both Hogan's and Dean's attention numerous times through face-to-face

meetings and by e-mail messages, but because the problem was not resolved, she contacted Union President Bond for assistance. Bond spoke with Hogan (and also briefly with Dean) about the problem, but management still failed to take steps to post Penberthy's ACT and Clinic participation on the schedule. Although management kept saying they would take care of it, Penberthy had to raise the matter directly with Dean in early August 2001 by explaining that it was still a problem. Dean again assured Penberthy that he would take care of it. (Tr. 34-35, 167-170)

Penberthy was never denied the opportunity to serve on either ACT or the Clinic even when they were left off of the schedule. (Tr. 143)

Penberthy was away from the Leavenworth facility in late March 2001. When she returned in early April, she learned that changes had been made to the work schedule requiring RNs to arrive for work at 6:00 am and to administer the 6:00 am medications. Penberthy objected to these changes and sought assistance from the Union. Union Steward Bobby Phillippe talked with Hogan, who changed the work schedule, but still required Penberthy and another RN to start work at 6:00 am. Penberthy again contacted Phillippe and the work schedule was changed again, eliminating the 6:00 am start time for the RNs. (Tr. 37-44)

Pursuant to Penberthy's request, Hogan met with Penberthy and Union President Bond on April 25, 2001. Penberthy began the meeting by explaining that the subject of the meeting was Hogan's inappropriate and disrespectful behavior toward her in front of other staff. Hogan responded that she didn't realize Penberthy perceived her behavior that way, but Penberthy and Bond explained the perception that Hogan was being disrespectful. (Tr. 44-46, 126)

On May 17, Hogan issued Penberthy a memorandum stating:

> This memo is to inform you that you [sic] verbal interaction during report with me on May 16, 2001 was done in an inappropriate manner and setting. In the future I would appreciate that if there is something we need to discuss we do this in an appropriate place. I will be returning June 11, if you would like to discuss this. 3

(G.C. Ex. 4)

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3 The memo was mis-dated March 17, 2001.

Penberthy responded by memo dated May 19 (a copy of which she sent to Hogan and Dean) charging that it was Hogan who was at fault due to her "total disregard and lack of respect for the role of charge nurse," and because Hogan had chosen the setting and the conversation. Penberthy further requested the "NFFE Union" to arrange a meeting to discuss the issue. Lastly, Penberthy's memo indicated that Dean needed to be fully aware that she, Hogan and the NFFE Union had previously met to discuss Hogan's own unprofessional behavior. (G.C. Ex. 5; Tr. 50)

Penberthy followed up with another memo to Hogan and Dean dated June 20 explaining her view of what had transpired on May 16. As described in this memo and in Penberthy's hearing testimony, she had been the Charge Nurse that day with responsibility for making work assignments and making adjustments during the day. During the change of shift "report" on May 16, the staff was assembled for Penberthy to explain the work assignments when Hogan walked in to announce that she needed someone to go to the Nursing Home Care Unit (NHCU). When no one stepped forward, Hogan again asked for a volunteer. At that point, Penberthy said that in her opinion as Charge Nurse, A2 did not have enough staff to send someone to the NHCU, but added that if any staff felt differently, they could certainly say so. When no one said anything, Penberthy offered to float an LPN student, but Hogan said they were not considered staff. Hogan asked a contract RN named Pat if she were willing to work in the NHCU, and Pat agreed. Penberthy then said that Pat was already assigned as a Team Lead. When Hogan told Penberthy to change the assignment, however, Penberthy did so, and Hogan left. Penberthy did not feel that any of her behavior or interaction with Hogan had been inappropriate as it was her responsibility as the Charge Nurse to keep the Nurse Manager and Nursing Supervisor informed of workload and staffing requirements. Penberthy did not feel that she was questioning Hogan's authority; rather, she was providing Hogan with information so that Hogan could properly evaluate the situation. Nor did Penberthy believe that their exchange at the May 16 change of shift "report" was anything unusual. (G.C. Ex. 6; Tr. 51-55, 124-126)

By memo of June 21, Hogan scheduled a meeting for June 22 in Hogan's Nurse Manager office. Bond also attended as Penberthy's Union representative. Hogan began by stating that Penberthy was "exceptional" in all areas related to patient care, but felt that she was low satisfactory to satisfactory in interpersonal relations. When Penberthy asked Hogan to explain, Hogan cited three episodes where she felt Penberthy's communication was poor. The first incident involved the May 16 change of shift report described above.

The second episode involved a situation where Hogan informed Penberthy that she (Hogan) had let one of the nursing staff go home sick, and Penberthy asked if Hogan had informed the Nursing Supervisor. When, during the June 22 meeting, Penberthy asked why this was considered poor communication, Hogan said she felt Penberthy was questioning her authority. Penberthy explained that they always let the Nursing Supervisor know for both time-keeping and staffing purposes. This seemed to satisfy Hogan. According to Hogan, the third episode concerned a situation where Hogan had approached Penberthy when she was working at the computer. Hogan asked a question about an education project, but, without looking at Hogan, Penberthy had "gruffly" responded that she didn't know there was a time limit on the project. Penberthy explained at the June 22 meeting that she vaguely remembered, but recalled that her focus had been on inputting a patient record on the new computer system and was afraid to make a mistake. Penberthy acknowledged that she probably didn't give Hogan the attention she needed at the time, but had merely asked if there was a time frame on the project. At that point, Bond asked Hogan if these were the only incidents or if there was anything else. When Hogan said others had complained, Penberthy asked if she could see those complaints, because she had not heard of any, and asked if they were in writing and whether Hogan had them. Hogan looked to Bond and asked if she had to have them. Bond said yes, and that she and Penberthy wanted to see them, but Hogan said she did not have anything in writing. Bond then said they had reviewed these incidents, and they were insignificant and not severe enough to show a communication problem. Bond then asked if Hogan was saying that Penberthy was low satisfactory to satisfactory for someone who was always highly satisfactory or outstanding. When Hogan did not respond, Bond stated that as far as the Union was concerned, these were insignificant incidents, their meeting that day should be the resolution of it, and they would not expect Penberthy to receive any further communication about it. (G.C. Ex. 7; Tr. 56-61, 170-172, 180-182)

On June 25 Hogan issued Penberthy a memorandum concerning their June 22 meeting on "Interpersonal Relationship." Hogan's memo cited the first and third of the incidents described above and stated that Hogan told Penberthy that in the area of interpersonal relationship, she was "low satisfactory." (G.C. Ex. 8; Tr. 61-62, 172)

Penberthy filed a grievance on July 19 over Hogan's June 25 memo and Bond was designated as her Union representative. (G.C. Ex. 9; Tr. 62-63, 172-173) A Step 1 meeting was held with Dean on Friday, August 17 in the 5th

floor conference room. Bond opened the meeting and Penberthy presented the grievance by reviewing the sequence of events which led to the filing of the grievance. Penberthy indicated that she thought the issues had been resolved during the meeting on June 22. Dean asked only one question and concluded the meeting. (Tr. 63-67, 173-174, 177-178, 215) Dean denied the grievance by memo dated August 22. (G.C. Ex. 10; Tr. 67-68). Penberthy elevated her grievance to Step 2 when Bond filed it with Medical Center Director Robert Malone on August 27. Bond and Penberthy met with Dr. Poulouse to discuss the Step 2 grievance on September 10. Dr. Poulouse first stated his view that supervisors have the right to bring to their employees' attention matters related to their performance evaluations. According to Penberthy, Dr. Poulouse then indicated that he had reviewed Penberthy's official personnel file and saw nothing to indicate anything less than a highly satisfactory rating. When Bond informed Dr. Poulouse that Penberthy had been moved off A2 and that the Union viewed it as reprisal, Dr. Poulouse responded that there was just "too much noise" coming from A2, but did not otherwise elaborate. (Tr. 68-70, 175) Dr. Poulouse issued his Step 2 decision denying the grievance by memo dated September 14, and although the Union invoked arbitration, Penberthy later dropped the grievance. (G.C. Ex. 12; Tr. 71)

On August 13, 2001, Penberthy sent a memorandum to Nurse Management regarding Tonia Nelson, another RN on A2, ". . . in support of her performance review and as constructive criticism in an area in which she can show improvement." The memorandum listed several positive areas, including her work habits, exhibiting genuine caring and compassion toward patients and family members, and strong rapport with the A2 LPN staff. She then discussed what she considered to be inappropriate language by Nelson. She did offer to meet with Nelson and the Nurse Manager for further input, indicating that she thought it would be appropriate for the Union to be there since both she and Nelson were in the bargaining unit. (G.C. Ex. 3; Tr. 46-48, 127-128, 140-141)

August 20, 2001 Details

On August 20, 2001, Dean issued similar memoranda to RNs Penberthy, von Morrison and Nelson, detailing them from the A2 Acute Medical/Surgical Ward to three different units within the VA Leavenworth facility. Penberthy was assigned to the Nursing Home Care Unit (NHCU) under the supervision of Silvia Steffen; von Morrison was assigned to the C1 Outpatient Care area; and Nelson was assigned to the C5 Care

Clinic. Dean made the decisions regarding where each employee was detailed, based on the vacancies within the VA system. Each of the details was effective immediately on August 20 (the date on all three memoranda), and each memorandum issued by Dean included the following sentence: "This action is taken in order to return a therapeutic milieu to A2 and ensure the best care for our veteran patient." [4] (Jt. Exs. 1, 2 and 3; Tr. 68, 71-72, 187-188, 209)

Dean testified that it was his decision to detail the three RNs away from A2. His reasons included interpersonal conflicts and "ongoing turmoil" on the Medical/Surgical Ward and Tonia Nelson's belief that she was being harassed by Penberthy and von Morrison. Dean did not talk with Penberthy or von Morrison about the situation, and indicated that his primary sources were Nelson, Hogan and Norman Cade, the new Nurse Manager on A2. Dean described his goal in detailing the three RN's away from A2 as an attempt to "de-escalate" the situation. Dean elaborated that he wanted to remove the individuals whose "names kept coming up" without placing blame on any individual, and that he also wanted to preserve patient care. As Dean described it, "there was just an ongoing problem with communication and interpersonal relationships [on A2]." (Tr. 212-214, 217-218, 232, 240-241)

While Dean acknowledged that he was aware of Penberthy's involvement of the Union in some of her memorandums and e-mails, including specifically the grievance and her efforts to have management make allowances on the schedule for her to participate in the Spinal Cord Injury Clinic, Dean denied the allegation in the Complaint to the effect that he had detailed Penberthy because of her protected Union activity. (Tr. 216-217, 245-246)

The Union was not given prior notice of the details by Respondent but was informed by Penberthy and von Morrison of the details. Dean had previously detailed RNs from other units, but did not recall ever detailing three RNs from one unit at the same time. Dean believed that the impact of the details was minimal and was therefore of the opinion that he was not required to notify or bargain with the Union. After learning of the details, Bond first called Labor Relations Specialist Jerel Devor in an attempt to obtain clarification of the reasons for the details. By memo dated

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Von Morrison remained in the Outpatient Care area until her request for reassignment to the Outpatient Care area was approved in January 2002, more than 120 days after she began the detail. (Tr. 200-201, 203-204)

August 21, Bond sent Dean a request to bargain to the full extent of the law concerning the details of Penberthy and von Morrison. [5] Bond also submitted a data request to determine the reasons why Penberthy and von Morrison were removed from the unit and detailed to other areas of the hospital, asserting that neither the employees nor the Union understood why they were detailed. [6] [Jt. Exs. 4 and 5; Tr. 154-157, 208-209, 230-231, 249)

Labor Relations Specialist Jerel Devor responded to the data request by memo dated August 27, stating:

> 1. This is to respond to your request for evidence file and specific justifications for the details given to Betsy Penberthy and Erica von Morrison.
>
> 2. Evidence Files are not required for assigning details. The details are temporary assignments that were made for the reasons stated in the letters provided to the employees, "to return a therapeutic milieu to A2 and ensure the best care for our veteran patients." In the judgement of Primary Care management, these temporary actions are necessary in order to assess the overall

[5] Jt. Ex. 4 indicates that Bond had not been able to locate Tonia Nelson to get her opinion on the detail, but would continue to try. The Union did not seek bargaining concerning Nelson's detail after she sent the Union an e-mail message stating that her move was at her request and declining Union representation. Dean testified that Nelson "had indicated that she wanted off of that unit, because she felt like there was a situation . . . ," but denied that the detail was at her request. (Jt. Ex. 4; G.C. Ex. 20; Tr. 155-156, 178, 191, 210, 226, 237-239)

[6] The August 21 data request reads, in part:

> . . . The reason management gives for the action was taken in order to return a therapeutic milieu to A2 and ensure the best care for our veteran patients.
> The RN's and the Union have no idea why they were removed.
> Therefore the Union requests:
> 1. The entire evidence file on both RN's and the specific justifications of why the action was taken.
> The Union would like this information immediately.
> (Jt. Ex. 5)

> organizational needs of A2. They are not in any way used as disciplinary actions against any individuals.

(Jt. Ex. 6; Tr. 157-158)

Bond requested a meeting because of uncertainty regarding the reasons for the detail and because Penberthy had concerns about the effect of the transfer on her Nursing license. In response, a meeting was held on September 4 between Dean, Waters, Bond and Penberthy in the A4 conference room. Bond first described the effect on Penberthy's blood pressure. When Bond then asked Dean why Penberthy had been moved off A2, Dean would not elaborate other than to refer to his memo regarding the therapeutic milieu. At one point, Dean said that A2 was a disaster. When Penberthy asked if she was the cause of the disaster, Dean said she was not. When Penberthy described the devastating affect that moving three RN's off a unit that was already short-staffed and how serious a decision it was, Dean turned to look Penberthy in the eye and said, "I know it was a serious decision. I made it." When Penberthy tried to explain how incriminating the last sentence of the detail memo was and expressed her concern that it threatened her Nursing license, Dean did not even respond. Bond asked management to return Penberthy to A2, but Dean said he had no intention of ever returning Ms. Penberthy to A2. Penberthy asked Waters what she needed to provide management in order to work the schedule recommended by her doctor due to the increase in her blood pressure. Waters responded that Penberthy would need a statement from her doctor. (Tr. 75-77, 158-161)

On September 6, Bond sent a memo to Dean and Dr. Kalavar, Primary Care Manager, requesting that von Morrison and Penberthy be returned to their original duty assignment on A2. The Union made this request due to the lack of management's reason for the abrupt movement of the employees and until the Union was able to negotiate the details of these two employees. Bond specifically requested "the compelling need of management of why these two RN's have been moved and the reason the agency cannot negotiate first before moving these Two Registered Nurses?" (Jt. Ex. 7; Tr. 161-162)

Nelson Dean also issued a memorandum to Betsy Penberthy on September 6, with a copy to the Union and others, in response to issues raised during the September 4 meeting. According to Dean,

> A decision was made to detail you because management and staff members on A2 were focusing a great deal of time and attention on issues such as interpersonal relationships and not patient care. In order to refocus the staff's attention on patient care, I made a decision to detail you, and others. The detail is not an indication that you are responsible for the difficulties, it was merely an appropriate decision to meet the mission of Primary Care nursing.
>
> . . .
>
> I would like to clarify, for the record, that you were not detailed because there was a question of professional competence nor was I challenging your license. There is nothing in the reason for the detail that would be the basis for a negative report to the licensing agency.
> (Jt. Ex. 8)

Both Penberthy and von Morrison asserted that staffing levels on A2 at the time of the August 20 details were not good and Penberthy testified that the loss of three RN's from A2 exacerbated the staffing problem and, based on what she had been told by A2 RN's and the Union, required much additional overtime to cover for the loss. Dean acknowledged that certain steps were taken to "fill the gap" following the details, such as using additional overtime, hiring contract nurses and decreasing the bed census so that there were not as many patients on the Unit. Dean testified that he had received comments from people throughout the Medical Center that A2 seemed to be functioning better. According to Penberthy, however, RN's on A2 told her that the tension was so thick you could cut it with a knife. Bond testified that RN's had expressed concern to her about the loss of leadership and experience caused by the details of Penberthy and von Morrison. In this connection, von Morrison described how she was often called back to A2 to assist with procedures such as setting up "PCA pumps," securing test tubes, and starting IV's for fragile patients. The RN's who remained on A2 also told von Morrison that they missed her, as she had "precepted" several RN's on the Unit.[7] (Tr. 133, 142-143, 162-163, 191-192, 225, 229-230, 244-245)

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[7] Precepting involves working closely with a new graduate or a new nurse over a period of six weeks or more to familiarize the new employee with procedures on the Unit. (Tr. 192).

Although Penberthy's and von Morrison's basic pay and benefits were unaffected by the August 20 detail, von Morrison's schedule was different in that her new unit was not open on the weekends, resulting in her loss of weekend differential pay totaling approximately $1,600. In addition, von Morrison had no training concerning the specialty of emergency care which she was required to perform in the Outpatient Care area. Penberthy indicated that because the NHCU staff did not know she was coming to work there, she was barraged with questions about what she was doing there. This resulted in an awkward situation that she described as unfair both to the NHCU and A2 staff. The work pace on A2 was much faster than the pace on the NHCU, but work schedules were similar as were the types of nursing duties performed. Dean continued in the supervisory chain of authority over Penberthy. Both Penberthy's and von Morrison's new work locations were on the Respondent's campus, and Penberthy's new work location at the NHCU was within a couple of blocks of A2. (Tr. 114-115, 134, 192-193, 200, 202-203, 228-229)

The most significant impact experienced by Penberthy by reason of the detail concerned the exacerbation of her pre-existing hypertension. Penberthy reported to work at the NHCU for the remainder of the week following her receipt of the August 20 detail memo, but "fell apart" and went home sick the next week. While her blood pressure condition had been controlled by medication prior to the detail, upon receipt of the August 20 detail memo, her blood pressure (as monitored every day for the next 2 weeks) ranged from 160 - 220 "systolically" and 98 - 116 "diastolically." (Tr. 80-81, 138-139)

Issues

1. Whether the Respondent violated section 7116(a)(1) and (5) of the Statute by detailing Betsy Penberthy and Erika von Morrison without providing the Union with prior notice and an opportunity to bargain to the extent required by law.

2. Whether the Respondent violated section 7116(a)(1) and (2) by detailing Betsy Penberthy because of her protected activity in seeking representational assistance from the Union.

Positions of the Parties

General Counsel

The General Counsel asserts that the Respondent violated section 7116(a)(1) and (5) of the Statute by detailing Penberthy and von Morrison without providing the Union with prior notice and an opportunity to bargain to the extent required by law. The General Counsel argues that the evidence shows that the Respondent failed to provide the Union with prior notice or an opportunity to bargain prior to the implementation of the August 20 details. Further there is no evidence that the Respondent fulfilled its bargaining obligations after the implementation. The General Counsel concedes that the Respondent's decision to detail the employees involved the exercise of a management right under section 7106(a) of the Statute. However, it argues that the Respondent denied the Union an opportunity to bargain over procedures and appropriate arrangements for employees adversely affected by a change, in that the details had more than a *de minimis* effect on unit employees. *United States Department of the Air Force, 913th Air Wing, Willow Grove Air Reserve Station, Willow Grove, Pennsylvania*, 57 FLRA 852, 855 (2002) (*Willow Grove*), *U.S. Department of the Air Force, Air Force Materiel Command*, 54 FLRA 914 (1998) (voluntary separation incentive pay has more than *de minimis* impact); *Department of the Navy, Marine Corps Logistics Base, Albany, Georgia*, 39 FLRA 1060 (1991) (details have more than *de minimis* impact), *reversed on other grounds, Marine Corps Logistics Base, Albany, Georgia v. FLRA*, 962 F.2d 48 (D.C. Cir. 1992).

According to the General Counsel, the adverse impact on bargaining unit employees falls within two broad categories: (1) the effect on Penberthy and von Morrison, and (2) the effect on unit employees who remained on A2 following the August 20 details. Although Penberthy's and von Morrison's basic pay and benefits were unaffected by the August 20 details, implementation of the details resulted in von Morrison working a completely different schedule and her loss of weekend shift differential pay totaling approximately $1,600. The General Counsel argues that von Morrison's loss of shift differential pay, standing alone, is sufficient to establish the Respondent's bargaining obligation in this case. In *Department of the Air Force, Scott Air Force Base, Illinois*, 33 FLRA 532, 544 (1988), *affirmed on other grounds, National Association of Government Employees, Local R7-23 v. FLRA*, 893 F.2d 380 (D.C. Cir. 1990), the Authority applied its *DHHS de minimis* standard and relied on the loss of approximately $2000 shift differential per year by a single employee to conclude that a change in the employee's tour of duty gave rise to a statutory obligation to bargain. *See also, United States Customs Service, Southwest Region, El Paso, Texas*, 44 FLRA 1128, 1129 (1992) (change held more than *de minimis* where

change affected employees' ability to earn overtime, night differential and Sunday premium pay); and *Department of the Air Force, Nellis Air Force Base, Nevada*, 41 FLRA 1011, 1028 (1991) (Authority adopted, without discussion, ALJ's finding that change in tour of duty resulted in more than *de minimis* impact based principally on loss of shift differential pay).

Beyond von Morrison's loss of shift differential pay, von Morrison was not provided any training concerning her new specialty of emergency care. Further the NHCU staff was not advised that Penberthy was detailed to work there. Of most significance to Penberthy, her blood pressure elevated after receipt of the August 20 memo, requiring her to seek medical treatment.

With respect to the impact on employees who remained on the unit, the General Counsel argues that it is undisputed that A2 was already short-staffed at the time the August 20 details were implemented. Penberthy described how the loss of three RN's from A2 exacerbated the staffing problem, and Dean acknowledged that certain measures, including the use of additional overtime, were required to "fill the gap." Additional measures described by Dean included the hiring of contract nurses and decreasing the bed census to reduce the number of patients on the Unit. The details of Penberthy and von Morrison resulted in a considerable loss of leadership and experience on A2.

The General Counsel asserts that the adverse impact of the Respondent's decision to detail Penberthy, von Morrison and Nelson was more than *de minimis*. That only three bargaining unit employees were directly affected by the details does not require a different conclusion. Thus, in *Willow Grove*, at 857, the Authority noted that "the number of employees affected by a change is not a controlling consideration in determining whether a change is *de minimis*," citing *Veterans Administration Medical Center, Phoenix, Arizona*, 47 FLRA 419, 424 (1993) (change affecting single employee not *de minimis*) with approval.

The General Counsel further argues that Respondent violated section 7116(a)(1) and (2) of the Statute by detailing Betsy Penberthy on August 20, 2001 because of her protected activity in seeking representational assistance from the Union. The General Counsel asserts that Penberthy's protected conduct is the motivating factor in the August 20 detail, citing, among other things, the nature and extent of Penberthy's protected activity, the timing of the decision to detail Penberthy and Dean and Hogan's hostility toward Penberthy's protected activity. *Letterkenny Army Depot*, 35 FLRA 113 (1990) *(Letterkenny)*.

The General Counsel further argues that Respondent has failed to establish that it would have detailed Penberthy even in the absence of her protected activities. *Letterkenny* at 118.

With regard to the remedy in this case, the General Counsel, with the concurrence of the Charging Party, filed a Motion to Amend Post-Hearing Brief to withdraw its request for make whole relief for Betsy Penberthy. Having no objection from the Respondent, the Motion is granted. The General Counsel continues to seek a Recommended Decision and Order finding the violations alleged in the Complaint and directing the Respondent to post an appropriate Notice To All Employees.

Respondent

Respondent asserts that there is no dispute that the decision to detail the employees was a management right under section 7106(a)(2) of the Statute. Respondent asserts that the resulting changes because of the details did not have more than a *de minimis* impact on conditions of employment of bargaining unit employees. Therefore it had no obligation to bargain with the Union prior to effecting the details. Respondent points out that the General Counsel did not present any evidence concerning how the working conditions of Tonia Nelson, one of the three detailees, changed during the course of her detail. Respondent disagrees that the evidence presented by the General Counsel with regard to Penberthy and von Morrison established that the details had more than a *de minimis* impact on those employees. With regard to von Morrison, Respondent asserts that registered nurses who work for the Respondent are subject to working different tours of duty, extra shifts, and consecutive weekends. Although von Morrison had the opportunity to work every other weekend on A2, she was not guaranteed the ability to work every other weekend, or any weekend for that matter when she was on the A2 unit.

Respondent further asserts that the General Counsel offered very little testimony of how Penberthy's working conditions changed as a result of the detail. She indicated that the Nursing Home Care Unit was a much slower paced environment than A2 and that she felt she would not have the skills to perform on the A2 unit if returned. Respondent points out that she has not requested and indicated she did not care to return to A2. Although there may have been some changes in Penberthy's daily duties and tasks while on the Nursing Home Care Unit, substantively her duties as a registered nurse did not change.

Respondent asserts that Penberthy's personal reaction to the detail and how she perceived the detail is not relevant to a determination of whether the change in working conditions during the detail was more than *de minimis*. *Department of Health and Human Services, Social Security Administration,* 24 FLRA 42 (1986). Respondent notes that there was no change in pay; no change in commute; no change in her schedule; her proficiency report was not impacted and she did not have to learn any new skills.

Respondent further argues that the nurses who were not detailed but who remained on A2 were not impacted by the detail. There was no testimony from anyone who directly worked on A2. While the remaining nurses may have missed Penberthy and von Morrison, and still sought their expertise on occasion, Respondent argues that this does not establish any impact as a result of the details. There was no evidence such as changes to employees' work schedules or that the remaining employees were disadvantaged from other career opportunities. *United States Customs Service,* 29 FLRA 307 (1987).

Respondent noted that in order to alleviate any disruptive changes that could have resulted from the details, management lowered the patient census on A2. Essentially management adjusted the workload of the unit and as a result, there was no impact on the remaining employees, and no obligation by the Respondent to bargain with the Union.

Respondent denies that it detailed Penberthy because of her Union involvement, in violation of section 7116(a)(1) and (2) of the Statute. Respondent asserted that the General Counsel's reliance on Penberthy's protected activity (going back to January 2000) and the grievance over Penberthy and Hogan's perception issue relating to "interpersonal relationship" did not establish a *prima facie* case. Although Dean heard the grievance at the first step, there was no evidence from which one could draw the inference that the grievance was his motivating factor for issuing the detail.

Respondent further asserts that the testimony of former Chief Steward Pauline Green, who testified that Dean had referred to Penberthy and von Morrison as "those bitches that keep stirring up trouble on A-2", and that things would be better "if those two would quit running to the union" (Tr. 148), are not sufficient to establish evidence of retaliation for protected activity.

Respondent argues that Dean detailed Nelson, Penberthy and von Morrison because personnel on the A2 unit were focusing too much time on interpersonal issues. (Jt. Ex. 8) His decision was based on conflicts between employees, not conflicts between employees and management officials. (Tr. 244) Dean could have expressed these reasons to the detailed employees with more specificity from the outset; instead he used words like "therapeutic milieu" and the need to "assess the overall organization needs of A-2". (Jt. Ex. 6) This initial lack of specificity, however, is hardly evidence that Dean made his decision in retaliation for protected activity. In his September 6, 2001 memorandum to Penberthy, Dean explained that the details were necessary because the focus of personnel was on interpersonal relationship rather than patient care. (Jt. Ex. 8)

Respondent asserts that Dean detailed three registered nurses because when he heard about the problems of interpersonal conflicts on A2, the names of those nurses was the one constant. Dean took an action that he hoped would address the problem; he made the necessary efforts to ensure that any change in working conditions during the details would be minimal; and he did not base his decision on any prior union activity in which one of the registered nurses had engaged.

Analysis and Decision

Effect of change of conditions of employment was not more than *de minimis* in nature.

Prior to implementing a change in conditions of employment of bargaining unit employees, an agency generally is required to provide the exclusive representative with notice and an opportunity to bargain over those aspects of the change that are within the duty to bargain. *See, Federal Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas*, 55 FLRA 848, 852 (1999) (*FCI, Bastrop*). With limited exceptions, parties must satisfy their mutual obligation to bargain before changes in conditions of employment are implemented. The extent to which an agency is required to bargain over changes in conditions of employment depends on the nature of the change. *FCI, Bastrop.* Where an agency institutes a change in a condition of employment and the actual decision, or substance of the change, is negotiable, the extent of impact on unit employees is not relevant to whether the agency is obligated to bargain. *92 Bomb Wing, Fairchild Air Force Base, Spokane, Washington*, 50 FLRA 701 (1995) (Fairchild AFB). Where, however, a change in a condition of employment entails the exercise of a management right under

section 7106 of the Statute, the agency has a statutory obligation to bargain concerning the impact and implementation of such change but only if the change would result in an impact on employees that is more than *de minimis* in nature. Fairchild AFB.

Here, it is undisputed that Respondent detailed three registered nurses from one duty station to three other duty stations within its facility. The Authority has found that the right to determine organization under section 7106(a)(1) refers to the administrative and functional structure of an agency and encompasses the designation of duty stations where that designation is for the purpose of implementing administrative matters. *See National Treasury Employees Union, Chapter 83 and Department of the Treasury, Internal Revenue Service*, 35 FLRA 398 (1990). I find that the detailing of the three employees constituted an exercise of management's right to determine organization. *See American Federation of Government Employees, AFL-CIO, Local 3805 and Federal Home Loan Bank Board, Boston District Office*, 5 FLRA 693 (1981). Thus, the Respondent was obligated to bargain concerning the impact and implementation of the change if the impact of the change was more than *de minimis*.

It is well-established that in assessing whether the effect of a decision on conditions of employment is more than *de minimis*, the Authority looks to the nature and extent of either the effect or the reasonably foreseeable effect of the change on bargaining unit employees' conditions of employment. *See, e.g., General Services Administration, Region 9, San Francisco, California*, 52 FLRA 1107, 1111 (1997). Equitable considerations are also taken into account in balancing the various interests involved.

The question in this matter therefore involves whether the detailing of the three registered nurses had a more than *de minimis* impact on bargaining unit employees' conditions of employment. The General Counsel asserts that von Morrison lost shift differential pay, or more precisely the opportunity of weekend overtime work, due to the detail. There was also an allegation that von Morrison was not provided any training concerning her new speciality of emergency care, but I find no evidence to substantiate that her work was of such a different nature as her work on A2. With regard to Penberthy, the General Counsel primarily alleged that Penberthy suffered embarrassment and discomfort because of the manner in which she was detailed. The primary significance to Penberthy was her elevated blood pressure after the detail and the necessity that she seek medical treatment for her ongoing condition.

As both the General Counsel and the Respondent point out, the detailed nurses did not suffer any change in their basic pay or benefits or change in commute. Further the evidence fails to show how their nursing duties changed as a result of the details. I specifically find that Penberthy's personal and medical reaction to the detail, while understandable, does not establish more than a *de minimis* impact. With regard to her medical problems, I do not find this a foreseeable result of the details. And with regard to her concerns about her Nursing license, there was never any evidence that the detail was in any way involved with her abilities as a nurse, as further stated in Dean's letter of September 6. With regard to von Morrison, the only impact set forth in the hearing involved her inability to work overtime, since the unit she was sent to did not actually work on the weekends. Although this had an effect upon her ability to work and earn overtime, I do not find this single instance of impact sufficient to find a violation in this matter.

The General Counsel also asserts that the evidence shows that the impact on the remaining bargaining unit employees on A2, following the transfer of the three nurses, was more than de minimis. None of the actual remaining employees presented evidence at the hearing, and the remaining testimony by Penberthy, von Morrison and the Union President was speculative at best. There is no evidence regarding the impact on overtime, staffing, or other conditions of employment. Although Dean testified that he reduced the bed inventory on the unit in order to lessen the impact, other than this there was little evidence of any actual impact on the A2 unit as a result of the details.

Under these circumstances, I do not find that the August 20 details had more than a *de minimis* impact on bargaining unit employees and Respondent was therefore not required to bargain over the impact and implementation of the change with the Union. *Social Security Administration, Malden District Office, Malden, Massachusetts*, 54 FLRA 531, 536 (1998).

Detail was not in retaliation for employee seeking representational assistance from the Union.

Section 7102 of the Statute guarantees employees the right to form, join, or assist any labor organization or refrain from such activity without fear of penalty or reprisal. Under section 7116(a)(2) of the Statute, 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.

In *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*), the Authority articulated an analytical framework for addressing allegations of discrimination claimed to violate section 7116(a)(2). Under that framework, 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 connection with hiring, tenure, promotion, or other conditions of employment. *Indian Health Service, Crow Hospital, Crow Agency, Montana*, 57 FLRA 109, 113 (2001) (*Crow Hospital*); *Letterkenny*, 35 FLRA at 118. As a threshold matter, the General Counsel must offer sufficient evidence on these two elements to withstand a motion to dismiss. *See, e.g., Crow Hospital*, 57 FLRA at 113. Whether the General Counsel has established a *prima facie* case is determined by considering the evidence in the record as a whole, not just the evidence presented by the General Counsel. *Department of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 55 FLRA 1201, 1205 (2000).

Satisfying this threshold burden 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) it would have taken the same action even in the absence of protected activity. *See, United States Air Force Academy, Colorado Springs, Colorado,* 52 FLRA 874, 878-879 (1997); *Federal Emergency Management Agency,* 52 FLRA 486, 490 n. 2 (1996); *Letterkenny,* 25 FLRA at 118. The General Counsel may seek to establish that the agency's reasons for taking the action were pretextual.

The Authority has held that although closeness in time between an agency's employment decision that is the focus of a discrimination allegation and protected activity may support an inference of illegal motivation, it is not conclusive proof of a violation.

It is undisputed that from January 2000 Penberthy engaged in protected activity in seeking assistance from the Union on a variety of issues, including staffing levels in

the A2 unit, the 6 am start time for nurses, and her differences with Sandy Hogan. Penberthy filed a grievance on July 19 over Hogan's June 25 memo and had a Step 1 grievance meeting with Nelson Dean and Sandy Bond on August 17. On August 20, Penberthy, along with von Morrison and Nelson, was detailed out of the A2 unit. The General Counsel does not allege that the detail of von Morrison or Nelson was connected with their Union activity, although both were also members of the Union. Dean admits that he was aware of Penberthy's protected activity.

Despite the sequence of events between the Step 1 grievance meeting on August 17 and the details on August 20, I do not find that the timing of the events involved supports a finding that the details of the three nurses was motivated by Penberthy's protected activity. The timing of the January 2000 memo from Penberthy regarding staffing on A2, and the subsequent meetings involving this meeting, are not close in time to the 2001 detail. Further there is nothing that suggests a link between Penberthy's protected activity and the August 20 details. 8

The General Counsel relies on several remarks by Dean regarding Penberthy. While his remarks indicate some frustration with Penberthy, I do not find a direct connection between her protected activity and the subsequent details. I find, in fact, that the details were directly related to the relationship between Nelson and the two other nurses, as credibly set forth by Dean. In that regard the August 13 memo by Penberthy regarding Tonia Nelson, with Nelson's apparent request to be moved from the unit, started a chain of events that resulted in the details.

Therefore, I find that the record, as a whole, does not establish a *prima facie* case that Penberthy's protected activity was a motivating factor in the detailing of Penberthy and the other two nurses.

Even assuming the General Counsel has established a *prima facie* case in this matter, I find the Respondent has met its burden of showing that the details would have been conducted in the same manner even in the absence of protected activity. In that regard, the evidence as a whole establishes that the details involved the relationship between three nurses on the A2 unit. Since Penberthy was specifically involved, noting her criticisms of Tonia Nelson in the August 13 memo, it is reasonable that she would have

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Even Penberthy seemed unsure that the detail was in retaliation for her protected activity, noting that she had also filed EEO allegations based on sex and age.

been one of the three nurses detailed from the unit. Therefore, the evidence fails to establish a violation of section 7116(a)(1) and (2) of the Statute.

In conclusion I find that the Respondent did not violate section 7116(a)(1), (2) and (5) of the Statute as alleged. I recommend dismissal of the complaint in this case.

It is therefore recommended that the Authority adopt the following Order:

ORDER

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

Issued, Washington, DC, February 6, 2004.

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SUSAN E. JELEN
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. DE-CA-01-1043, were sent to the following parties:

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DATED: February 6, 2004
Washington, DC