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

MEMORANDUM DATE: October 23, 1996

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

SUBJECT: 305TH AIR MOBILITY WING
MCGUIRE AIR FORCE BASE
NEW JERSEY

Respondent

and Case No. BN-CA-60070

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1778

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(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
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

305TH AIR MOBILITY WING MCGUIRE AIR FORCE BASE NEW JERSEY Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1778 Charging Party	Case No. BN-CA-60070

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. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **NOVEMBER 25, 1996**, and addressed to:

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

JESSE ETELSON
Administrative Law Judge

Dated: October 23, 1996
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

305TH AIR MOBILITY WING MCGUIRE AIR FORCE BASE NEW JERSEY Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1778 Charging Party	Case No. BN-CA-60070

Steven E. Sherwood, Esquire
For the Respondent

Barbara S. Liggett, Esquire
Richard D. Zaiger, Esquire (Regional Attorney)
For the General Counsel

Before: JESSE ETELSON
Administrative Law Judge

DECISION

This case presents a novel question concerning the circumstances under which the reclassification of an employee's position may result in "discrimination" as that term is used in the Federal Service Labor-Management Relations Statute (the Statute). An unfair labor practice complaint alleges that Respondent violated sections 7116(a)(1) and (2) of the Statute by downgrading the position of employee Richard E. Thomas because, as Vice President of the Charging Party (the Union), he changed his work schedule pursuant to a collective bargaining agreement. Respondent denied some of the allegations forming the factual basis for the ultimate unfair labor practice allegation and denied that it committed an unfair labor practice.

The case was presented at a hearing in Philadelphia, Pennsylvania. As the hearing developed, and as confirmed in the post-hearing briefs filed by Counsel for the General

Counsel and for Respondent, nearly all of the material evidentiary facts disputed in the pleadings proved to be uncontroverted. Indeed, a major element in the defense Respondent offered in its brief is that the downgrading of Thomas' position was the result of a reclassification that resulted (for non-union-related reasons) from the change in his work schedule, and that the reclassification was not reviewable under the Statute because such matters are excluded from the Statute's definition of "conditions of employment."

I do not accept Respondent's position to the extent that it implies a lack of Authority jurisdiction to consider whether the downgrading violated the Statute. However, my analysis of the exclusion, as applied to the facts of this case, persuades me that the reclassification that occurred here was not an action of the kind described in section 7116 (a)(2) of the Statute. Further, for reasons that relate to the procedural posture of the case, I find no violation of section 7116(a)(1).

The following findings of fact make liberal use of the General Counsel's statement of facts, which incorporates much of the evidence presented by both sides. In addition, I have credited crucial testimony by Supervisory Personnel Management Specialist Judith A. Simon, especially regarding her role in bringing about the reclassification, that Counsel for the General Counsel did not specifically controvert but parts of which, by implication, they would have me reject.

Findings of Fact

The Union is the exclusive representative of appropriated fund employees in a unit appropriate for collective bargaining at Respondent Air Force Base. The Union and Respondent are parties to a collective bargaining agreement that covers employees in this unit. Article 45 of the agreement deals with the subject of union officials. Section 5 of that article provides as follows: "Union officials [sic] basic workweek will consist of Monday through Friday, 0745 to 1630; deviations from this schedule can be agreed to by the official and his/her supervisor."

Richard A. Thomas has been employed by Respondent as a boiler plant operator since 1993, and is included in the bargaining unit represented by the Union. Prior to his assignment as a boiler plant operator, Thomas was employed by Respondent in a supervisory position, as a WS-3 foreman. In approximately August 1993, that position was eliminated

and Thomas was assigned to a position as a WG-11 boiler plant operator.

Respondent's boiler plant operates seven days a week, 24 hours a day, with three shifts per day as follows: 7:00 a.m. to 3:00 p.m.(day shift), 3:00 p.m. to 11:00 p.m., and 11:00 p.m. to 7:00 a.m. The boiler plant supervisor, Richard J. Borden, works on the day shift, Monday through Friday. No supervisor is present during evening and weekend shifts. Nonsupervisory employees at the boiler plant are assigned to one of five crews, or "shifts," designated as "A" through "E." A, B, C, and D shifts are rotating shifts, and are generally staffed by a WG-11 boiler plant operator and a WG-10 boiler plant operator for each shift. The WG-11 serves as "operator in charge," taking on certain responsibilities that a supervisor performs when present. If no supervisor or WG-11 is present, the senior WG-10 operator may unofficially assume the duties of an operator in charge. "E" shift is normally scheduled Monday through Friday, 7:00 a.m. to 3:00 p.m., but E shift employees are sometimes placed on "relief" assignments to fill in for absent employees on other shifts.

After being assigned to the boiler plant operator position in 1993, Thomas worked a rotating shift schedule, consisting of six days on the day shift, seven days on the 3:00 to 11:00 shift, and seven days on the 11:00 to 7:00 shift. In July 1994, Thomas became Vice President of the Union. Thomas informed his immediate supervisor, Borden, that he had become a Union officer and that the Union was exercising the right under Article 45 of the negotiated agreement to change his schedule to day shift, Monday through Friday. Borden told Thomas that he could not change to a nonrotating day shift schedule because this would diminish scheduling flexibility and increase overtime costs, but Thomas insisted that the negotiated agreement gave him this right.

Borden contacted Ruth R. Sharp, Respondent's Labor Relations Officer, and discussed his conversation with Thomas. Sharp told Borden that the Article 45 provision was binding on management, but suggested that management set up a meeting with the Union to explain the problems that would be created by placing Thomas on a day shift schedule.[1]

On August 23, 1994, at Sharp's request, representatives of the Union and Respondent met to discuss Thomas' request

[1] Although the hours of the day shift (7:00 to 3:00) do not conform to the hours specified in Article 45 (7:45 to 3:30), there is no evidence that this discrepancy became an issue.

for a nonrotating day shift schedule. Representing management at the meeting were Sharp, Borden, Vincent Sarno (Borden's immediate supervisor), and Charles Giddens (Sarno's immediate supervisor). The Union was represented by Thomas, Union President Michael Horahan, and Executive Vice President Douglas Loftin. Management representatives told the Union that they did not want to remove Thomas from rotating shifts because they were "short-manned" in the boiler plant and because moving Thomas to a nonrotating shift would increase overtime costs. No reference was made at this meeting to the classification of Thomas' position. At the end of the meeting, the Union representatives agreed to consider management's concerns and to respond. On August 26, Horahan responded by letter to Sharp, agreeing to continue searching for answers to the staffing problem, but insisting that Respondent abide by Article 45, section 5 of the contract and permit Thomas to work the "regular scheduled day shift hours." Thomas was then placed on that schedule.

On approximately four to five occasions after Thomas was assigned to a day shift schedule, Borden asked him to change his schedule to work other shifts. On each of these occasions, Thomas told Borden that he would not alter his regular schedule to work other shifts, but that he would work these shifts on an overtime basis. Since his assignment to the day shift, Thomas has often worked different hours on an overtime basis, but not as a part of his regular schedule.

In April 1995, Borden talked with Sharp about changing the schedules of WG-11 boiler plant operators in order to reduce overtime costs in the boiler plant. Sharp notified the Union of the proposed change. The Union requested bargaining over it. During a meeting to discuss the proposed change, the parties discussed the option of putting Thomas temporarily on a rotating shift until a vacant WG-11 position was filled. Respondent wrote up a proposal and sent it to the Union so that Thomas, who apparently had not been at the meeting, could review it.

After receiving this proposal from Sharp, Thomas and Loftin discussed the matter with Colonel Peter W. Lindquist, Commander of the 305th Support Group. Lindquist is the co-chair of the parties' labor-management partnership council, of which Loftin and Thomas are members. The boiler plant is under Lindquist's managerial authority. Loftin and Thomas explained to Lindquist that Thomas could not be required to work a rotating shift, according to the contract, because that would prevent him from performing his duties as a Union official. Thomas and Loftin asked Lindquist for his

assistance in filling the vacant WG-11 position and assuring that Thomas would not have to work a rotating shift.

Following this meeting, Lindquist called Sharp and asked for more information about the staffing situation in the boiler plant. A meeting was scheduled for July 6. Sharp had scheduled leave for the time when the meeting was to be held. She asked another representative of the Civilian Personnel Office, Judith Simon, to attend the meeting in her place. In preparation for the meeting, Simon reviewed the staffing in the boiler plant. As a result of this review Simon determined that, if Thomas worked regularly only on the day shift, he could not qualify as an "operator in charge," as that position was described within the applicable Job Grading Standard within the Federal Wage System promulgated by the United States Office of Personnel Management (OPM). Simon concluded that, absent qualification for that position, Thomas could only be considered a WG-10 boiler plant operator. Simon so advised Sharp. Simon's determination remained the same when Sharp informed her that Thomas was assigned to day shift pursuant to his request, in order to fulfill his Union obligations. She did not consult anyone at OPM concerning this determination.

After talking with Simon, Sharp changed her leave plans and attended the scheduled meeting with Lindquist. Sharp relayed the information she had received from Simon concerning the classification of Thomas' position. Lindquist concluded that Thomas could not continue to hold a WG-11 position while working a day shift schedule. He met with Union Executive Vice President Loftin and told him that if Thomas would not work a rotating shift, his job would be reclassified. The Union informed Lindquist that Thomas would not agree to work rotating shifts. Lindquist then directed Sharp to perform the reclassification.

Sharp and other management officials decided to delay the action until after the vacant WG-11 position had been filled, because, had Thomas been reclassified to WG-10 before it was filled, it would have been necessary to offer him the WG-11 position. Then, if he found it necessary to decline that offer, his retained grade and salary, his pay, and his ability to have priority placement in other higher graded positions could have been affected adversely.

On October 17, 1995, after the WG-11 position was filled, Thomas received a memorandum dated October 10, 1995, signed by Simon. The memorandum stated that Thomas' current WG-11 position had been reviewed and found to be correctly classified as a WG-10. A notification of personnel action

furnished to Thomas showed that the downgrade was effective October 1, 1995.

In December 1995, another WG-11 boiler plant operator vacancy occurred as a result of the death of an employee. Respondent offered this position to Thomas but made it clear that Thomas would be required to work rotating shifts in order to hold the position. Thomas declined the position. Shortly afterward he received a notifications of personnel action, effective April 14, 1996, stating that because he had declined the WG-11, his grade retention period as a WG-11 was terminated and he was no longer entitled to grade or pay retention at WG-11. He continued to retain his right to pay at the level of his former WS-3 position, but his future cost-of-living pay increases may be subject to reduction.

Discussion and Conclusions

A. Preliminary Overview of the Case as Presented

As noted, the complaint alleges, and the General Counsel contends, that Respondent downgraded Thomas' position because of his protected union activities and that Respondent's

conduct violated sections 7116(a)(1) and (2) of the Statute.

Sections 7116(a)(1) and (2) provide that:

> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
>
> (2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other condition of employment;

The theory of the General Counsel's case, as alleged in the complaint and as argued in his counsel's brief, is a theory of discrimination of the kind described in section 7116(a)(2). The alleged violation of section 7116(a)(1) is what is commonly described as a "derivative" violation, that is, an interference with employee rights that flows from the unlawful discrimination. *See, for example, United States Department of Defense, Department of the Air Force, Headquarters 47th Flying Training Wing (ATC), Laughlin Air Force Base, Texas*, 18 FLRA 142, 167 (1985). It is neither alleged nor argued that Respondent's conduct *independently* interfered with, restrained, or coerced any employee in the exercise of his or her rights.

B. A Morass of Jurisdiction-related Problems

In order to sustain an allegation that an agency has violated section 7116(a)(2), each of the elements of the proscribed discrimination must be established. Thus, the General Counsel must establish that the alleged discriminatory action was taken "in connection with hiring, tenure, promotion, or other conditions of employment." If the General Counsel fails to make the required *prima facie* showing, the case ends without further inquiry. *Letterkenny Army Depot*, 35 FLRA 113, 118 (1990) (*Letterkenny*). It is fundamental, therefore, that the discrimination proscribed by section 7116(a)(2) must have been practiced in connection with something that is regarded, under the Statute, as a condition of employment. However, section 7103(a)(14) of the Statute defines "conditions of employment," as specifically excluding certain "policies, practices, and matters," among which are those "relating to the classification of any position[.]"

Although, as the Authority has noted, the term "classifi-cation" is not defined in the Statute, "it is commonly under-stood to mean the process by which a level of compensation is assigned to a particular position based on

the duties and responsibilities of that position." *American Federation of Government Employees, Local 3295 and U.S. Office of Thrift Supervision*, 47 FLRA 884, 900-01 (1993) (*Office of Thrift Supervision*), *review on other issues denied*, 46 F.3d 73 (D.C. Cir. 1995). The Authority further understands that "[t]he assignment of a particular 'pay level' or 'grade level' to a position based on its duties and responsibilities is [for section 7103(a)(14)(b) purposes] part of the classification process." *International Organization of Masters, Mates and Pilots, Marine Division, Panama Canal Pilots Branch and Panama Canal Commission*, 51 FLRA 333, 339 (1995) (*Panama*).

There is no dispute here over the fact that Respondent's downgrading of Thomas' position resulted from a reclassifica-tion. Thus it was a matter "relating to the classification of a position."[2] Although this is a case of first impression as to whether the section 7103(a)(14) exclusion of matters relating to classification from "conditions of employment" applies to "conditions of employment" for section 7116(a)(2) purposes, all the definitions in section 7103(a) are expressly applicable "[f]or the purpose of this chapter" (that is, the Statute) as a whole.

On the other hand, there is some evidence that Congress had a different objective in excluding classification matters from the definition of conditions of employment. As quoted in *March Air Force Base, Riverside, California*, 13 FLRA 255, 258 (1983) (*March AFB*), Representative Udall stated to the House of Representatives that:

> The effect of this new exclusion would be to remove the classification of positions from collective bargaining. This change is designed to help ensure the continuation of classification uniformity throughout the Federal Government.

---

2 In *Office of Thrift Supervision*, at 902, the Authority found no basis on which to limit the meaning of the section 7103(a)(14) "classification" exclusion to a classification procedure accomplished under a particular statute. In *American Federation of Government Employees, Local 1978 and U.S. Department of the Interior, Bureau of Reclamation, Lower Colorado Regional Office, Boulder City, Nevada*, 51 FLRA 637, 643 n.9 (1995) the Authority held that 7103(a)(14)(B) was intended to except from the definition of "conditions of employment" matters relating to the classification of any position, including "blue-collar" positions.

Representative Udall's substitute to the bill then before the House had added that exclusion. Thus the Authority concluded in *March AFB* that "Congress intended to remove from the scope of bargaining threshold determinations as to what duties and responsibilities will constitute a given position and the placement of that position in a class for purposes of personnel and pay administration." *Accord Panama* at 339.

To the extent that this piece of legislative history, and the conclusion the Authority drew from it, suggest a need for statutory construction in deciding the instant case, one must, nevertheless, look first to the statute itself. *Hughey v. United* States, 495 U.S. 411, 415 (1990). Effect must be given "to the meaning and placement of the words chosen by Congress." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 645 (1990). And "the clearer the statutory language, the more compelling the legislative history must be to overcome that language." *American Federation of Government Employees, AFL-CIO, Local 1897 and Department of the Air Force, Eglin Air Force Base, Florida*, 24 FLRA 377, 382 (1986).

Neither Representative Udall's remarks nor the Authority's previous interpretation of these remarks negate the plain meaning of the statutory language. For while no one would dispute that Congress intended to remove classification matters from collective bargaining (at least as to their substance), the language of the section 7103(a)(14) exclusions are not so limited. "Legislative declaration of the meaning that a term shall have in the same or other acts is binding, so long as the prescribed meaning is not so discordant to common usage as to generate confusion." 2A N. Singer, *Sutherland Stat. Const.* § 47.07 (5th Ed. 1992).

It would not have stretched the drafters' imagination beyond reason to have provided some indication that the Section 7103(14) definition of conditions of employment was meant to apply only to certain parts of the Statute. Collective bargaining occupies such a central position in the purpose of the Statute that the exclusion of "classification" matters from collective bargaining might have been regarded as tantamount to an exclusion of such matters from any meaningful aspect of the Statute's

coverage.[3] In any event, personal conjecture aside, it would be presumptuous for me to infer, on the basis of the Udall remarks alone, that Congress failed to comprehend the effect of excluding "classification" matters from the general definition of conditions of employment.

Another recognized basis for questioning the plain-meaning reading of a statute is that such a reading would lead to absurd or impractical consequences. *United States v. Missouri Pacific R.R.*, 278 U.S. 269, 278 (1929). It could be argued that exclusion of all matters relating to classifica-tion from the scope of conditions of employment for purposes of section 7116(a)(2) is potentially so destructive of employee rights that the interpreter should be reluctant to conclude that this was the intention of Congress. The following considerations may assuage that concern.

An action that purports to be a classification of a position, if taken for discriminatory reasons, may be seen as a disguised disciplinary action. Where such an action results in the reduction of an employee's grade or pay, I see nothing to preclude a piercing of the bureaucratic veil in order to call the action what it really is. The question then is: What is the appropriate forum for such a veil-piercing inquiry?

Section 7116(d) of the Statute prevents the raising, as unfair labor practices (ULPs), of "[i]ssues which can properly be raised under an appeals procedure." *See generally United States Small Business Administration, Washington, D.C.*, 51 FLRA 413 (1995) (*SBA*). The Authority could invoke section 7116(a)(2), under my previous analysis, if the reclassifica-tion is regarded as something in the nature of a disciplinary action. In the instant case, there appears to have been a reduction in grade. However, a reduction in grade is explicitly covered by 5 U.S.C. § 7512 and therefore may be appealed to the Merit Systems Protection Board (MSPB) as a "prohibited personnel practice" under 5 U.S.C. § 2302. *See Department of Commerce v. FLRA*, 976 F.2d 882, 888-90 (D.C. Cir. 1992).

I recognize that the Authority stated in *SBA* that, while it would decline jurisdiction in cases where the

---

[3] The exclusion of matters relating to classification from the scope of bargaining is not complete. Proposals that address not the actual process of classification but the impact and implementation of decisions to classify or reclassify positions may be negotiable. *March AFB* at 258-60.

alleged ULP focuses on the rights of an individual employee, it would assert jurisdiction "when the ULP focuses on the union's institutional interest in protecting the rights of other employees." *Id.* at 422. In the instant case, it can hardly be denied that the Union had an institutional interest in protecting its vice president in his right to implement the contract provision that placed the Union's officials on the day shift. Presumably, the Union would not have negotiated such a provision unless it had an institutional interest in its implementation. However, the Authority's "focus" distinction does not provide an adequate basis for asserting jurisdiction here.

One element of every violation of section 7116(a)(2) is, according to *Letterkenny*, "protected activity." *Id.* at 118.[4] But "protected activity," as described in section 7102 of the Statute, includes only activity that relates to the right to "form, join, or assist" a labor organization. *U.S. Department of Labor, Employment and Training Administration, San Francisco, California*, 43 FLRA 1036 (1992). Thus, every section 7116(a)(2) violation implicates an institutional interest of a labor organization. If that connection were sufficient to trigger the Authority's jurisdiction, section 7116(d) would be rendered meaningless.

Therefore one might conclude that section 7116(d) precludes consideration of the action taken here, insofar as it affected any condition of Thomas' employment, as a ULP. But the plot continues to thicken. For while Thomas' position was reclassified downward, he received the benefit of grade and pay retention. In those circumstances, the reclassifica-tion is not appealable to the MSPB. *Atwell v. MSPB*, 670 F.2d 272 (D.C. Cir. 1981); *Broderick v. Dept. of Treasury*, 52 MSPR 254 (1992) (*Broderick*). The Authority acknowledged this state of affairs in *American Federation of Government Employees, Local 3369, AFL-CIO and Social Security Administration, New York Region*, 16 FLRA 866

4
Letterkenny requires the General Counsel to establish, in all cases of alleged discrimination, that the employee against whom the alleged discriminatory action was taken was engaged in protected activity. Section 7116(a)(2) cases do usually involve protected activity by the alleged discriminatee(s). However, the *Letterkenny* requirement is more useful as a description of what is to be expected in the general run of cases than as a prescription for the universe of cases that may arise. *See, for example, PJAX*, 307 NLRB 1201, 1203-05 (1992) (unlawful discouragement of union activity established when employer discharged the *brother* of an employee who employer *believed* to be a leading union activist).

(1984). In fact, the court in *Atwell* went as far as to suggest, albeit obliquely, the availability of the ULP route for Federal employees to challenge the "bona fides" of a reclassification decision. *Id.* at 288 and n.26.

Thomas lost the retention benefit a few months after his reclassification. However, this event does not make the action "appealable." MSPB jurisdiction "is determined on the basis of the rights the petitioner received when her classification was effective and not upon what subsequently happened." *Schaffer v. MSPB*, 751 F.2d 1250, 1253 (Fed. Cir. 1985). Further, the MSPB's view of its own jurisdiction in such matters is that the right to appeal reductions in pay and grade to it "has been narrowly construed." *Broderick* at 258.

Aside from its contention that the action involved here was an excluded "classification" matter, Respondent appears to concede that the downgrading had the necessary connection with a condition of Thomas' employment, for it proceeds from the "classification" argument to one asserting the legitimacy of its motivation. I conclude that the action was so connected and that the Section 7116(a)(2) allegation is properly before the Authority, at least for the preliminary purpose of inquiring into whether the action was essentially a bona fide reclassification or was a disguised disciplinary action. Such inquiry necessarily bears some resemblance to a *Letterkenny* analysis, but is not quite the same. It focuses on the existence, or not, of facts and circumstances sufficient to remove the downgrading from the reach of the "classification" exclusion. Because the action taken was, on its face, a reclassification, it was presumptively within the exclusion. The General Counsel must, therefore, assume the burden of establishing that the "reclassification" label is a facade.

C. Application of this Analytical Framework

The General Counsel has not met that burden in this case. The impetus for the reclassification was Simon's discovery that Thomas' day shift schedule called into question his status as an "operator in charge." On looking further into the matter, she concluded that his WG-11 classification was improper. Simon had about 20 years of experience in classifying positions in the Federal Government, had received extensive training, and had classified thousands of positions. Her expertise, which it is fair to infer was recognized by other management officials, led them to rely on her opinion.

There is no evidence to suggest that Simon was asked to review Thomas' classification in order to find a pretext to downgrade him. On the contrary, as Simon testified credibly, this review was a byproduct of her preparation for the meeting at which she had been asked to substitute for Sharp. It was not planned. Respondent then relied on Simon's determination and did not conduct any further research or explore "less onerous options." The General Counsel finds Respondent's motivation suspect for that reason. I do not. For one thing, reliance on Simon's expertise suggests nothing out of the ordinary. In this connection, Respondent was not required to establish that her determination was correct. Second, the effect of the reclassification on Thomas was not particularly onerous. Moreover, the pains Respondent took to minimize the adverse effects on Thomas, by delaying the reclassification action, demonstrated an attitude that weakens the force of any implication that Respondent was out to get him.

For the limited purpose of this inquiry, I find that Respondent relied in good faith on Simons' advice and conducted a legitimate classification review that resulted in the downgrading of Thomas' position. Motivation aside, the action was what it purported to be. Under my analysis of the "classification" exclusion, therefore, that ends the case.

D. Alternative Theories

Even if a full inquiry into the usual elements of a section 7116(a)(2) violation is appropriate, I cannot find such a violation for another reason. The Authority recently stated, without qualification, that "we require a showing of disparate treatment of similarly situated employees in order to find a violation of section 7116(a)(2) . . . ." *American Federation of Government Employees, AFL-CIO*, 51 FLRA 1427, 1439 n.11 (1996). I am bound by that statement, and there

was no such showing here. For while the General Counsel elicited testimony that the classification of an employee who became a union official spending 100 percent of his duty time on union business would not be downgraded, I believe the Authority contemplates only disparities between the treatment of union activities and other activities. Whether or not the distinction between Thomas and a 100 percent union official can be justified on any rational basis, it is not a distinc-tion under which union and other activities are treated differently.5

Finally, the General Counsel has argued that, also irrespective of Respondent's actual motive, a violation should be found because Respondent's actions were "inherently destructive" of important employee rights. I entertain that argument only to provide an alternative basis for the disposition of this case, on the untested assumption that the Authority might find that an "inherently destructive" action violates section 7116(a)(2) even without disparate treatment.

I have previously recommended that the Authority adopt the "inherently destructive" doctrine, as developed in private sector labor relations law. I also noted that the Authority applied a version of this doctrine in *Internal Revenue Service and Brooklyn District Office*, 6 FLRA 642, 659 (1981), a case that arose under Executive Order 11491. *See also Defense Logistics Agency, Defense Depot Tracy, Tracy, California*, 16 FLRA 703, 716 (1984). However, I do not find this doctrine to be of assistance to the General Counsel here.

As articulated in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967) the doctrine works this way:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to

5
The General Counsel asserts that downgrading Thomas' position was "illogical." I fear that attempting in earnest to hold the Government's classification system to a "logic" standard would be an experience akin to seeking the Holy Grail.

> sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him.

I find that the adverse effect of Respondent's action here falls into the category of "comparatively slight." Among Respondent's options following the exercise of the Union's right to have Thomas assigned to the day shift, this downgrade, which resulted in no immediate loss of pay and was delayed so as to minimize its impact, was not one that speaks so loudly against employee rights that it "bears 'its own indicia of [improper] intent'". *Great Dane* at 33, quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228, 231 (1963).[6]

As stated above, I only entertained the "inherently destructive" argument because it might have provided a basis for finding a violation of section 7116(a)(2) despite the Authority's sweeping declaration that a showing of "disparate treatment of similarly situated employees" is required. If, as I have found, Respondent's action had only a "comparatively slight" effect on employee rights, thereby requiring proof of antiunion motivation, it is more difficult to rationalize an escape from this requirement. In the absence of a showing of disparate treatment, therefore, I do not reach the question of Respondent's motivation, or whether its action had what *Great Dane* calls a "legitimate and substantial business justifica-tion."[7] Rather, I conclude that the "inherently destructive"

---

[6] In the leading decision in which it adopted an analysis to which the Authority's *Letterkenny* analysis bears a remarkable resemblance, the National Labor Relations Board opined that the discharge of an employee (clearly an action sending a stronger signal than Respondent's action here) "in and of itself, is not normally an inherently destructive act which would obviate the requirement of showing an improper motive." *Wright Line*, 251 NLRB 1083, 1088 (1980).

[7] The Supreme Court has further described such a justifica-tion as one that "is reasonably adapted to achieve legitimate business ends or to deal with business exigencies." *NLRB v. Brown*, 380 U.S. 278, 288 (1965).

analysis does not provide an alternative basis for finding a section 7116(a)(2) violation here.

None of this would necessarily preclude a finding that Respondent's action "interfere[d] with, restrain[ed], or coerce[d] any employee" within the meaning of section 7116 (a)(1) of the Statute. What does preclude such a finding is the fact that such an independent unfair labor practice was neither alleged nor litigated. A "derivative" allegation of a section 7116(a)(1) violation does not make an independent violation litigable. *See U.S. Soldiers' and Airmen's Home, Washington, D.C.*, 15 FLRA 139, 147 (1984), *vacated on other grounds and remanded sub nom. AFGE Local 3090 v. FLRA*, 777 F.2d 751 (D.C. Cir. 1985). Further, the Authority recently expressed a heightened sensitivity to "due process considerations," and treated as such a consideration the fact that a party "could not have clearly known until after the hearing . . . that the legal theory of the case against it had grown . . . to include an allegation that it also inde-pendently interfered with employee rights under section 7102." *American Federation of Government Employees, Local 2501, Memphis, Tennessee*, 51 FLRA 1657, 1661-62 (1996).

I therefore recommend that the Authority issue the following order.

ORDER

The complaint is dismissed.

Issued, Washington, DC, October 23, 1996

JESSE ETELSON
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by JESSE ETELSON, Administrative Law Judge, in Case No. BN-CA-60070 were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Barbara S. Liggett, Esquire
Richard D. Zaiger, Esquire
Federal Labor Relations Authority
99 Summer Street, Suite 1500
Boston, MA 02110-1200

Steven E. Sherwood, Esquire
AFLSA/CLLO
1501 Wilson Blvd., 7th Floor
Arlington, VA 22209

REGULAR MAIL:

Richard A. Thomas, Vice-President
American Federation of Government
Employees, Local 1779
P.O. Box 278
Wrightstown, NJ 08562

John Sturdivant, National President
American Federation of Government
Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

Dated: October 23, 1996
Washington, DC