66 FLRA No. 45

UNITED STATES
DEPARTMENT OF DEFENSE
UNITED STATES AIR FORCE
325TH FIGHTER WING
TYNDALL AIR FORCE BASE, FLORIDA
(Respondent)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1113
AFL-CIO
(Charging Party/Union)

AT-CA-05-0293

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DECISION AND ORDER

September 30, 2011

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This unfair labor practice (ULP) case is before the Authority on exceptions to the attached decision of the Administrative Law Judge (Judge) filed by the General Counsel (GC).[1]

As relevant here, the complaint alleges that the Respondent violated: (1) § 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by failing to notify the Union of a formal discussion; (2) § 7116(a)(1) and (5) by changing a bargaining unit employee's (the employee's) schedule without providing the Union with proper notification and an opportunity to bargain over the change to the extent required by the Statute; and (3) § 7116(a)(1) and (2) by discriminating against the employee for engaging in protected activity when it placed her on administrative leave, changed her work schedule, and suspended her.[2] The Judge recommended that the Authority dismiss the complaint in its entirety.

For the reasons that follow, we: (1) grant the GC's exception alleging that the Respondent violated § 7116(a)(1) and (8) by holding a formal discussion without providing the Union with notice and an opportunity to attend; (2) grant the GC's exception claiming that the Respondent violated § 7116(a)(2) by changing the employee's work schedule; (3) dismiss, in part, and deny, in part, the GC's exception that the Respondent violated § 7116(a)(1) and (5) by failing to give the Union notice and an opportunity to bargain; and (4) deny the GC's exception that the Respondent violated § 7116(a)(2) by placing the employee on administrative leave and suspending her.

II. Background and Judge's Decision

A. Background

The facts are set forth in detail in the Judge's decision and are only briefly summarized here.

On Friday, January 21, an incident occurred at the employee's cubicle involving the employee, the Union President, and the Respondent's labor relations specialist (LRS), during which the employee told the LRS to leave because the LRS was upsetting her.[3] Judge's Decision at 7. Following this incident, the employee, among other things, lodged complaints with her unit commander and the Respondent's Inspector General, and also called the security police on Tyndall Air Force Base (security police). *Id.* at 7-8; GC Ex. 1(c), Complaint at 3.

The following Monday morning, January 24, the employee's supervisor and another management official met with her in a conference room. Judge's Decision at 11-12. The supervisor handed the employee two memoranda, which provided, respectively, that: (1) effective at noon that day, she would be placed on administrative leave until further notice, *id.* at 12; and (2) effective February 6, the employee's Monday through Friday work schedule would change from 8:00 a.m. to 4:30 p.m. with a thirty-minute lunch break, to 7:30 a.m. to 4:30 p.m. with a one-hour lunch break, *id.* at 13. The memorandum explaining the schedule change stated that the change was necessary so that the employee could attend mandatory training each Tuesday morning beginning at 7:30 a.m. *Id.* That memorandum also addressed the issue of tardiness, stating that further incidents of tardiness would result in disciplinary action.

The employee returned to work on Monday, February 7. The following Friday, her supervisor met

[1] As discussed further below, the Respondent filed an opposition to the GC's exceptions, and we decline to consider the Respondent's opposition.

[2] The complaint also alleges that the Respondent violated § 7116(a)(1) of the Statute by making inappropriate statements to the Union president and the employee. The Judge found no violation in this regard. As there are no exceptions to this finding, we do not discuss it further.

[3] All dates refer to the year 2005 unless otherwise indicated.

with her again, along with another management official and the Union president. During this meeting, the supervisor gave the employee a memorandum proposing a twelve-day suspension for: (1) tardiness; (2) five incidents of disruptive behavior; (3) two incidents of failing to complete assigned duties in a timely manner; and (4) one incident of failing to follow instructions. *See id*. at 17.

The Union filed a charge, and the GC issued a complaint alleging, as relevant here, that the Respondent violated: (1) § 7116(a)(1) and (8) by failing to notify the Union of a formal discussion; (2) § 7116(a)(1) and (5) by changing the employee's schedule without providing the Union with proper notification and an opportunity to bargain to the extent required by the Statute; and (3) § 7116(a)(1) and (2) by discriminating against the employee for engaging in protected activity.

B. Judge's Decision

The Judge determined that the Respondent did not violate § 7116(a)(1) and (8) of the Statute by failing to notify the Union of a formal discussion within the meaning of § 7114(a)(2)(A).[4] Although the Judge found that the employee's call to the security police constituted a grievance within the meaning of § 7103(a)(9)(A),[5] he found that the meeting on January 24 (the memoranda meeting) did not constitute a formal discussion because it did not "concern" that grievance. Judge's Decision at 27. According to the Judge, the purpose of the memoranda meeting was not to discuss a grievance, but to deliver the memoranda to the employee placing her on administrative leave and changing her work schedule. *Id.* at 25, 27. The Judge found it to be "of no consequence" that the Respondent's decision to place the employee on administrative leave may have been caused, in part, by her January 21 call to the security police. *Id.* at 27. As the Judge found that the memoranda meeting did not constitute a formal discussion, he concluded that the Respondent did not commit a ULP by failing to notify the Union of the meeting.

The Judge also determined that the Respondent did not violate §§ 7116(a)(1) and (5) of the Statute by changing the employee's schedule without providing the Union with proper notification and an opportunity to bargain over the change to the extent required by the Statute. Specifically, the Judge found that: (1) the Respondent timely notified the Union of its right to bargain over the change, *id.* at 28; (2) the Union failed to request bargaining, *id.*; and (3) in any event, the change was "covered by" the parties' collective bargaining agreement (CBA), *id.* at 28-29. Accordingly, the Judge concluded that the Respondent did not commit a ULP in this regard.

The Judge further found that the Respondent did not violate the Statute by discriminating against the employee for engaging in protected activities. Citing *Letterkenny Army Depot*, 35 FLRA 113, 118 (1990) (*Letterkenny*), the Judge determined that, in order to establish a prima facie case of discrimination, the GC must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity and that consideration of the activity was a motivating factor for the Respondent's "adverse action" against the employee. *Id.* at 29. The Judge also stated that, in order to rebut a prima facie case of discrimination, the Respondent must show that there was a legitimate, nondiscriminatory justification for the adverse action and that it would have taken such action in the absence of protected activity. *Id.* at 29-30.

The Judge found that the employee's January 21 discussion with the Union President and the LRS constituted protected activity under the Statute, but that the employee's phone call to the security police did not. *Id.* at 30. The Judge further found that the Respondent's suspension of the employee constituted an adverse action, but that its placement of her on administrative leave and its change to her work schedule did not. *Id.* at 30-31. Therefore, the Judge found that the GC established a prima facie case of discrimination only with regard to the suspension. *Id.*

Further applying *Letterkenny*, the Judge addressed whether the Respondent had a legitimate, nondiscriminatory justification for suspending the employee.[6] In this regard, the Judge considered the employee's employment history as set forth in her notice of proposed suspension, which based the employee's suspension on her alleged: (1) tardiness; (2) five incidents of disruptive behavior; (3) two incidents of failing to timely complete assignments; and (4) one incident of failing to follow instructions. *Id.* at 17. Specifically, the Judge found that the employee had a history of "sensitivity to what she characterized as surveillance by supervisors," that "[s]he [i]s prone to emotional and excessive reactions to questions or criticism," and that she has a tendency to overreact "to any challenge to her performance." *Id.* at 23. In this

[4] Section 7114(a)(2)(A) of the Statute entitles the exclusive representative to be represented at certain "formal discussion[s] . . . concerning any grievance or any personnel policy or practices or other general condition of employment[.]"

[5] 5 U.S.C. § 7103(a)(9)(A) of the Statute defines "grievance" as "any complaint . . . by any employee concerning any matter relating to the employment of the employee[.]"

[6] Given the Judge's finding that the GC did not establish a prima facie case of discrimination with regard to the Respondent's placement of the employee on administrative leave and its change to her work schedule, he found it unnecessary to address whether the Respondent had a legitimate, nondiscriminatory justification for these actions. *See* Judge's Decision at 30-32.

regard, the Judge cited testimony noting that the January 21 incident was not the first, but the second, time that the employee had called the security police as a result of a work-related incident. *Id.* at 15 (citing Tr. at 183-84). The Judge also cited testimony recounting an incident in which the employee was confronted about leaving work early without permission, during which she "pound[ed] her fist into her hand while saying that 'they' were always after her." *Id.* The Judge concluded that the employee's distress, "while genuine, was not that of a reasonable employee." *Id.* at 23.

The Judge considered the Respondent's documentation of the instances leading up to the employee's suspension, as well as the Respondent's procedural process in administering the suspension, testimony regarding the employee's recurring "disruptive behavior," and the employee's "own demeanor as a witness," and concluded that the Respondent's actions were justified and would have been taken even absent the employee's protected activity. *Id.* at 32.

In addition, the Judge found that the GC cited nothing to show that the stated grounds for the suspension were pretextual, other than to emphasize the proximity in time between the incident on January 21 and the February 11 memorandum setting forth the terms of the employee's suspension. *Id*. at 31. The Judge determined that, although the suspension followed the employee's protected activity, merely showing the proximity of time between an agency's action and an employee's protected activity is not conclusive proof of a violation of the Statute.

Therefore, the Judge concluded that the Respondent did not commit a ULP when it: (1) placed the employee on administrative leave; (2) changed her work schedule; and (3) notified her of the suspension.

For the foregoing reasons, the Judge recommended dismissing the complaint.

III. GC's Exceptions

The GC presents several exceptions to the Judge's decision. Initially, the GC argues that the Judge mistakenly concluded that the memoranda meeting was not a formal discussion because it was not held to discuss a grievance. According to the GC, the record demonstrates that meeting was held, at least in part, as a result of the employee's complaint to the security police, which the Judge found to constitute a grievance under the Statute. In this connection, the GC claims that the Statute and Authority precedent do not require a discussion of the actual merits of a grievance in order for that discussion to "concern" a grievance. Exceptions at 4-5. Thus, the GC claims that the Judge erroneously determined that the meeting did not constitute a formal discussion requiring Union notification and an opportunity to be present.

In addition, the GC argues that the Judge improperly rejected its contention that the Respondent failed to provide the Union with adequate notice and an opportunity to bargain over the Respondent's change to the employee's work schedule. *Id.* at 6-8. The GC claims that the Judge erroneously found that the employee's schedule change was "covered by" the CBA because the Judge failed to apply the Authority's "covered by" test or even cite any applicable provisions of the parties' CBA. *Id.* at 8. The GC also claims that, even though Article 8, Section 6 (Article 8-6) of the CBA provides that shift hours may be changed by supervisors to permit employees to participate in training, this provision does not apply where training is never actually provided.[7] *Id.* at 9-10. Further, the GC contends that, "as a general rule," under Article 8, Section 2 of the CBA, work schedules cannot be changed unilaterally.[8]

Finally, the GC argues that the Judge improperly found that the Respondent did not violate § 7116(a)(1) and (2) by discriminating against the employee for engaging in protected activity when it: (1) placed her on administrative leave; (2) changed her work schedule; and (3) suspended her. *Id.* at 10-17. Initially, the GC contends that the Judge mistakenly determined that the employee's complaint to the security police was not protected activity. *Id.* at 11. The GC further contends that the Judge improperly found that, under *Letterkenny*, 35 FLRA 113, a prima facie case of discrimination requires the GC to show that the Respondent took an "adverse action" against the employee. *Id.* In addition, the GC argues that the Judge failed to consider whether the Agency had a legitimate justification for its actions. *Id.* at 13-15. Moreover, the GC contends that the Respondent's asserted reasons for suspending the employee were mere pretext and that the suspension actually was motivated by her protected activity. *Id.* at 15-16.

IV. Preliminary Issues

A. The Authority will not consider the Respondent's opposition.

Section 2423.40(b) of the Authority's Regulations requires that an opposition to exceptions be

[7] The pertinent wording of Article 8, Section 6 is set forth below.

[8] Article 8, Section 2 provides that: "Except for those individuals whose jobs are directly related to protection of property, security, health, and providing essential services to the base or its personnel, the employer agrees not to change the hours of duty until meeting with the [U]nion jointly to discuss such changes." Exceptions at 9 (citing Respondent's Ex. 9, at 12).

filed with the Authority within twenty days after the date of service of the exceptions. 5 C.F.R. § 2423.40(b). The Authority did not receive the Respondent's opposition within this timeframe, and ordered the Respondent to show cause why its opposition should not be dismissed as untimely. The Respondent filed a response to the order, in which it acknowledges that its opposition is untimely but requests the Authority to consider it because the Respondent's counsel was out of town when the Respondent received the exceptions and the attorney preparing the opposition brief was provided with the wrong filing deadline by the Respondent's counsel. Response to Order at 2.

Section 2429.23(b) of the Authority's Regulations permits the Authority to waive an expired time limit in "extraordinary circumstances." 5 C.F.R. § 2429.23(b). The Authority has declined to find extraordinary circumstances warranting the waiver of an expired time limit where, for example, a decision was received while a party representative was out of town but prior to the expiration of filing the deadline, and a timely submission could have been, but was not, filed. *See, e.g., U.S. Dep't of Veterans Affairs, Med. Ctr., Kansas City, Mo.*, 52 FLRA 282, 284 (1996). In addition, the Authority has consistently held that a party's filing error may not be excused due to receipt of inaccurate filing information. *See, e.g., Dep't of Veterans Affairs, John J. Pershing Med. Ctr., Poplar Bluff, Mo.*, 45 FLRA 791, 792 (1992). Accordingly, nothing in the Respondent's submission establishes that extraordinary circumstances exist justifying a waiver of this time limit. Therefore, we decline to consider the Respondent's opposition.

B. 5 C.F.R. § 2429.5 bars the GC's argument that Article 8, Section 2 of the CBA prohibits unilateral schedule changes.

The GC claims that the change to the employee's work schedule is not covered by the CBA because Article 8, Section 2 of the CBA indicates that work schedules cannot be changed unilaterally.

The Authority's Regulations that were in effect when the Agency filed its exceptions provided that "[t]he Authority will not consider . . . any issue[] which was not presented in the proceedings before the . . . Administrative Law Judge." 5 C.F.R. § 2429.5 (§ 2429.5).[9] Under § 2429.5, the Authority will not consider issues that could have been, but were not, presented in the proceedings below. *See, e.g., U.S. Dep't of the Air Force, Air Force Materiel Command, Robins Air Force Base, Ga.*, 59 FLRA 542, 544 (2003).

The Judge noted that the GC argued that the change to the employee's work schedule was not covered by wording in the CBA authorizing such schedule changes for purposes of providing training, as the employee never received any training. *See* Judge's Decision at 20. However, the GC did not argue before the Judge that Article 8, Section 2 of the CBA provides that work schedules cannot be changed unilaterally. As the GC could have raised this argument before the Judge, but did not do so, we find that § 2429.5 bars the GC from raising this argument in its exceptions. Accordingly, we dismiss the exception.

V. Analysis and Conclusions

A. The Respondent violated § 7116 (a)(1) and (8) by holding a formal discussion with the employee without giving the Union notice and an opportunity to be present.

In order for a union to have a right to be represented under § 7114(a)(2)(A) of the Statute, there must be: (1) a discussion; (2) which is formal; (3) between a representative of the agency and a unit employee or the employee's representative; (4) concerning any grievance or any personnel policy or practice or other general condition of employment. *See, e.g., Soc. Sec. Admin., Office of Hearings & Appeals, Boston Reg'l Office, Boston, Mass.*, 59 FLRA 875, 878 (2004) (Chairman Cabaniss dissenting as to application). The Judge found, and there is no dispute, that the first three requirements are satisfied here. Judge's Decision at 25-26. Thus, the only issue is whether the Judge erred by finding that the memoranda meeting did not concern a grievance.

As noted previously, § 7114(a)(2)(A) of the Statute entitles the exclusive representative to be represented at certain "formal discussion[s] . . . concerning any grievance or any personnel policy or practices or other general condition of employment[.]" The Authority has emphasized that the intent behind § 7114(a)(2)(A) is to afford an exclusive representative the opportunity to be present at discussions addressing matters of interest to unit employees in order to take "appropriate action" to safeguard their interests. *Dep't of Def., Nat'l Guard Bureau, Tex. Adjutant General's Dep't, 149th TAC Fighter Group (ANG) (TAC), Kelly Air Force Base*, 15 FLRA 529, 532 (1984) (*Kelly AFB*). The Authority has long held that the term grievance under § 7114(a)(2)(A) should be interpreted in light of its broad definition in § 7103(a)(9) of the Statute. *NTEU v. FLRA*, 774 F.2d 1181, 1185-89 (D.C. Cir. 1985).

With respect to whether a discussion "concern[s]" a grievance, neither the Statute nor Authority precedent defines the term "concern." Thus, in

[9] Section 2429.5 was revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the GC's exceptions were filed before that date, we apply the prior Regulations.

assessing whether the memoranda meeting concerned a grievance, it is appropriate to consider the ordinary usage of the definition. *See, e.g., ACT, Razorback, Chapter 117*, 56 FLRA 427, 430 (2000) (Chairman Cabaniss concurring). A common dictionary meaning of the word "concern" is "to relate or refer to." *Webster's Third New International Dictionary* 471 (2002). Consistent with this broad definition, the Authority has found that a meeting concerned a grievance even where it did not directly involve a grievant, such as where it was held to interview witnesses scheduled to testify in a grievance arbitration hearing. *AFGE, Local 2054*, 63 FLRA 169, 172 (2009). Further, § 7114(a)(2)(A) requires management to give the employees' exclusive representative notice of, and an opportunity to be present at, a meeting even if the meeting was called for the purpose of making a statement or announcement rather than to engender dialogue. *Dep't of the Air Force, Sacramento Air Logistics Ctr., McClellan Air Force Base, Cal.*, 29 FLRA 594, 598 (1987) (citation omitted).

Here, the Judge found that the purpose of the memoranda meeting was to discuss the contents of two memoranda, one of which stated that it was placing the employee on administrative leave. Judge's Decision at 25, 27. Undisputed record testimony, which the Judge did not discredit, stated that the employee's supervisor "nodded in the affirmative" when the employee asked whether she was being placed on administrative leave because of her call to the security police. *See id.* at 14. Further, as stated previously, the Judge determined that the call to the security police constituted a grievance within the meaning of the Statute, and there are no exceptions to this finding. *See id.* at 30. As this finding is undisputed, we assume, without deciding, that the Judge's conclusion in this regard is correct. Thus, the meeting was called, at least in part, to inform the employee that she was being placed on administrative leave, and this action was taken based on the grievance. Therefore, the meeting "related to" -- i.e., "concerned" -- the grievance. As such, we find that the memoranda meeting constituted a formal discussion. *See, e.g., Kelly AFB*, 15 FLRA at 533. Further, as the Respondent failed to give the Union notice of and an opportunity to attend the meeting, we find that the Respondent violated § 7116 (a)(1) and (8).

B. The Respondent did not violate § 7116(a)(1) and (5) by failing to give the Union notice and an opportunity to bargain over the impact and implementation of a change in conditions of employment.

Prior to implementing a change in conditions of employment, an agency must provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain. *See U.S. Penitentiary, Leavenworth, Kan.*, 55 FLRA 704, 715 (1999) (then-Member Cabaniss dissenting in part as to another matter). The "covered by" doctrine excuses parties from bargaining on the ground that they have already bargained and reached agreement concerning the matter at issue. *U.S. Dep't of Health & Human Servs., SSA, Balt., Md.*, 47 FLRA 1004, 1013, 1015-19 (1993). The doctrine has two prongs. Under the first prong, if a party seeks to bargain over a matter that is expressly addressed by the terms of the parties' CBA, then the other party may properly refuse to bargain over the matter. *U.S. Customs Serv., Customs Mgmt. Ctr., Miami, Fla.*, 56 FLRA 809, 813-814 (2000). The second prong provides that, if a matter is not expressly addressed by the terms of the parties' CBA, but is nonetheless inseparably bound up with and, thus, an aspect of a subject covered by the terms of the agreement, then the other party also may properly refuse to bargain over the matter. *Id*.

The Judge found that the Respondent's change to the employee's work schedule was to accommodate her request for training. Judge's Decision at 29. Although the Judge determined that the Respondent's change to the employee's work schedule was covered by the CBA, he did not cite a specific CBA provision in support of this finding. However, in the section of his decision setting forth relevant CBA provisions, he cited Article 8-6 of the CBA. *Id.* at 3. Article 8-6, "Change in Shift Hours," provides: "Shift hours may be changed by the supervisor because of mission requirements or to permit an employee to participate in grievances, appeals, official hearings, investigations, and official training." *Id.* Thus, Article 8-6 expressly provides that the Respondent can change employees' schedules so employees can participate in training.

There is no dispute that, at the time of the memoranda meeting, the Respondent claimed that it was changing the employee's schedule so that she could participate in training. As a result, the change in work schedules was expressly contained in Article 8-6. Although the GC argues that the employee never actually received the training that purportedly necessitated the change to her work schedule, the GC does not cite, and there is no basis for finding, that this precludes the change from being expressly contained in Article 8-6. Thus, we find that the change is covered by Article 8-6 under the first prong of the covered by doctrine.

Even if the change were not expressly covered by Article 8-6, the circumstances under which the Respondent can change employees' schedules are inseparably bound up with and, thus, aspects of a subject covered by the terms of Article 8-6. The Respondent's change to the employee's work schedule thereby also meets the second prong of the covered by doctrine. As

such, the Respondent's change to the employee's work schedule was "covered by" Article 8-6.

For the foregoing reasons, we find that the Respondent did not violate § 7116(a)(1) and (5) as alleged.[10] Accordingly, we deny the GC's exception.

C. The Respondent violated § 7116(a)(2) by changing the employee's work schedule but not by placing her on administrative leave and suspending her.

The GC claims that the Respondent discriminated against the grievant for engaging in protected activity when it: (1) placed the employee on administrative leave; (2) changed her work schedule; and (3) suspended her. In *Letterkenny*, 35 FLRA 113, the Authority established an analytic framework for evaluating allegations of discrimination under § 7116(a)(2) of the Statute. Under that framework, the GC bears the burden of proving 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. 35 FLRA at 118. As part of its prima facie case, the GC may seek to establish that the Respondent's asserted reasons for taking the allegedly discriminatory action are pretextual. *Id.* at 122-123. The existence of a prima facie case is determined by considering the evidence in the record as a whole, not just the evidence presented by the GC. *See Dep't of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 55 FLRA 1201, 1205 (2000).

Once the GC makes the required prima facie showing, an agency may establish the affirmative defense that: (1) there was a legitimate justification for the action; and (2) the same action would have been taken even in the absence of the protected activity. *U.S. Dep't of Veterans Affairs, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 58 FLRA 44, 47 (2002).

The Authority has long considered the timing of a management action significant in determining whether a party has established a prima facie case of discrimination under § 7116(a)(2) of the Statute. *See U.S. Dep't of the Navy, Naval Aviation Depot, Naval Air Station Alameda, Alameda, Cal.*, 38 FLRA 567, 568 (1990); *Dep't of the Air Force, Ogden Air Logistics Ctr., Hill Air Force Base, Utah*, 35 FLRA 891, 900 (1990). Specifically, the Authority considers the proximity of time of an agency's action in conjunction with the facts and circumstances to determine whether a preponderance of the record evidence supports finding a violation. *See, e.g., U.S. Customs Serv., Region IV, Miami Dist., Miami, Fla.*, 36 FLRA 489 (1990) (*Customs*). However, although the closeness in time between an agency's employment decision and protected union activity engaged in by an employee may support an inference of illegal anti-union motivation, it is not conclusive proof of a violation. *See U.S. Dep't of Labor, Wash., D.C.*, 37 FLRA 25, 37 (1990) (*DOL*). As relevant here, the Authority has found that a respondent's change to an employee's work assignment violated the Statute where, among other things, the assignment followed shortly after the employee's protected activity. *Customs*, 36 FLRA at 495-99. In addition, the Authority has found a § 7116(a)(2) violation where an agency claims it is taking action for a certain reason after an employee engages in protected activity, but the evidence contradicts the purported reason for the action. *See id.* at 497-99.

1. Work Schedule

The employee called the security police on January 21. As discussed previously, we assume without deciding that the Judge did not err in his undisputed finding that this call was a "grievance" within the meaning of § 7103(a)(9)(A) of the Statute. Although the Judge found that the call did not constitute "protected activity," the Authority has held that filing a grievance constitutes protected activity. *NTEU, Chapter 284*, 60 FLRA 230, 231 (2004) (Chairman Cabaniss dissenting). The Respondent changed the employee's work schedule on the next business day after the phone call.

With regard to whether the change in work schedule was motivated by the phone call, the close proximity of time between the two events, coupled with the fact that the Respondent never provided the training that it claimed necessitated lengthening the employee's workday, support the GC's contention that the schedule change was motivated by the employee's protected activity. *Customs*, 36 FLRA at 495-99. Therefore, we find that the GC has established a prima facie case of discrimination with regard to the Respondent's change to the employee's work schedule.

With regard to whether the Respondent has met its rebuttal burden, in the Respondent's memorandum setting forth the terms of the employee's schedule change, the Respondent claimed that the change was necessary because the employee would be required to attend training each Tuesday morning beginning at 7:30 a.m. Judge's Decision at 13, 14. However, despite the employee's prior requests for training, the

[10] As we have found that the Respondent's change to the employee's work schedule was covered by the CBA, we find it unnecessary to address the GC's arguments that the Respondent failed to provide the Union with adequate notice and an opportunity to bargain over the change to the employee's work schedule.

Respondent previously had never granted these requests. *Id.* at 14 (citing Tr. at 105). Then, shortly after the employee engaged in protected activity, the Respondent changed the employee's work schedule to purportedly allow for training. The Respondent does not explain its justification for implementing the new schedule to accommodate the mandatory training at the time that it did. In addition, the Respondent does not explain why it was necessary to lengthen the employee's work day on every day of the work week when the mandatory training that allegedly required the schedule change was scheduled to take place only one day a week. Moreover, the Respondent never actually scheduled the employee for the training that purportedly necessitated lengthening her work day. Taken as a whole, the facts do not demonstrate that the Respondent had a legitimate justification for changing the employee's work schedule and that it would have done so even absent the employee's protected activity. Therefore, we find that the Respondent has failed to demonstrate that it had a legitimate justification for changing the employee's work schedule.

For the foregoing reasons, we find that the Respondent violated § 7116(a)(2) by changing the employee's work schedule.

2. Placement on Administrative Leave

Undisputed record testimony, which the Judge did not discredit, provided that the Respondent's decision to place the employee on administrative leave was for the purpose of helping her cope with workplace stress and not as a result of her protected activity. Judge's Decision at 14-15. In this regard, the Judge concluded that the employee tended to become distressed and would regularly overreact when supervisors provided her with feedback on her performance. Judge's Decision at 23. In addition, undisputed record testimony, which the Judge did not discredit, indicates that the employee had concerns about health issues that her supervisors thought might be best addressed while on administrative leave. *Id.* at 14-15. This undisputed record evidence supports a finding that the Respondent had a legitimate, nondiscriminatory justification for placing the employee on administrative leave, and would have done so, even absent her call to the security police. Accordingly, even assuming that the GC has established a prima facie case of discrimination, we find that the Respondent has met its rebuttal burden under *Letterkenny*. Thus, we find that the Respondent did not violate § 7116(a)(2).

3. Suspension

The Judge found that the Respondent's notice of proposed suspension to the employee cited: (1) her tardiness; (2) five incidents of disruptive behavior; (3) two incidents of failing to timely complete assignments; and (4) one incident of failing to follow instructions. *Id.* at 17, 31. In addition, the Judge determined that the GC cited nothing to show that the stated grounds for the suspension were pretextual, other than to emphasize the proximity of time between the incident on January 21 and the February 11 memorandum setting forth the terms of the employee's suspension. *Id*. at 31.

As stated previously, although the Authority considers the proximity of time of an agency's action in conjunction with the facts and circumstances to determine whether a preponderance of the record evidence supports finding a violation, *see Customs*, 36 FLRA at 495-99, the Authority has also held that such proximity is not conclusive proof of a violation, *see DOL*, 37 FLRA at 37. Consistent with these principles, the Judge determined that, although the suspension followed the employee's protected activity, this fact was not conclusive proof of discrimination. In addition, the Judge considered the Respondent's documentation of the employee's other performance and disciplinary issues -- which took place over the course of the two months leading up to the suspension -- as well as the Respondent's procedural process in administering the suspension, testimony setting forth the employee's recurring "disruptive behavior," and the employee's "own demeanor as a witness," in concluding that the Respondent's actions were justified and would have been taken in the absence of the employee's protected activity. Judge's Decision at 32. These findings support a conclusion that, even if the GC met its prima facie case under *Letterkenny*, the Respondent met its rebuttal burden by establishing that it would have suspended the employee even absent her protected activity. Thus, we find that the Respondent did not violate § 7116(a)(2) in this respect.

VI. Order

Pursuant to § 2423.41(c) of the Authority's Regulations and § 7118 of the Statute, the Respondent shall:

1. Cease and desist from:

(a) Failing or refusing to provide the Union with advance notice and the opportunity to be represented at formal discussions concerning any grievance or any personnel policy or practices or other general conditions of employment.

(b) Discriminating against any employee by changing his or her work schedule because he or she has engaged in activities protected under the Statute.

(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured them by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Provide the Union with advance notice of and the opportunity to be represented at formal discussions concerning any grievance or any personnel policy or practices or other general conditions of employment.

(b) Post at its facilities, where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Commander of the Air Force, 325th Fighter Wing, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to § 2423.41(e) of the Authority's Regulations, notify the Regional Director, Atlanta Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the United States Department of Defense, United States Air Force, 325th Fighter Wing, Tyndall Air Force Base, Florida, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT fail or refuse to provide the Union with advance notice and the opportunity to be represented at formal discussions concerning any grievance or any personnel policy or practices or other general conditions of employment.

WE WILL NOT discriminate against any employee by changing his or her work schedule because he or she has engaged in activities protected under the Statute.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce unit employees in the exercise of their rights assured by the Statute.

_____
(Respondent)

Date:_____By: _____
(Signature) (Commanding Officer)

This Notice must remain posted for 60 consecutive days from the date of this posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, then they may communicate directly with the Regional Director for the Atlanta Regional Office of the Federal Labor Relations Authority, whose address is: Federal Labor Relations Authority, 225 Peachtree Street, Suite 1950, Atlanta, Georgia 30303-1730, and whose telephone number is: (404) 331-5300.

Office of Administrative Law Judges

DEPARTMENT OF DEFENSE
UNITED STATES AIR FORCE
325TH FIGHTER WING
TYNDALL AFB, FLORIDA
Respondent

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES
LOCAL 1113, AFL-CIO
Charging Party

Case No. AT-CA-05-0293

Ruth Pippin Dow, Esquire
For the General Counsel

Major Robert M. Gerleman
Major Lawrence Lynch
For the Respondent

Andrew Colvin
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

On May 25, 2005,[1] the American Federation of Government Employees (AFGE), Local 1113, AFL-CIO (Union) filed an unfair labor practice charge against the Department of Defense, United States Air Force, 325th Fighter Wing, Tyndall Air Force Base, Florida (Respondent); an amended charge was filed on October 31 (GC Exs. 1(a) and (b)). On December 28 the Regional Director of the Atlanta Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing in which it was alleged that, on January 21, the Respondent committed an unfair labor practice in violation of §7116(a)(1) of the Federal Service Labor-Management Relations Statute (Statute) by virtue of the actions of Kimberly D. Zakar, a management representative of the Respondent, who addressed Andrew Colvin, the President of the Union, and Kathryn Blanchard (also known as Becky Blanchard), a member of the bargaining unit represented by the Union, in a loud and threatening manner because they were engaged in activities protected under the Statute. It was also alleged that the Respondent violated §7116(a)(1) of the Statute[2] when Zakar initiated a second confrontation with Colvin during which she addressed him inappropriately while he was talking to Wanda Kirkpatrick, another member of the bargaining unit. It was further alleged that, on January 24, the Respondent committed an unfair labor practice in violation of §7116(a)(1) and (8) by holding a formal discussion with Blanchard without giving the Union notice and the opportunity to attend; the aforesaid action by the Respondent was also alleged to be in violation of §7114(a)(2)(A). It was also alleged that, on January 24, the Respondent committed an unfair labor practice in violation of §7116(a)(1) and (5) by changing Blanchard's work schedule without giving prior notice to the Union and by not affording the Union the opportunity to bargain to the extent required by the Statute. Finally, it is alleged that all of the aforesaid actions against Blanchard, along with the fact that she was placed on administrative leave on January 24 and received a notice of proposed suspension on February 11 and a notice of suspension on March 7, were taken by the Respondent because of her protected activity, thus constituting an unfair labor practice in violation of §7116(a)(1) and (2) (GC Ex. 1(c)). The Respondent filed a timely Answer in which it denied the alleged violations
(GC Ex. 1(g)).

A hearing was held in Panama City, Florida on May 25 and 26, 2006. The parties were present with counsel and were afforded the opportunity to present evidence and to cross-examine witnesses. This Decision is based upon consideration of all of the evidence, including the demeanor of witnesses, and of the post-hearing briefs submitted by each of the parties.

Findings of Fact

The Respondent is an agency within the meaning of §7103(a)(3). The Union is a labor organization as defined in §7103(a)(4) and is the exclusive representative of a unit of the Respondent's employees which is appropriate for collective bargaining. Blanchard is an employee as defined in §7103(a)(2) and, at all times pertinent to this case, was a member of the bargaining unit represented by the Union (GC Ex. 1(c) and 1(g)). Her job classification was Military Pay Clerk; she was assigned to the Customer Support Section of the FMF Flight, 325th Comptroller Squadron (Tr. 59).

The Collective Bargaining Agreement

At all times pertinent to this case a collective bargaining agreement (CBA) existed between the Union and Tyndall Air Force Base (Tr. 13; Resp. Ex. 9).

[1] All subsequently cited dates are in 2005 unless otherwise indicated.

[2] For the sake of brevity, subsequently cited sections of the Statute will be identified only by section numbers.

Article 5, entitled "**UNION RIGHTS AND REPRESENTATION**" states, in pertinent part:

> Section 6. **AUTHORIZED OFFICIAL TIME**
>
> . . . If the representational matter involves contact with another employee(s)(in the investigation of grievances), the union official must first obtain permission from the employee's immediate supervisor for release. . . . . Union officials will report to the immediate supervisor and obtain their permission prior to entering the work area. The immediate supervisor will be informed when the union official returns to the duty section.

Article 8, entitled "**HOURS OF WORK AND TOURS OF DUTY**" states, in pertinent part:

> Section 6. **CHANGE IN SHIFT HOURS**: Shift hours may be changed by the supervisor because of mission requirements or to permit an employee to participate in grievances, appeals, official hearings, investigations, and official training.

Blanchard's Past Problems

Blanchard's work history was somewhat troubled. She testified that, on December 8, 2004, she was held up in traffic on her way to work and telephoned Sergeant Winslow, who has then her supervisor, to inform her that she would be late (it turned out that she was delayed for about 5 minutes). Blanchard told Winslow that she would take leave to cover her tardiness. Later that day Winslow sent Blanchard an e-mail message stating that she would not have to take leave because she had not been late for some time. Winslow also informed Blanchard that there would be administrative action if another such incident occurred (Tr. 61, 62).

Later that day Winslow came into Blanchard's cubicle and, according to Blanchard, "demanded" a copy of an e-mail message and remained in the cubicle while looking over Blanchard's shoulder and stating that she needed the e-mail message right away. Blanchard further testified that the incident left her trembling, so she called the Family Practice line and heard a recording that advised her to call 911 if she felt that she was having a life-threatening emergency. She did so and the security police and the emergency medical technicians responded. Her blood pressure was elevated and a medical technician gave her oxygen and made a hospital appointment for her. Blanchard later went to the hospital where the doctor found that her blood pressure had gone down. He knew that she was having "some anxiety" at work and gave her extra medication to go with the anti-depressants that she was already taking
(Tr. 62-64).

On January 5 Blanchard was at her desk when she was approached by two security police who ordered her to accompany them. She was taken to the office of Lieutenant Gregory who, along with Lieutenant Smith, was the Flight Chief. Blanchard was then asked if she had a lawyer; she stated that she did not and was allowed to call Colvin. Colvin was unable to come there at that time, so they made an appointment to come to the security office on the afternoon of the next day (Tr. 65, 66).

The next day Colvin and Blanchard went to the security office where Blanchard's statement was taken (GC Ex. 3) in connection with an investigation of the alleged theft of a record in which her training time was recorded.[3] Blanchard has no knowledge of the results of the investigation, but she was never charged or disciplined with regard to the alleged theft.[4] However, she testified that she was criticized for not completing her work on the day of her interrogation at the security office (Tr. 65-69).[5]

Blanchard also testified that she had previously spoken to the Inspector General (IG) to complain about being harassed and followed around. On January 6 Blanchard sent an e-mail message to the IG informing him of the incident involving the training record (Tr. 70). On the same date Colonel Armand Grassi, the IG, sent Blanchard an e-mail message (GC Ex. 4) indicating that her complaint should be directed to the appropriate Civilian Personnel Office and attaching a copy of the form to be used for filing a complaint of reprisal with the IG's office. (It is unclear whether she ever filed a complaint with the IG.) Colonel Grassi also offered to assist Blanchard in any way that he could.

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[3] It is unclear whether the document was used to record only Blanchard's training or the training of a group of employees.

[4] According to Blanchard, her interrogation was to be conducted by Winslow's husband. Another investigator was assigned after she objected (Tr. 66,67).

[5] There is no other evidence to indicate that Blanchard was counseled for failure to complete her work on the day of her interrogation with regard to the alleged theft. However, a memorandum to Blanchard from Winslow (Resp. Ex. 5, p.13) indicates that Blanchard did not complete her work on January 21 when she called the Security Police because of alleged harassment by Zakar. It is possible that Blanchard confused the dates as she did on a number of occasions during her testimony.

Blanchard stated that she informally complained to Zakar because Winslow kept writing her up for behavior. Blanchard also stated that she was intimidated by Zakar because Zakar attempted to counsel her about her behavior in the presence of another employee whom Zakar identified as a trainee (Tr. 72, 73). Graber testified that he replaced Winslow as Blanchard's immediate supervisor in January because of friction between Blanchard and Winslow and that he so informed Blanchard when the change occurred (Tr. 170-172, 189, 190). However, in describing an incident on January 24, Blanchard testified that Graber was not her supervisor (Tr. 82).

The Incident in Blanchard's Cubicle

Some time around mid-day on January 21 Colvin entered the work area of the 325th Comptroller Squadron to speak to Blanchard. Colvin did not first seek permission from Graber, but proceeded past Graber's cubicle and directly to Blanchard's cubicle.[6] Both Graber[7] and Technical Sergeant Abel Luna were in Graber's cubicle[8] and saw Colvin go to Blanchard's cubicle[9] (Tr. 26, 27, 151, 152, 176).[10] Because Graber was under the impression that Colvin was acting improperly, he went to Zakar's office to seek clarification (Tr. 174-178). Zakar was a Human Resources Specialist who was responsible for labor and employee relations for Respondent's civilian employees. Among her duties was the administration of the CBA (Tr. 202, 203).

Zakar confirmed Graber's impression that Colvin was not following the procedure which was laid out in the CBA. She thereupon took a copy of the CBA and proceeded to Blanchard's cubicle along with Graber. Zakar told Colvin that he was not following the contract. There is some divergence in testimony as to how Zakar conducted herself in dealing with Colvin. Colvin and Blanchard testified that Zakar was yelling at Colvin, waving the CBA and acting as if she were "out of control" (Tr. 30, 31, 72). Blanchard testified that she asked Zakar to leave because she was upsetting her by standing about 3 feet from her chair (Tr. 72).

Zakar corroborated the testimony of Colvin and Blanchard with regard to the gist of the conversation, but denied that she had raised her voice or was otherwise out of control. Zakar further testified that Blanchard stood up and started yelling when she entered her cubicle and that Colvin told her to calm down.[11] According to Zakar she did not speak to Blanchard other than to offer to read her the pertinent portion of the CBA (Tr. 203-207). Graber testified that Zakar raised her voice after Blanchard's outburst; he made the somewhat ambiguous statement that, "I don't think that anybody was yelling at anybody but they got loud" (Tr. 179). Luna, who remained in Graber's cubicle, could hear Zakar's voice over the partition and testified that her voice was somewhat louder than normal (Tr. 156). Lieutenant Gary Smith was the commander of the Financial Services Flight to which Blanchard, Luna and Graber were assigned. On January 21 Smith was in the area looking for Sgt. McCloud, who was one of his noncommissioned officers, with whom he wanted to discuss something when he heard a loud voice which he recognized to be Colvin's.[12] He proceeded to Blanchard's cubicle to caution Colvin against disrupting customers and others assigned to the area, but by the time he got there the incident was about over and the participants were on their way out.[13] Blanchard later approached him and complained about being harassed, but did not indicate who was harassing her (Tr. 160-162).

It is undisputed that Colvin acknowledged to Zakar that he should have consulted Graber prior to

[6] The layout of the immediate vicinity of Graber's and Blanchard's cubicles is shown in Joint Ex. 1. Blanchard's cubicle was adjacent to Graber's.

[7] At the time of this incident Graber was still on active duty with the rank of Senior Master Sergeant. Some time after the incidents upon which this case is based Graber retired from active duty and became the Chief Accounting Liaison in the Comptroller Squadron (Tr. 168, 169).

[8] Luna marked his position in Graber's cubicle with a circled "L" and Graber's position with a circled "G" on Joint Exhibit 1 (Tr. 149).

[9] Luna marked Colvin's path from the entrance to the waiting area to Blanchard's cubicle with circled "C2" and "C3" on Joint Exhibit 1 (Tr. 150-152).

[10] Colvin testified that he had intended to request permission from Graber to speak to Blanchard, but that he was distracted by another person before he could do so. When Colvin finished his conversation with the other person Graber was no longer in his office (Tr. 26, 27). As will be shown, Graber's absence was probably due to his consultation with Zakar. The fact that Colvin intended to see Graber indicates that, in spite of Blanchard's purported uncertainty as to the identity of her immediate supervisor, Colvin was aware that Graber had succeeded Winslow in that capacity.

[11] Colvin himself testified that Blanchard accused Zakar of trying to get her fired. According to Colvin, Blanchard also accused Zakar of showing her records to new supervisors and stating that "In less than one week, everybody started coming down on me" (Tr. 27, 28). It is unclear what Blanchard meant by "new supervisors" but, as shown above, Graber replaced Winslow as Blanchard's supervisor some time in January.

[12] Smith marked his location at the time with a circled "M" on Joint Exhibit 1 (Tr. 162).

[13] Smith marked Colvin's position at that time with a circled "C4" on Joint Exhibit 1 (Tr. 162). He marked his own position with a circled "S" (Tr. 166).

speaking with Blanchard (Tr. 27, 30). Furthermore, Colvin and Graber testified that Colvin acted to calm Blanchard's reaction to Zakar's appearance in her cubicle (Tr. 29, 179). Although it is unclear how long the confrontation between Zakar, Blanchard and Colvin lasted, it apparently was of relatively short duration. Blanchard first testified that the incident lasted about 30 or 40 minutes; she then said that it wasn't very long and could have been about 30 minutes or less (Tr. 75). Colvin testified that he was in Blanchard's cubicle for a very short time before Zakar's arrival (Tr. 27). He also stated that his conversation with Zakar and Graber lasted about 5 minutes (Tr. 29). Although Luna left Graber's cubicle before Colvin left the area, he (Luna) later saw the participants disperse and estimated that their conversation went on for no more than 5 to 10 minutes (Tr. 157).

Following the incident in her cubicle, Blanchard called the IG and was told that he could not help her but that she could call the security office. Blanchard did so and made a written statement in which she briefly described the incident, indicating that Zakar had addressed Colvin in a "threatening tone" (Tr. 79, 80; GC Ex. 5)[14]. Colvin submitted a statement (GC Ex. 6) in which he indicated that Zakar explained that he needed to follow the CBA prior to speaking to employees. Colvin made no mention of Zakar's demeanor or of Blanchard's reaction to her arrival. In Graber's statement (Resp. Ex. 1) he made no mention of Zakar's demeanor, but stated that Blanchard became "visibly upset" when Zakar reminded Colvin about the requirement of making an appointment before visiting employees. He also stated that Blanchard interrupted the conversation several times and that Colvin told her to be quiet.

Luna's statement (Resp. Ex. 2) made no mention of outbursts from anyone in Blanchard's cubicle. In Smith's statement (Resp. Ex. 3) he indicated that he went to Blanchard's cubicle because Colvin's voice was so loud that it was disturbing him, his customers and his "troops". Smith further stated that he did not see either Zakar or Graber make any "oral or physical contact" with Blanchard. After the incident, Blanchard told him about being harassed by "them". When Smith asked Blanchard who she meant she did not identify anyone but said that "she" was following her.

In Zakar's statement (Resp. Ex. 4) she indicated that, when she arrived at Blanchard's cubicle, she saw Blanchard and Colvin looking at the wall calendar and talking.[15] Zakar also stated that, during her conversation with Colvin, Blanchard stood up and said, "she is the problem". At that point Colvin told her to, "sit down and shut up".

My review of the evidence leads to the conclusion that, while both Colvin and Zakar were speaking in voices which were louder than normal, the incident did not degenerate into a shouting match, nor could either Colvin's or Zakar's tone have been fairly characterized as yelling. Zakar's manner appears to have been somewhat abrupt and might have been an over-reaction to Colvin's appearance in the work area. Nevertheless, Zakar's actions apparently were prompted by Graber's legitimate concern over a breach of the contractual procedure for visits by Union representatives as well as by Blanchard's emotional reaction to Graber's and her appearance. While Zakar might have acted more diplomatically, the credible evidence does not support the allegation that she was out of control. The evidence also leads me to the conclusion that Blanchard's distress, while genuine, was not caused by inappropriate conduct by Zakar, but by Blanchard's perception that Zakar and others were out to get her.

The Incident at the Elevator

Colvin testified that, after the confrontation in Blanchard's cubicle, he proceeded to the elevator. After he had pressed the call button he saw Wanda Kirkpatrick, a former coworker and member of the bargaining unit, come out of the ladies' room. According to Colvin, he had tried to assist Kirkpatrick with regard to a reduction in force which had caused her grade to be reduced from GS-9 to GS-5. Kirkpatrick called Colvin aside to question him when Zakar and Graber came out of the Manpower Office which was across the foyer. When Zakar saw Colvin, she "politely turned", approached him and asked why he was in the building. Colvin told Zakar that she did not have the authority to order him out of the building. Zakar then asked Kirkpatrick why she was not behind her desk. At that point, Colvin got into the elevator and left the building (Tr. 32, 33). Colvin included a generally consistent description of this incident in his written statement to the security police regarding the incident in Blanchard's cubicle (GC Ex. 6).

Kirkpatrick testified that she was on her way back to her office from the ladies' room when she saw Colvin. They began talking when someone, whom she later learned was Zakar, came "rushing out of finance". Zakar asked Kirkpatrick what she was doing out of her office and then told Colvin that he was not allowed in the building other than on official business. According to Kirkpatrick, Zakar's facial expression suggested that she

[14] Blanchard's statement, as well as all of the others, was made on January 21.

[15] Zakar's description of Colvin's and Blanchard's activities is consistent with Colvin's testimony and written statement that he was in Blanchard's cubicle only to ascertain when she would be available for a substantive discussion.

was very angry and she was rushing toward her and Colvin as if she was "on the attack". Kirkpatrick returned to her office without speaking to Zakar (Tr. 141, 142).

Graber testified that he saw Zakar approach Colvin as he was standing by the elevator with a civilian that Graber did not recognize. Zakar spoke to Colvin about conducting business during duty hours. According to Graber, both Zakar and Colvin were speaking somewhat loudly. The incident lasted only a few minutes; Colvin told Graber that he had to do an 1168, which is a witness statement[16] (Tr. 192, 193). Graber included the following description of this incident in his written statement (Resp. Ex. 1):

> Mr Colvin was in the second floor atrium talking to a civilian I don't know. Ms Zakar reminded Mr. Colvin about conducting union business without an approved appointment. Mr. Colvin got defensive and told me I was a "witness", that Ms Zakar was "harassing" him and he would take care of her through the General. He also told me to write an MFR [presumably a witness statement]. Ms Colvin [*sic*] told him he could not order management to do anything.

Zakar testified that, after the incident in Blanchard's cubicle, she went to Graber's cubicle to discuss some issues. She then left the Comptroller Squadron area and proceeded to the second floor hallway where she saw Colvin speaking to Kirkpatrick, whom she knew to be a bargaining unit employee with pending issues. According to Zakar, she asked Kirkpatrick if she was on a break or lunch period; when Kirkpatrick said that she was not, Zakar asked Colvin to follow the provisions of the CBA and make arrangements with management to speak with employees during duty hours. She also told Colvin that he should depart the work center (presumably the building) until he had made the appropriate arrangements. Colvin then told Zakar that he was on his way downstairs to see the General at which point Zakar told Colvin to do whatever he felt was necessary. Zakar assumed that Colvin was referring to the Wing Commander whose office was in the building. Zakar further testified that Colvin was entitled to be in the building so long as he made the appropriate arrangements to talk to employees. Zakar denied that she rushed out to the elevator area because, having recently recovered from a heart attack, she was incapable of doing so (Tr. 210-212).

[16] Each of the written statements taken by the security police were on 1168 forms.

As with the incident in Blanchard's cubicle, the evidence as to the incident at the elevator is unclear. It is likely that Zakar was annoyed because Colvin was again conferring with a bargaining unit employee without having made an appointment with her supervisor. It is also likely that both Zakar and Colvin raised their voices. However, I credit Colvin's written statement, which was made shortly after the incident, that Zakar was polite. It is also clear that Colvin was aware that his conversation with Kirkpatrick, which was more than a casual exchange of greetings, was in violation of the contract since she was not on an authorized break and he had not made the necessary arrangements with her supervisor.

Blanchard's Meeting with Graber

Shortly after Blanchard arrived at work on January 24 Graber came to her cubicle and told her to come with him. Blanchard asked if she could call her Union representative at which time Graber told her that she did not need the representative since it was not a disciplinary meeting. She accompanied Graber to the conference room which was across the hall from her cubicle (see Jt. Ex. 1).[17] Another person was in the conference room whom Blanchard identified as Deborah Laskiewicz, the MSG Commander.[18] Laskiewicz said nothing during the meeting (Tr. 87). Graber then handed Blanchard a memorandum (GC Ex. 7) which was addressed to her and signed by him as Superintendent, Financial Management. The memorandum states, in pertinent part:

> SUBJECT: Administrative Leave
>
> 1. Effective 1200 hours, 24 January 2005, you are being placed in an administrative leave status (i.e., paid, non-duty status) until further notice. . . . . The reason I am taking this action is because your recent disruptive behavior indicates you may be experiencing difficulty handling workplace situations. I realize you have minimal annual and sick leave balances; therefore, it is my sincere hope that by allowing you some paid time off you might better cope with your difficulties when you return to

[17] Blanchard acknowledged that she often went to the conference room, which was used for training, and that she and other employees sometimes ate their lunch in the room (Tr. 120).

[18] Laskiewicz later testified that she was the Deputy Commander of the 325th Mission Support Squadron which is separate from the Comptroller Squadron (Tr. 197).

> duty. Rest and relaxation should help you in this endeavor.
>
> 2. There are numerous agencies, both on the installation and off the installation that might be of assistance to you. You may seek the assistance of the Life Skills Center or the Chaplain. [The telephone numbers of each of those offices is indicated as well as a statement that the Life Skills Center is ready to assist her if she desires to contact an off-base agency.]
>
> 3. Please know that management is willing to make reasonable accommodation for any medically related issue you may have. Accordingly, if you choose to seek a medical evaluation, request you provide the following information to me as soon as possible, but no later than close of business 11 February 2005:
>
> [Listing of required information including diagnosis, treatment, estimated date of full recovery and impact on life activities.]
>
> 4. Attached is a copy of your core personnel document for any physician to review at your discretion. [Instructions regarding submission of medical information.] I would appreciate your prompt attention to this matter so that I can determine whether or not any accommodations are required for you to perform the essential functions of your job.
>
> 5. It is my sincere hope that we can assist you in adjusting to the demands of your duties and responsibilities, and your work environment. I look forward to your return as a productive employee of the 325th Comptroller Squadron.

AFGE Local 1113 is listed as one of the copy addressees. Colvin acknowledged that administrative leave is not discipline (Tr. 48).

Graber handed Blanchard a second memorandum (Resp. Ex. 10) which was addressed to her from him and which reads as follows:

> SUBJECT: Change in Work Schedule
>
> 1. In accordance with Article 8, Section 1.b.(3), of the current Memorandum of Agreement between Tyndall AFB and American Federation of Government Employees (AFGE) Local 1113, I am notifying you that effective 6 February 2005 your work schedule will change. Your new schedule will be Monday through Friday, 0730 to 1630 each day, with a one-hour lunch period from 1130-1230 each day. This change is necessary because your presence is required at squadron training each Tuesday morning beginning at 0730.
>
> 2. You have been tardy on numerous occasions while working for TSgt Winslow. Tardiness will no longer be tolerated and may result in disciplinary action. I expect you to be at work (i.e., at your desk and ready to begin work) each morning at 0730, leave promptly for lunch at 1130 each day, and return promptly from lunch at 1230 each day. You will be required to depart the workcenter promptly at 1630 each day. Credit hours will not be approved unless you have discussed the reasons for such with me, and obtained my approval, in advance, of any credit hours being worked.
>
> 3. If you have any questions or concerns regarding this schedule change please feel free to discuss them with me.

A copy is addressed to AFGE Local 1113. (Tr. 80-83)

Blanchard testified that she was confused by the first paragraph of the first memorandum because it mentioned administrative leave rather than a disciplinary action. She had been placed on administrative leave some years before for medical reasons. She was also upset about the fact that she was to be on leave until further notice as well as the reference to disruptive behavior. Blanchard asked Graber if the memorandum was the result of her having called the security police on January 21 and he nodded in the affirmative (Tr. 83, 84).

Blanchard stated that, at the time she learned of the change in her schedule, she was working from 8:00 to 4:30 with a 30 minute lunch break. She was distressed over the change because it would interfere with her ability to get her daughters to school (Tr. 85). She has

two daughters with special needs who attend different schools; she cannot drop them off prior to 7:30 because there is no supervision before that time (Tr. 93, 94). Blanchard was unclear as to when she notified any supervisor of this problem. She did state that Winslow had been aware of her situation, but gave no details as to whether Winslow or anyone else knew of her daughters' school schedule. Blanchard testified that she did not mention this problem during the meeting on January 24 because she was afraid. She did not remember what she said other than that "this is not good" (Tr. 94, 95, 97). Graber told her that the change in schedule was necessary for training. Blanchard had made several requests for training but the requests had not been granted and she was never included in the scheduled training (Tr. 105).

Graber testified that he placed Blanchard on administrative leave because she was stressed and stated that she needed to consult a doctor because of stomach problems and headaches. He thought that a period of leave might allow her to "relax and get back in the game" (Tr. 182). Graber was of the opinion that Blanchard could not handle work-related stress very well because of a number of incidents. For example, on one occasion Blanchard had left work early; when Winslow mentioned it, Blanchard said that Graber had given her permission to leave early in spite of the fact that he had not done so. When Graber confronted Blanchard her face got red and she kept pounding her fist into her hand while saying that "they" were always after her (Tr. 182, 183). Graber also referred to the incident of January 21 after which Blanchard called 911. This was the second time that she had done so (Tr. 183, 184).

Graber further testified that he had Blanchard come to the conference room so that they could have privacy. When he first approached Blanchard she picked up the telephone and said that she had to call Colvin if this was a disciplinary matter. Graber stated that he told Blanchard that it was not a disciplinary matter, but that she could call Colvin if she wanted to. According to Graber, Blanchard did not call Colvin and followed him to the conference room which was about 20 yards from her cubicle (Tr. 186, 187). Graber wanted a female witness present so as to provide Blanchard with a level of comfort. He did not want to bring Winslow in because of past "head butting" and therefore asked Laskiewicz to attend because her office was just around the corner and she was a civilian. Laskiewicz was not in the room in her official capacity, but only as a witness (Tr. 185).

Graber described the conference as lasting between 10 and 15 minutes. Blanchard had very little to say. At that time Graber was not aware that Blanchard had children with special needs or that the impending change in her work schedule would create difficulties in getting them to school. Graber only learned of those matters about three weeks before the hearing. He took no action because he was no longer Blanchard's supervisor. However, he was under the impression that Blanchard had been allowed to revert to her previous schedule (Tr. 187-189).

Laskiewicz's testimony differs somewhat from Graber's. According to Laskiewicz she was asked by Zakar, rather than by Graber, to attend the meeting as an independent observer. Zakar had informed Laskiewicz that the purpose of the meeting was to deliver a letter to Blanchard placing her on administrative leave, but she was not shown the letter and did not know its exact contents. She understood her function to be limited to observing the delivery of the letter to Blanchard (Tr. 197-199). Laskiewicz testified that she was not sure whether she or Graber arrived first, but she believed that she was first. Graber then arrived alone and, while they waited for Blanchard, she asked Graber if a Union representative was going to be present; Graber answered that Colvin would be attending. Laskiewicz speculated that Colvin called to say he could not make the meeting, but she has no direct knowledge that he made such a call (Tr. 199, 200). Laskiewicz stated that she had no clear memory of what transpired at the meeting, but she remembered that Graber presented the letter[19] to Blanchard and that Blanchard seemed reluctant to read it. Laskiewicz encouraged Blanchard to read the letter in case she had questions. According to Laskiewicz, the meeting lasted less than five minutes (Tr. 200, 201).

Colvin's testimony is directly contradictory to that of both Blanchard and Graber. According to Colvin, Blanchard called him before the meeting and told him that it was going to occur. Colvin stated that he told Blanchard to ask her supervisor if they were going to discuss disciplinary action. Blanchard called back and said that she was told that there would be no disciplinary action; Colvin thereupon told Blanchard that he did not need to be present (Tr. 35). Colvin also testified that Blanchard later called him (the time and date is unclear) and told him that she had been placed on administrative leave and that her schedule had been changed. Blanchard had not received prior notice of the change in schedule (Tr. 35-37).

Blanchard testified that, at the conclusion of the meeting, Graber told her to log off of her computer, get her passwords and go home. He came to her cubicle and looked over her shoulder while she did so. Blanchard asked Graber how she would know when to come back

[19] Laskiewicz referred only to a single letter although, in response to a question from Respondent's counsel, she stated that she recommended that Blanchard read the "letters" (Tr. 201). The discrepancy, if any, is of no consequence in view of Laskiewicz's limited role and Blanchard's acknowledgment that she received both memoranda at the meeting.

and he said that he would call her. Blanchard is unsure when she called Graber to ask when she could return, but believes that she first called the next Monday and then periodically thereafter. Graber finally told her that she could return after she had been gone for two weeks. Blanchard came back to work on a Monday (which would have been February 7) (Tr. 88-91). There is no evidence that Blanchard ever provided the Respondent with medical information as described in the memorandum by which she was placed on administrative leave.

Blanchard's Suspension

On February 11 Graber ordered Blanchard to attend a meeting at which Linda Evans, the Civilian Personnel Chief, and Colvin were also present (Tr. 91-93). Graber then presented Blanchard with a memorandum from him (Resp. Ex. 5) informing her that he was proposing to suspend her from duty and pay for 12 calendar days. The stated reasons were: tardiness, disruptive behavior (five incidents were cited), failure to complete assigned duties in a timely manner (two incidents were cited) and failure to follow instructions. The letter further informed Blanchard that she had ten working days to respond and that her response should be submitted to Captain Michael Prater, Acting Commander of the 325th Comptroller Squadron. The letter also provided the following information:

1. She could submit medical information, to be provided at her own expense, which she claims to have contributed to her alleged misconduct.

2. She could select a representative to assist her in her response. The representative was to be designated in writing.

3. She could review the material upon which Graber had relied in proposing the suspension; copies of that material were attached to the memorandum (there are 13 attachments).

4. She could submit a written request to Graber for additional time to prepare her response.

5. Full consideration would be given to her response, if any. She would receive a written notice of the final decision; the suspension, if carried out, would not take place earlier than 15 days from her receipt of the memorandum.

6. She would be placed on paid administrative leave for the duration of the advance notice period. If the suspension were to go into effect, she would then go to a non-pay status.7. She could review pertinent regulations or obtain information as to her procedural rights by contacting Zakar.

It is unclear when Colvin received a copy of the memorandum, but AFGE Local 1113 was among the information addressees.

Blanchard submitted a response to the notice of proposed suspension by a memorandum to Prater dated March 1 (Resp. Ex. 6) and signed by her and Colvin.[20] The memorandum is 8 pages in length and addresses most or all of the incidents described in the notice of suspension.

On March 7 Blanchard and Colvin were called to a meeting in Prater's office which was also attended by Zakar (Tr. 104, 105). Blanchard was presented with a memorandum from Prater dated March 7[21] (Resp. Ex. 7) in which she was informed that Prater had decided to suspend her for seven calendar days. The memorandum also informed Blanchard of her rights under the contractual grievance procedure as well as her right to have Union representation. AFGE Local 1113 is listed as an information addressee. Blanchard signed the memorandum and checked off a blank indicating that she wanted the Union to receive a copy.

Positions of the Parties

The General Counsel

The General Counsel maintains that the Respondent violated §7116(a)(1) by virtue of Zakar's conduct during the two incidents on January 21 which, in both instances, would tend to have a coercive or intimidating effect on a reasonable employee. With regard to the incident in Blanchard's cubicle, Zakar should merely have advised Graber rather than rushing to the cubicle and yelling at both Blanchard and Colvin while waving the contract at them. Zakar's actions were indicative of her intent to provoke a confrontation. Colvin's purpose in entering the work area was to confer with Graber in order to schedule an appointment to speak to Blanchard so as not to disrupt the work schedule. The incident would have been avoided if Graber had simply asked Colvin what he wanted. Zakar's conduct at the elevator, like that in Blanchard's cubicle, demonstrated a disrespect for Colvin's position in the presence of a bargaining unit employee. Such conduct would have the natural effect of discouraging a reasonable employee from consulting with a Union official, which is a protected activity under the Statute.

[20] Blanchard presumably requested and was granted an extension of time to submit her response.

[21] The memorandum is dated March 7, 2004. This is obviously an error since the memorandum refers to events which occurred in 2005.

The General Counsel further maintains that she has presented a *prima facie* case of discrimination under §7116(a)(1) and (2) with regard to the incidents of January 21 and with regard to all of the Respondent's other actions against Blanchard. Blanchard's consultation with the Union, through Colvin, was protected activity as were her calls to the security police. The Respondent's stated reasons for placing Blanchard on administrative leave, changing her work schedule, giving her notice of suspension and, finally, suspending her were pretexts for retaliation because of her protected activity on January 21. According to the General Counsel, the Respondent has failed to rebut her *prima facie* case and has failed to show that its actions were justified and that it would have taken those actions regardless of Blanchard's protected activity.

The General Counsel further maintains that Graber's meeting with Blanchard on January 24 was a formal discussion and that the Respondent's failure to provide the Union with notice and an opportunity to attend was a violation of §7116(a)(1) and (8). According to the General Counsel, the meeting of January 24 had all of the indicia of a formal meeting. The Respondent, through Graber, acknowledged to Blanchard that her placement on administrative leave was prompted, at least in part, by her reaction to Zakar on January 21. Blanchard's reaction was a form of protest which meets the definition of a "grievance" under §7114(a)(2)(A).

The General Counsel also argues that the Respondent violated §7116(a)(1) and (5) by failing to provide the Union with advance notice of the change in Blanchard's schedule and an opportunity to bargain to the extent allowed by the Statute. While acknowledging that the change in schedule was a management right under §7106(b)(1), the General Counsel maintains that the change in Blanchard's schedule was more than *de minimis* and that, therefore, the Respondent was obligated to bargain over its impact and implementation.

The General Counsel maintains that the change in Blanchard's schedule was not covered by the language in the CBA which authorizes changes in work schedules so as to allow employees to participate in official training since Blanchard never received training after the change went into effect.

As a remedy the General Counsel proposes that, in addition to the customary posting, the record of Blanchard's suspension be expunged from her personnel file and that she be made whole for the loss of pay and leave which was imposed during the suspension.

The Respondent

The Respondent maintains that the General Counsel has failed to show a violation of §7116(a)(1) because there is no evidence that Zakar or any other representative of the Respondent took any action that could reasonably have been interpreted as coercive or intimidating. The credible testimony of witnesses to the incident in Blanchard's cubicle shows that, although Zakar might have raised her voice, she was not yelling. The loudest voices where those of Colvin and Blanchard, whom Colvin told to calm down. Colvin's testimony that Zakar was "screaming" and out of control was inconsistent with his own written statement which he made to the security police within a few hours after the incident occurred.

The Respondent also maintains that Zakar's conduct during the incident at the elevator could not reasonably have been interpreted as coercive or intimidating. The only evidence to the contrary is the testimony of Kirkpatrick which is at odds with that of Zakar, Graber and Colvin. Furthermore, Zakar testified that she was physically incapable of rushing toward Colvin and Kirkpatrick because she was in the process of recovering from a heart attack and was working half days against medical advice.

The Respondent maintains that the meeting of January 24 was not a formal discussion, nor was its purpose to discuss a grievance. The only management representative who participated was Graber, who was Blanchard's immediate superior. Laskiewicz was present as a witness and did not act in an official capacity. The meeting was held in a conference room in the immediate vicinity of Blanchard's cubicle for the sake of privacy. It was very short in duration and there was neither a formal agenda nor notes taken.

The Respondent argues that it was under no obligation to provide the Union with prior notice and the opportunity to bargain over the change in Blanchard's work schedule since the change was *de minimis*. Blanchard had complained to Graber that her poor performance was the result of inadequate training and had made several requests for training. The change in Blanchard's schedule was consistent with the fact that the office was closed for training from 7:30 to 8:30 on Tuesdays and Thursdays. Furthermore, such a change in schedule is specifically authorized by the CBA.

The Respondent also argues that there is no evidence that either Blanchard or the Union raised any objections to the change in schedule or informed any responsible representative of the Respondent that Blanchard's new schedule would interfere with her ability to take her daughters to school. Blanchard testified that she discussed the change of schedule with Colvin, yet the Union never requested bargaining.

Finally, the Respondent denies that it restrained or coerced any employee in violation of §7116(a)(1) and

(2). In questioning Blanchard on January 5 about the alleged theft of a document the Respondent followed established procedure and Blanchard was neither accused of wrongdoing nor disciplined. Her interrogation was postponed to allow for Colvin's attendance and there was a change in investigators after Blanchard complained that the original investigator was Winslow's husband.

The Respondent maintains that the General Counsel did not offer evidence as to any impropriety in Blanchard's placement on administrative leave. Graber's testimony and his memorandum to Blanchard show that Blanchard was given two weeks off with pay in response to her complaints about stress and because of problems with her behavior.

The Respondent also maintains that the notice of proposed suspension was accompanied by extensive documentation of incidents which justified the proposal. Blanchard was represented by the Union which succeeded in having the suspension reduced from 12 to 7 working days. There was no evidence of discrimination or retaliation.

Discussion and Analysis

The Respondent's Alleged Acts of Interference, Restraint or Coercion

The Authority has adopted an objective standard in determining whether actions taken on behalf of an agency would have an intimidating or coercive effect on employees within the meaning of §7116(a)(1). Neither the employer's motive nor the reaction of individual employees are controlling. Rather, the crucial factor is whether a reasonable employee would be coerced or intimidated, *U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky*, 49 FLRA 1020, 1034 (1994) (*Frenchburg*).

In arguing that the Respondent, through Zakar, violated §7116(a)(1) the General Counsel has cited *U.S. Penitentiary, Florence, Colorado*, 52 FLRA 974 (1997), a case in which a management representative of the agency threatened to "write up" all bargaining unit supervisors if the union pursued an issue on behalf of one of them. Since there are no allegations of such overt threats in the instant case, a coercive or intimidating effect, if any, can only arise by inference from Zakar's and Graber's speech and demeanor. The General Counsel has not alleged that Graber said or did anything which could, in itself, have been construed as threatening; rather, the General Counsel has implied that, as a supervisor, Graber's presence reinforced the intimidating effect of Zakar's conduct.[22] Therefore, it is Zakar's behavior on January 21 which is the key to my determination of whether a violation occurred.

As stated above, my review of the evidence leads me to the conclusion that Zakar's speech and demeanor at Blanchard's cubicle was somewhat abrupt. While Zakar might have spoken in a louder than normal voice, her tone was apparently a reaction to that of Colvin and Blanchard. It is undisputed that, by speaking with Blanchard while she was on duty without having made an appointment, Colvin violated the CBA and it is also undisputed that Zakar's remarks to Colvin and Blanchard were confined to that fact. Although the language of the CBA does not, in itself, absolve the Respondent of liability for a violation of §7116(a)(1), it is relevant to a determination of the overall effect of the incident in Blanchard's cubicle. Colvin, and possibly Blanchard, was aware of the applicable contract language. In that context, the appearance of Zakar and Graber was unlikely to have intimidated a reasonable employee who, as a member of the bargaining unit, was or should have been familiar with the provisions of the CBA. There is merit to the General Counsel's suggestion that Zakar should have limited her involvement to advising Graber as to the provisions of the CBA while allowing him, as Blanchard's supervisor, to handle the situation on his own. Yet, Zakar's actions, while perhaps imprudent, were not coercive or intimidating within the meaning of §7116(a)(1).

In reaching this conclusion, I have considered Blanchard's obvious distress because of Zakar's appearance in her cubicle. Blanchard had a history of sensitivity to what she characterized as surveillance by supervisors. She felt intimidated by Winslow, Zakar and Graber. She was prone to emotional and excessive reactions to questions or criticism. Her tendency to dial 911 and instigate investigations by the security police demonstrate a significant over-reaction to any challenge to her performance. Colvin himself had to calm her down after such an emotional reaction. The evidence indicates that Blanchard's distress, while genuine, was not that of a reasonable employee as is required by *Frenchburg*.

The General Counsel seems to imply that the incident at the elevator, especially when viewed in the context of the incident in Blanchard's cubicle which immediately preceded it, suggests a desire by Zakar to provoke a confrontation with Colvin. Yet, the undisputed evidence indicates that, in conferring with Kirkpatrick while she was on duty, Colvin was again violating the

[22] If anything, Graber might have alleviated the effect of Zakar's conduct since he informed Colvin that he could make an appointment to talk to Blanchard two weeks hence because of an exercise that was scheduled for the week immediately following.

CBA, whether or not knowingly.[23] The testimony of both Colvin and Kirkpatrick indicates that their conversation, like Colvin's conversation with Blanchard, while not of long duration, was more than a casual exchange of greetings and took place away from the immediate vicinity of the elevators. Therefore, Zakar could justifiably question whether Colvin was again violating the contract immediately after he had previously done so with Blanchard. Colvin indicated on his written statement that Zakar was polite. Although both Zakar and Colvin might have raised their voices and Zakar might have had an angry expression on her face, the evidence does not support the proposition that Colvin, or any other reasonable employee[24], would have felt coerced or intimidated. In view of Zakar's testimony as to her recent return to a part time work schedule after a major heart attack, I do not credit Kirkpatrick's assertion that Zakar came rushing toward her and Colvin.

In summary, the most that can be said about the actions of Respondent's representatives on January 21 is that they tended to discourage Colvin, Blanchard and Kirkpatrick from ignoring contractual requirements for conferences between Union representatives and employees during duty time. There is no evidence or allegation that the Respondent discouraged Union representatives or bargaining unit employees from conferring during break times or that the Respondent unreasonably failed to cooperate with the Union's efforts to make appointments.

The Nature of the Meeting of January 21

Each of the parties has cited the applicable legal standards for determining whether the meeting of January 21 was a formal discussion within the meaning of §7114(a)(2). That portion of the Statute provides, in pertinent part, that:

> An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at--
>
> (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment

In numerous cases, such as *Defense Logistics Agency, Defense Depot Tracy, Tracy, California*, 39 FLRA 999, 1012 (1991), the Authority has held that, in order for a formal discussion to occur, there must be (1) a discussion (2) which is formal (3) between one or more representatives of the agency and one or more bargaining unit employees or their representatives (4) concerning any grievance or personnel policy or practices or other general conditions of employment. Each of those criteria will be applied to the meeting on January 21.

The purpose of the meeting was to deliver two memoranda to Blanchard. Although she was invited to ask questions or make comments, the evidence indicates that she said little or nothing. However, in *U.S. Department of the Army, New Cumberland Army Depot, New Cumberland, Pennsylvania*, 38 FLRA 671, 677 (1990) the Authority held that the term "discussion" is to be interpreted broadly so as to apply to meetings at which no actual discussion or dialogue occurs. The meeting occurred at the behest of the Respondent and was not a casual conversation. Thus, it fell within the broad definition of a discussion.

The issue of formality is less clear. In *U.S. Department of Labor, Office of the Assistant Secretary for Administration and Management, Chicago, Illinois*, 32 FLRA 465, 470 (1988) (*DOL*) the Authority examined the following factors in determining whether a meeting was formal: (1) whether the meeting was held by a first-level supervisor, (2) whether any other management representative attended, (3) where the meeting took place, (4) how long it lasted, (5) whether the meeting was called with advance notice or spontaneously, (6) whether there was a formal agenda, (7) whether attendance was mandatory, and (8) whether there was a formal record or transcription of attendance and comments.

It is undisputed that the meeting was held by Graber who, in spite of Blanchard's purported uncertainty, was clearly her first-level supervisor. However, the meeting was also attended by Laskiewicz who was a member of management. Although Laskiewicz was only at the meeting as a witness, she was

[23] The incident occurred in a non-work area around lunch time; there is no evidence as to whether Colvin knew if Kirkpatrick was on her lunch break. Even if Zakar did not, as she claimed, ask Kirkpatrick if she were on her lunch break, neither Kirkpatrick nor any other witness testified that she was on break.

[24] The General Counsel has not alleged that Zakar's conduct had the effect of coercing or intimidating Kirkpatrick individually.

recognized by Blanchard as being more than a rank and file employee. The Respondent has cited no authority for the proposition that the significance of Laskiewicz's presence at the meeting was diminished by the fact that she was not an active participant or part of Blanchard's chain of command. Both Laskiewicz's presence and the fact that Graber wanted a witness support the contention that the meeting was formal.

The meeting took place in a conference room in which Blanchard acknowledged that she had often been present and where she and other employees sometimes ate their lunches. Accordingly, the location of the meeting does not suggest that it was formal. The duration of the meeting, no more than about fifteen minutes, neither adds nor detracts from the General Counsel's position.

Although a formal agenda was not published, there is no doubt that there were three specific purposes for the meeting. The first purpose was to present Blanchard with formal notice of her administrative leave and of the change to her work schedule. The second purpose was to afford Blanchard the opportunity to ask questions and make comments. The third purpose was for Graber to direct Blanchard to turn off her computer and to make other preparations for leaving the building without delay.

While there was no advance notice of the meeting, Graber's appearance at Blanchard's cubicle and his instruction to her that she follow him to the conference room was neither spontaneous nor informal. In spite of the fact that Blanchard did not challenge Graber's instruction or say that she didn't want to follow him, her attendance clearly was mandatory. Although a separate record or attendance sheet was not kept, the purpose of the meeting and Blanchard's attendance were recorded by the contents of the memoranda and by her signature which acknowledging receipt.

The Authority has made it clear that factors other than those cited above may be taken into account and that the totality of facts and circumstances are to be considered in determining whether a meeting was formal, *DOL*, 32 FLRA at 470. Upon consideration of all of the evidence I have concluded that the meeting of January 21, while not a classic example of a formal discussion, satisfied the criteria of *DOL*.

The Respondent does not deny that the meeting of January 24 was attended by at least one representative of the agency, Graber, and one bargaining unit employee, Blanchard. Consequently, my analysis now turns to the purpose of the meeting. The General Counsel contends that the subject of the meeting was a grievance because one of the reasons for Blanchard's administrative leave was that she had called the security police on January 21 to complain of harassment by Zakar. This, according to the General Counsel, is sufficient to come within the definition of "grievance" as set forth in §7103(a)(9)(A).

The General Counsel is correct in asserting that both the Statute and Authority precedent support a broad definition of a "grievance". Section 7103(a)(9)(A) defines the term as encompassing any complaint by an employee concerning any matter relating to his or her employment. In *United States Department of the Air Force, Luke Air Force Base, Arizona*, 58 FLRA 528, 533 (2003) the Authority confirmed that the definition of a grievance is not limited by the language of a contractual grievance procedure. Nevertheless, the purpose of the meeting of January 21 was not to discuss a grievance, no matter how broadly defined. Graber called the meeting to deliver the memoranda to Blanchard and to discuss their contents if she so desired. The most that can be said about the purpose of the meeting is that it could have given rise to a future grievance. That fact is not sufficient to have triggered the Union's right to be present.[25] It is of no consequence whether the decision to put Blanchard on administrative leave was caused, wholly or in part, by her outburst and subsequent call to the security police on January 21. The fact remains that those actions were not the subject of the meeting on January 24.

The Union's Right to Notice and the Opportunity to Bargain

The right of a union to receive notice and the opportunity to bargain is well established. Prior to implementing any change in conditions of employment an agency must provide the union with notice of the change and the opportunity to negotiate over those aspects of the change that are within the duty to bargain, *U.S. Penitentiary, Leavenworth, Kansas*, 55 FLRA 704, 715 (1999). The agency remains under that obligation regardless of whether the proposed change is an exercise of management rights under §7106, *United States Department of the Air Force, 913th Air Wing, Willow Grove Reserve Station, Willow Grove, Pennsylvania*, 57 FLRA 852, 855 (2002). Exceptions to the duty to bargain include changes that are *de minimis*, *Social Security Administration, Office of Hearings and Appeals, Charleston, South Carolina*, 59 FLRA 646 (2004), and, in the case of mid-term bargaining, those that are covered by a CBA, *U.S. Customs Service, Customs Management Center, Miami, Florida*, 56 FLRA 809, 813 (2000).

[25] The General Counsel has not challenged the accuracy of Graber's statement to Blanchard, which she relayed to Colvin, that the meeting was not about discipline. Nor does the General Counsel maintain that the purpose of the meeting was to discuss a personnel policy or practices or other general condition of employment within the meaning of §7114(a)(2)(A).

The Respondent contends that the change in Blanchard's schedule was *de minimis*. It is not necessary to resolve that issue in view of other factors which establish that the Respondent did not deprive the Union of notice and the opportunity to bargain. The most obvious factor is that of notice. Graber's memorandum of January 24 (Resp. Ex. 10), with a copy to the Union, stated that the change in Blanchard's schedule would go into effect on February 6, thereby giving Blanchard and the Union approximately two weeks in which to request bargaining.[26] There is no evidence as to when the Union received the memorandum, but the General Counsel has not denied that the memorandum was in fact received. In the absence of an allegation or evidence of undue delay in forwarding the memorandum to the Union, it is reasonable to assume that the memorandum was received by the Union no later than January 25. It is also likely that Blanchard informed Colvin of the impending change of schedule shortly after she received it and probably on the same day. Notice to the Union from Blanchard would not have absolved the Respondent of its own failure to provide notice; however, the evidence indicates that the Respondent did notify the Union in a timely manner. Regardless of how the Union first learned of the impending change in Blanchard's schedule, there is no evidence of a request from the Union that the Respondent either bargain over the change or delay its implementation until the completion of bargaining.

Even if the Respondent had not notified the Union, there is no credible evidence that the Respondent knew or should have known that Blanchard would be adversely affected by the change. In the first place, the change itself, whether or not *de minimis*, is not one that a typical employee would necessarily consider to be burdensome. According to Blanchard's testimony, at the time she received the memorandum her workday started at 8:00 a.m. with a 30 minute lunch break; her new schedule had a starting time of 7:30 a.m. with a 60 minute lunch break. Furthermore, the new schedule accommodated her request for training by allowing her to take advantage of unit training periods during which the office was closed to customers from 7:30 to 8:30 on Tuesdays and Thursdays.

Blanchard testified without challenge that she never received training after the change in her schedule and the General Counsel suggests that this takes the change in schedule outside the coverage of the CBA. That argument is not persuasive. Blanchard was on administrative leave until February 7 and again from February 11 to March 7 when her suspension occurred. She also testified that she mentioned the problem with her daughters during a meeting at which Colvin was present, which would have been either on February 11 or March 7. Therefore, she worked on only two of the days when her office was closed from 7:30 to 8:30 and then went back on administrative leave. Graber's impression that Blanchard was eventually allowed to revert to her old schedule is corroborated by the fact that the General Counsel has not included the restoration of Blanchard's old schedule as a remedy in the proposed order which accompanies her post-hearing brief.

In summary, the evidence indicates that the Respondent gave the Union adequate notice of the change in Blanchard's schedule, that the Union did not make a request to bargain and that, in any event, the change in schedule was covered by the CBA.

The Nature of the Respondent's Actions

In order to meet her burden of proof that the Respondent has violated §7116(a)(1) and (2), the General Counsel must establish by a preponderance of the evidence that the employees, including Union representatives, against whom allegedly adverse action was taken were engaged in protected activity and that consideration of the activity was a motivating factor in the adverse action, *Letterkenny Army Depot*, 35 FLRA 113, 118 (1990) (*Letterkenny*). Once the General Counsel has presented a *prima facie* case, the burden shifts to the Respondent to show, again by a preponderance of the evidence, that there was a legitimate nondiscriminatory justification for the adverse action and that the action would have occurred in the absence of the protected activity, *Department of the Air Force, Air Force Materiel Command Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 55 FLRA 1201, 1205 (2000) (*Warner Robins*).

Colvin's conversations with Blanchard and Kirkpatrick, and his effort to arrange for an appointment with Graber, clearly fell within the definition of "act[ing] for a labor organization as a representative" and, therefore, constituted protected activity within the meaning of §7102. So too were Blanchard's actions in speaking with Colvin in order to enforce what she considered to be her rights under the CBA, *U.S. Department of Labor, Employment and Training Administration, San Francisco, California*, 43 FLRA 1036, 1039 (1992). Because Blanchard's 911 calls were reactions to perceived harassment by representatives of the Respondent, they were "grievances" within the scope of §7103(a)(9)(A). However, the General Counsel has cited nothing in support of her contention that the calls were protected activity. The most that can be said is that the incidents which gave rise to Blanchard's calls might have given rise to contractual grievances. However, the security police are not charged with vindicating the rights of employees under the CBA or the Statute.

[26] February 6 was a Sunday and presumably the start of a new pay period. Blanchard's work under the new schedule was to begin on February 7 which was exactly two weeks from the date of Graber's memorandum.

The General Counsel has cited the placement of Blanchard on administrative leave and the change in her schedule as adverse actions. Yet, as stated above, Graber's memorandum clearly explained that the purpose of the leave was to help Blanchard to cope with the workplace stress that had been amply demonstrated by various incidents, including her outburst on January 21. Blanchard was explicitly informed that the administrative leave was not discipline and she could not reasonably have construed as adverse action of any other kind since she acknowledged that she had previously been on administrative leave for medical reasons.

Blanchard was understandably upset over the impending change in her schedule, but the basis for her distress was unknown to the Respondent for more than two weeks after she received Graber's memorandum informing her and the Union of the change. The General Counsel has not shown that, in the absence of the special circumstances involving Blanchard's daughters, her change in schedule, which was authorized under the CBA, could be seen as adverse.

Graber's memorandum of February 11 (Resp. Ex. 5) which informed her of his intention of suspending her for 12 days, was adverse action. Furthermore, there can be no legitimate doubt that Prater's decision to suspend Blanchard for 7 days, as stated in his memorandum of March 7 (Resp. Ex. 7), was disciplinary. Accordingly, I find that the General Counsel has established a *prima facie* case of discrimination.

The Respondent's Affirmative Defenses

Graber's memorandum of February 11 includes a description of tardiness, five incidents of disruptive behavior, two incidents of failing to complete assignments in a timely manner and one incident of failure to follow instructions. Blanchard and Colvin attempted to justify her actions regarding each of the incidents in their response to the notice of proposed suspension (Resp. Ex. 6). However, the General Counsel has cited nothing to show that the stated grounds for the suspension were pretextual other than to emphasize the proximity in time between the events of January 21 and the memorandum of February 11. While such proximity may support an inference of improper motivation by an agency, it is not conclusive proof of unlawful conduct, *Warner Robins*, 55 FLRA at 1205.

The merits of the Respondent's decision to put Blanchard and the Union on notice of its intent to subject her to a disciplinary suspension and later to actually suspend her are not properly before me. The sole issue is whether those actions by the Respondent were discriminatory. I have considered the Respondent's stated rationale for the suspension only in the context of determining whether it is so frivolous and devoid of justification as to be considered pretextual. Whatever the merits of the Respondent's actions, it has not been alleged that the Respondent did not follow the proper procedure.[27] The unrebutted evidence shows that Blanchard and the Union were provided with advance notice of the proposed suspension, a specific statement of the grounds for the suspension, along with documentary support, and a detailed explanation of her appeal rights. That evidence, as well as the testimony of Blanchard's disruptive behavior and her own demeanor as a witness, offset any inference of unlawful conduct arising out of the proximity in time between her protected activity and the actions of which the General Counsel complains. The totality of the evidence, when evaluated according to applicable law, supports the conclusion that the Respondent's actions were justified and would have been taken in the absence of Blanchard's protected activity.

For the foregoing reasons, I have concluded that the Respondent did not commit unfair labor practices by virtue of the actions of its representatives on the dates cited in the Complaint. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

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

Issued, Washington, DC, September 1, 2006.

Paul B. Lang
Administrative Law Judge

[27] The same is true of the incident of January 5 when Blanchard was called for an interview by the security police. The interview was rescheduled to allow Colvin to attend and the investigator was changed at Blanchard's behest. Blanchard was never charged or disciplined as a result of that investigation.