ACW 7/2/09

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
SAN FRANCISCO REGION
901 Market Street, Suite 220
San Francisco, California 94103-1791
(415) 356-5000 Fax:(415) 356-5017

June 30, 2009

Jeffrey Lewis
28242 S. Salo Road
Mulino, OR 97042

Re: Federal Aviation Administration
Concord, California
Case No. SF-CA-09-0098

Dear Mr. Lewis:

The unfair labor practice charge in this case was filed with the San Francisco Region of the Federal Labor Relations Authority on December 5, 2008. After investigation, consideration of the evidence, and application of the law to the facts, it is concluded that issuance of a complaint is not warranted.

The charge alleges that the Federal Aviation Administration, Concord, California (Activity) repudiated a settlement agreement by failing to pay or restore 72 hours of sick leave. The charge, as clarified during the investigation, also alleges that FAA retaliated against you for engaging in protected activity. Specifically, you assert that FAA changed its plan to return you to work and instead proposed to remove you from federal service. This conduct is alleged to have violated section 7116(a)(1), (4), (5) and (8) of the Federal Service Labor Management Relations Statute (Statute). The FLRA has jurisdiction over the matters raised in this timely filed charge.

On May 1, 2008, FAA and you entered into a settlement agreement to resolve a grievance and unfair labor practice charge. In the settlement the Activity agreed to restore 72 hours of sick leave to your leave balance. The Activity also agreed to waive the time limits for you to file a new grievance concerning additional leave matters, payment for medical examinations and other issues. Further, the Activity agreed that the SFO Hub Manager would issue you a letter explaining your current employment status with regards to your administrative leave.

It is undisputed that prior to the filing and investigation of the charge in this case the Activity failed to make corrections in your time and attendance record for the 72 hours of sick leave as required by the settlement agreement. However, the record reveals that restoration of the 72 hours sick leave is now complete.

As to the alleged discrimination, you engaged in protected activity by filing a grievance on May 1, 2008, as part of the settlement agreement. This grievance has been processed through the steps of the grievance procedure and is now at the arbitration stage. In addition, you engaged in protected activity in June 2008, when you provided an affidavit to this office, in support of an

unfair labor practice charge you had filed against a union. No evidence was presented to establish that any statements of animus toward your protected activity were made by any FAA representatives.

On April 17, 2008, the District Manager informed you that a return to work plan would be discussed with you at a later date. However, no discussion took place. Instead, on July 28, 2008, the District Manager proposed to remove you from federal employment for allegedly engaging in inappropriate behavior in the workplace; insubordination or refusal to carry out orders; and providing misleading information during an official investigation, all occurring during 2007.

In October 2008, the Activity issued its decision to remove you from duty effective November 6, 2008. You elected to appeal this decision to the Merit Systems Protection Board.

The Activity clearly violated the settlement agreement when it failed to restore 72 hours of sick leave to the leave balance in a timely manner. The Activity's conduct amounted to a patent breach of the settlement which went to the heart of the agreement. Such conduct violates section 7116(a)(1) and (5) of the Statute. *See, Dep't of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Ill.*, 51 FLRA 858, 862 (1996) (standard to be applied when repudiation is asserted). However, I have decided to exercise prosecutorial discretion and not issue a complaint in this case concerning the Activity's repudiation of the agreement.

The Office of the General Counsel applies the following factors in determining whether or not to apply this policy including: 1) the nature of the violation; 2) the harm to the bargaining unit; 3) harm to employees; 4) whether there is a pattern of conduct; 5) whether the violation has been cured; 6) the effectiveness of any remedy; 7) changed circumstances and 8) precedential significance. Here, the nature of the violation was serious and harm resulted to you. However, the violation has been cured; the hours have been restored to you. Thus, at this time there is nothing to remedy and this situation lacks precedential significance. Therefore, the alleged violation of section 7116(a)(1) and (5) of the Statute is dismissed.

The charge also alleges discriminatory treatment for exercising rights protected by the Statute, filing a contractual grievance and participating in an investigation of an unfair labor practice charge. Although the charge did not specify a violation of section 7116(a)(2) of the Statute, the case is being considered as if one had been alleged. The charge does allege a violation of section 7116(a)(4) of the Statute. The Authority has applied the analysis in *Letterkenny Army Depot,* 35 FLRA 113 (1990)(*Letterkenny*), for complaints alleging discrimination in violation of both sections 7116(a)(2) and 7116(a)(4) of the Statute. *Dep't of Veterans Affairs Medical Ctr., Brockton and West Roxbury, Mass.*, 43 FLRA 780, 781 (1991).

Under *Letterkenny*, the facts must establish a *prima facie* case, showing that an employee was engaged in protected activity, and that this conduct was a motivating factor in an agency's decision adversely affecting the employee. Even if the *prima facie* showing is made, an agency will not be found to have violated section 7116(a)(2) of the Statute if it can demonstrate, by a preponderance of the evidence, that there was a legitimate justification for its action and the same action would have been taken even in the absence of protected activity. *Id.*, at 118.

In this case, there is insufficient evidence of a connection between the Activity's decision to remove you and your protected activity (i.e., filing a grievance and giving testimony under the Statute). While the events giving rise to the removal occurred in 2007, the evidence revealed that the Activity's decision to remove did not occur until 2008, after your protected activity had taken place. It is well-settled that evidence of motive may be shown by suspicious timing of the questioned conduct. *See U.S. Customs Serv.*, 36 FLRA 489, 496 (1990). Timing "may support an inference of illegal anti-union motivation, [but] it is not conclusive proof of a violation." *U.S. Dep't of Labor, Wash., D.C.*, 37 FLRA 25, 37 (1990) (*DOL*). As the Authority noted in *DOL*, the timing establishes a violation if it is offered in conjunction with other facts and circumstances that establish a violation. In this case, however, no evidence was presented other than apparent timing, and, without more, there is insufficient evidence of a nexus between the Activity's conduct and your protected activity. Therefore, the alleged violation of section 7116(a)(4) is dismissed. No allegations were made or evidence presented in support of the alleged violation of section 7116(a)(8) of the Statute, and this allegation is dismissed.

Accordingly, this charge is dismissed. An appeal may be filed by mail or by hand delivery with the Office of the General Counsel. Your appeal should include the Case Number (SF-CA-09-0098) and be addressed as follows:

Federal Labor Relations Authority
Office of the General Counsel
1400 K Street NW, Second Floor
Attention: Appeals
Washington DC 20424-0001

Whichever method you choose, please note that the last day for filing an appeal of the dismissal is **August 3, 2009**. This means that an appeal that is mailed must be postmarked, or an appeal must be hand delivered, no later than **August 3, 2009.** Please send a copy of your appeal to the Regional Director.

If you need more time to prepare your appeal, you may ask for an extension of time. Mail or hand deliver your request for an extension of time to the Office of the General Counsel at the address listed above. Because requests for an extension of time must be **received** at least five days before the date the appeal is due, any request for an extension of time in this case must be **received** at the above address no later than **July 29, 2009.**

The procedures, time limits and grounds for filing an appeal are contained in Volume 5 of the Code of Federal Regulations at section 2423.11(c)-(g). 5 C.F.R. § 2423.11(c)-(g). The regulations may be found at any FLRA Regional Office, public law library, some large general purpose libraries, Federal Personnel Offices and the Authority's Home Page internet site--**www.FLRA.gov.** I have also enclosed a document which summarizes frequently-asked

questions and answers regarding the Office of the General Counsel's unfair labor practice appeals process.

Sincerely,

Gerald M. Cole
Regional Director

Enclosures: Questions and Answers About Appeals

cc: Glen A. Rotella, Labor Relations Specialist
Federal Aviation Administration, AWP-16
Western Pacific Region
P.O. Box 92007
Los Angeles, CA 90009-2007

Office of the General Counsel
Federal Labor Relations Authority
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