

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

U.S. DEPARTMENT OF ENERGY OAK RIDGE, TENNESSEE Respondent	
and OFFICE OF PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 268 Charging Party	Case No. CH-CA-90297

NOTICE OF TRANSMITTAL OF DECISION

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

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

Any such exceptions must be filed on or before **MAY 24, 2000**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW., Suite 415
Washington, DC 20424-0001

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: April 24, 2000
Washington, DC

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

MEMORANDUM

DATE: April 24, 2000

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF ENERGY
OAK RIDGE, TENNESSEE
Respondent

and

Case No. CH-CA-90297

OFFICE OF PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 268

Charging Party

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

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

OALJ

00-27

WASHINGTON, D.C.

U.S. DEPARTMENT OF ENERGY OAK RIDGE, TENNESSEE Respondent	
and OFFICE OF PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 268 Charging Party	Case No. CH-CA-902971

Don F. Thress, Jr., Esquire
For Respondent

Susanne S. Matlin, Esquire
For the General Counsel

Mr. Phillip Pope
For the Charging Party

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. 7101, et seq.², and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether, as the Complaint alleges, the Union

1

This case originally was consolidated for hearing with Case Nos. CH-CA-90264 and CH-CA-70267 (G.C. Exh. 1(c)) both of which were settled prior to hearing (Tr. 5).

2

For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial, "71", of the statutory reference, i.e., Section 7116(a)(1) will be referred to, simply, as, "\$ 16(a)(1)".

Shop Chairman was suspended for five days in violation of §§ 16(a)(1) and (2) of the Statute.

This case was initiated by a charge filed on February 8, 1999 (G.C. Exh. 1(a)), which alleged violation of § 16(a)(1) and "others" and by a 1st Amended charge filed on May 13, 1999 (G.C. Exh. 1(b)), which alleged violation of §§ 16(a)(1) and (2) of the Statute. The Order consolidating cases and Complaint and Notice of Hearing issued June 30, 1999 (G.C. Exh. 1(c)) and set the hearing for August 25, 1999, at a place to be determined, in Knoxville, Tennessee; and by Notice dated July 30, 1999 (G.C. Exh. 1(m)), the place of hearing was fixed, pursuant to which a hearing was duly held on August 25 and 26, 1999, in Knoxville, Tennessee, before the undersigned. At the conclusion of the hearing, October 4, 1999, was fixed as the date for filing post-hearing briefs, which time subsequently was extended, on Joint Motion of Respondent and General Counsel, to which the Charging Party did not object, for good cause shown, to October 25, 1999, and General Counsel and Respondent each timely mailed an excellent brief, received on or before, November 1, 1999, which have been carefully considered. Upon the basis of the entire record³, I make the following findings and conclusions:

FINDINGS

1. Office and Professional Employees International Union, Local 268 (hereinafter, "Union") is the exclusive representative of employees of the U.S. Department of Energy, Oak Ridge, Tennessee (hereinafter, "Respondent"); Mr. Phillip Pope is Business Representative of the Union; and Mr. Monroe Dalton Cooper, an accountant in Oak Ridge Operations, is Shop Chairman of the Union, a position he has held for about seven and a half years (Tr. 209-210). Ms. Sue Davis, a Technical Information Specialist in the Office of Scientific and Technical Information (OSTI), is a Union Steward (39-40), a position she has held for about one year; and Ms. Delores Henry, an accountant in Oak Ridge Operations, is Chief Steward of the Union, a position she has held for almost four years (Tr. 109-110).

2. Ms. Leota Kane is a former employee of Respondent who had worked in OSTI. A grievance had been filed on

3

Respondent's Motion to correct the hearing transcript, to which there was objection, is granted and the transcript is hereby corrected as follows: page 493, 1.2 the word, "NOT" inserted after the word, "would" so that the sentence, as corrected reads, "A. I would not see that as a true representation of what happened."

behalf of Ms. Kane which had gone to arbitration in the fall of 1998. Mr. Pope had represented Ms. Kane at the arbitration hearing, which Ms. Davis had attended, and Mr. Pope asked Ms. Davis to prepare a draft brief and to get Ms. Kane's input (Tr. 41). Although Ms. Davis had never written a brief (Tr. 41), she worked on it and put a brief on a computer disk. She then called Ms. Kane and asked her to come to the Federal Building on the morning of November 17, 1998 (Tr. 41-42). Ms. Davis discussed this arrangement with Ms. Henry, Chief Steward (Tr. 42, 110), but not with Mr. Cooper (Tr. 42, 111, 203, 213, 214, 261).

3. Ms. Kane arrived at the Federal Building on November 17, 1998, at about 8:30 a.m. and was met by Ms. Davis and by Ms. Henry, who signed her in. Ms. Kane was given a badge, which gave her free access to the building, and the three of them then went to Ms. Henry's old office, G-28, which she had left on a detail, but which still housed Ms. Henry's computer. Ms. Henry turned on the computer and Ms. Davis inserted her disk containing the brief, and Ms. Henry printed a copy for Ms. Kane to read (Tr. 43-44).

4. Ms. Henry decided that before she and Ms. Davis left, for negotiations scheduled that morning, she should tell her supervisor, Mr. William Hough, that Ms. Kane would be using the office (Tr. 44, 113). Ms. Davis walked down the hall to Mr. Hough's office with Ms. Henry but did not go into the office; however, she heard Ms. Henry tell Mr. Hough that a former employee⁴ would be using the G-28 office and that she had been issued a badge that gave her free access. Mr. Hough said "Okay" (Tr. 44, 113, 394). Ms. Henry and Ms. Davis returned to G-28 and Ms. Davis told Ms. Kane that Mr. Hough had approved her using the office (Tr. 45, 114) and Ms. Davis and Ms. Henry then left for the ground rules contract negotiations (Tr. 45, 114).

5. Having told Ms. Henry that it was "okay" that a former employee use her, Henry's, office, Mr. Hough had misgivings about his statement to Ms. Henry, apparently suspecting he had, "put his foot in his mouth", and went to the office of Ms. Melanie Kent, a Personnel Management Specialist (Tr. 324, 392), and told her that an employee

4

Ms. Henry was positive she identified the person as "Ms. Kane" (Tr. 113) as was Ms. Davis (Tr. 44); but Mr. Hough was insistent that the person was not identified (Tr. 322). As it is unnecessary to resolve this conflict, I do not. If told the former employee's name, Mr. Hough promptly forgot it and acted accordingly.

terminated from OSTI5 was in Ms. Henry's office and would be using Ms. Henry's computer and that he had told Ms. Henry, "okay" (Tr. 394). Ms. Kent told Mr. Hough, "It didn't appear to me to be appropriate to have a member of the public using a Government computer in the office." (Tr. 396; 398). However, Ms. Kent said she further told Mr. Hough, ". . . there might have been some prior arrangement made for that person to use the computer, and I wanted to check and see." (Tr. 398).

6. Thereafter, Ms. Kent embarked on a flurry of activity. She checked to see if there had been any "prior arrangement" for the former employee to use Ms. Henry's computer, and found there had not; she called Mr. William Watson, who is team leader for Computer Security and Inspections (Tr. 464), but he wasn't in, so she talked to Mr. Barry Krause, Associate Director of Safeguards and Security Division, who is Mr. Watson's supervisor; however, Mr. Krause told her that he wanted to check with Mr. Watson and he would call her back (Tr. 398-401). Mr. Krause called and left a message for Ms. Kent in which he told her that Ms. Henry's supervisor [Mr. Hough] should go to Ms. Henry's office (G-28) and make certain who was present; to obtain any computer files and have them scanned by Safeguards and Security; and to escort the person using G-28 to the lobby (Tr. 402-404). Ms. Kent then called Mr. Hough and relayed Mr. Krause's instructions (Tr. 404).

7. Mr. Hough dutifully repaired to G-28 where he told Ms. Kane that Ms. Henry did not have authority to allow her to use the government computer; that he needed to take possession of the computer disk and have it scanned; and that he must escort her to the lobby and sign her out (Tr. 329). Because the disk contained Union material, Ms. Kane said she would like to contact Ms. Henry (Tr. 329) and Mr. Hough told her he would get Ms. Henry's number; however, when he reported to Ms. Kent, she told him she would personally contact Ms. Henry and have Ms. Henry meet Ms. Kane in the lobby (Tr. 330).

8. Mr. Hough, with the disk in his possession, escorted Ms. Kane to the lobby, a large open area which is open to the public. There is a Congressional Office (Representative Walk) and employees enter this area to reach their work areas (Tr. 331). There is a guard station to insure that people do not enter secured areas without authorization. While Ms. Kane was being signed out,

5

OSTI is a wholly separate entity which is located several miles from Oak Ridge and its employees are not accountable to management of Oak Ridge Operations (Tr. 325-326).

Ms. Henry arrived and Mr. Hough explained to her that he had been instructed to take control of the disk that was in the computer and to have it scanned by Safeguards and Security; that Ms. Kane was not authorized to use a government computer; and that he had been instructed to escort her to the lobby, as he had done (Tr. 332).

9. After being told by Ms. Kane and Mr. Hough what had taken place (Tr. 116-117), Ms. Henry left the lobby and went back to the conference room and told Ms. Davis and Mr. Cooper that, ". . . Hough and Kane were out in the lobby with the disk and that he [Hough] had confiscated it and that Melanie Kent had told him to do this." (Tr. 118). Ms. Henry and Ms. Davis returned to the lobby and Mr. Cooper joined them a few minutes later at which time Mr. Cooper said he was going to call Barry Krause and left to use a telephone (Tr. 119). In the meantime, Ms. Davis, who was upset because management had taken her personal disk (diskette) which contained a Union brief she did not want management to have access to at that point (Tr. 47), told Mr. Hough the disk was her personal property and she wanted it back (Tr. 335); but Mr. Hough told her he could not return it until it had been scanned. Mr. Hough said Ms. Davis, ". . . was in a total rage . . . said that I had no business calling personnel . . . and I was the one who caused the problem. . . ." (Tr. 335-336) [Ms. Davis said, ". . . she felt like that he (Hough) had betrayed her." (Tr. 46)]. Mr. Cooper, after hanging up the telephone, returned to where Ms. Kane, Ms. Henry, Ms. Davis and Mr. Hough were talking and, while he had been calm when he first came to the lobby (Tr. 119, 336), Mr. Cooper "went ballistic" on his return to the group and, Mr. Hough said, ". . . he [Cooper] just went off, and what he said was that . . . you could not trust management, because they were a bunch of dumb asses, a bunch of liars, and cheats, crooks. Then he went ahead to say that all of management should be fired, SOB's, locked up in jail because they were wasting taxpayers' money, and this was all in an extremely loud tone of voice." (Tr. 337). Ms. Henry remembered that Mr. Cooper made such remarks and that his voice was raised (Tr. 189); but she didn't recall, "the dumb-asses . . . I remember him saying you can't trust them. They are a bunch of liars, cheats and thieves . . . that most of them should be fired and most of them should be locked in jail for wasting money, taxpayer money." (Tr. 189). Mr. Cooper conceded he made, in essence, these statements and that he, ". . . was very loud again." (Tr. 221); however, he placed his statements after he returned from Personnel (Tr. 215, 220); but Ms. Davis did not remember what Mr. Cooper was saying except that his voice was ". . . louder than the other people he was talking to" (Tr. 49, 89) and she seems to have placed

Mr. Cooper's talking after Mr. Cooper and Ms. Henry came back from Personnel (Tr. 49).

10. Ms. Henry said she told Mr. Cooper, ". . . let's go back to personnel and find out if this is a personnel issue or a security concern. . . ." (Tr. 119) and Mr. Cooper agreed, so they left the lobby and went to Personnel to speak with Ms. Kent (Tr. 120). Ms. Henry insisted that she did most of the talking (Tr. 121); that she told Ms. Kent, ". . . we need to know if this is a personnel issue or a security issue. . . ." (Tr. 120); that Ms. Kent said, ". . . there was three issues and she said there was the computer issue, the ADP issue of someone using the computer that isn't an employee, there was a possible security concern . . . and then there was the possibility that I might need to be counseled over this." (Tr. 120); that she, Henry, responded, ". . . you're going to fucking counsel me? I didn't respond well to being threatened." (Tr. 120); that Ms. Kent said, ". . . please don't use that language." (Tr. 121); that Mr. Cooper said nothing (Tr. 121); that as she and Mr. Cooper were getting ready to leave, Ms. Jago, Branch Chief for Personnel and Management Analysis Branch, came for, ". . . just a 30 second meeting . . ." (Tr. 121); and that he [Cooper] said, ". . . I'll just try to get a hold of Barry Krause again. (Tr. 121) and we returned to the lobby.

Mr. Cooper said that after Ms. Henry told him that, "They had taken back an agreement to let Ms. Kane to use the office, to use the computer. They escorted her out of the building . . . And they had confiscated the disk that contained our brief, which was highly sensitive and confidential to us." (Tr. 214), he, alone, had gone to see Ms. Kent and talked to Ms. Kent at a counter outside her office (Tr. 215); that he, ". . . asked her what was going on . . ." (Tr. 215); that his tone of voice was, ". . . fairly normal . . ." (Tr. 215); that Ms. Kent told him, ". . . Barry Krause from security had wanted to review that disk for classified information." (Tr. 216); that he, Cooper, told Ms. Kent that was dishonest and crooked and that was -- that she shouldn't be doing that kind of stuff, it was wrong to do it, and she should be in jail instead of having a government job; Mr. Cooper said that at this time, ". . . I was speaking loudly but I was not shouting." (Tr. 216). On cross-examination, Mr. Cooper, when asked if he had pounded on the table during his encounter with Ms. Kent said,

"A I don't remember doing that.

. . .

"A Could have happened. I don't remember doing it." (Tr. 285).

When asked on cross-examination if he had shouted something like, ". . . You all are a bunch of crooks, you are dishonest, you shouldn't even be working for the government, and you all are a bunch of SOB's.", Mr. Cooper responded,

"A I didn't shout that but I did say something similar to that. I don't believe I said SOB's. . . ." (Tr. 285).

Mr. Cooper admitted that Ms. Kent may have told him the disk would be returned as soon as it was scanned (Tr. 283) and that she may have told him Human Resources (Personnel) would not see the contents of the disk (Tr. 284-285).

Ms. Kent said that at about 10:40 a.m., as she was leaving her office to go to the central file area, Mr. Cooper appeared at the reception area and, in a stern voice, asked why the disk was confiscated and why Mr. Hough had to take the disk; when the disk would be reviewed and how it would be reviewed (Tr. 408); that Mr. Cooper became louder and more angry as he spoke; that she tried to respond to his questions and told him that when the disk would be scanned would depend on the workload of Safeguards and Security, at which point, Mr. Cooper, ". . . began yelling across the office you all are a bunch of crooks. You should be in jail. You should never even work for the Federal Government. You're a bunch of liars. He continued on just yelling and screaming and pounding his fist on the table . . . he was pounding his fist with every word he spoke. . . . He continued with the yelling you all are a bunch of liars, a bunch of cheats. You should be in jail. You should never even been working for the Federal Government. You're all a bunch of SOB's. . . . As he left he was yelling down the hallway about how we were all a bunch of SOB's." (Tr. 408-409). When Mr. Cooper indicated that Personnel were going to see everything that was on the disk, Ms. Kent, ". . . told him that we wouldn't see it. That we wouldn't ask for it and that Safeguards and Security wouldn't offer it so he didn't have anything to worry about." (Tr. 409).

Ms. Lois Jennell Jago, Branch Chief for the Personnel and Management Branch and Ms. Kent's supervisor, was on a conference call in her office with her door closed, her office being four or five offices - probably 45 feet - from the reception area (Tr. 438-439), when she heard Mr. Cooper's voice and it got louder and louder and he was

pounding on something - ". . . a banging noise," - so she put the telephone on mute and opened her door to see what was going on but as she started out the door she saw Mr. Cooper leaving (Tr. 438, 439, 440), so she checked to see if Ms. Kent was alright and returned to her conference call (Tr. 440).

Ms. Carol Ann Aytes, who also is employed in Human Resources, was in her office working when she heard Mr. Cooper shouting and she went out to see what was going on. She stated, "When I got up there he was accusing the Personnel Staff of trying to get a disk. Melanie [Kent] was trying to explain that we had no need for the disk, and he made a statement about all of us being a bunch of SOB's. As he was going out the door - I wasn't up there long before he left. As he was going out the door he was shouting that Management was a bunch of crooks and all should be locked up in jail. . . ." (Tr. 446-447).

11. Ms. Kent and Ms. Jago confirmed that Mr. Cooper had first come to Human Resources alone at about 11:00 a.m. on November 17, when he engaged in his shouting and pounding episode, and again at about 11:30 a.m. when he was accompanied by Ms. Henry (Tr. 411, 433). Ms. Kent said Ms. Henry asked what the issue was over Ms. Kane using the computer and why the disk had to be confiscated and that she, Kent, ". . . tried to explain to her that we had a potential security infraction . . . that we had a potential information resources management issue . . . and . . . that we had a potential personnel management issue . . ." (Tr. 411); that Ms. Henry responded with foul language; that she, Kent, told Ms. Henry that the disk, ". . . would be scanned and if there was nothing on it that she would get it back, and at that point she [Henry] told me it wasn't even her - excuse me - fucking disk . . . referring to Leota Cain (sic). . . ." (Tr. 412). Ms. Kent told Ms. Henry it was inappropriate for Ms. Kane to use a government computer and was in the process of getting out her contract to show her the language in the contract when Ms. Jago, whose office is next to Ms. Kane's, appeared with her contract in hand and pointed out specific language to Mr. Cooper and Ms. Henry (Tr. 413, 433, 434). Ms. Kent said that on this occasion, Mr. Cooper was calm and didn't say "a lot during this meeting." (Tr. 413). After Ms. Jago pointed out the contract language, Mr. Cooper and Ms. Henry left (Tr. 413).

12. As noted earlier, Ms. Davis, although she could not remember what Mr. Cooper said, seemed to indicate that Mr. Cooper's loud talking in the lobby occurred after he and Ms. Henry returned from Personnel, but the more probable

chronology is that Mr. Cooper made the loud statements in the lobby after he had returned from his first, and solo, visit to Personnel, where he had loudly proclaimed the essentially identical sentiments while pounding on the counter for emphasis. Mr. Cooper was distraught and angry on this visit to Personnel and the essentially identical statements he made in the lobby appear to have been a continuation of the harangue he had begun in Personnel. Mr. Cooper, at least by inference, confirms this. Thus, he said he walked over to where Ms. Henry was standing in the lobby and, ". . . I talked to her about the management at OR being dishonest and these things that were wrong and crooked and they shouldn't be holding government jobs, and they should be in jail . . . I was still upset . . . I was very loud again." (Tr. 220-221). Moreover, Ms. Henry, in order to calm Mr. Cooper, asked him to go outside and talk while she had a cigarette (Tr. 124, 223), and after they returned to the lobby, she, Ms. Henry, and Mr. Cooper went to Personnel and, on this second trip to Personnel, Mr. Cooper was calm and Ms. Henry did the talking.

13. Mr. Hough, Mr. Cooper, Ms. Davis, Ms. Kane and Ms. Henry remained in the lobby awaiting the arrival of someone from Security to pick up the disk for scanning. Eventually, Mr. Ronald Eugene Adams, Federal Officer and Physical Security Specialist (Tr. 376, 448), arrived. Mr. Adams stated that while in his vehicle on the morning of November 17, 1998, sometime between 11:00 a.m. and noon, he received a radio transmission to call the Emergency Operation Center which informed him that there was a disturbance in the lobby (Tr. 449) and he had responded. Mr. Adams said that there was no disturbance in the lobby when he arrived (Tr. 455); that there were three or four people in a group talking among themselves (Tr. 450); that he, Adams, went to the two guards stationed in the lobby and asked them what the problem was and the guards told him there was a dispute between Mr. Hough and several other people concerning a computer disk; that he then went to Mr. Hough and took Mr. Hough aside and asked him what the problem was (Tr. 450). Mr. Adams said that Mr. Hough explained the matter to him and told him, ". . . I want to make sure nothing has been injected into the machine or taken off the machine . . ." (Tr. 451); that Mr. Hough asked if he could make that determination and he had told him that he, Adams, could not but that someone in his Division (Safeguards and Security) (hereinafter, "S&S") could make the determination and told Mr. Hough to accompany him across the street to Building 2714, where S&S is located, and he would have the disk scanned (Tr. 451-452). Mr. Adams stated that as he and Mr. Hough started to leave the lobby, Mr. Cooper stopped him asked where he, Adams, was going and

told Mr. Adams ". . . you cannot take that disk." (Tr. 452); that he, Adams, told Mr. Cooper that he was going to take Mr. Hough over to S&S to have the disk scanned; that Mr. Cooper a second time told him he, Adams, ". . . was not going to take the disk." (Tr. 453); that Mr. Cooper said, ". . . there was information on that [disk] that was Union sensitive and we were not allowed that disk" (Tr. 453); that he, Adams, again told Mr. Cooper he was, ". . . going to try to satisfy Mr. Hough's concerns there was nothing on it [the disk] that should not be on it, nor had anything been extracted." (Tr. 453); that for a third time, Mr. Cooper said, ". . . you're still not taking the disk . . ." (Tr. 453); and that at that point he, Adams, told Mr. Cooper officially his name and position in S&S and told Mr. Cooper to cease and desist from trying to stop him or he would take action against him, Cooper (Tr. 454). Mr. Adams said that Mr. Cooper then asked if he could go with him and he had told Mr. Cooper he could not take him because, ". . . I only had a two seater vehicle and with Mr. Hough there wouldn't be room . . . but . . . you're certainly welcome to follow us . . . [to Building 2714]." (Tr. 454, 455).

Mr. Hough said that to try to defuse the confrontation in the lobby he had offered to give the disk to the security guard who refused to take it until she called her supervisor (Tr. 339-340); that he, Hough, then talked to Mr. Pat Belton, in S&S, who told him to bring the disk to Building 2714 to have it scanned (Tr. 340); that Building 2714 is only about two or three hundred yards from the Federal Building (Tr. 340); that at this point Mr. Adams arrived and told him, Hough, that he, Adams, had talked to his supervisor who told him to bring the disk to Building 2714 to be scanned; that he, Hough, gave the disk to Mr. Adams and rode with him to Building 2714 (Tr. 341).

Ms. Davis said that a man, whose name she was later told by Ms. Henry and Mr. Cooper was Ron Adams, came into the lobby and announced that, ". . . he was from Jim Ware's office. . . ." (Tr. 51); that Mr. Adams went behind the guard station and motioned Mr. Hough over, talked to him and took the diskette (disk) from him (Tr. 52); that she immediately, ". . . was in Ron Adams' face, because he had my diskette and I wanted to explain to him . . . what was on the diskette, and that they couldn't take it . . ." (Tr. 52). Ms. Davis said Mr. Cooper and Ms. Henry, who had been sitting with Ms. Kane, came over to where she and Mr. Adams were talking; that she, Davis, did most of the talking; that Mr. Adams said, ". . . his boss, Jim Ware, had sent him over there to get the diskette and the supervisor and nobody else." (Tr. 53); that we were all

trying to tell him, ". . . you can't take it . . ." (Tr. 53); that when we realized Mr. Adams was not going to give up on taking the disk to have it scanned, ". . . we told him that we had to go with him, and he said we could go if we wanted to, but he did not have room for us in his car, since he only had one seat . . .", and, so, Mr. Hough and Mr. Adams went in the car and we walked across the parking lot to Building 2714 (Tr. 54).

Ms. Henry said that they [Mr. Cooper, Ms. Davis, Ms. Kane and herself], ". . . had found out that Ron Adams or someone was coming to get the disk and take it to security and review it for security information . . ." (Tr. 125); that, at that point, three more armed guards came into the lobby to just stand there." (Tr. 125). Ms. Henry said that while she and Mr. Cooper were talking to Ms. Kane, Mr. Ron Adams, ". . . a security officer for DOE, an armed officer" (Tr. 126), entered the lobby; that Mr. Adams walked toward Mr. Hough and Ms. Davis; that Mr. Hough handed the disk to Mr. Adams; that she and Mr. Cooper went over to join Messrs. Hough and Adams and Ms. Davis and, . . . We were in kind of a circle." (Tr. 127). Ms. Henry said that she told Mr. Adams, ". . . we just had this problem with the disk and that security wanted to check it and we wanted one of us to be there when they checked it." (Tr. 127-128). Ms. Henry said Ms. Davis was upset and, ". . . said two more times that he took my disk, he took my disk . . ." (Tr. 128). Ms. Henry said that she told Mr. Adams the disk contained a Union brief which had important confidential information and, ". . . we needed to protect it." (Tr. 128). Ms. Henry said Mr. Adams told them, ". . . we could not ride with him because he had been ordered to bring Hough and the disk plus he did not have a back seat in his vehicle so if we wanted to go over to talk to Jim Ware we would have to walk over or take our car." (Tr. 130).

Mr. Cooper said that Mr. Krause had told him in their telephone conversation that he was going to send someone over to get the disk but didn't say who; that he and Ms. Henry were sitting on a couch with Ms. Kane when Mr. Adams entered the lobby and went over to Mr. Hough and took the disk (Tr. 225-226); that he and Ms. Henry walked over to where Ms. Davis and Messrs. Hough and Adams were standing; that the Union triumvirate (he did not indicate whether it was he, or Ms. Henry, or Ms. Davis who spoke; or if indeed it had been all three of them) said they, ". . . didn't want to interfere with him, that we understood that that was his job to come get that. We also understood that there was really nothing classified on that disk . . ." (Tr. 227); that they explained to Mr. Adams that

the disk, ". . . did contain a very sensitive union brief . . . and we didn't want anybody else copying that disk, or having it out of our presence . . ." (Tr. 227); that Mr. Adams told them he did not have authority to, ". . . let us be with the disk. . . ." (Tr. 228); and Mr. Adams told them that, while he could not take them because his car did not have a back seat, they could go to Building 2714 if they wished and speak to Mr. Ware, Director, S&S, and Mr. Adams' immediate supervisor (Tr. 228). Mr. Cooper denied that he pulled Mr. Adams at any time (Tr. 229), and after Mr. Adams and Mr. Hough left the lobby and went to Mr. Adams' vehicle, Mr. Cooper, Ms. Henry and Ms. Davis proceeded to walk to Building 2714.

14. As Mr. Adams drove, he and Mr. Hough had entered Building 2714 (subsequently, also, referred to, perhaps more accurately, as Building 2714-J) (e.g., Tr. 347, 479) before Mr. Cooper, Ms. Henry and Ms. Davis arrived.

Mr. Hough said he said he saw Mr. Cooper, Ms. Henry and Ms. Davis enter; that he and Mr. Adams had gone, ". . . in to Jim Ware's office and at the same time or shortly thereafter Delores Henry, Sue Davis and Dalton Cooper entered and Mr. Ware's response to them was may I help you? And one of them -- I don't remember which one - told him that they were there to observe the disk being scanned." (Tr. 342); that when he and Mr. Adams, Mr. Cooper, Ms. Henry and Ms. Davis arrived, Mr. Ware had been meeting with a gentleman he, Hough, did not know (Tr. 343); that Mr. Ware told the Union triumvirate, ". . . that they would not be allowed to observe the scanning and again⁶ he asked them to please leave." (Tr. 343). Mr. Hough said Mr. Ware's tone of voice was, ". . . normal but forceful" (Tr. 343); that Mr. Ware did not yell nor was his voice loud (Tr. 344); that he did not observe anything out of the ordinary (Tr. 344); that Mr. Ware did not wave his arms over his head; that he, Hough, saw nothing that appeared to be threatening (Tr. 344). Mr. Hough said he did not see a gun on Mr. Ware's person (Tr. 344). Mr. Hough said that the Union triumvirate did not leave when Mr. Ware asked them to leave (Tr. 344). Mr. Hough said, ". . . Mr. Adams gave the disk to Bill Watson, who works in the security division, and Mr. Watson took the disk back to a classified computer and inserted the disk in the floppy disk drive, and he did a directory scan" (Tr. 345); that only he and Mr. Watson were present when the disk was scanned (Tr. 345); that the scanning took, "Approximately two minutes maybe" and no

6

Although Mr. Hough said this was, "the second time he asked them to leave" (Tr. 343), the record does not show when he first asked them to leave.

sensitive or classified files were detected (Tr. 345); that after the disk was scanned, Mr. Watson, ". . . removed it from the disk drive, he gave it back to Ron Adams. And then Ron gave the disk to me and I gave it to Sue Davis." (Tr. 346). Mr. Hough said he was uncertain whether, when he returned the disk to Ms. Davis, she, Ms. Henry and Mr. Cooper were still in the secured area (Building 2714) or whether it was just outside the door (Tr. 343). Mr. Hough said that the disk was not copied, as far as he knew (Tr. 347).

Mr. Adams testified that he, ". . . explained to Mr. Ware over the telephone that I was bringing the tape over and asked him to find Mr. Watson and have Mr. Watson present to review the tape. He said that he would come on over." (Tr. 454). Mr. Adams said that when he and Mr. Hough entered Building 2714, ". . . As I went in to get to Mr. Watson I had to pass Mr. Ware's Office and I was going to tell him that we had arrived but I saw that he was in conversation with one of the Assistant Managers [Mr. Bob Dempsey] so I held up the tape. He looked at me and nodded and I continued to walk back where Mr. Watson was located." (Tr. 456). Mr. Adams said that he had not noticed at this point whether Mr. Cooper, Ms. Henry and Ms. Davis had entered the building (Tr. 457) but he later saw them in the building, ". . . so I assumed that they followed me directly." (Tr. 456). Mr. Adams said he gave Mr. Watson the disk and, ". . . told him that Mr. Hough had found someone on a machine in his office who he didn't recognize and he was afraid the person might have interjected something into the machine or extracted something from it and Mr. Hough just wanted to make sure there was nothing on the tape that should not be there." Mr. Adams said Mr. Watson, accompanied by Mr. Hough, took the disk into another room; that he, Adams, stayed outside and he knew nothing about what went on (Tr. 457, 458, 460, 461); that Mr. Watson emerged from the room and gave him, Adams, the disk and Mr. Hough said, ". . . I'm satisfied that there is no problem with the disk, and Mr. Hough and I left the building." (Tr. 458). Mr. Adams said he was armed on this occasion, that he is, ". . . the only person who is armed all the time." (Tr. 461).

Mr. William (Bill) Watson is a team leader for Computer Security and Inspections (Tr. 464). Mr. Watson said that on November 17, 1998, Mr. Adams asked him to scan a disk (Tr. 468); that, ". . . As I was leaving my office [also in 2714-J (Tr. 468)] to go get the disk from Ron Adams I noticed them [Dalton Cooper and Delores Henry] at the entry way to our area." (Tr. 469); that he, Watson, opened the door for them; and that, ". . . I went on to Ron Adams got

the disk and they [i.e. Cooper and Henry] came on into the office area. Then Ron Adams gave me the disk. I told them that I would need someone who was familiar with the information that was in that area that the disk came from to help me . . ." (Tr. 469). The following questions and answers by Mr. Watson followed:

"Q . . . Mr. Watson . . . did you speak with Mr. Adams in front of Mr. Ware's Office?

"A Yes, that's where we discussed a little but about the disk and getting someone else to go with me to look at it.

"Q Did anyone else approach the office at any time?

"A Well Delores and Dalton came up behind me.

"Q Was Mr. Ware in his office, out of his office?

"A He was inside.

"Q Who was he meeting with or was he meeting with anyone?

"A There was someone in there but I didn't know who it was at the time.

"Q So at this point in front of Mr. Ware's Office approximately how many people were there counting yourself and Mr. Adams?

"A About five.

"Q Did you hear much conversation between Mr. Ware, Mr. Cooper, Ms. Henry, this other person? [Ms. Davis].

'A No.

"Q Did you ever hear Mr. Ware yell or scream?

"A No.

"Q Did he do anything that you in any way would interpret as violent and intimidating?"

"A No.

"Q You didn't see him wave his arm over his head.

"A No.

"Q When Mr. Adams gave you the disk did you request anything from him. . . .

"A Asked him for somebody that was familiar with where the media came from to help look at the files for classification.

. . .

"Q Did Mr. Adams respond to that?

"A Yes, he said that Bill Hough would look at it with me.

. . .

"Q Once Mr. Adams gave you the disk what happened?

"A I took the disk. Bill Hough and I then went to another area of the office where am classified machine was to use it for the scanning, and got the machine went through the - looked at files on the disk and basically brought them back.

"Q You scrolled them?

"A Yeah, look at . . . opened a file manager . . . just first of all see how many files were on the disk. As I recall there was something like five. . . .

. . .

"Q What did te scanning reveal?

"A It looked like multi-versions of the same file. It looked - well to me it looked lit it could be a possible grievance type thing and there was about five copies of it, but that was about it.

"Q Did you see any classified information. . .

"A No.

"Q About how long did this scanning take?

"A The scanning itself probably about five minutes. About a minute for each file.

"Q Mr. Watson, did you print out the text of the files on the disk?

"A No.

" Did you place the text of the files on any other disk?

"A No.

"Q Did you re-produce the disk or copy any of its contents in any way?

"A No.

"Q What did you do with the disk when the scanning ended?

"A Took it back to Ron Adams. . .

"Q When you went back up to the front had Mr. Cooper and Ms. Henry left by this period?

"A No, I don't believe so. They were still there.

"Q Where were they?

"A Mr. Ware's door.

"Q All right. What did you do then, Mr. Watson?

"A I gave Ron Adams the disk. Told him that it looked clean and went back to my office and went to work.

. . . ." (Tr. 469-473)

Ms. Teresa Rollen, Office Manager of S&S whose desk, inside the electronic doors, is about fifteen feet from Mr. Ware's Office (Tr. 479-481). On November 17, 1998, when she was getting ready to go to a Thanksgiving luncheon (Tr. 487), Mr. Cooper and two ladies she did not know came in, she had not let them in (Tr. 481), and went past her desk, ". . . straight to Jim Ware's Office" (Tr. 480) where Mr. Ware was meeting with Mr. Bob Dempsey, then Assistant Manager for Defense Programs, which included S&S (Tr. 482). Ms. Rollen stated that Mr. Ware came to the door way of his

office and, ". . . they started talking something about a disk" (Tr. 481; that, ". . . I remember Jim [Ware] said that I've already discussed that with you and I don't have anything else to say about it. Then they started - Dalton [cooper] got kindly (sic) upset about that and agitated, and they were kindly (sic) all talking at the same time. Especially Dalton and the two woman were talking to Jim, and one at (sic) point one of the women walked over to the front of my desk and said something about how rude he is"⁷ (Tr. 482). Ms. Rollen said, ". . .I didn't respond to her comment but I remember thinking yes, it was rude because they just barged into his office . . .", that is, it was Dalton Cooper and the two women who were with him who were rude (Tr. 482). Ms. Rollen said Mr. Ware, ". . . talked in his normal tone of voice, but he was firm." (Tr. 482); that he [Ware], ". . . was calm but you could tell he meant what he said when he said that he had already talked to them about the disk . . . That that was all he had to say about it." (Tr. 483). Ms. Rollen said Mr. Ware was not yelling (Tr. 493); that he asked Mr. Cooper and the women to leave, ". . . several times . . . I remember at least twice" (Tr. 483); that, ". . . at first Dalton kept talking, and he told Jim [Ware] that he was going to file a grievance against him. Probably several grievances, and he started back out the door but he kept talking as he was going out the door. . . ." [i.e., Mr. Cooper went out the electronic doors] (Tr. 483); that the two women stayed (Tr. 484); that Mr. Ware was not yelling, did not wave his arms over his head, did not gesture in a threatening way (Tr. 484); that, "Mr. Ware came back to the door and he looked out and he said you're still here, and they said - they were looking at something . . . and Mr. Ware said well I asked you all to leave, and they said well we're just looking through

7

General Counsel in her Brief states,

". . . Rollen confirmed that one of the women with Cooper spoke to her but she incredulously interpreted Davis' negative comment about Ware's behavior . . . as a reference to what she considered as the inappropriate or rude behavior of the Union representatives. . . ." (General Counsel's Brief, p. 44).

Ms. Rollen testified that the Union representative [Ms. Davis] said, "something about how rude he is" (Tr. 482) and in her statement, "I've never seen anybody act so rude." (G.C. Exh. 23, p. 3). I find nothing incredulous in Ms. Rollen's attribution of the comment to Mr. Cooper and the two women with him, for that is how she viewed them. "It makes a difference whose ox is gored."

something. He told them that they could do that in their office, and so they left then." (Tr. 485). Ms. Rollen repeated that she did not see Mr. Ware violently wave his arms while yelling; that she never saw him engage in any behavior she would consider violent or intimidating; that Mr. Ware did not rush toward Ms. Henry waving his hands in an irrational and violent manner; that Mr. Ware never rushed toward Ms. Henry at all; that neither Mr. Ware nor Mr. Dempsey was armed (Tr. 486) and that, "During the interaction with them he was - he talked in a normal voice and was calm. He never did get angry . . . and he just very firmly told them that he had discussed it with them and he was not going to discuss it any longer, and there was nothing that was threatening or yelling or anything like that." (Tr. 486).

Mr. Robert (Bob) Dempsey on November 17, 1998, was Assistant Manager for Defense Programs which included S&S, and he now is detailed as Deputy Assistant Manager for Environmental Safety and Health and Special Technical Advisor to the Manager (Tr. 488). On November 17, 1998, just before lunch, he was in Mr. Ware's office discussing business when Ron Adams came to the door of Mr. Ware's office and, ". . . indicated to Jim and I (sic) that he had the disk and I was at a loss as to what he was talking about, and you know Jim told him to go ahead and have the disk scanned. Then Jim started to tell me more about you know what was going on and then there was an interruption with other people coming in . . . Dalton Cooper was the only one that I knew for sure. There were two other ladies with him. I could tell that by the voices but I could not see one of the ladies . . . They were wanting to discuss the fact that they felt they had a right to view this disk being scanned, and Jim Ware told them basically that he did not agree with that and that if they didn't have any other business that you know he had no further need to talk to them." (Tr. 490-491). Mr. Dempsey said Mr. Ware's demeanor was ". . . pretty calm at that point . . ." (Tr. 491); that, ". . . they [Mr. Cooper and the two ladies] pressed you know demanding that they be allowed to go do this raising their voices, and you know Jim once again told them if they didn't have any other business there to please leave." (Tr. 491); that Mr. Ware was standing in his door way and that he, Dempsey, was sitting inside Mr. Ware's office near a small table; that Mr. Ware asked them to leave twice and then he heard the security door open and someone went out (Tr. 491); that someone remained in the foyer area and, ". . . I heard Jim once again ask them you know what is your business here, and once again told them that they needed to leave" (Tr. 491); that Mr. Ware's, ". . . voice was raised but he was still you know basically asserting his

responsibilities as the Manager over a limited security area." (Tr. 491); that Mr. Ware asked them to leave three times and, ". . . when I heard him having to say something the third time, I had started towards the door but by the time I got to the door whoever was there in the foyer had left." (Tr. 492). Mr. Dempsey said the assertion in General Counsel Exhibit 3 that when the Union triumvirate tried to talk to Mr. Ware, before any of them could say a word, Mr. Ware started yelling for them to leave was not ". . . a true representation of what happened." (Tr. 492-493); he said Mr. Ware did not yell, ". . . By the time he had had to say something his voice was raised but it wasn't a yell. It wasn't you know to a point where you would have any concern about violence in my opinion." (Tr. 493); and that he never saw Mr. Ware rush toward Ms. Henry yelling and waving his hands (Tr. 493). Mr. Dempsey said he was not armed and that Mr. Ware, to his recollection was not armed (Tr. 493).

Mr. James Ware, Director of S&S since July, 1996 (Tr. 497), said that he received a call from Mr. Adams, who works for him, at about 10:45 a.m. in which Mr. Adams told him about the disk matter and he, Ware, asked Mr. Adams to get the disk and bring it to him for scanning (Tr. 507); that he, Ware, was in his Office meeting with his supervisor, Mr. Bob Dempsey, when Mr. Adams showed up, ". . . I didn't talk to him when he came. Passed my office but he did hold up the disk and indicated that he had it, and he and Bill Hough and I think Watson went back to the computer security area to scan it." (Tr. 509). Mr. Ware said that, "Shortly after Adams came through I saw Mr. Cooper and one lady. I didn't see - I ultimately found that there were two ladies with him but I saw Dalton Cooper and one lady approaching the door to my office; that he, Ware, was in his office; that, "Mr. Cooper was very angry. He was somewhat belligerent and his first words to me was (sic) that I need to talk with you and my - the best of my knowledge I informed him that look, first I was meeting with Dempsey. Secondly, if he wanted - if he was concerned about the disk that the disk would be scanned and as soon as it was scanned we would give it back to him." (Tr. 510). Mr. Ware said Mr. Cooper responded; that, "I don't recall exactly but the gist of the conversation then went to the fact that he felt that we were in a conspiracy with Management and that we would scan the disk and then turn the information on over to Management and, of course, we responded that we had no interest in what was on the disk." (Tr. 510). Mr. Ware stated that he told Mr. Cooper

he had no need to observe the scanning⁸ (Tr. 511); that the scanning would take only a few minutes and, when completed, the disk would be returned to him (Tr. 511). Mr. Ware said that after he told Mr. Cooper he could not see the scanning that there transpired, "Just more of the same conversation with him regarding the fact that he felt we wanted to take the information. . . . and share it with upper Management and so forth. I asked him then to leave . . . and more of that type of discussion continued. I asked him the second time to leave. I don't really recall how many times I asked him to leave, but eventually he did leave" (Tr. 513); that Mr. Cooper said, ". . . he was going to file a grievance as he walked out the door. . . . I said that's fine but leave." (Tr. 515). Mr. Ware said his voice was firm; that, ". . . I did not - I don't - I didn't raise my voice. I did not yell at him, but after initially asking him to leave I'm certain that I said it with emphasis." (Tr. 513). Mr. Ware further said, "After Mr. Cooper left two women remained. They stood right in front of my secretary's desk⁹ [Ms. Sandra Hayward] and were looking through a Handbook or pamphlet of some type. . . . I asked them to leave. I came out. I went into the office after Mr. Cooper left. Then I came back out and I asked them to leave again. . . . I asked them to leave maybe two or three times after that, and one of the ladies stated to me well we're doing something. I told them that the area was not one in which one could loiter and if they were in there they should have some official reason for being there. I asked them to leave again and they left." (Tr. 513-514). Mr. Ware said he approached the two ladies. ". . . I did not get in their space. I was not in their face. I did approach them and simply asked them to leave." (Tr. 515). On cross-examination, Mr. Ware was asked whether during his conversation with Mr. Cooper he gestured and Mr. Ware replied, "I don't recall gesturing. It's quite possible that I did. I just - I don't recall it." (Tr. 519).

15. Mr. Cooper acknowledged that Mr. Watson let him, Ms. Henry and Ms. Davis into Building 2714 (Tr. 231). Mr. Cooper said, ". . . As I entered, I see could see

8

Mr. Ware explained that for security reasons, i.e., the methodology used, the software that is used and the computer used, only those who have to have knowledge of a process in order to do their jobs have a need to observe the scanning. Mr. Cooper had no such need and could not be permitted to observe the scanning. (Tr. 511-512).

9

Directly in front of Mr. Ware's office door (Tr. 514) and Ms. Rollen sits at a desk about three feet away, to the right of Ms. Hayward (Tr. 514).

Mr. Adams and Mr. Hough already walking around the counter down the hallway. . . . Mr. Ware was - by the time I entered Mr. Ware was already out of his office shouting at us to leave, pointing at the door, you know, get out of here, we don't want you in here, you can't be in here, you know, shouting at us. . . . I hadn't said anything. I don't believe anybody had said anything at that point. We didn't have a chance to say anything. . . . Mr. Dempsey, who was sort of standing in the doorway of Mr. Adams' - Mr. Ware's office, sort of sticking his head out the doorway looking at us. . . . He [Ware] was waving his arms, you know. I mean, very animated and yelling at us. . . . I didn't say anything. . . . Ms. Davis said why are you being so hostile toward us. . . . I don't think he [Ware] responded at all, except get out of here, I don't want you in here. . . . I left. . . . I was -- you know, I was amazed and afraid for my safety because of his actions. I had never seen him that angry before. . . . I said that we'll have to file a ULP." (Tr. 232-234, 294). Mr. Cooper said that when talking to Mr. Ware he, Ms. Davis and Ms. Henry, ". . . were very calm. We didn't get to say very much. We were very calm." (Tr. 236). Ms. Henry and Ms. Davis did not leave when Mr. Cooper left, "They stood in there a few more seconds and I don't know what Ms. Henry was doing, but I think she was looking at something up there on the counter trying to get it together to get out of there. . . . I looked back and it's a glass door. . . . He [Ware] came back toward Ms. Davis and said you're still here, I told you to get out of here, now get out, and I want you out now. . . . He approached them fairly close. I mean, he wasn't right there able to hit them, but he came closer than he was the first time when I was in there." (Tr. 234-235). Mr. Cooper said Mr. Ware's voice was very loud and he was waving his arms (Tr. 235) and Ms. Henry and Ms. Davis left (Tr. 235). Mr. Cooper said that when Ms. Henry and Ms. Davis came and they talked about what had occurred and, ". . . we were amazed about how angry he was . . . In a couple minutes Mr. Hough came out and gave us the disk, gave it back to us and said there was nothing wrong with it and we could take it back." (Tr. 236-237). Mr. Cooper said that they then returned to the Federal Building where they had left Ms. Kane and, ". . . apologized to her for the things that had happened . . ." (Tr. 237) and then Mr. Cooper, Ms. Henry and Ms. Davis went to Mr. Cooper's office (Tr. 237). Mr. Cooper insisted that, ". . . he [Ware] was already outside his office. When I got in the door, he was already outside his office and he was already telling us to get out, I don't want you in here, yelling at us. . . ." (Tr. 294). Mr. Cooper said, ". . . I don't know if Mr. Ware carries a weapon. I don't have any idea. . . . I did not see any

weapons. I didn't see Mr. Adams' weapon. I know that he normally is armed. . . ." (Tr. 296). Mr. Cooper said that when Mr. Ware was ranting and raving, ". . . I guess that office manager was probably there. . . . I know Mr. Dempsey was there. Mr. Adams and Mr. Hough had just walked down the hallway, weren't very far away . . ." (Tr. 297). Mr. Cooper said he was frightened (Tr. 297), but said Mr. Ware asked him to leave, "I would say four or five times, I guess . . . at least four or five times" (Tr. 298). Mr. Cooper said, "Ms. Davis was not frightened. We went outside and she didn't know people were armed. Ms. Henry and I did know that. . . . When we told Ms. Davis that there were armed people in that building, she became frightened too." (Tr. 299-300).

Ms. Henry said that Mr. Watson opened the door to let them into Building 2714 and, "That was when things just went crazy. We walked in and Jim Ware was standing outside of his office door and just started yelling." (Tr. 132); that he was about 8 to 10 feet from us; that ". . . he just started yelling to get out of here. He said, what are you people doing here, I want you out of here, get out of here now. I don't want you here. I was shocked . . . He was pointing toward the door saying get out, get out of here now, I don't want you people here." (Tr. 133). Ms. Henry said, "There was a secretary sitting there, an office manager, and then on the other side I saw Bill Hough and Ron Adams. They were -- you come in this way and here's the desk where the secretary sits and right here's the door to Jim Ware's office and he was standing outside of it, then it goes down the hallway this way and Adams and Hough were there just down that hallway. . . . After the initial shock and we felt we had to protect that union information, that was our job, our responsibility as a union official so we walked on over to try to tell him and he screamed once or twice more and then Davis said to him, why are you being so hostile, Jim. . . . He then calmed down and stepped back, I guess a step or two back in towards hi (sic) office . . . I explained to him that there was a union brief on that disk and we just wanted one of us to be with it when it was checked so it could not be copied or saved in anyway and you know, we wanted to make sure that management did not get a copy of it. . . . He [Ware] said, I'm not even going to respond to that now get out of here and he started yelling again. . . . He was very angry. . . . We were right outside the office door . . . I saw Bob Dempsey standing in there." (Tr. 133-135). Ms. Henry said she did not remember Mr. Cooper saying a word while we were in there (Tr. 135); that, "We turned around and started to leave and Cooper was out the door and I started out the door when I stopped. . . . because I thought I had lost a note . . . and

I wanted to see if it dropped on the floor. . . . He became really, really upset then. Upset isn't the word. He became really obnoxious and started screaming, I told you to get out of here and he kind of came rushing towards us and had his arms up and said get out. I'm telling you to get out of here, I want you out of here now, just over and over, so . . . I ran out the door real fast. . . . She [Davis] ran out right behind me." (Tr. 135-137). Ms. Henry said that, "Before he [Cooper] went out the door nothing. He was already out the door and I was kind of in the door way and he said, we'll just have to file an ULP against them. I said, yeah, I guess so." (Tr. 136). Ms. Henry said they waited for someone to come out with the disk; that Mr. Hough came back with the disk and said no problem and the four of them, Cooper, Hough, Davis and Henry, walked back to the Federal Building (Tr. 138); that she, Ms. Davis and Mr. Cooper talked to Ms. Kane and told her that, "he [Ware] was crazy and you know, threatening us, he didn't threaten us but acting in a threatening way. He didn't say anything threatening but was definitely acting in a threatening and hostile manner. She [Kane] left and Davis and I went over to Cooper's office." (Tr. 138-139). Ms. Henry said, "We told her [Davis] - she hadn't been aware of it, that there were armed people over there . . . She [Davis] was real upset. She didn't realize that anyone there carried guns except the guards." (Tr. 140). Ms. Henry said that Mr. Ware was standing outside his office door when they came but he was not waiting for them, that ". . . On the other side of the counter Ron Adams and Bill Hough were there and he was kind of saying something to then (sic) as they started walking down the hallway . . ." (Tr. 191); that Mr. Ware became very volatile, "The second we walked in the door. . . ." (Tr. 192); that his [Ware's] voice was, "Wild, yelling . . . loud and nasty." (Tr. 192), but she was not afraid he would hit her (Tr. 192); that she did not know whether Mr. Ware was armed (Tr. 193); that Mr. Ware, ". . . never asked us to leave. . . . He demanded us to leave . . ." (Tr. 195).

Ms. Davis said Ms. Henry tried her key pad number to enter Building 2714, but it did not work (Tr. 55), but a man she did not know let us in (Tr. 55; that, "We were immediately met by Jim Ware and telling us that we had no business being there and to get out. . . . He was loud but I would not say he was yelling at that point. . . . He kept -- and I think it was more at first a motion, you know, that people with (sic) talk with their hand, saying get out, get out, and he was kind of shoving us toward the door with his hand, you know. . . . We were actually trying to get a word in to tell him that, you know, what the diskette was and to ask him if we could be present when they checked the

diskette. Especially me, I wanted to be present when the diskette was checked. And so that's what we were trying to tell him. . . . He wouldn't listen. He just continued to tell us to get out, that we had no business being there, to go back to our offices and do some work and he continued to get a little louder and he continued to wave his arm, saying, you know, to motion us out." (Tr. 55-56). Ms. Davis said she had known Mr. Ware about 20 years and thought he was a good friend, ". . . and I'm used to him hugging me when I see him, rather than yelling at me, and I really thought that this behavior . . . was just out of character for him . . . I felt kind of threatened by him because it was so out of character for him. . . . I tried to say to Jim, you know, Jim, why are you being so hostile, why can't we talk about this, and he wouldn't listen to that either, and then I think Mr. Cooper gave up first, and he kind of said, you know, come on, let's go, you know, he's not going to let us stay with the diskette, we'll just have to file a ULP. And he left. And Ms. Henry and I did not leave at that point. She stopped at the receptionist desk. There's a little counter in front of her and was looking at something in her book that she had with her, which I think was a contract or something, but anyway, she was looking at something in that book. And I started out, and then I decided that I was not going to leave her there with him acting the way he was acting. . . . I just didn't understand his behavior. I had never seen Mr. Ware act like that, and I just was not going to leave her there. I just felt like she was staying, I was staying. I don't know that I could have protected her, but I felt like I needed to stay with her. . . . Mr. Ware came -- kept calling -- he kept getting closer and closer to use at that point, and I felt threatened for Ms. Henry, because she was in front of me and he kept waving his arms and telling us to get out, get back to our office and do some work, and it seemed like each time he said it, he got louder, and at one point I looked over at the receptionist . . . and I said how do your stand working in this hostile environment, does he yell like that all the time? . . . She just looked at me and smiled. She didn't say anything. . . . I kept - I began to feel more threatened for Ms. Henry, and I finally got hold of her and said let's go, you know, so we left." (Tr. 56-58).

Ms. Davis said, "We met Mr. Cooper outside. . . . We were going to walk back over to the Federal Building . . . We hadn't taken ten steps till Mr. Hough came out of the building carrying the diskette, gave it back to me, and said everything was okay. . . ." (Tr. 59); that she, Ms. Henry and Mr. Cooper went back to the Federal Building and talked to Ms. Kane in the lobby and then she, Ms. Henry and Mr. Cooper went to Mr. Cooper's office (Tr. 59, 60). On cross-examination, Ms. Davis said, "He [Ware] was waving his

arms. I don't think we said waving his arms over his head. It was just motioning." (Tr. 92); that Mr. Ware was not wearing a gun, "Not to my knowledge" (Tr. 93); and she did not see anyone except the guards wearing a gun (Tr. 93); and when asked if she thought Mr. Ware was going to shoot her, she said "No" (Tr. 98), "Q But you thought he might order someone else to shoot you? "A After they [Cooper and Henry] told me he could,10 yes." (Tr. 98).

16. As noted above, Mr. Cooper, Ms Henry and Ms. Davis left the lobby of the Federal Building and repaired to Mr. Cooper's office. Ms. Davis said, "We were discussing what had happened, and so we called Phillip Pope, the business agent and talked - discussed it with him, and he suggested that while it was fresh on our mind that we write down everything that had happened, which we started doing a little bit of that. . . . They then started talking about a threat assessment policy, and so they went and got the

10

Ms. Davis said, ". . . I didn't know about the guns and when we were discussing it they said Delores Henry and Dalton Cooper knew of an incident. They actually told me that Ron Adams was wearing a gun. It kind of scared me since I was standing in his face but they told me about an incident where one of the men that does carry a gun that works in Jim Ware's office was twirling it around in the blood mobile threatening, saying that he wanted to shoot someone." (Tr. 95-96).

Whether the gun twirling incident took place is not an issue before me; but assuming that it did, and Ms. Henry said his gun was taken away from him (Tr. 140, 158), obviously, such conduct was immature, reckless and utterly reprehensible. Nevertheless, both Ms. Henry's asserted belief that Mr. Ware must be prone to like irresponsible conduct because he had hired, i.e. ". . . gave the right to carry a gun . . . (Tr. 199), a person who proved to be irresponsible and Ms. Davis' asserted belief, on the basis of what Ms. Henry and Mr. Cooper had told her, are wholly without support and, at best, the result of Ms. Henry's intentional misrepresentation of fact to induce a contrived response of fear in the gullible and credulous Ms. Davis.

document. . . . Well, after we looked at the booklet,11 it said that we were something, and I can't remember its exact words, said something about we should start with the nurse, which is a woman named Iris Housely (sic), so we went down

11

Respondent's "THREAT ASSESSMENT TEAM POLICY AND PROCEDURES" (G.C. Exh. 2), provides, in part, as follows:

"III. DUTIES

The Threat Assessment Team will assess threats or potentials for violence . . .

"IV. TERMS Examples of behavior for which there is zero tolerance include, but are not limited to the following:

- . . .
- "B. VERBAL THREATS; i.e., Abuse, Harassment, Intimidation.
 - "C. NONVERBAL - Gestures, Intimidation . . .

"PROCEDURES

"A. Incidents involving a threat or act of violence, aggression, or intimidation which appear to involve an imminent risk to the physical safety of an individual should be immediately reported to the Federal Building Complex Security Manager . . . or Operations Center . . . and Immediate Supervisor. . . .

"B. Any incident involving inappropriate behavior (i.e., apparent intoxication, a threat of violence, aggression, intimidation, or harassment) should be reported by telephone to the Federal Building Complex Security Manager . . . the Director of Personnel . . . or the EAP Coordinator . . . or the Oak Ridge Operations Center (after duty hours)

"C. A Threat Assessment Report/Violent Incident Form . . . must also be completed . . . by the response official. It should be given to the Director of Safeguards and Security

. . . ." (G.C. Exh. 2, pp. 3, 4
(as numbered by Reporter)

Ms. Housley is listed as one of the eight Threat Assessment Team Members as: "MEMBER Iris S. Housley, Oak Ridge Operations Office Nurse" (G.C. Exh. 2, p. 8).

to her office and talked to her about what had happened and told her how Mr. Ware had acted . . . She encouraged us at that point to file a threat assessment form and said that she was on the threat assessment team and that even though, although Mr. Ware was the person in charge of the threat assessment team, that it would be kept confidential and that he would not be in on its decision or anything. He would not be a part of the investigation. . . . She took our blood pressures . . . They were all three elevated." (Tr. 60-62) ". . . Then we went back to Mr. Coopers's office . . . we filled out a form. We made one up on the computer, I think, to match the one in the booklet . . . It's a threat assessment form . . . We filed (sic) it out and we all talked about it and filled it out together and helped word it, and then we all signed it and I think Mr. Cooper took it down and gave it to Iris Housely (sic), the nurse." (Tr. 63).

Ms. Henry said that when she, Ms. Davis and Mr. Cooper arrived at Mr. Cooper's office, "We decided to type up a report of the incident. We checked the Violence in the Workplace handbook . . . and yeah, this is the type of behavior you're supposed to report so we typed up a statement as to what we felt happened and signed it." (Tr. 139). Ms. Henry said that after they completed and signed the incident report, "We [Ms. Henry, Ms. Davis and Mr. Cooper] took it down to Iris Housely (sic) who is the nurse and a point of contact for reporting such behavior. . . . She [Housley] told us that she would have to turn the report in and make sure that Ware was not a part of it . . . and that she thought she should take our blood pressures because we all looked pretty upset. . . . All three of us had high blood pressures that day." (Tr. 141-142).

Mr. Cooper said that after talking to Ms. Kane, "We [Cooper, Davis and Henry] went up to my office and filled out a violence in the workplace form. . . . We felt like we had been threatened. We felt afraid for Mr. Ware's actions, just felt like it was a good thing to do to report this to upper management, as we were supposed to do under the violence in the work place policy that had just been instituted. . . . Mr. Ware had explained that to myself and Ms. Henry a couple of months before, that any time that a person felt threatened, felt afraid, that they should file and let the team investigate it and see if there's anything to it or not. They shouldn't be afraid of filing." (Tr. 237-238). Mr. Cooper said that after completing the report, "We took it to the nurse, Ms. Iris Housely (sic). . . . She's a member of the threat assessment team." (Tr. 239).

17. The incident report form signed by Mr. Cooper, Ms. Davis and Ms. Henry and filed with Ms. Housley stated, in pertinent part, as follows:

"On November 17th at about 11:40 AM, Sue Davis, Dolores Henry and Dalton Cooper (Union Representatives) went to the Safeguards and Security Division (Building 2714) along with Ron Adams and Bill Hough to accompany a computer disk that Ron and Bill were going to check for classified data. The disk had been taken away from a union member who was going to review a brief that a steward had prepared on the disk. Bill Hough had already said to Ron Adams that nothing in Dolores' office, area, or computer was classified or sensitive. We wanted to be present while the disk was being checked to make sure the union data on the disk was not compromised. We went into the office complex outside Jim Ware's office and tried to talk to Mr. Ware. Before any of us was able to say a word, Mr. Ware immediately started yelling for us to leave the area. He was violently waving his arms around in a threatening manner while yelling. His boss, Bob Dempsey was present and did not try to tell Jim not to yell or control Mr. Ware's violent and intimidating behavior in any way. As Ms. Henry was leaving, she stopped at the Office Manager's desk to look at the union contract. Mr. Ware rushed towards her yelling and waving his hands in an irrational and violent manner. At this point we all left the area for fear of our safety and physical well being. We did not stay in the area because we were afraid Mr. Ware would become violent himself or have one of the persons in the area that carry a pistol shoot us. We were not hostile toward Mr. Ware, we only wanted to be present when the disk was examined/copied. Mr. Ware refused to allow us to wait for the disk to be returned to us. Mr. Adams had previously advised us that checking the disk would take only a few minutes. Mr. Ware had no reason to act in a hostile manner toward any of us because we did not even have a change to speak before he started yelling at us.

"The Director of the Safeguards and Security Division, Director of the Personnel Division and the EAP coordinator were notified by 1:30 PM on November 17, 1998. The Deputy Manager was called

and the incident was reported to Debbie Booher in his absence." (G.C. Exh. 3).

The report was dated and signed November 17, 1998, by Mr. Cooper, Ms. Henry and Ms. Davis (id.).

18. The Threat Assessment Team investigated the incident report of November 17, 1998, and on December 3, 1998, issued its report in which, in part, it was found that, "Interviews with the witnesses confirmed that NO THREAT WAS MADE BY MR. WARE. . . ." (G.C. Exh. 5) and "Because of this blatant attempt to misuse the Threat Assessment Policy when there was no truth to their allegations, the Threat Assessment Team recommends . . . that disciplinary action be taken against each12" (id.).

19. On December 18, 1998, Mr. James R. Martin, Director, Oak Ridge Financial Service Center, issued Mr. Cooper a notice of a proposed five day suspension (G.C. Exh. 6); and on January 28, 1999, Ms. Judith M. Penry, Chief Financial Officer, issued her decision to suspend Mr. Cooper for five days (G.C. Exh. 15), which Mr. Cooper served.¹³ As both the Notice of Proposed Suspension (G.C. Exh. 6) and the Decision to Suspend (G.C. Exh. 15) make clear, the action against Mr. Cooper was based on his conduct in Personnel, in the lobby of the Federal Building, in Building 2714 and in part of his alleged "deliberately misrepresenting material facts. . . ." in the Incident Report Form (G.C. Exh. 3). Specifically, Mr. Cooper was suspended for, ". . . (1) making false, unfounded, highly irresponsible, and potentially defamatory statements against other employees; (2) for making such statements with the apparent intent to damage the reputation of those concerned; (3) use of offensive language; (4) insubordinate defiance of authority,

12

As I stated at the hearing, this is an unconscionable and reprehensible practice which demeans the presumed purpose of having a threat assessment team to investigate perceived threats. When threat investigation enters the realm of discipline its procedure appears to be a kangaroo court. See, for example, General Counsel Exhibit 2 where, again, discipline was recommended; but cf., General Counsel Exhibit 22, where the incident which, ". . . were unable to confirm", had been filed by a supervisor.

13

Mr. Cooper said he actually served thirty-five hours, because of his work schedule, rather than forty hours (G.C. Exh. 20; Tr. 252-253, 254).

and (5) deliberately misrepresenting facts in connection with an official document." (G.C. Exhs. 6, 15).¹⁴

CONCLUSIONS

The conduct in this case resembled conduct most often found in cases of "road rage" with like unfortunate consequences to the participants. Mr. Hough had been told by Ms. Henry, Chief Steward, that a former OSTI employee, terminated in a RIF, was in Ms. Henry's office and would be using Ms. Henry's computer and Mr. Hough had told Ms. Henry, "Okay". Mr. Hough then committed the first act in our "road rage" episode by figuratively "cutting in front" of Union representative Henry when, without notice to Ms. Henry, he reneged on his approval of the RIF'd former employee, Ms. Kane, using Ms. Henry's office and Ms. Henry's computer and went to Ms. Henry's office where he told Ms. Kane that Ms. Henry had no authority to allow her to use a government computer, wholly ignoring that he had approved her use of the computer; took the computer disk from the computer, telling Ms. Kane it must be scanned; and escorted Ms. Kane to the lobby where he signed her out. Ms. Henry was told to come to the lobby because Ms. Kane needed to speak to her. Once there, Ms. Henry was told what Mr. Hough had done and she returned to the conference room, where negotiations had been conducted, and informed Mr. Cooper, Shop Chairman, and Ms. Davis, Steward, to whom the disk taken by Mr. Hough belonged and who had written the draft brief which was on the disk. Ms. Davis was outraged because Respondent had taken her disk which contained her brief; Ms. Henry and Mr. Cooper were outraged because Respondent had confiscated union sensitive material; and all three were infuriated because Mr. Hough had reneged on his approval of Ms. Kane using Ms. Henry's computer, as indeed he had. This immediately provoked response by Mr. Cooper, Ms. Henry and Ms. Davis whereby they retaliated to Mr. Hough's "cutting in

14

On December 21, 1998, a Notice of Reprimand was issued to Ms. Henry (G.C. Exh. 1(c), Par. 14) and on January 8, 1999, a Notice of Reprimand was issued to Ms. Davis (G.C. Exh. 1 (c), Par. 15). Ms. Henry said she received no discipline for her use of profanity in Personnel to Ms. Kent (Tr. 156) and no allegation of impropriety in her letting Ms. Kane use her computer (Tr. 207). Ms. Davis was disciplined for, ". . . filing of a false violence in the work place form. . . ." (Tr. 66, 67). Of course, the allegations of paragraphs 14 and 15 of the complaint were dismissed and those allegations are not before me, except to note that Respondent did take disciplinary action against both Ms. Henry and Ms. Davis for asserted filing of a false incident report form.

front" of them by figuratively "speeding forward and whipping in front" of Mr. Hough. The unfortunate aftermath we now must deal with.

1. Mr. Cooper's Tirade in Personnel and in the lobby.

Mr. Cooper, Ms. Henry and Ms. Davis went to the lobby of the Federal Building and while Ms. Henry and Ms. Davis confronted Mr. Hough, Mr. Cooper, after using the telephone, went, alone, to Personnel where he confronted Ms. Kent and loudly demanded what was going on and when Ms. Kent told him the disk would have to be scanned, Mr. Cooper in a very loud voice berated Ms. Kent and Personnel in general by shouting words to the effect that it was dishonest and crooked to take the disk which contained union sensitive material; that you all are a bunch of crooks; you should be in jail; you should never work for the Federal Government; you're a bunch of liars and cheats; and, for emphasis, pounded his fist on the table with every shouted epithet. Mr. Cooper's tirade brought the head of Personnel, Ms. Jago, from an interrupted conference call in her office to see what was going on, as well as Ms. Aytes, a Human Resources employee, from her office. Mr. Cooper returned to the lobby and in a loud voice continued, in essentially identical language, the harangue he had begun in Personnel, i.e. management is dishonest, shouldn't be holding jobs, should be in jail, et al.

Ms. Henry, in order to calm Mr. Cooper, asked him to go outside and talk while she had a cigarette. After they returned, Ms. Henry and Mr. Cooper made a second visit to Personnel and on this trip to Personnel, Mr. Cooper was calm and Ms. Henry did the talking. Ms. Kent, to whom they talked in Personnel, said that Ms. Henry asked what the issue was over Ms. Kane using the computer and asked why had the disk been confiscated; that she, Kent, told Ms. Henry and Mr. Cooper that the disk would be scanned and if there was nothing on it, the disk would be returned. Ms. Henry, inter alia, asserted that the parties' agreement authorized Ms. Kane's use of the computer while Ms. Kent asserted the agreement did not and as Ms. Kent was in the process of getting out her contract to show Mr. Cooper and Ms. Henry the language in the contract, Ms. Jago appeared on the scene with her contract in hand and pointed out the specific language to Mr. Cooper and Ms. Henry and Mr. Cooper and Ms. Henry then left and returned to the lobby.

Mr. Cooper was Shop Chairman and the record is plain that he was engaged in protected activity when he engage in his diatribe in Personnel and in the lobby of the Federal Building. As the Authority stated in Department of the Air

Force, Grissom Air Force Base, Indiana, 51 FLRA 7, 11 (1995) (hereinafter, "Grissom")

"Section 7102 of the Statute guarantees employees the right to form, join, or assist any labor organization, or to refrain from such activity, without fear of penalty or reprisal. INS, 44 FLRA 1402. A union representative has the right to use "'intemperate, abusive, or insulting language without fear of restraint or penalty'" if he or she believes such rhetoric to be an effective means to make the union's point. Naval Facilities Engineering Command, 45 FLRA at 155 (quoting Old Dominion Branch No. 46, National Association of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264, 283 (1984)). Consistent with section 7102, however, an agency has the right to discipline an employee who is engaged in otherwise protected activity for remarks or actions that "'exceed the boundaries of protected activity such as flagrant misconduct.'" U.S. Air Force Logistics Command, Tinker Air Force Base, Oklahoma City, Oklahoma and American Federation of Government Employees, Local 916, AFL-CIO, 34 FLRA 385, 389 (1990) (citation omitted) (Tinker AFB). Remarks or conduct that are of such "an outrageous and insubordinate nature" as to remove them from the protection of the Statute constitute flagrant misconduct. Naval Facilities Engineering Command, 45 FLRA at 156; Tinker AFB, 34 FLRA at 390." (51 FLRA at 11).

To determine whether an employee has engaged in flagrant misconduct, Judge Oliver, in Department of Defense, Defense Mapping Agency Aerospace Center, St. Louis, Missouri, (hereinafter, "Defense Mapping"), 17 FLRA 71 (1985)), stated,

"The various factors to be considered in striking the balance should include (1) the place and subject matter of the discussion, (2) whether the employee's outburst was impulsive or designed, (3) whether the outburst was in anyway provoked by the employer's conduct, and (4) the nature of the intemperate language and conduct. . . . The balance must be struck in each case with an eye to the special facts presented by it." (17 FLRA at 81).

The Authority adopted Judge Oliver's findings, conclusions and Recommended Order, id. at 71, and applies these factors,

Grissom, supra, 51 FLRA at 12; Federal Bureau of Prisons, Office of Internal Affairs, Washington, D.C. and Federal Correctional Institution Englewood, Littleton, Colorado, (hereinafter, "FCI Englewood") 53 FLRA 1500, 1518-1519 (1998). (1) Mr. Cooper's tirade began in the office of Personnel (Human Resources) where it disrupted, momentarily, the work of Ms. Jago and Ms. Aytes, and continued in the lobby; however, the record does not show that any member of the public was present to hear Mr. Cooper's remarks which, in the lobby, appeared to be directed at Mr. Hough. The guards notified their superiors that there was a disturbance in the lobby, but they, the guards, did nothing to quiet the disturbance, which was short-lived. Mr. Cooper had been told that Personnel had told Mr. Hough that it was not proper for a non-employee to use a government computer, whereas, Mr. Cooper, and later Ms. Henry, contended that Ms. Kane's use of the computer was authorized by their Agreement; and, because Ms. Henry had told Mr. Cooper that Mr. Hough had informed her that Ms. Kent had told him to confiscate the disk, he made the assumption, although erroneous, that Personnel had done this in order to gain possession of the Union's brief. In view of the fact that Mr. Hough had reneged on his approval of Ms. Kane using Ms. Henry's computer and Ms. Kent had ignored the fact that, while, technically, Ms. Kent was not then an employee, she most assuredly was not a stranger, Mr. Cooper understandably gave no credence to Ms. Kane's assertions that Personnel would not see the contents of the disk. In short, Mr. Cooper's discussion concerned the gravamen of the controversy and his tirade concerned and stemmed from that discussion. (2) Mr. Cooper's outburst was impulsive. (3) Mr. Cooper's outburst was provoked by Respondent's conduct. First, Mr. Hough reneged on his approval of Ms. Kane using Ms. Henry's computer. Second, Mr. Hough gave Ms. Henry, the person he had told it was "okay" for Ms. Kane to use Ms. Henry's computer, no notice whatever of his change of heart. Third, Ms. Kent ignored the fact that Mr. Hough had approved Ms. Kane's use of Ms. Henry's computer. At best, it was disingenuous for Ms. Kent to say that she looked to see if, ". . . there might have been some prior arrangement made for that person to use the computer . . ." (Tr. 398), when she well knew Mr. Hough had made such "prior arrangement". Had she accepted Mr. Hough's statement that he had approved Ms. Kane's use of the computer and, had she realistically and forthrightly weighed the fact that the employee [Ms. Kane] was an employee terminated from OSTI, she might have agreed that Mr. Hough's approval of her use of Ms. Henry's computer was fully warranted; but if she did not, common courtesy and common decency should have mandated that she instruct Mr. Hough first to notify Ms. Henry. Instead, she instructed

Mr. Hough to, “. . . obtain any computer files that were created by that person and that he should escort that person to the lobby. . . . that any files that were accessed or created on the computer should be scanned. . . .” (Tr. 404). Not only did Respondent demonstrate its propensity to “speak with a forked tongue”, to act in an underhanded manner and to violate its expressed agreement; but Respondent seized Union sensitive material and rudely and crassly removed Ms. Kane from Ms. Henry’s office and from the building, but for the lobby. Plainly, Respondent’s conduct was certain to cause anger and to provoke indignation. (4) Mr. Cooper’s words and his pounding with his hand while in Personnel was boorish and unseemly conduct. However, his language was not so base as that used in Grissom, supra, which the Authority found, “. . . did not constitute flagrant misconduct.” (51 FLRA at 13); and when Mr. Cooper returned to Personnel a few minutes later with Ms. Henry, discussions with Ms. Kent and Ms. Jago were uninhibited by Mr. Cooper’s prior statements and/or conduct.¹⁵ Moreover, Respondent induced Mr. Cooper’s intemperate retort by its own deplorable and raffish conduct. On balance, Mr. Cooper did not engage in flagrant misconduct. Therefore, Respondent violated §§ 16(a) (2) and (1) of the Statute by disciplining Mr. Cooper based, in part, on his conduct and remarks in Personnel and/or his remarks in the lobby of the Federal Building.

2. Mr. Cooper’s Confrontation with Mr. Adams

From all of the testimony, I do not credit Mr. Adams’ testimony, nor the statement in Respondent’s Notice of Proposed Suspension to Mr. Cooper (G.C. Exh. 6), that he had responded, i.e., came to the Federal Building, because, “. . . there was a disturbance in the lobby. . . .” (Tr. 449). Rather, I find that Mr. Adams had been instructed to go to the Federal Building and pick up the disk to have it scanned before Mr. Cooper’s tirade. Mr. Cooper testified that when he talked to Mr. Barry Krause, before he went to Personnel, Mr. Krause told him he was going to send someone to get the disk (Tr. 225-226); Mr. Hough stated that Mr. Adams told him he, “. . . had talked to his supervisor who told him to bring the disk to Building 2714 to be scanned” (Tr. 341); and Ms. Davis stated that Mr. Adams said, “. . . his boss, Jim Ware, had sent him over there to get the diskette . . .” (Tr. 53). To be sure, Mr. Adams was told by the dispatcher that there was a

15

Ms. Henry reacted in an uncouth manner to Ms. Kent’s threat to counsel her, but this was unrelated to anything Mr. Cooper had said. Further, Ms. Henry was not disciplined for her language.

disturbance at the Federal Building, but, as I have found, this was not the reason Mr. Adams had been directed to go to the Federal Building and there was no disturbance when Mr. Adams arrived. Nor do I credit Mr. Adams' testimony that when he and Mr. Hough started to leave the lobby, Mr. Cooper stopped him (Tr. 452). Rather, as Ms. Davis credibly testified, after Mr. Adams talked to Mr. Hough and Mr. Hough had given Mr. Adams the disk, she immediately, ". . . was in Ron Adams' face, because he had my diskette and I wanted to explain to him . . . what was on the diskette, and that they couldn't take it . . ." (Tr. 52); that Ms. Henry and Mr. Cooper came over to where she, Mr. Hough and Mr. Adams were; and that she, Ms. Henry and Mr. Cooper individually and collectively forcefully argued that the disk contained sensitive Union information, a brief, that there was nothing classified on the disk, and that they, the Union, did not want anybody else copying the disk. Ms. Henry's and Mr. Cooper's testimony corroborate Ms. Davis' testimony. I have no doubt, as Mr. Adams stated, that Mr. Cooper, as Ms. Davis said she stated and probably Ms. Henry as well, although she did not admit having said it, told Mr. Adams, ". . . you cannot take that disk" (Tr. 452). Nor is there any doubt that Mr. Adams told Mr. Cooper, Ms. Henry and Ms. Davis that he, Adams, was going to take Mr. Hough over to S&S to have the disk scanned; that he told them more than once that he was going to have the disk scanned, ". . . to try to satisfy Mr. Hough's concerns that there was nothing on it that should not be on it, nor had anything been extracted" (Tr. 453); that he spoke in a forceful manner and that he told them not to interfere; but it is not credible that Mr. Adams, ". . . officially advised him [Cooper] of my name and my position . . ." (Tr. 453-454) since Mr. Adams knew and recognized Mr. Cooper and Ms. Henry (Tr. 451, 458) and Mr. Adams was well known to them (Tr. 126, 225). Nor do I credit Ms. Henry's testimony that she began her protest to Mr. Adams, by saying, in effect, ". . . we wanted one of us to be there when they checked it." (Tr. 128), although I conclude she later made such a statement to Mr. Adams. Rather, I find as Ms. Davis said, she, Davis, Henry and Cooper, stoutly objected to the disk being scanned and told Mr. Adams, in effect, you can't take the disk, and only after Mr. Adams had made it clear that their protests were not going to be granted, or as Ms. Davis stated, when, "We realized that he [Adams] was not going to give up on taking the diskette over" (Tr. 54), that they [Davis, Cooper and Henry], ". . . told him that we had to go with him . . ." (id.). It is agreed by all witnesses that Mr. Adams told them they were welcome to go to Building 2714 but that he could not take them because his car had only one seat (id., Tr. 130, 228-229, 454-455).

Plainly, Mr. Cooper, Ms. Henry and Ms. Davis were engaged in protected activity in their efforts to protect sensitive Union information which Respondent had seized. They were highly agitated and emotional, Ms. Davis because it was her disk and her brief that Respondent had taken, and all three were deeply disturbed that Respondent had taken possession of sensitive Union information. Their protests may have sounded like a trio of magpies but certainly did not go beyond robust debate. Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264, 273 (1974), Grissom, supra, 51 FLRA at 51. There was no swearing, no vulgar language, no intemperate, abusive or insulting language used and while they used the phrase "you can't take the disk" the record shows that the phrase was not used in the prohibitory sense but in a sense of amazed disbelief, a usage commonly expressed by virtually everyone, e.g., "You can't do that to me"; "they can't do that", etc. That this was the sense the phrase was used is shown by the fact that Mr. Adams concluded by telling them they were welcome to follow him to Building 2714 but that he could not take them because his car had only one seat. Further, I credit Mr. Cooper's denial that he pulled Mr. Adams at any time (Tr. 229, 267), but if he did, it was no more than a touching to gain his attention for Mr. Cooper to make a point. Because I find no conduct which could have removed Mr. Cooper, Ms. Henry or Ms. Davis from the protection of § 2 of the Statute, i.e., no remarks or conduct which were outrageous or insubordinate in nature, it is unnecessary to apply the factors for flagrant misconduct set forth above. Mr. Cooper, as well as Ms. Henry and Ms. Davis, was engaged in protected activity during his protest to Mr. Adams and Respondent violated §§ 16(a)(2) and (1) of the Statute by disciplining Mr. Cooper based, in part, on his conduct and remarks to Mr. Adams in the lobby of the Federal Building.

3. The confrontation in Mr. Ware's Office.

Much of this case centers on the Incident Report (G.C. Exh. 3) filed by Mr. Cooper, Ms. Henry and Ms. Davis on November 17, 1998, which, after investigation by the Threat Investigation Team, was found by them, on December 3, 1998, to have without basis; a misuse of the Threat Assessment Policy; and for their deliberate misuse of the Policy and for knowingly providing false and malicious information, that disciplinary action be taken against each. (Res. Exh. D, Incident 98-3, attached). Indeed, the Report stated, in part, as follows:

". . . It appears that Mr. Cooper, Ms. Henry and Ms. Davis in their signed report used language to describe Mr. Ware's behavior that would fit the criteria of a threat. The allegation that he might shoot them or have someone else do it was completely without basis and was an obvious attempt to use the Threat Assessment Policy inappropriately. Their own statements indicate that nothing was done or said to support that assertion only their speculation that persons who work in his area carry guns.

"Because of this blatant attempt to misuse the Threat Assessment Policy when there was no truth to their allegations, the Threat Assessment Team recommends to the Manager, Oak Ridge Operations for Mr. Cooper and Ms. Henry and the Manager, Office of Scientific and Technical Information for Ms. Davis that disciplinary action be taken against each for their deliberate misuse of the policy and for knowingly providing false and malicious information concerning Mr. Ware to the Threat Assessment Team. We recommend that this action be documented in their Official Personnel Files for one year." (id.)

The Notice of Proposed Suspension of Mr. Cooper issued December 18, 1998 (G.C. Exh. 6), and, in part, based the proposed suspension on the Report which had found the, ". . . Violence in the Workplace complaint against Mr. Ware was false, unfounded, and highly irresponsible and demonstrated your clear intent to damage Mr. Ware's reputation. You deliberately misrepresented the facts in your official complaint document and frivolously used the ORO Violence in the Workplace policy to disrupt the work of the six members of the TAT who were convened to consider your complaint." (G.C. Exh. 6, p. 3).

Although I am aware of the Report by the Threat Assessment Team, I have not considered the Report nor its "Investigation Activities" but rely solely on the testimony of the witnesses at the hearing.

A. The events in S&S

The Safeguards and Security Division (S&S), of which Mr. Ware was Director, is located in the secured portion of Building 2714-J. As noted above, Mr. Adams, with Mr. Hough, drove from the Federal Building and they had entered the building before Mr. Cooper, Ms. Henry and Ms. Davis arrived. Mr. Cooper, Ms. Henry and Ms. Davis were admitted to the

building by Mr. Watson and there is no dispute that they moved from the entrance, past the receptionist, and to Mr. Ware's office. From this point, the testimony of Respondent's and General Counsel's witnesses markedly diverge.

i) Mr. Ware's location when Cooper, Henry and Davis arrived.

Mr. Adams and Mr. Hough entered Building 2714-J before Mr. Cooper, Ms. Henry and Ms. Davis arrived and had gone past Mr. Ware's office, which was open, and seeing that he was in a meeting [with Mr. Dempsey], Mr. Adams held up the disk which Mr. Ware acknowledged. Mr. Adams and Mr. Hough went just past Mr. Ware's office to wait for Mr. Watson's arrival. That Mr. Ware was in, and remained in, his office with Mr. Dempsey when Messrs. Adams and Hough passed his office is undisputed.

Mr. Watson, who was to scan the disk, and whom I found to be a wholly credible witness, admitted Mr. Cooper, Ms. Henry and Ms. Davis to the S&S premises and the four of them, with Mr. Watson in the lead, proceeded to Mr. Ware's office. Mr. Watson went beyond Mr. Ware's open office door, where he saw that Mr. Ware was meeting with someone, and joined Messrs. Adams and Hough. Mr. Watson said that Mr. Cooper, Ms. Henry and Ms. Davis came up behind him and that Mr. Ware was inside his office. Mr. Watson's testimony was fully corroborated by the testimony of Mr. Hough, Mr. Dempsey, Ms. Rollen and Mr. Ware.

I do not credit Ms. Henry's testimony nor Mr. Cooper's testimony that when they, entered the S&S premises Mr. Ware was already out of his office, e.g. Cooper: "When I walked in the door, he was outside his office." (Tr. 293-294) ". . . When I got in the door, he was already outside his office . . ." (Tr. 294); Henry: ". . . We walked in and Jim Ware was standing outside of his office door . . ." (Tr. 132); nor do I credit the testimony of Ms. Davis that, "We were immediately met by Jim Ware. . . ." (Tr. 55), although she was less specific than Mr. Cooper and Ms. Henry the implication was that Mr. Ware was outside his office at least when they reached his office, for the reason that such testimony is contrary to the testimony of Messrs. Watson, Hough, Dempsey and Ware and of Ms. Rollen and is inherently improbable. For example, it is not disputed that Mr. Ware was in his office in a meeting with his supervisor, Mr. Dempsey, when Messrs. Adams and Hough arrived and passed his open door. Mr. Ware and Mr. Dempsey each credibly testified that their meeting continued until Mr. Cooper, Ms. Henry and Ms. Davis arrived

at Mr. Ware's office. Indeed, the foursome of Watson, Cooper, Henry and Davis, with Mr. Watson in the lead, arrived at Mr. Ware's office simultaneously, and Mr. Watson said all of them, including Mr. Adams and Mr. Hough [he said "about five" - there actually would have been six] were in front of Mr. Ware's office; that Mr. Ware was in his office (Tr. 470).

ii) Mr. Ware's words and action upon the arrival of Cooper, Henry and Davis at his office door.

Mr. Watson had gone to Mr. Adams, who gave him the disk, and Mr. Watson told Mr. Adams he would need someone familiar with information in the area that the disk had come from and Mr. Adams told him Mr. Hough would look at the disk with him. In the meantime, Mr. Ware had come to the doorway of his office to speak with Mr. Cooper, Ms. Henry and Ms. Davis (Tr. 480-481). Mr. Watson, busy with Mr. Adams did not hear much of the conversation between Mr. Ware, Mr. Cooper, Ms. Henry and Ms. Davis (Tr. 470); but he did not hear Mr. Ware yell or scream (id.) and did not see him wave his arms over his head (id.). Mr. Hough testified that one of the Union triumvirate, he did not remember which one, ". . . told him [Ware] that they were there to observe the disk being scanned." (Tr. 342); that Mr. Ware, in a normal but forceful tone of voice, ". . . told them that they would not be allowed to observe the scanning and again he asked them to please leave." (Tr. 343). Mr. Hough said Mr. Ware did not yell, did not wave his hands over his head and did nothing that appeared to be threatening. (Tr. 344).

Messrs. Watson, Adams and Hough then left the area of Mr. Ware's office and went to the computer security area to scan the disk.

Ms. Rollen (Tr. 482, 484), Mr. Dempsey (Tr. 490-91, 492-93) and Mr. Ware (Tr. 510-11, 513) testified in different words that Mr. Cooper, and/or Ms. Henry and/or Ms. Davis, talked about the disk and Mr. Ware told them they could not view the scanning; that Mr. Ware did not yell; that Mr. Ware asked them to leave.

Mr. Cooper testified that, ". . . by the time I entered Mr. Ware was already out of his office shouting at us to leave, pointing at the door, you know, get out of here . . . I hadn't said anything. I don't believe anybody had said anything at that point. . . . Mr. Dempsey, who was sort of standing in the doorway . . . sort of sticking his head out the doorway . . . He [Ware] was wavng his arms, you know. I mean, very animated and yelling at us." (Tr. 232-233; see, also, Tr. 294).

Ms. Henry testified, “. . . We walked in and Jim Ware was standing outside of his office door and just started yelling.” (Tr. 132); “We walked in, I don’t even know if he saw me. I walked in first, Davis behind me and Cooper was behind her and as soon as he saw me . . . he just started yelling to get out of here. He said, what are you people doing here, I want you out of here, get out of here now. I don’t want you here. . . . He was pointing toward the door saying get out, get out of here now, I don’t want you people here.” (Tr. 132-133).

Ms. Davis testified, “We were immediately met by Jim Ware and telling us that we had no business being there and to get out. . . . He was loud but I would not say he was yelling . . . he was kind of shoving us toward the door with his hand . . .” (Tr. 55-56).

As noted previously, I did not find the testimony of Mr. Cooper, Ms. Henry and Ms. Davis credible as to Mr. Ware having been outside his office when they were admitted by Mr. Watson. Nor do I find credible their testimony that at that time Mr. Ware was shouting at them or was waving his arms. In part, I do not credit their testimony as to the shouting and waving of his arms as they entered, for the reasons I did not credit their testimony that he was then standing outside his office. In addition, not only did the credited testimony show that Mr. Ware was in his office when Mr. Watson, with Mr. Cooper, Ms. Henry and Ms. Davis, arrived at his door,¹⁶ but the apparent physical layout and the conceded fact that Cooper, Henry and Davis had been admitted by Mr. Watson (Tr. 55, 231, 569) quietly. Thus, Ms. Rollen said that she sits, “. . . right in front of the doors. . . . Yes, the electronic doors.” (Tr. 479); that Mr. Ware’s office is about fifteen feet from where she sits; that because of the angle, from her desk she can see, “. . . the doorway and part of the inside of his [Ware’s] office” but not the whole office; and that in front of Ms. Rollen is a counter that faces the electronic doors, all of which indicates that Mr. Ware could not have seen people entering the suite while sitting at his desk. Consequently, Mr. Ware, sitting at his desk, with no reason to expect the

16

Mr. Watson did not expressly describe the location of Mr. Ware’s desk; but, from the testimony of Messrs. Adams, Hough and Watson, it would appear that Mr. Ware when sitting at his desk faced the door, and the person with whom he was meeting sat in a chair facing Mr. Ware, with his back to the door, e.g. Mr. Watson said, “He [Ware] was inside. . . . There was someone in there but I didn’t know who it was at the time.” (Tr. 470).

unannounced appearance of Mr. Cooper, Ms. Henry and Ms. Davis, would have had no reason to break off his meeting with his supervisor, Mr. Dempsey, until Mr. Cooper, Ms. Henry and Ms. Davis arrived at his office door at which time he came to the door to speak to them. Accordingly, I find that Mr. Cooper and/or Ms. Henry and/or Ms. Davis discussed the disk with Mr. Ware and insisted on being present when it was scanned; that Mr. Ware told them they would not be allowed to observe the scanning; and that Mr. Ware asked them to leave.

iii) Watson, Adams and Hough absent from Ware's office for 10-20 minutes.

Mr. Watson testified, without contradiction, that, ". . . we were back there in the back about a total of ten minutes with transit time maybe a total of twenty minutes or so." (Tr. 473-474). When he went back to the front, Mr. Watson said that Mr. Cooper, Ms. Henry and Ms. Davis were still there (Tr. 473); Mr. Watson had given the disk to Mr. Adams, telling him it looked clean; and he, Watson, ". . . went back to my office and went to work." (Tr. 473).17

iv) Mr. Ware's words and action during the 10-20 minute period of scanning.

Mr. Cooper's initial testimony that when they entered ". . . I hadn't said anything, I don't believe anybody had said anything . . . He [Ware] was waving his arms . . . very animated and yelling . . . I didn't say anything. . . . Ms. Davis said why are you being so hostile toward us. . . . I don't think he [Ware] responded at all, except get out . . . I left. . . ." (Tr. 232-234), not only was discredited by his later testimony, but plainly, since Mr. Cooper was present until Mr. Watson returned, he did not leave when Mr. Ware first asked or told him to leave. Indeed, Mr. Cooper later admitted that Mr. Ware asked him to leave, "I would say four or five times, I guess . . . at least four or five times" (Tr. 297-298). Because I found Mr. Cooper was not a wholly credible witness, I do not credit Mr. Cooper when his testimony is in conflict with any other witness.

17

After Mr. Watson gave him the disk and "went to work", Mr. Hough and Mr. Adams spoke and Mr. Hough told Mr. Adams he was satisfied that there was no problem with the disk (Tr. 458). Accordingly, Mr. Adams and Mr. Hough reached the front after Mr. Watson. Mr. Adams said, "I saw Mr. Cooper's back as he was exiting the door . . ." (Tr. 458).

Ms. Henry said that Ms. Davis said to him, ". . . why are you being so hostile . . . He then calmed down . . . I explained to him that there was a union brief on that disk and we just wanted one of us to be with it when it was checked so it could not be copied or saved in anyway and you know, we just wanted to make sure that management did not get a copy of it. . . . He [Ware] said, I'm not even going to respond to that now get out of here and he started yelling again. . . . We were right outside the office door. . . . I saw Bob Dempsey standing in there . . . We turned around and started to leave and Cooper was out the door and I started out the door when I stopped. . . . He became really obnoxious and started screaming, I told you to get out of here and he kind of came rushing towards us and had his arms up and said get out, I'm telling you get out of here . . . Before he [Cooper] went out the door nothing. . . . He was already out the door and I was kind of in the door way and he said, we'll just have to file an LP against them. I said, yeah, I guess so." (Tr. 134-136). Earlier, Ms. Henry said Mr. Ware, ". . . was pointing toward the door saying get out, get out of here now, I don't want you people here." (Tr. 133). Ms. Henry said Mr. Ware, ". . . didn't threaten us. . . ." "He didn't say anything threatening but was definitely acting in a threatening and hostile manner." (Tr. 138-139).

Ms. Davis said Mr. Ware, ". . . was loud but I would not say he was yelling . . . He kept -- and I think it was more at first a motion, you know, that people . . . talk with their hand, saying get out, get out, and he was kind of shoving us toward the door with his hand . . ." (Tr. 55-56). Ms. Davis said, "We were actually trying to get a word in to tell him that, you know, what the diskette was and to ask him if we could be present when they checked the diskette . . . He wouldn't listen. He just continued to tell us to get out and get out, that we had no business being there, to go back to our offices and do some work and he continued to get a little louder and he continued to wave his arm, saying, you know, to motion us out." (Tr. 56). Ms. Davis said, "I tried to say to Jim, you know, Jim, why are you being so hostile, why can't we talk about this, and he wouldn't listen to that either, and then I think Mr. Cooper gave up first, and he kind of said, you know, come on, let's go, you know, he's not going to let us stay with the diskette, we'll just have to file a ULP. And he left. And Ms. Henry and I did not leave at that point. She stopped at the receptionist desk. There's a little counter in front of her and was looking at something in her book that she had with her, which I think was a contract or something, but anyway, she was looking at something in that book." (Tr. 57). Ms. Davis said, "Mr. Ware came - kept

calling - he kept getting closer and closer to us . . . and I felt threatened for Ms. Henry . . . and I finally got hold of her [Henry] and said let's go, you know, so we left." (Tr. 58). On cross-examination, Ms. Davis said, "He [Ware] was waving his arms. I don't think we said waving his arms over his head. It was just motioning." (Tr. 92).

Mr. Ware said he did not recall gesturing, ". . . It's quite possible that I did. I just - I don't recall it." (Tr. 519). Based on all of the testimony, I find, as Ms. Davis said, Mr. Ware did gesture by pointing to the door; but I find he did not, in pointing to the door, make any threatening movement, nor did he act in an irrational or violent manner. Mr. Ware said his voice was firm, that he spoke with emphasis, but he said, "I didn't raise my voice. I did not yell . . ." (Tr. 513). Mr. Hough said Mr. Ware's voice was "normal but forceful." (Tr. 343). Mr. Dempsey said Mr. Ware's ". . . voice was raised but he was still you know basically asserting his responsibilities as the Manager over a limited security area" (Tr. 491); that, ". . . his voice was raised but it wasn't a yell. . . ." (Tr. 493). I find, based on all of the testimony, that after telling Mr. Cooper, Ms. Henry and Ms. Davis they could not view the scanning and asking them to leave, and they did not leave, Mr. Ware did raise his voice and tell them to leave and, while loud and forceful, he did not yell or scream. I further find, that after Mr. Cooper left, Ms. Henry and Ms. Davis remained and Mr. Ware said, in effect, "Are you still here?"; that one of the ladies responded, in effect, "We are doing something"¹⁸; and that Mr. Ware told them this was not an area in which they could loiter and told them to leave; that they did not leave and he walked toward them and told them two or three more times to leave and they left. I specifically do not credit Ms. Henry's testimony that Mr. Ware "rushed" at them. Mr. Cooper did not so testify, nor did Ms. Davis. Mr. Cooper testified that, "He [Ware] came back toward Ms. Davis and said you're still here, I told you to get out . . . He approached them fairly close.

18

In the Incident Report it states, "As Ms. Henry was leaving, she stopped at the Office Manager's desk area to look at the union contract." (G.C. Exh. 3); but at the hearing, Ms. Henry testified, ". . . I stopped because I thought I had lost a note that I had with me and I wanted to see if it dropped on the floor. I didn't see it on the top of the book that I was carrying. So I wanted to see if I dropped it." (Tr. 136). Ms. Davis testified, ". . . She stopped at the receptionist desk. . . . and was looking at something in her book that she had with her, which I think was a contract or something, but anyway, she was looking at something in that book." (Tr. 57).

I mean, he wasn't right there able to hit them, but he came closer than he was the first time when I was in there." (Tr. 235). Ms. Davis said only that, "Mr. Ware came -- kept calling -- he kept getting closer and closer to us . . ." (Tr. 58). Mr. Ware said, "I approached them, yeah. I don't know was not - I did not get in their space. I was not in their face. I did approach them and simply asked them to leave." (Tr. 515).

v) Weapons were a non issue.

Mr. Ware was not armed and Mr. Dempsey was not armed (Tr. 486, 493). Ms. Davis said that to her knowledge Mr. Ware was not wearing a gun (Tr. 93), indeed, she did not see anyone other than the guards wearing a gun; Ms. Henry admitted that she did not know whether Mr. Ware was armed (Tr. 193); and Mr. Cooper stated, ". . . I don't know if Mr. Ware carries a weapon. I don't have any idea . . . I did not see any weapons. I didn't see Mr. Adams' weapon. . . ." (Tr. 296).

4. The Incident Report Signed and Filed by Mr. Cooper, Ms. Henry and Ms. Davis.

The Incident Report (G.C. Exh. 3) was signed and filed by Mr. Cooper, Ms. Henry and Ms. Davis on November 17, 1998, at shortly after 1:30 p.m., and is based on the occurrences in S&S [Building 2714] set forth in Section 3, above. There is no question that Mr. Cooper, Ms. Henry and Ms. Davis exercised protected rights as Union officers to go to Mr. Ware's office; nor is there any question that they acted in the capacity as Union officials when they filed the Incident Report. For reasons more fully set forth hereinafter, I conclude that Mr. Cooper, Ms. Henry and Ms. Davis engaged in flagrant misconduct.

After Mr. Hough returned the disk to Ms. Davis at Building 2714, Mr. Hough, Mr. Cooper, Ms. Henry and Ms. Davis walked back to the Federal Building. After talking to Ms. Kane, Mr. Cooper, Ms. Henry and Ms. Davis went to Mr. Cooper's office. Ms. Davis testified, without contradiction, that they called Mr. Pope, Business Agent; that Mr. Cooper and Ms. Henry started talking about a threat assessment policy and got out the document (G.C. Exh. 2); that the three of them went to see Ms. Iris Housley, Oak Ridge Operations Office Nurse and member of Respondent's Threat Assessment Team; and that Ms. Housley encouraged them to file a threat assessment form (Tr. 60-62). Ms. Davis said they returned to Mr. Cooper's office and prepared the Incident Report, ". . . we all talked about it and filled it out together and helped word it, and then we all signed it

and I think Mr. Cooper took it down and gave it to Iris Housley, the nurse." (Tr. 63). Ms. Henry said all three of them took the report to Ms. Housely (sic) (Tr. 141) as, presumably, did Mr. Cooper, although he said only, "We took it to the nurse, Ms. Iris Housely (sic)" (Tr. 239).

I have considered the four factors of Defense Mapping, supra; Grissom, supra; and FCI Englewood, supra, in the context of the filing of the Incident Report. First, the Union officials were certainly entitled to file an Incident Report concerning any, "A. . . . threat or act of violence, aggression, or intimidation which appear to involve an imminent risk to the physical safety . . ."; or "B. Any incident involving inappropriate behavior (i.e., . . . a threat of violence, aggression, intimidation, or harassment)" (G.C. Exh. 2, p. 4). Second, the preparation of the Incident Report was not impulsive. Third, Mr. Ware's refusal to permit a Union representative to be present at the scanning of the disk which contained Union sensitive material provoked a prolonged refusal by the Union officials to leave and resulted in conduct which brought about the filing of an Incident Report; but nothing provoked the knowingly false, wholly baseless and demeaning accusation that Mr. Ware, ". . . would become violent himself or have one of the persons in the area that carry a pistol shoot us. . . ." (G.C. Exh. 3). Fourth, the deliberate, calculated and intentional injury to Mr. Ware's reputation was shown by the record. To begin, Mr. Ware was not armed, nor was Mr. Dempsey, with whom he was meeting when Mr. Cooper, Ms. Henry and Ms. Davis appeared at his doorway, and Mr. Cooper, Ms. Henry and Ms. Davis were aware that he was not armed. No weapon was seen or displayed at any time except the weapons worn by guards, no mention of a weapon was made by anyone at any time and Ms. Henry said Mr. Ware made no threats and ". . . didn't say anything threatening" (Tr. 138). Mr. Cooper said, "Ms. Davis was not frightened." (Tr. 299). Ms. Henry said she was not afraid that Mr. Ware would hit her (Tr. 192). Ms. Davis said she did not think Mr. Ware was going to shoot her (Tr. 98). Ms. Henry and Mr. Cooper willfully deluded Ms. Davis about weapons (Tr. 140, 299-300), and Davis said, ". . . I didn't know about the guns and when we were discussing it they said Delores Henry and Dalton Cooper knew of an incident. They actually told me that Ron Adams was wearing a gun. It kind of scared me since I was standing in his face but they told me about an incident where one of the men that does carry a gun that works in Jim Ware's office was twirling it around in the blood mobile threatening, saying that he wanted to shoot somebody." (Tr. 95-96). As I stated earlier, the alleged gun twirling incident was not a matter before me and if it occurred clearly demonstrated

immature and reckless conduct which was utterly reprehensible, but to assert that because someone else had exhibited deplorable conduct, Mr. Ware would shoot them, or order it done, was a despicable, unprincipled and scurrilous affront to Mr. Ware's character and to his professional reputation and standing. The transparent insincerity of Ms. Henry's and Mr. Cooper's assertion was further shown by the fact that Mr. Cooper was not deterred from his tirade in the lobby of the Federal Building despite the presence in his immediate vicinity of armed guards; nor were either Ms. Henry or Mr. Cooper hesitant in the least in their confrontation of Mr. Adams notwithstanding that they well knew Mr. Adams regularly was armed. Further, as set forth in Section 3, above, the allegations in the Incident Report were, in part, intentionally false, intentionally grossly exaggerated, and intentionally carefully constructed to make it appear that Mr. Ware was violent and irrational. Because they engaged in flagrant misconduct, Respondent did not violate § 16(a)(1) or (2) by imposing discipline for their flagrant misconduct with respect to their Incident Report.

REMEDY

There is no question from the record that Respondent would have disciplined Mr. Cooper for the Incident Report alone. This is not a Letterkenny case¹⁹ where there are mixed motives for discipline. Rather, this case is the antithesis of Letterkenny in that there are no mixed motives for the discipline. It is conceded that, absent the protection of protected activity, Mr. Cooper's boorish, unseemly, disruptive and demeaning remarks and conduct in Personnel and in the lobby of the Federal Building would have warranted discipline. Nevertheless, the "bottom line" of Letterkenny is applicable, namely, would Respondent have imposed the same discipline on Mr. Cooper where I have found that his conduct, inappropriate as it may have been, in Personnel and in the lobby of the Federal Building²⁰, did

19

Letterkenny Army Depot, 35 FLRA 113 (1990); United States Air Force Academy, Colorado Springs, Colorado, 52 FLRA 874 (1997).

20

Respondent's tally is quite different from mine. In its Notice of Proposed Suspension (G.C. Exh. 6), Respondent stated, ". . . You initiated multiple, in fact, seven separate infractions on November 17, 1998. . . ." (id., at 3). In order that there be no possible misunderstanding, all incidents except one, ". . . deliberate misrepresentation of an official document" (id.), which meant the Incident Report (G.C. Exh. 3), were found not to have constituted flagrant misconduct.

not constitute flagrant misconduct, and that the Incident Report, alone, constituted flagrant misconduct. I find nothing in the record that indicates, or even suggests, what Respondent might have done vis-a-vis discipline for Mr. Cooper's one infraction rather than seven. In its Notice to Mr. Cooper (G.C. Exh. 6) and its Notice of Decision to Suspend (G.C. Exh. 15); in the testimony of Ms. Judith Penry, Chief Financial Officer and the deciding official in the imposition of the discipline of Mr. Cooper (Tr. 580); and in its Brief (Respondent's Brief, e.g., pp. 54-55), Respondent linked all incidents. Because I can not determine what discipline Respondent might have imposed, it is necessary that the original Notice and decision imposing discipline on Mr. Cooper be withdrawn and if Respondent elects to file a new Notice of Proposed Discipline, such notice must not include conduct I have found to have been protected conduct; that it must accord Mr. Cooper all the rights to respond to any such notice, as it did with regard to its original Notice of December 18, 1998; and if it elects not to impose discipline on Mr. Cooper, or if it imposes less discipline than it originally imposed, which Mr. Cooper has already served, it shall make Mr. Cooper whole for any loss he may have suffered.

Having found that Respondent violated §§ 16(a)(2) and (1) of the Act, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 2423.41 of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41, and § 18 of the Statute, 5 U.S.C. § 7118, it is hereby ordered that the United States Department of Energy, Oak Ridge, Tennessee, shall:

1. Cease and desist from:

(a) Suspending Dalton Monroe Cooper, or any other bargaining unit employee, for engaging in activity protected under the Statute.

(b) In any like or related manner interfering with, restraining, or coercing bargaining unit employees in the exercise of rights assured by the Statute.

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

(a) Withdraw the five day suspension of Dalton Monroe Cooper, issued January 28, 1999, together with the Notice of

Proposed Suspension, issued December 18, 1998, and the Notice of Decision To Suspend, issued January 28, 1999.

(b) Should Respondent elect to give further notice of discipline of Dalton Monroe Cooper for his conduct with respect to the Incident Report Mr. Cooper signed and filed on November 17, 1998, which I have found constituted flagrant misconduct, any notice of proposed discipline must be limited to that one incident, namely the Incident Report of November 17, 1998, and must not include conduct which has been found to have been protected activity.

(c) Should Respondent elect not to give further notice of Dalton Monroe Cooper with respect to the Incident Report of November 17, 1998, it shall expunge any reference to such disciplinary suspension from his personnel records, reimburse him for the loss of pay he suffered by reason of the suspension, and restore to him any right or privilege he may have lost by such disciplinary action.

(d) Should Respondent elect to give a new Notice of Proposed Discipline of Dalton Monroe Cooper with respect to the Incident Report of November 17, 1998, and if any less discipline is imposed, he shall be reimbursed for any resulting difference in loss of pay and made whole for any difference in penalty he may have suffered.

(e) Post at its facilities in Oak Ridge, Tennessee, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Manager, Oak Ridge Operations Office, and they 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.

(f) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41(e), notify the Regional Director, Chicago Region, Federal Labor Relations Authority, 55 West Monroe, Suite 1150, Chicago, Illinois 60603-9729, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

William B. Devaney
Administrative Law Judge

Dated: April 24, 2000
Washington, DC

**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 Energy, Oak Ridge, Tennessee, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT suspend Dalton Monroe Cooper, or any other bargaining unit employee, for engaging in activity protected under the Statute.

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

WE WILL withdraw the five day suspension of Dalton Monroe Cooper, issued January 28, 1999, together with the Notice of Proposed Suspension, issued December 18, 1998, and the Notice of Decision To Suspend, issued January 28, 1999.

WE WILL give Dalton Monroe Cooper notice of discipline if we elect to give further notice of discipline for his conduct with respect to the Incident Report Mr. Cooper signed and filed on November 17, 1998, and if we elect not to give further notice of discipline with respect to the Incident Report of November 17, 1998, WE SHALL EXPUNGE any reference to such disciplinary suspension from his personnel records and reimburse him for the loss of pay he suffered by reason of the suspension and restore to him any right or privilege he may have lost by such disciplinary action.

WE WILL give Dalton Monroe Cooper notice should we elect to give a new Notice of Proposed Discipline with respect to the Incident Report he filed on November 17, 1998, and any such Notice of Proposed Discipline should be limited to that one incident, namely the Incident Report of November 17, 1998, and will not include any conduct which has been found to have been protected activity.

DATE: _____ BY: _____

Manager
Oak Ridge Operations Office
U.S. Department of Energy
Oak Ridge, Tennessee

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Chicago Regional Office, Federal Labor Relations Authority, whose address is: 55 West Monroe, Suite 1150, Chicago, IL 60603-9729, and whose telephone number is: (312) 886-3465.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. CH-CA-90297, were sent to the following parties:

—

CERTIFIED MAIL & RETURN RECEIPT

CERTIFIED NOS:

Susanne S. Matlin
Counsel for the General Counsel
Federal Labor Relations Authority
55 W. Monroe, Suite 1150, Xerox Centre
Chicago, IL 60603-9729
Phone: 312-886-6306
Fax: 312-886-5977

P 726 680 952

Phillip Pope
Business Representative
Office and Professional Employees
International Union, Local 268
411 S. Gay Street, Suite D
Knoxville, TN 37902
Phone: 423-637-6547
Fax: 423-637-6548

P 726 680 953

Don F. Thress, Jr., Esquire
U.S. Department of Energy
Oak Ridge Operations Office
200 Administration Road
Oak Ridge, TN 37831
Phone: 423-576-1204

P 726 680 954

REGULAR MAIL:

Lois Jago
Chief, Personnel and Management Branch
U.S. Department of Energy
Oak Ridge Operations Office
P.O. Box 2001
Oak Ridge, TN 37831-8729

DATED: April 24, 2000
Washington, DC