UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

AIR FORCE MATERIAL COMMAND WARNER ROBINS AIR LOGISTICS CENTER ROBINS AIR FORCE BASE, GEORGIA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 987 Charging Party	Case No. AT-CA-70283

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 **JANUARY 5, 1998**, and addressed to:

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

WILLIAM B. DEVANEY

Administrative Law Judge

Dated: December 3, 1997
Washington, DC

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: December 3, 1997

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: AIR FORCE MATERIAL COMMAND
WARNER ROBINS AIR LOGISTICS CENTER
ROBINS AIR FORCE BASE, GEORGIA

Respondent

and Case No. AT-CA-70283

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 987

Charging Party

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

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C.

AIR FORCE MATERIAL COMMAND WARNER ROBINS AIR LOGISTICS CENTER ROBINS AIR FORCE BASE, GEORGIA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 987 Charging Party	Case No. AT-CA-70283

C.R. Swint, Jr., Esquire
Ms. Janet Spivey
For the Respondent

Richard S. Jones, Esquire
For the General Counsel

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. [1], and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether Respondent required new and significantly different monthly status reports in a small procurement section with four procurement technicians, beginning in 1995, without Notice to he Union, it being

[1] 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)(5) will be referred to, simply, as, "§ 16(a)(5)".

asserted that the Union did not learn of the implementation of the new report until January 7, 1997. Respondent asserts: (a) the change was de minimis; and (b) the charge occurred in June, 1995, or earlier, and the form in question has been used continuously since 1995. Accordingly, the charge filed on January 21, 1997, is barred by § 18(a)(4) of the Statute.

This case was initiated by a charge filed on January 21, 1997 (G.C. Exh. 1(a)); the Complaint and Notice of Hearing issued on May 23, 1997 (G.C. Exh. 1(c)); and set the hearing for July 15, 1997, at a place to be determined in Atlanta, Georgia; by Order dated June 5, 1997, the place was fixed (G.C. Exh. 1(e)), by Order dated June 24, 1997, the hearing was rescheduled for July 16, 1997, at Robins AFB, Georgia (G.C. Exh. 1(j)); by Order dated June 25, 1997, the location of the hearing was changed to Bibb County Courthouse, Macon, Georgia (G.C. Exh. 1(k)); and by Order dated July 17, 1997, the hearing was rescheduled for September 9, 1997, at the Bibb County Courthouse, Macon, Georgia, pursuant to which a hearing was duly held on September 9, 1997, in Macon, Georgia, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard and to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument, which each party waived. At the conclusion of the hearing, October 9, 1997, was fixed and the date for mailing post-hearing briefs and Respondent and General Counsel each timely mailed an excellent brief, received on, October 15, 1997, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

FINDINGS

1. The American Federation of Government Employees (AFGE) is the exclusive representative, command-wide, of the employees of the Air Force Material Command, and American Federation of Government Employees, Local 987 (hereinafter, "Union"), is the agent of AFGE for the purpose of representa-tion of bargaining unit employees at Warner Robins Air Logistics Center (hereinafter, "Respondent").

2. Respondent has a small procurement section known by the letters, "LYKPD". At all times material, LYKPD has consisted of four procurement technicians, a procurement clerk and a supervisor (Tr. 33, 73, 99). Currently, the technicians are: Geraldine Polite, Mildred Nobles, Martha Umberger and Betty Bruno; and the clerk is Glrenda Mangetto (Tr. 33). Ms. Judy Hunter was the supervisor of LYKPD prior

to March, 1995; Ms. Deena Wallace was the supervisor from March, 1995, until August 25, 1997 (Tr. 33, 98), and she now is Director
of Vehicle Management (Tr. 137); and since August 25, 1997, Ms. Sadie Harris has been the supervisor (Tr. 32, 33).

3. The forms involved herein are, and were, used solely by the four technicians in LYKPD. Ms. Hunter had the form shown as General Counsel Exhibit 4 (without attachments) and Respondent Exhibits 2, 3, 4 and 5 which have the AFLC Form 773s (hereinafter, "773s") attached, which attachments accompanied each of Ms. Hunter's forms. Because Ms. Hunter's form displayed the term "ELINS" at the top left, it will be referred to as the "ELINS" form[2]. It is obvious that the ELINS form was simple, contained little information and could be completed in 15 to 30 minutes (Tr. 37, 78).

4. Ms. Wallace replaced Ms. Hunter in March, 1995, and devised a new and different form called, "Monthly Status Report" (G.C. Exh. 5; Res. Exhs. 6, 7). The Monthly Status Report used and, in a sence, evolves from the monthly 5WA Report, more properly entitled, "Line Item Definitization Report" (G.C. Exh. 10 , attachment). The first item on the Monthly Status Report is: "# A MODs DISTRIBUTED". Ms. Polite stated,

> ". . . An A-MOD is like a definitization product coming in from . . . ACO, the administrating contracting officer, definitizing this particular contract so that the dollar amount can be estimated and Item No. 3 . . . the PQ-MOD . . . the money will be

---

[2] Ms. Polite said,

> ". . . ELIN, that is like an item number that we assign to a PQ-MOD." (Tr. 62).

It would appear that the number of ELINS means the total item count (item 11) shown on the 773s. Thus, Respondent Exhibit 2 shows 6 ELINS. There are six 773s attached with a total of six on the first four 773s; the last two 773s each shows one item deleted without replacement, and, apparently, was not counted on the ELINS report. Respondent Exhibit 3 shows 5 ELINS; there are three 773s attached with a total item count of 5 ELINS. Respondent Exhibit 4 shows 26 ELINS; there are ten 773s attached with a total item count of 30. There is no obvious reason for the disparity unless Ms. Polite simply added incorrectly.

definitized so that it can drop off our 5WA report." (Tr. 38).

Thus, contract no. F33657-90-c-2254 (hereinafter, "2254") on the above 5WA Report (G.C. Exh. 10, attachment) was supposed to have been definitized (amount made definite) August 28, 1995, but was not until December 18, 1996 (transmitted to Ms. Nobles January 13, 1997). Accordingly, the time from August 28, 1995, when the contract amount should have been made definite, to the date it was, constitutes the number of days delinquent. Once the contract modification (A-MOD), in this Case No. A-00007, issues the delinquency for the provisioned items covered ceases. The 5WA Report shows each ELIN and each ELIN has a PQ-MOD number which also is shown on the 5WA.

The 5WA for Ms. Nobles' December, 1995, Monthly Status Report, due January 14, 1997, was dated January 3, 1997 (G.C. Exh. 10, attachment) and, even though, as Ms. Nobles later learned, A-MOD A-00007, which definitized nearly all of contract 2254 on December 18, 1996, showed all of contract 2254 delinquent. Why Ms. Nobles checked the status of contract 2254 after receipt of the 5WA is not clear. If, as it would appear, contract 2254 was the only contract she had, in so far as the 5WA showed, she might had inquired as a matter of rote, or it might have been an inquiry by someone who wanted to acquire an item under the contract, but whatever triggered her inquiry, it was not the 5WA. The price infor-mation furnished by the Region, consisting of 28 pages, showed the total delinquency ($1,921,944.35); from which Ms. Nobles: (a) deducted 10,167.61 as not delinquent (1,911,776.74); (b) added 23,796.50 which was delinquent under a different contract (PQ0124), for total of $1,935,573.24 which she entered as the first item of paragraph 2 of the Monthly Status Report; (c) deducted $29,975.64 delinquent less than 90 days for a balance of $1,905,597.60 delinquent over 90 days which she entered as the second item of paragraph 2 (G.C. Exh. 10). Paragraph 3 of Monthly Status Report is the same information as reported to Ms. Hunter.

5. Clearly, the information required on the Monthly Status Report was very different from the information required on the ELINS report and, plainly, the change had more than a de minimis effect on the working conditions of the four technicians if only completion of the Monthly Status Report is considered. Indeed, Ms. Polite said it sometimes took, ". . . as much as 40 hours, a whole week, because . . . we have to like send out letters to the ACO requesting a status report. We have to wait until we receive this information in, and like then we have to add up

our -- we have to add up our ELINS and come up with a total dollar delinquent and a total dollar delinquency over 90 days . . . ." (Tr. 48). Ms. Nobles said it required ". . .probably two or three days, or longer." (Tr. 77).

Respondent asserts that there wasn't any change because the technicians always did the very same thing, although it was not shown on the ELINS report. For example, the Performance Plan for technicians shows as a critical element, inter alia,

> (a)"4E. Reviews the J041.5WA Line Item Definitization report on a monthly basis." (Res. Exhs. 8, 9, eff. in 1991, 1992, 1995, 1996)
>
> "4E. Reviews monthly J041.5WA Line Item Definitization Report." (Res. Exhs. 10, eff. in 1996 and 1997)
>
> (b)"5E. Accomplishes timely closeout of inactive contracts. (Res. Exhs. 8, 9)
>
> "5E. Accomplishes timely closeout of inactive/retired contract working files and assists in maintaining, reviewing and updating working contract files, records, logs, computer files and administrative records for assigned contracts." (Res. Exh. 10);

and shows as a non-critical element, inter alia,

> (a)"4Sa. Identifies PIOs [Provisioned Item Order] delinquent in defitization and takes appropriate action to reduce delinquencies." (Res. Exhs. 8, 9, 10)

Ms. Wallace quite credibly testified that the items on the Monthly Status Report are, ". . . the elements of the job" (Tr. 102); that Ms. Polite's and Ms. Nobles' assertion that the Monthly Status Report required them to spend a week contacting people, finding out the status, etc., simply wasn't true. She said,

> ". . . Because that is our work, that is what we get paid to do . . . we are issuing orders, we are definitizing, getting definitizing modifications in. We are requesting funds, we are taking money off. Everything that is on there is reporting what has happened during that month." (Tr. 119)

Ms. Wallace stated that documents she found in the files showed that technicians were, indeed, doing precisely the same things (Res. Exh. 11; Tr. 122-126). Ms. Wallace certainly was correct in saying that it was not true that the technicians must wait for the 5WA printout, which sometimes is not received until about the 9th of the month, because they have the previous month's 5WA and know the deficiencies; any A-MODs that come in, they will be checking off; and any PQ-MODs [orders] they will be recording (Tr. 117). Nevertheless, Ms. Wallace stated that it would take, ". . . an hour tops" (Tr. 105), if the employee were doing the work as indicated above.

The Monthly Status Report was not to report when a technician was away from the office (Tr. 151), so Ms. Noble's showing such things as time at Christmas party was not required (Tr. 152). The 40 copies of computer inquires on inactive contracts in G.C. Exh. 10 represented normal work activity (see, paragraph 5E on Res. Exh. 8, 9, 10, supra) as did all attachments to G.C. Exh. 10, except the first two handwritten attached papers, on columned paper with the number F33657-90-c-2254 at the top, which constituted Ms. Nobles' computations to arrive at the dollar amounts she entered on paragraph 2 and 3 of the Monthly Status Report (G.C. Exh. 10). These computations had not been required for the ELINS reports and making them for the Monthly Status Report was more than de minimis change. In addition, assuming that each technician had all other data, the copying, collating and assembly of the documentation of what we had done for the month (Tr. 77, 116, 119) for attachment to the Monthly Status Report was, alone, more than a de minimis change inasmuch as there were no such attachments to the ELINS Reports.

6. Respondent concedes (Tr. 12) that it did not give the Union notice of the implementation of the new Monthly Status Report (Amended Answer, G.C. Exh. 1(m)); and it is agreed by all parties that the Monthly Status Report was required by Ms. Wallace from the time of its implementation in June, 1995 (Res. Exh. 1; Tr. 52), or slightly earlier (Tr. 52), until she left as supervisor of LYKPD on August 25, 1997; and Ms. Polite said she did not know whether Ms. Harris intended to continue the filing of the Monthly Status Reports (Tr. 50-51).

Ms. Polite is a former supervisor (Tr. 70) and has been a member of the Union since June, 1996 (Tr. 56). She has filed grievances, with the assistance of the Union, her first grievance in June, 1995 (Tr. 43), later changed to June, 1996 (Tr. 54) having been for counseling, ". . . for

unscheduled leave, which was really mostly like emergency leave . . . ." (Tr. 43). Ms. Polite asserted that the due date, of the 14th of the month, for the Monthly Status Report was absolute (Tr. 47); that once she had not got her report in on time and Ms. Wallace, ". . . took off for it. And at the time, when I was late doing it, I had a doctor appointment and winded up having to have emergency surgery on my hand, and I couldn't get it in on time . . . ." (Tr. 48) Ms. Polite filed a grievance on June 26, 1996, about a counseling session on tardiness and unscheduled leave (Tr. 56) and was represented by Ms. Juanita (Tillie) Johnson (Res. Exh. 12; Tr. 56, 153), Union steward. Ms. Wallace stated that she talked to Ms. Polite about not filing her Monthly Status Report on time; that Ms. Polite told her, ". . . she would turn it in when she got around to turning it in" (Tr. 128) and that she, Wallace, told Ms. Polite, ". . . it was part of her job to submit her status on time . . . if there was a problem, some work type problem that she had that would prevent her from doing this, or an isolated emergency, then certainly . . . we would take that into consideration. But that it couldn't be every month." (Tr. 128). Ms. Wallace further stated that failing to file one Monthly Status Report on time wouldn't hurt (Tr. 128), but, ". . . Missing three, four, five times would hurt you." (Tr. 128). As to her refusal to extend Ms. Polite's time to make the Monthly Status Report, Ms. Wallace responded, ". . . I don't remember specifics. Geraldine [Polite] was out a lot and the report is due by the 14th of the month, and it was not an isolated absence." (Tr. 127). When asked if she remembered that Ms. Polite asserted "she couldn't submit the report because of . . . an emergency surgery", Ms. Wallace replied, "I don't remember it being emergency" (Tr. 127), although she did have surgery (Tr. 127).

7. Ms. Polite stated that she did not tell Ms. Johnson about the Monthly Status Report because she didn't think it was a significant enough thing to bring to her attention (Tr. 57). Ms. Johnson was not called as a witness.

CONCLUSIONS

1. Change was more than de minimis.

The Monthly Status Report was very different than the ELINS Report; but, because the technicians were doing the work required for the report before, the change in conditions of employment, while not considered by the technicians as significant enough to report to the Union (Tr. 53, 57), was more than de minimis. Thus, for example,

each technician for the Monthly Status Report had to segregate by contract number each A-MOD number, the dollar amount of each and the days delinquent of each; determine from the 5WA report the total dollar delinquency, the amount delinquent less than 90 days in order to arrive at the amount delinquent over 90 days; copy, collate and assemble copies of all letters, inquires and fax copies sent. Not any of this had been required for the ELINS Report and, although the time estimated for completion of the Monthly Status Report appears greatly exaggerated, Respondent conceded that it would require at least an hour to complete whereas the ELINS Report took 15 to 30 minutes. Accordingly, even though the change in conditions of employment was slight, it was more than de minimis. Social Security Administration, 16 FLRA 56 (1984); Department of Health and Human Services, Social Security Administration, 26 FLRA 344 (1987).

2. Charge was untimely.

§ 18(a)(4) of the Statute, 5 U.S.C. § 7118(a)(4), provides as follows:

> "(4)(A) Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority.
>
> "(B) If the General Counsel determines that the person filing any charge was prevented from filing the charge during the 6-month period referred to in subparagraph (A) of this paragraph by reason of—
>
> "(i) any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person, or
>
> "(ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6-month period,
>
> the General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice."

In one of the first cases involving a change of conditions of employment of which, as here, the union was not given notice and it was asserted that because the agency failed to give the union notice it thereby failed to perform a duty

owned the union which prevented the union filing a charge within six months of the change of conditions of employment, Judge Naimark, sated, in part, as follows:

> "Assuming arguendo that no specific notification was given by Respondent to the Union re the implementation of the dress code at CSB on November 15, 1982, such failure to notify should not toll the six month statute of limita-tions. A contrary conclusion would render any alleged unilateral change as insulated from 7118(4). Since such a charge involves a lack of notice to the bargaining representative, the six month limitation period would, a fortiori, become inapplicable to any unilateral change by an agency which is alleged as an unfair labor practice. To construe Section 7118(4) as requiring that the charge be filed within six months of the discovery of the alleged unfair labor practice would, in my opinion, do violence to the intent of the Statute. A more reasonable construction, and in accord with the statutory language, warrants the conclusion that a charge must be filed within six months of the conduct or action forming the basis of the unfair labor practice. See Department of Health and Human Services, Social Security Administration, Bureau of Field Operation (New York, N.Y.), 11 FLRA 600. [1983]" United States Department of the Treasury, Internal Revenue Service and United States Department of the Treasury, Internal Revenue Service, Houston District, 20 FLRA 51, 67 (1985) (hereinafter, "Treasury, IRS")

Judge Naimark had found that the agency had discussed the intended dress code for months with union representatives, made known its position as to appropriate attire for employees and had invited the union to attend meetings when the dress code was announced but the union did not attend. The Authority affirmed and stated, in part, that,

> ". . . the policy prohibiting the wearing of jeans . . . was announced . . . at open meetings of employees . . . on November 15, 1982 and the Charging Party was invited to have a representa-tive attend . . . the rule against wearing jeans was consistently enforced, and the May 5, 1983 incident by which the Charging Party asserts it first

> learned of the policy was but a continua-tion of the open and undisguised enforcement of this rule. This . . . leads the Authority to conclude . . . that the Respondent's conduct did not preclude the Charging Party from filing the charge within six months of the November 15, 1982 meetings, at which the rule was announced . . . ." (20 FLRA at 52).

Nevertheless, the decisions do hold that an agency's failure to give a union notice of a change of conditions of employment prevents the union filing a charge and, if filed within six months of discovery, is timely. Department of the Treasury, Internal Revenue Service, Jacksonville District, Jacksonville, Florida, 15 FLRA 1014, 1026 (1984); Air Force Accounting and Finance Center, Lowry Air Force Base, Denver, Colorado, 42 FLRA 1226, 1237-1238 (1991); U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C. and U.S. Department of Justice, Immigration and Naturalization Service, Portland, Maine District Office Portland, Maine and Immigration Service, St. Albans Sub-Office, St. Albans, Vermont, 43 FLRA 241, 248-249, 261 (1991) (hereinafter, "INS"). However, the Authority has made it clear that the Union does not exist in a cocoon oblivious of the world. Thus, the Authority pointedly noted in INS. supra, ". . . there was no way the Union could reasonably have been expected to have learned of that policy. We adopt these findings." (43 FLRA at 249; see, also 260, ". . . There is no evidence that the Union was informed of the new twist Henry put on the smoking policy, and no way the Union can reasonably be held responsible for learning of it . . . ." Of course, the union in Treasury, IRS, supra, had constructive knowledge of the dress code.

Here, the May or June, 1995, implementation of the new Monthly Status Report affected only the four LYKPD procurement technicians; there was no general dissemination of this new Report or of its implementation; the record does not show that any employee in LYKPD was then a member of the Union; and the record does not show any Union activity or involvement in LYKPD at that time. Ms. Polite did not report the implementation of the new report to the Union because, in her mind, the change was not significant (Tr. 53) and Ms. Nobles said she did not inform the Union, "Because I didn't know that you could do this." (Tr. 80). Accordingly, when the new Monthly Status Report was implemented the Union did not know of the new report and Respondent's failure to give the Union notice prevented the Union from filing the charge within six months of the date of implementation of the new Report on, or about, June 14,

1995 (Res. Exh. 1); but beginning in March 1996, Ms. Polite filed numerous grievances with respect to which she was represented by Union steward Johnson (Tr. 54, 56, 153). One grievance was filed on June 26, 1996 (Tr. 56) and involved counseling on tardiness and unscheduled leave [Ms. Polite said she dealt with Ms. Johnson, ". . . when I was going through this when Deena [Wallace] was harassing me about my time, my leave, and my tardiness." (Tr. 69)]. Ms. Polite said that Ms. Wallace, ". . . when she got ready to grade me, she took off for it. And at the time, when I was late doing it, [Monthly Status Report] I had a doctor appointment and winded up having to have emergency surgery on my hand, and I couldn't get it in on time. . . ." (Tr. 48). Ms. Wallace remembered the surgery but did not remember it being an emergency (Tr. 127).

Ms. Polite said she did not tell Ms. Johnson about the Monthly Status Report because she didn't think it was significant enough (Tr. 57). She might have thought the introduction of the new form in 1995 was not significant enough to go to the Union; but it is not believable that she would not have told her Union representative, Ms. Johnson, about the Monthly Status Report as it was directly related to the grievance about counseling on tardiness and unscheduled leave, e.g., ". . . for unscheduled leave, which was really mostly like emergency leave . . . ." (Tr. 43); " . . . when I was late doing it [Monthly Status Report], I had a doctor appointment and winded up having to have emergency surgery on my hand, and I couldn't get it in on time . . . ." (Tr. 48). Not to have told Ms. Johnson about the Monthly Status Report would be about the same as going to a dentist because you have a toothache and then not telling the dentist that your tooth hurts. Accordingly, I do not credit Ms. Polite's testimony that she did not tell Ms. Johnson about the Monthly Status Report.

General Counsel is certainly correct in his assertion that timeliness is an affirmative defense which, in this case, Respondent initially asserted in its Amended Answer (G.C. Exh. 1(m)), pursued at hearing and in its Brief. At the outset, Ms. Polite testified that she had been a member of the Union, "About two years" (Tr. 42) which, as the hearing was held on September 9, 1997, would have meant about September, 1995; but it later turned out that she had become a member in June, 1996. In like manner, Ms. Polite first testified that she filed her first grievance in June, 1995 (Tr. 43), but later said no, it was April or May of 1996 (Tr. 53, 54), and still later revised it to June 26, 1996 (Tr. 55). Once it was shown that Ms. Polite's grievances directly concerned the Monthly Status Report, a presumption arose that Ms. Polite told Ms. Johnson about the

Report. General Counsel sought to counter this presumption by Ms. Polite's testimony that she did not mention the Monthly Status Report to Ms. Johnson, which testimony I have found unworthy of belief. Once it was shown that the Union presumptively was told of the Monthly Status Report, the burden shifted to General Counsel to rebut that presumption. General Counsel did not call Ms. Johnson, a Union steward, but instead relied on the testimony of Ms. Polite which I have found unworthy of belief. Because the burden of proving that the charge was filed within six months from the time of discovery had now shifted to General Counsel (the charge having been filed January 21, 1997, more than six months after the presumed discovery), I do draw the adverse inference from General Counsel's failure to call Ms. Johnson that she would have acknowledged notice of the Monthly Status Report on, or before, June 26, 1996. Nevertheless, even in the absence of inference from General Counsel's failure to call Ms. Johnson, the presumption of knowledge was wholly unrefuted.

Mr. Ronald Jack Williams, steward and Sergeant-at-Arms of the Union, first represented Ms. Polite on her 1996 appraisal (see, Settlement Agreement dated September 19, 1996 (G.C. Exh. 2)) and later Ms. Nobles on her 1996 appraisal (see, Settlement Agreement dated October 8, 1996 (G.C. Exh. 2)). The record is unchallenged that he did not learn of the Monthly Status Report until some time after January 7, 1997 (G.C. Exh. 3; Tr. 17-18). Ms. Nobles is not, and never has been, a member of the Union (Tr. 74) and did not consult the Union until she contacted Mr. Williams, "Because he had represented Geraldine [Polite] . . . ." (Tr. 74). Consequently, because she was not shown to have had any contact with Ms. Johnson and further because she said she did not inform the Union about the Monthly Status Report, "Because I didn't know that you could do this" (Tr. 80), General Counsel's purported reliance on her testimony is wholly without basis.

Inasmuch as the Charge herein was not filed until January 21, 1997, it was not filed within six months from the date of discovery of the Monthly Status Report by the Union on, or before June 26, 1996, and the Complaint is barred by § 18(a)(4) of the Statute.

Having found that the Complaint is barred by § 18(a)(4) of the Statute, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. AT-CA-70283 be, and the same is hereby, dismissed.

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: December 3, 1997
Washington, DC

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. AT-CA-70283, were sent to the following parties in the manner indicated:

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Dated: December 3, 1997
Washington, DC