

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

. . . . .  
DEPARTMENT OF THE AIR FORCE, .  
OGDEN AIR LOGISTICS CENTER .  
HILL AIR FORCE BASE, UTAH .  
Respondent .  
and . Case No. 7-CA-70456  
AMERICAN FEDERATION OF .  
GOVERNMENT EMPLOYEES, .  
AFL-CIO, LOCAL 1592 .  
Charging Party .  
. . . . .

Michael Farley, Esq.  
For the General Counsel

Clara A. Jones, Esq.  
For the Respondent

Mr. William Harper  
For the Charging Party

Before: ELI NASH, JR.  
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. section 7101 et. seq. (herein called the Statute). It was instituted by the Regional Director of Region VII based upon an unfair labor practice charge filed March 31, 1987 by the American Federation of Government Employees, AFL-CIO, Local 1592 (herein called the Union), against the Ogden Air Logistics Center, Hill Air Force Base, Utah (herein called the Respondent). The Complaint alleged that Respondent violated section 7116(a)(1) and (2) of the Statute by lowering an employee's performance appraisal in retaliation for his having engaged in protected activity and by making certain statements which tended to interfere with employees' rights to engage in protected activity.

Respondent's Answer denied the commission of any unfair labor practices.

A hearing was held before the undersigned in Ogden, Utah at which the parties were represented by counsel and afforded full opportunity to adduce evidence, and to call, examine and cross-examine witnesses and to argue orally. Timely briefs were filed by the Respondent and the General Counsel and have been duly considered.

Upon consideration of the entire record in this case, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendation.

#### Finding of Fact

The Union is the exclusive representative of a nation-wide bargaining unit of non-supervisory and non-professional employees of Respondent including non-supervisory and non-professional employees of Respondent's Ogden Air Logistics Center involved herein. The Union is an affiliate member of Council 214 and an agent of the Council.

Mr. Roberto Cantu-Villarreal is employed by Respondent as a Electroplater Worker, WG-07, within the Directorate of Maintenance, Industrial Products and Landing Gear Division, Repair Support Section, Electroplating Shop, at Hill Air Force Base. Cantu-Villarreal, a bargaining unit employee, has been an electroplater worker for about 4 years.

At the time of the hearing, Cantu-Villarreal was the Union's Administrative Vice-President, a position he has held since around March 1987. Prior to acting as a vice-president, Cantu-Villarreal was elected as a Floor Steward in the Electroplating Shop in 1984. After serving as a Floor Steward, Cantu-Villarreal was appointed Chief Steward of the Directorate of Accounting and Finance in May 1985, and later during 1985 he was appointed Chief Steward of the Directorate of Personnel. In September 1986, Cantu-Villarreal was appointed Chief Steward for the Directorate of Material Management.

In his work as an electroplater worker, Cantu-Villarreal is involved in the rebuilding, refurnishing, refinishing and grinding of aircraft parts. Electroplater workers are primarily responsible for plating metallic aircraft parts to meet necessary specifications and tolerances for the aircraft parts and must follow established procedures and instructions for doing this work. The Performance Plan for Electroplater Workers contains six performance elements and

standards, and indicates whether the individual performance elements are critical or non-critical elements. These six performance elements include: (1) performing a full range of plating tasks while meeting production and time standards; (2) interpreting written guidelines; (3) complying with process and procedure requirements to produce a quality item; (4) complying with material handling procedures; (5) following shop policies and regulations; and (6) following tool control regulations.

On February 10, 1986, Cantu-Villarreal received an annual Civilian Performance and Promotion Appraisal (CPPA) for the appraisal period of February 1, 1985 - January 31, 1986. The 1985-1986 appraisal was prepared for Cantu-Villarreal by his supervisor, Morris Edwards, Electroplating Foreman. Although Edwards did not supervise Cantu-Villarreal for the entire period he was responsible for the preparation of the appraisal. Cantu-Villarreal received an overall performance rating of "Excellent" on this appraisal; in Part I of the appraisal, he was evaluated as having "exceeded" four performance elements and standards, and having "met" the remaining two performance elements and standards. In Part III of the performance appraisal (Appraisal Factors-Manner of Performance), Cantu-Villarreal received an overall point score of 67 points by receiving a rating of "above fully successful" (7 points) in seven of the appraisal factors, and a rating of "outstanding" (9 points) in the remaining two appraisal factors. Based on this performance during that appraisal period, Cantu-Villarreal received a Sustained Superior Performance Award, and a cash award upon the recommendation of Edwards.

As already noted, Cantu-Villarreal had in 1984 been elected a Union floor steward in 1984 and by the 1985-86 appraisal period he was representing employees in the processing of contractual grievances. This representational activity, which took place on official time, during regular work hours took him away from work approximately 15 percent of the time. During this period, no manager or supervisor raised any objection to Cantu-Villarreal about his use of official time.<sup>1/</sup>

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<sup>1/</sup> To be released on official time to represent an employee on a grievance, Cantu-Villarreal was issued an Air Force Form 949 by his supervisor, in most instances, Edwards. The Form 949 which indicated the time when Cantu-Villarreal started, and the time when he ended, his use of official time. Cantu-Villarreal's completed 949 forms were initialed by his supervisor, and Edwards was also involved in scheduling the meetings with employees which Cantu-Villarreal attended.

In the next appraisal period, February 1, 1986 to January 31, 1987, Cantu-Villarreal's use of official time increased dramatically. During the 1986-1987 appraisal period, Cantu-Villarreal spent 950 hours, or about 45 percent of his time engaged in representational activities. The increase in time basically appears to have come about because of Cantu-Villarreal's increasing responsibilities with the Union. With the Chief Steward's position in which he served during 1986-1987, he not only continued to represent employees in grievances, but expanded his activities by representing the Union in dealings with Respondent's management concerning safety practices and other work policies throughout the base. In this same period, he also filed about 12 grievances with his direct line of supervision Edwards and the General Foreman, William Phillips concerning his own use of official time. By the time of the hearing, Cantu-Villarreal was serving 100 percent official time in his capacity as the Union's Administrative Vice President.

Cantu-Villarreal's use of official time seemingly became a problem for Respondent's management around November 5, 1986. At that time, Boyd T. Thurgood, Deputy Director, Directorate of Maintenance, instructed supervisors and managers throughout the base to follow special procedures to obtain Cantu-Villarreal's release on official time for representational activity. According to Thurgood, these measures were necessary due to Cantu-Villarreal's use of "an excessive amount of official time for Union business" which had "significantly" detracted from his assigned duties as an electroplater in the Industrial Products and Landing Gear Division (MAN). Of note is the fact that, the of approximately 132 Union stewards at Hill Air Force Base, Cantu-Villarreal was the only steward subject to such special procedures.

Several times during the 1986-1987 appraisal period (approximately once every two weeks), Edwards had discussions with Cantu-Villarreal concerning his use of official time. On these occasions, Edwards expressed his concern that he could not depend on Cantu-Villarreal because he was gone from the work-site too much, that he could not meet his production quotas due to Cantu-Villarreal's absences, and that he did not know how he was going to be able to appraise Cantu-Villarreal. In short, it appears that Edwards' view was that Cantu-Villarreal's use of official time detracted from the performance of his duties.

As a consequence of Cantu-Villarreal's absences because of representational activity, he was not moved from one

plating task to another every one or two months as was done with other employees. Cantu-Villarreal indeed protested that he had not been assigned to the nickel area for some six or seven months causing, as is shown below, some questions when he asked for assistance on a project.

During the 1986-1987 appraisal period, Cantu-Villarreal's absences from the work-site on official time also caused Edwards to exempt him from being regularly assigned to certain critical plating tasks. During early 1986, Edwards informed Cantu-Villarreal that, due to his involvement in the Union, Cantu-Villarreal could not be depended on to be at the shop, and that he therefore would not be assigned to certain critical tasks (including nickel-plating). Edwards, of course, acknowledged that there were occasions during the 1986-1987 appraisal year when he would not assign Cantu-Villarreal to certain plating tasks because Cantu-Villarreal's Union-related absences would interfere with the work operation. In practice, Cantu-Villarreal was no longer assigned to critical tasks when Edwards removed Cantu-Villarreal from an established work rotation system for electroplater workers which was designed to expose the employees to a full spectrum of plating tasks, and to maintain the employees' competence in all shop operations.

On February 19, 1987, Edwards presented Cantu-Villarreal with his annual performance appraisal for the period February 1, 1986 - January 31, 1987. Edwards again was the supervisor responsible for preparing the appraisal although he shared supervision for some of this period with Ignacio Olvera. Olvera did not testify. The appraisal ratings were generally lower than the appraisal that Cantu-Villarreal had received for the 1985-1986 appraisal period. In Part I of the appraisal, Cantu-Villarreal was rated as having "met" 3 performance elements which he had been rated as having "exceeded" during the prior year. In Part III, Cantu-Villarreal received a total of 61 points as his rating, as compared to a total of 67 points he received during the 1985-1986 appraisal period. In Part III of the 1986-1987 appraisal, Cantu-Villarreal was down-graded in 6 out of 9 appraisal factors when compared to his ratings in the 1985-1986 appraisal. Overall, Cantu-Villarreal was rated as "fully successful" for 1986-1987, a decline from his overall rating of "excellent" for 1985-1986.

After reviewing the appraisal, Cantu-Villarreal noticed that he was rated lower than he had been during the previous year, and asked Edwards why he had received the lower appraisal. Edwards stated that the previous year's

appraisal was a fair appraisal, but that this appraisal was not fair. There was apparently no explanation of what "fair" meant. Edwards also mentioned that he had been given some new guidelines to appraise Cantu-Villarreal. Somewhere along the line he mentioned that he had to fight management to give him the appraisal for the preceding year but that he was not going to fight management anymore.

It is undisputed that during this meeting, Edwards attempted to justify his lower ratings for Cantu-Villarreal by describing an incident which took place during the appraisal year when Edwards had assigned Cantu-Villarreal to the nickel-plating line, and Cantu-Villarreal had asked Edwards to provide him with assistance. Because Cantu-Villarreal had not been assigned to this task by Edwards for approximately 2 years, Cantu-Villarreal suspected he would need assistance. Edwards did not provide the assistance requested by Cantu-Villarreal, but Cantu-Villarreal was able to re-familiarize himself with the nickel-plating operation, and to perform the work satisfactorily, by asking a co-worker a few questions concerning the nickel-plating task assigned to him. Edwards himself felt that Cantu-Villarreal was asking for "help from a man" when he should not have been.

According to Cantu-Villarreal, Edwards during the course of this meeting said words to the effect that Cantu-Villarreal was gone a lot on Union activities, and that he could not be depended on, or assigned to critical plating operations, including the nickel line. Edwards also is alleged to have said that these were the reasons that he was giving Cantu-Villarreal a lower appraisal than Cantu-Villarreal had received for the previous appraisal period. Edwards also is alleged to have told Cantu-Villarreal that he understood how difficult it was for him to wear two hats at the same time, that he understood where Cantu-Villarreal's loyalties lay, and that Cantu-Villarreal was loyal to the Union. Edwards further allegedly reiterated that he could not depend on Cantu-Villarreal because Cantu-Villarreal was gone most of the time. Cantu-Villarreal asked that they discuss each element of the appraisal, but Edwards refused, stating it wouldn't do any good. The entire meeting lasted approximately 20 minutes. Edwards denied making any of these statements.

On his part Edwards described his rationale for giving Cantu-Villarreal a lower appraisal during the 1986-1987 period, as compared with the 1985-1986 period. Edwards expressed his view that Cantu-Villarreal's use of official

time was excessive during the 1986-1987 appraisal period, and that Cantu-Villarreal's use of official time detracted from the performance of his duties. Edwards acknowledged that there were occasions during the 1986-1987 appraisal year when Cantu-Villarreal was called away from his work at "critical moments" to perform Union-related duties on official time. Specifically, Cantu-Villarreal is credited in his testimony that Edwards told him the following:

"Roberto, your thing is that --- your --- its your [u]nion activities. You're gone a lot. I cannot depend on you. I cannot put you on the nickel line. I cannot put you on some other areas, critical lines, because I need somebody there that -- that I can depend on to be there when I need him to be there."

Edwards also gave reasons concerning the specific ratings Cantu-Villarreal received in Part I of the 1986-1987 appraisal, and he explained the basis for these ratings. Cantu-Villarreal's rating declined from "exceeded" during the 1985-1986 appraisal period to "met" during the 1986-1987 appraisal period for performance element #1 ("performs a full range of plating tasks, meeting production and time standards"). Edwards asserts that this decline was because Cantu-Villarreal had asked for assistance in performing a nickel-plating task, and because Cantu-Villarreal had presumably not checked the technical order ("TO") for how to perform the task. Edwards also claims that he lowered Cantu-Villarreal's rating in performance element #1 because during training in the "hard anodize" area, Cantu-Villarreal "had a lot of questions." He acknowledged however, that Cantu-Villarreal was new in the "hard anodize" area and that he "hadn't worked there as much as the others had." Edwards described no other reasons for rating Cantu-Villarreal as "met," rather than "exceeded," in performance element #1.<sup>2/</sup>

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<sup>2/</sup> The standard for performance element #1 provides that plating tasks are to be accomplished "within engineering time standards 92% of the time." The witnesses testified that management did not maintain records on the production of individual Electroplater Workers, including Cantu-Villarreal, and that there was no objective basis to qualify Cantu-Villarreal's production during the 1986-1987 appraisal period.

With respect to performance element #2, Edwards testified that he rated Cantu-Villarreal as having "met," rather than "exceeded" ("interprets MIL-STANDARDS, technical orders, prints, and work control documents to insure parts meet necessary requirements") because he assumed that Cantu-Villarreal had not been checking the applicable TO's during the 1986-1987 appraisal period as often as he had during the 1985-1986 appraisal period. He further acknowledged that he may not have observed Cantu-Villarreal reviewing TO's because, with increased experience, Cantu-Villarreal was less likely to need to review TO's, that Cantu-Villarreal may have reviewed the TO's while Edwards was not observing him, and that a co-worker may have informed Cantu-Villarreal of the contents of the TO's, making review of the TO's by Cantu-Villarreal unnecessary. Edwards finally concluded that his failure to observe Cantu-Villarreal reviewing TO's was not determinative in his rating of Cantu-Villarreal for the 1986-1987 appraisal period.

As for performance element #3 ("complies with process and procedure requirements and insures a quality item is produced"), Edwards rated Cantu-Villarreal as having "exceeded" this element during both the 1985-1986 and 1986-1987 appraisal periods. During both appraisal periods, Cantu-Villarreal did not receive any inspector's notices, or "pink slips," indicating deficiencies in his work product.

Edwards testified that he rated Cantu-Villarreal during the 1986-1987 appraisal period as having "met" performance element #4 ("complies with material handling procedures"), rather than "exceeded" (the rating Cantu-Villarreal received during the 1985-1986 period), because he didn't "put that extra little effort into his work during 1986-1987."<sup>3/</sup>

For the 1986-1987 appraisal period, Edwards rated Cantu-Villarreal as having "met" performance element #5 ("Follows shop policies and regulations"), and performance element #6 ("Must report lost tools 100% of the time. Not

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<sup>3/</sup> The standard performance element #4 provides that the "employee will insure parts are cleaned and protected for movement 92% of the time." The witnesses testified that no records were maintained by management which would objectively quantify the performance of an Electroplater Worker, including Cantu-Villarreal, in this element.

more than two tool control incidents per quarter"),<sup>4/</sup> the same rating Cantu-Villarreal had received during the 1985-1986 appraisal period in these two performance elements.

During his testimony, Edwards also described the basis for the ratings he gave Cantu-Villarreal in Part III (Appraisal Factors-Manner of Performance) of the 1986-1987 appraisal. In the category of "Work Effort," Edwards rated Cantu-Villarreal as "slightly above fully successful" (6 points), whereas he rated Cantu-Villarreal as "above fully successful (7 points) during the 1985-1986 appraisal period. Edwards explained this decline as being due to Cantu-Villarreal's occasional failure to report to the work site at 7:05 a.m. Edwards testified that Cantu-Villarreal failed to report to work at 7:05 a.m. on those occasions when he was waiting for Edwards to provide a listing of Cantu-Villarreal's representational meetings scheduled for that day, and on an occasion when Cantu-Villarreal was speaking to William Phillips, General Foreman (and Edwards' supervisor), concerning a representational matter (a change in working conditions). In rebuttal, Cantu-Villarreal denied ever having reported late to the work site during the 1986-1987 appraisal year.

Edwards rated Cantu-Villarreal as "slightly above fully successful" (6 points) in the category of "Adaptability to Work" in Cantu-Villarreal's 1986-1987 appraisal, a decline from the rating of "above fully successful" (7 points) Edwards had given Cantu-Villarreal in this category during the 1985-1986 appraisal period. Edwards testified that Cantu-Villarreal would have received a higher rating if he had shown a "little extra ambition or effort." Concerning the rating Edwards gave Cantu-Villarreal in this category, Edwards testified that ". . . I could have raised him there."

In the category of "Problem Solving," Edwards downgraded the rating of "outstanding" (9 points) Cantu-Villarreal had received in his 1985-1986 appraisal to a rating of "far above fully successful" (8 points) in Cantu-Villarreal's 1986-1987 appraisal. Edwards testified that

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<sup>4/</sup> Edwards claimed that a reason he did not rate Cantu-Villarreal as "exceeded" in performance element #6 in his 1986-1987 appraisal was that Cantu-Villarreal, on occasion, had failed to record the inventory of his tools in the daily tool control log, an assertion denied by Cantu-Villarreal during his rebuttal testimony.

this reduction was because there were fewer problems to be tackled during the 1986-1987 year when compared to the 1985-1986 year.

In the category of "Communications," Edwards lowered the rating of "outstanding" (9 points) Cantu-Villarreal had received in his 1985-1986 appraisal to a rating of "far above fully successful" (8 points) in Cantu-Villarreal's 1986-1987 appraisal. Edwards could offer no reason why he dropped Cantu-Villarreal's rating in this category.

In the category "Work Productivity," Edwards rated Cantu-Villarreal as "slightly above fully successful" (6 points) in his 1986-1987 appraisal, a drop from the previous year's rating of "above fully successful" (7 points) in this category. Despite the absence of any productivity records for individual employees, Edwards explained the reduction as follows: "And over the years for the time that I had him, some days he would be up, other days he would be down, but - and I just figured to average it out, he just about - just met the standard or instead of exceeded it."

Edwards rated Cantu-Villarreal as "slightly above fully successful" (6 points) in the category of "Self-Sufficiency" in Cantu-Villarreal's 1986-1987 appraisal; this represented a decline from Cantu-Villarreal's previous rating of "above fully successful" (7 points) of his 1985-1986 appraisal. Edwards testified that this decline was because Cantu-Villarreal had requested help during the appraisal period.<sup>5/</sup>

Throughout the 1986-1987 appraisal period, Edwards did not document any work-related deficiency by Cantu-Villarreal.<sup>6/</sup> In addition, Edwards apparently failed to meet with Cantu-Villarreal during the 1986-1987 appraisal period to discuss Cantu-Villarreal's work performance, and

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<sup>5/</sup> In the remaining categories in Part III of Cantu-Villarreal's 1986-1987 appraisal ("Working Relationships," "Skills in Work," and "Work Management"), the ratings Edwards gave Cantu-Villarreal matched those he received on his 1985-1986 appraisal

<sup>6/</sup> The only work-related entry in Cantu-Villarreal's 971 form for the 1986-1987 appraisal period is his receipt of a letter of appreciation from Ignacio Olvera for work performed by Cantu-Villarreal while under Olvera's supervision.

to annotate the meeting on Cantu-Villarreal's 971 form, as required by Air Force Regulation 40-452, Section 215, and further defined by a Maintenance Directorate policy, and Article 15, Section 15.02, paragraph f, of the parties' collective bargaining agreement. Edwards failed to do so as he asserts, in essence, that Cantu-Villarreal's problems never rose to a level requiring documentation.

The numerical rating receipt for the 1986-1987 appraisal was roughly equivalent to the scores received by others rated by Edwards. Cantu-Villarreal considered that score a bench mark, feeling that if he were rated the same as the other electroplaters, his advancement would be stifled. He also felt that his work deserved a higher rating.

In the four years Cantu-Villarreal was an electroplater worker his numerical appraisals were 1983 - 48; 1984 - 52; 1985 - 67; 1986 - 61. Cantu-Villarreal admittedly had not jumped in ratings by leaps and bounds, but was determined to retain his "exceeded" rating for the 1985 period. Unlike Edwards, he felt that he had "put in a lot of extra effort" for the 1986-1987 appraisal period.

#### Conclusions

- A. Whether Respondent violated section 7116(a)(1) of the Statute when its agent, Morris Edwards, told an employee on February 19, 1987, words to the effect that the employee's annual performance appraisal had been lowered because the employee was gone a lot on union business, and that Edwards therefore could not depend on him, or assign him to critical plating operation.

The effect of the agency representative's statements must be judged in light of circumstances in which words, perhaps innocent in and of themselves, may be understood as threats. Department of the Treasury, U.S. Customs Service, Region IV, Miami, Florida, 19 FLRA No. 114, 19 FLRA 956 at 969 (1985); Department of the Treasury, Internal Revenue Service, Louisville District, 11 FLRA No. 64; Federal Mediation and Conciliation Service, 9 FLRA No. 31, 9 FLRA 199 (1982).

The General Counsel contends that the statements attributed to Edwards contain a clear and explicit message that Cantu-Villarreal's performance appraisal had suffered as a result of Cantu-Villarreal's representational activities. The General Counsel also asserts that Edwards' statements described a discriminatory act that had already been executed and Cantu-Villarreal was implicitly put on

notice that he could expect no better treatment in the future, as long as he used official time for protected activity. Thus, Cantu-Villarreal's options were to continue to use the same amount of official time and never expect a higher appraisal, or to replace or eliminate his use of official time and perhaps receive a more favorable appraisal in the future.

Respondent seeing this allegation as a mere credibility problem, in essence, relies on Edwards' categorical denial of the statement and leaves the matter in the hands of the undersigned.

Even in crediting Cantu-Villarreal that Edwards told him he could not depend on him, that he is gone a lot; that he could not put him in some areas that were critical because he needed someone who would be there, it is difficult to attach the discriminatory meaning that the General Counsel sees to these statements. I credit Cantu-Villarreal basically because the entire thrust of Edwards' testimony is that he graded him only on the time that he was at work. If then, Cantu-Villarreal could not be present to become totally proficient in all areas, Edwards would of course have some difficulty in grading him because he felt Cantu-Villarreal could not work unsupervised or unaided in all of the processes performed by electroplater workers. In my view, this was a legitimate concern of Edwards and it is my opinion that in his assessment of Cantu-Villarreal he could not have helped but mention this concern, no matter how inartfully he might have expressed that uneasiness.

This case involves a conflict between the apparent interest of two sides and to a great extent is dictated by the Authority's holdings in such cases as Department of the Air Force, Scott Air Force Base, Illinois, 20 FLRA 761, 806 F.2d 283 (D.C. Cir. 1986). The record reveals a long and perhaps bitter series of grievances and memoranda concerning specific and ongoing conflict between Cantu-Villarreal's right to use official time and the agency's right to manage effectively and efficiently. In Scott the Authority held "that when such conflicts arise, the parties must recognize the need for and seek reasonable accommodations." The Authority viewed the statements made by the agency representative to the employee there as an attempt to seek accommodation and, in the circumstances, should have been understood to have been made in that context by a reasonable employee. Here Cantu-Villarreal was performing what appears to be a rather complex process on aircraft parts. Further,

the work was done via group production and the supervisor Edwards was certainly concerned about in his group's productivity as well as the ability of individual electroplater workers to perform a full range of the process. His testimony leaves no doubt that he did not feel Cantu-Villarreal capable of the full range because he was unable to rotate him without affording some assistance in certain areas. Furthermore, there most certainly was a continuing conflict as evidenced by a number of grievances filed as to the usage of official time by Cantu-Villarreal. A conflict over use of official time which apparently did not exist with the 130 odd other stewards on the base since special constraints were placed only on Cantu-Villarreal by management.

The standard to be applied appears to be whether the employee would reasonably have been coerced by the conversation. See Federal Mediation Conciliation Service, 9 FLRA 199 (1982). Applying that standard to the instant case, it appears, in all the circumstances that Edwards was concerned with Cantu-Villarreal's performance while on the job citing the nickel plate incident, the amount of questions he had in the hard anodize area and other reasons for that concern. In my opinion, Edward's statements were not so much a criticism of Cantu-Villarreal's protected activities, but showed a concern that certain of his work had not met the high standards of the previous year and that under questioning from Cantu-Villarreal, Edwards' revealed his feeling that some additional effort was needed to maintain that previous years' rating.

The above interpretation is buttressed by Edward's testimony concerning shortcomings in some areas which are noted above and his observation of Cantu-Villarreal's performance while on the job. Furthermore, Edwards it seems had worked Cantu-Villarreal in all the shops critical areas, but with the time Cantu-Villarreal had missed, clearly he was somewhat rusty and not proficient in all the areas. Lack of total familiarity with all of the processes rather than protected activities seem to have prevented him from the effective full rotation experienced by other electroplater workers. Thus, Edwards statements do not appear to be so much a criticism of Cantu-Villarreal's use of official time, but rather evidences a concern for his inability to perform a full range of work. In sum, it appears that the statements related not so much to Cantu-Villarreal's protected activity, but to his unfamiliarity with certain processes and his inability to be successfully rotated through a full range of the electroplating process without help. It is my view, that this is the message Edwards sought to convey through his statements at the February 19, 1987 meeting.

Accordingly, the complaint insofar as it alleges an independent violation of section 7116(a)(1) of the Statute should be dismissed.

- B. Whether Respondent violated section 7116(a)(1) and (2) of the Statute by preparing an annual performance appraisal for a bargaining unit employee which was based upon consideration of the employee's protected activities.

The General Counsel maintains that Cantu-Villarreal's performance appraisal was prepared based on consideration of his protected activities and that the appraisal for the 1986-1987 appraisal period was lowered because his supervisor considered Cantu-Villarreal's protected activities in preparing the appraisal.

Once again, applying the Scott Air Force, supra, rationale to this matter it does not appear that a violation exists. What occurred, in my view, was an attempt to reach an accommodation between Cantu-Villarreal's right to perform protected activities on official time and Edwards' interest that Cantu-Villarreal be capable of performing a full range of electroplating processing jobs while on the job. Edwards' explanation was merely that since he was not present for the full range of work activities and he had to be rated on the work he performed, the same as other employees, he could not receive a rating higher than "fully satisfactory."

This case does not lend itself to the theory set forth by the General Counsel. Thus, it is not at all an Internal Revenue Service, Washington, D.C., 6 FLRA 96 (1981) type case, but rather it must be analyzed on the basis that such conflicts concerning usage of official time must be balanced by reasonableness and accommodation on both sides. However, if the IRS, supra, rationale were applied to the matter, in all of the circumstances of the case, it would be my view that the Respondent established a legitimate basis for not rating Cantu-Villarreal higher for the 1986-1987 appraisal period involved in this matter. Thus, Edwards is credited when he testified that Cantu-Villarreal gave him a really good job in 1985, but in 1986 the extra effort was not there. One example of this was Cantu-Villarreal moving to assist other workers when he did not have work in 1985, which he did not do in 1986.

Since a reasonable employee in my view, could have understood that Edwards was apparently trying to reach an

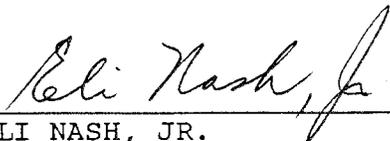
accommodation rather than penalizing Cantu-Villarreal for engaging in protected activities, it is found that the circumstances do not warrant a finding that the 1986-1987 appraisal constituted discrimination against Cantu-Villarreal because he had engaged in protected activity.

In light of the foregoing, it is concluded that Respondent did not violate section 7116(a)(1) and (2) of the Statute, I recommend that the Authority issue the following Order:<sup>7/</sup>

ORDER

The Complaint in Case No. 7-CA-70456 be, and hereby is, dismissed in its entirety.

Issued, Washington, D.C., July 29, 1988



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ELI NASH, JR.  
Administrative Law Judge

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<sup>7/</sup> The General Counsel's uncontested motion to correct transcript is granted.