

OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001 UNITED STATES DEPARTMENT OF THE NAVY, SUPERVISOR
OF SHIPBUILDING, CONVERSION AND REPAIR NEW ORLEANS, LOUISIANA Respondent
and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES Charging Party

Case Nos.

6-CA-10996, DA-CA-20287 Audrey L.

Covington For the Respondent Christopher J. Ivits For the General Counsel George L. Reaves, Jr. For the Charging Party Before: JOHN H. FENTON Chief Administrative Law Judge

DECISION

Statement of the Case

At issue in this proceeding are the questions whether Commander Gregory Todd responded to a Union organizing drive by making coercive, intimidating or disparaging statements about the Union, and by lowering the performance appraisal and withholding a recommended monetary award from Doug Harris as well as refusing to approve a monetary award recommended for Richard Ball because these employees were active in the organizational effort (and became, respectively, Vice - President and a steward upon certification of the Union). The broad outlines of this controversy are as follows. In the Spring of 1990 some of Respondent's employees began discussing unionization and contacted representatives of both [PAGE 2] AFGE and NAGE. In about June, organizational efforts looking toward representation by NAGE began at the Respondent's premises during nonduty time, including the wearing of Union buttons by some of its supporters. On February 19, 1991, a petition for an election was filed, and on June 6 an election was held. On June 17 NAGE was certified as the exclusive representative of an activity-wide unit of about 236 non-professional employees, who worked at the Todd Shipyard in Algiers or the Avondale Shipyard 16 miles upstream, or at both. On June 18 a notice was posted on the Union Bulletin Board in the foyer of the building where Todd, Harris and Ball worked, showing that a Mr. Dickerson had been appointed President, Harris Vice -President and one Lawson Executive Vice - President. By letter of July 2, President Dickerson officially notified Respondent of the results of the Union's election of officers, including, in addition to those named above, Richard Ball as one of five Stewards and Stephen Fontaine as Chief Steward. That notice was received by Captain Donohue, Commanding Officer of Respondent Activity on July 8, and distributed by him to his staff on July 17. In the meantime, Harris placed a copy of that letter in Todd's in-box no later than July 5. On July 11 Commander Todd lowered the recommended appraisal of Harris from Outstanding to Exceeds Fully Successful and refused to approve a recommended monetary performance award. On August 8 Todd refused to approve a performance award for Ball.

The Complaint alleged that Todd, during the period from March to June 5, 1991 (the date of the election) "on several occasions informed bargaining unit employees that the Union causes only trouble, the Union will only hurt careers, the Union is getting out of hand, and the Union will do nothing for the people." It is contended that such remarks violated the statute both by interfering with the rights of employees to form, join or assist a labor organization and by breaching Respondent's duty to remain neutral during the election campaign. There is much testimony that Todd made such remarks, but little that they occurred during the time-frame set forth in the Complaint. Much is undated or placed in the early months of Todd's tenure (which began in late August 1990). Curiously, alleged discriminatee Harris has much to offer, but alleged discriminatee Ball has none at all.

Commander Todd was Repair Officer. He maintained an office in Algiers as well as one in Avondale, spending about 70% of his time in the latter location. His assistant was [PAGE 3] Commander Sumner. Harris was a Production Controller, who kept track of the money assigned to jobs. This was especially important

with respect to new work, or work uncovered as repair work proceeded, where he had to give the ship surveyors who negotiated the cost of such new work the limits of funds available for such purpose.

Harris worked for supervisor John Ryan, with Todd as his second-level supervisor. He interfaced with Todd and Sumner quite a bit. Ball was a ship surveyor, who worked under the immediate supervision of two different supervisors during the rating here at issue, (and at the two locations). John Ryan was his second-level supervisor and Todd his third. Ball did not interface directly with Todd or Sumner.

Most of the witnesses worked out of the Algiers office. As noted, Todd spent only about 30% of his time in that office. Harris worked about half his time in each. The managers, supervisors and unit employees involved in this proceeding shared close office space in Algiers, where they could overhear each others' conversations. In addition, they commingled at the coffee pot in the room shared by Harris and Fontaine and in the smoking area. And it is clear that there was some, unclear, discussion of the Union involving Todd and Fontaine, or between Fontaine and Harris and heard by Todd. Unfortunately Fontaine, who did receive an Outstanding rating as well as an award, and who was clearly the most vocal supporter of the Union at Algiers (and was to become its Chief Steward), did not testify. We know very little about the labor relations climate at the Avondale yard, from which the Union president apparently came, or elsewhere in this unit.

Three union-member unit employees (aside from the alleged discriminatees) were called to testify. Ship surveyor Perry Hitt said that he overheard Todd saying to unidentified people that "This union shit will only cause trouble", "The (expletive) union will only hurt careers:", and "The (expletive) union will do nothing for the people". He placed such statements between March 1990 and June 1991, thus embracing some six months prior to Todd's arrival. Hitt also said that Todd, at a meeting of employees in September of 1990, told employees that they did not need a union, that he was going to make them GS-11s at Step 2. 1

Ship surveyor James Toombs said that, when the men were at their work stations he heard Todd say "This union is only [PAGE 4] going to hurt us", or words to that effect, sometime between February and June 1991. Within the same time period, he overheard what he believed to be an upset Todd say "This union shit...". He somehow managed to leave the area before listening to the balance. He also recalled a Todd statement that he was trying to get GS-11s for the surveyors. However, like Ball, he did not tie it to any reference to the Union and he placed it in the office rather than at an official meeting.

Ship surveyor Frank Seymour, who arrived on board in March of 1991 said he heard Todd say, "in various conversations, group meetings" that the Union "wasn't going to be good for the Command", and "would hurt careers" and "stuff like that." He said he also overheard Todd say to another supervisor, that "This (expletive) union shit's going too far". He gave the expletive a certain force, observing that Todd did not use it all the time, but used it when speaking of the Union. He further said he had heard such comments as that the Union will do nothing for the people at meetings in Algiers and also in Avondale.

Harris attributed many derogatory and even threatening remarks to Todd. Thus, he said that in August 1990, Todd remarked "I understand you're active in organizing the Union" and, receiving an affirmative response, said "The (expletive) union only hurts careers". Earlier, in coffee breaks in the room Harris shared with Fontaine, Todd, he said, had made "casual" remarks that "The Union doesn't do anything for the people." In September of 1990, in a meeting of 15 to 20 people, Todd allegedly said "You don't need a Union, I'll give you, all you wage grades, a GS-11 and give you a two-step increase". Although all the surveyors were allegedly present, only Hitt corroborated this claim. Except for Hitt the others, including Ball, (who spoke up to resist conversion to GS status) apparently have no recollection of it. After the Union petition was filed Todd allegedly said to him that the "Union only hurts careers" and said to Fontaine that "he hopes somebody's career won't get hurt over this union activity." 2 Harris also reported overhearing Todd say to Sumner that "This (expletive) union shit's getting out of hand". Finally, Harris testified that Todd, after the results of the election of Union officers were published, said to him "Congratulations [PAGE 5] on your election as

Executive Vice President. Smile. You are on candid camera".

Supervisors Ryan, Cravey, Hughes, Gonyier and Sumner all deny having heard Todd make disparaging remarks about the Union. Retired supervisor Ryan, whose premature actions in recommending Harris and Ball for awards and Outstanding ratings hardly suggest he was a loyalist, said he had heard no comments whatever. Non-union surveyor Welding gave testimony to the same effect. Welding said that, at Avondale, most conversations about the Union took place in the smoking area outside the building, and involved himself, Harris, Fontaine and Ball. Such conversations ceased, he said, when the only smoking supervisor (Lt. Commander Gonyier) appeared. He further said that, at Algiers, such conversations took place in the Harris - Fontaine office or in his own large office, and that they did not occur in the presence of management officials, although he acknowledged that he was an infrequent user of the former office. He testified that he heard no comments by Todd about the Union and that he saw no union buttons. 3

Todd, like the other managers/supervisors asked about it, denies he knew of the Union campaign prior to late 1990 or very early 1991, and specifically denies that he was aware that Harris and Ball were activists. Todd admits having (undescribed) conversations about the Union, but denies any recollection of derogatory statements, and specifically denies ever having said the Union was no good for careers, or that he hoped people would not get hurt because of the Union, or that the Union "shit was getting out of hand". He admits that he sometimes responded to Fontaine's aggressive remarks about the need for a union but says he has no specific recollection of his answers. Finally, he says he was briefed, after the petition was filed, about the obligation of managers to remain neutral, i.e. to stay out of the election campaign, and that he did so.

Resolution of the 7116(a) (1) allegations as well as any lesser showing of animus, largely depends upon the assessment of the testimony of Harris vs. that of Todd. For there is otherwise little evidence in this sketchy record indicating that Todd made unlawful statements to employees, as opposed [PAGE 6] to being overheard in remarks made to managers or unknown parties. Most of the coarse and disparaging remarks attributed to him were devoid of specifics as to when, where and in what circumstances they were allegedly made. Only Seymour and Harris placed such remarks within the March to June period set forth by the Complaint and Seymour very vaguely spoke of "meetings, various conversation" in which he asserts Todd made derogatory statements but is not supported by any other witness (save Harris). Nor do I find this very vague and conclusory testimony persuasive, given his testimony, totally uncorroborated, that Todd's derogatory remarks continued right up to the time of trial. Hitt unreliable placed what he overheard somewhere in a sixteen month time-frame, including six antedating Todd's arrival. He does support Harris's version of Todd's having connected a promise to convert certain employees to GS status to a statement that no union was needed, in a September meeting. Toombs, however, testified to no such connection in his testimony about the conversion effort. More importantly Ball made no such connection, although he played a prominent role in speaking out against the conversion, and allegedly prevented the unanimity among affected employees supposedly required to effect such a change. Nor, as noted, does Ball, a self-described Union activist whose role, he says, must have been known to management from his Union button and other activities, offer any evidence of statements violative of the statute or otherwise even suggesting hostility to or disdain for, the Union.

Noting the unanimity of the managers and supervisors who say they heard no untoward statements by Todd, the sharp and inexplicable contrast between the accounts of the two alleged discriminatees, and the seven statements recounted by the three other unit employees called to testify, it is difficult to believe the various witnesses worked in the same small world of ship surveyors. The task of determining who is telling the truth, or who most closely approximates it, is complicated by the fact that alleged statements litter the landscape over a period of about ten months, and that more than a year thereafter went by before testimony was given. However daunting the prospect of coming even close to reconstructing the reality, it is unavoidable. I conclude, without reliance on demeanor, a factor I found unavailing, that General Counsel has not established by a preponderance of the evidence that Todd made unlawful remarks to employees at meetings. I do so because only Harris and Hitt linked a September promise of conversion to GS-11 to the lack of need for the

Union, and only Seymour said Todd spoke of the negative impact of the Union upon careers and upon the Command [PAGE 7] at meetings in the few months before the election. Other employees called by the General Counsel did not support them.

On the other hand, I do believe that Hitt and Toombs overheard Todd uttering remarks to the effect that the Union would cause trouble, hurt careers, do nothing for the people or was going too far. This testimony was woefully lacking in specifics that would lend it force and meaning, particularly the last remark. Nevertheless we know that Todd responded to pro-union remarks from Fontaine (which he professed not to recall), and that Todd denied remembering remarks of this kind, rather than denying outright that he had made them. And Harris said Todd's "casual remarks in my office over a cup of coffee were a little more deeply involved than what we first suspected", an apparent reference to statements whose meaning became "clear" only after what he perceived as discrimination. I find such statements were made, either during coffee break discussions in the office shared by Fontaine and Harris, or to other managers. How often they were made is anybody's guess, but given the lack of specifics, there is no reason to believe each witness heard separate statements unheard by others, i.e. that each witnesses' report is cumulative rather than redundant. To the extent such statements were made in response to Fontaine's pro-union statements, that would throw some light on their meaning and purpose: to dispute Fontaine's view that problems would be solved with a union. It is, to say the least, most unfortunate that Fontaine was too ill to testify. He was a key witness to very important events, was an outspoken advocate of the Union to his superior, came to occupy the very important post of Chief Steward, and received an award for his performance.

Because I believe Todd made the kinds of statements noted just above, and not because I find Harris any more credible than Todd, I also find that Todd informed him that he understood that Harris was active in organizing the Union - an observation easily understood to be an implied question. I also conclude that, upon receiving an affirmative response, Todd told Harris that the Union would only hurt careers. I do not believe such conversation occurred early on, immediately upon Todd's arrival, nor do I believe Harris' testimony that shortly thereafter, in September, Todd told assembled employees that no union was needed, or tried to buy them off with promises of conversion to GS status. Others more deeply involved report no such effort. Other conversations or overheard statements are not placed in time, and the campaign appears to have been circumspect in the main. I think knowledge of Harris' role occurred much later, and I find no convincing evidence that Ball's role was ever known prior to dissemination of the Union's report that he was a steward.

In sum, I find no evidence that Todd spoke negatively of the Union to any group of employees, or that he spoke in such manner to any individual employee except Harris. I am convinced that he was overheard making disparaging remarks not intended for employee consumption to other managers, or to Fontaine, who drew him into such discussions. In essence, I do not find that a preponderance of the evidence establishes that Todd mounted a serious and purposeful campaign to intimidate employees and defeat the Union. I do, however, find persuasive the evidence that he made remarks to the effect that the union would do nothing for the people, would cause trouble and hurt careers, or was going too far. Clearly, he did not view the arrival of a bargaining representative as an event good for either employees or the Command. In expressing such views he violated Section 7116(a)(1), which protects employees from interference, restraint or coercion in the exercise of their right to form, join or assist a labor organization. (See Department of the Air Force, AFPRO, Ft. Worth, Texas, 5 FLRA 492 and Ogden Air Logistics Center, Hill Air Force Base, Utah, 35 FLRA 891, 895-6). Whether such violations indicate that Todd harbored an intention to punish Union supporters by discrimination against them is quite another question, one sensibly left until the alleged discrimination is examined. Absent convincing evidence that the refusals to grant the Outstanding rating or the awards were rather obviously unjustified, the evidence of animus will be of little avail.

The Alleged Discrimination

A . Doug Harris

Mr. Harris received an Exceeds Fully Successful rating as a WD-8 ship surveyor and a GS-9 production controller for the period from December 18, 1988 to June 30, 1989 (Agency Exh. 3). For the year ending on June 30, 1990, while still apparently a ship surveyor, he received an Outstanding rating from John Ryan (first level) and Commander Charles Sumner (second level) (G.C. Exh. 2). He received in addition, an award of over \$800.00. He also received an overlapping Outstanding from the same supervisors, as a production controller, for the period March 5 to June 30, 1990 (G.C. Exh. 3). On June 1, 1991 Supervisor Ryan appraised Harris' performance as a production controller GS-11 as Outstanding [PAGE 9] for the period ending on June 30 (G.C. Exh. 4), and recommended a 20% performance award. 4

This last appraisal and the award recommendation were prematurely done, and, more importantly, were done in clear violation of the Civilian Performance Appraisal System (Jt. Exh. 2). 5 The regulations require a supervisor to refrain from informing an employee of his rating before it has been reviewed and approved by the second-level supervisor, and direct him not to discuss any award recommendation until it has received final approval. Ryan not only shared his rating and his strong award recommendation with Harris, but he had Harris sign off on the form, so that Todd, the new second-level supervisor, was presented with an appraisal complete in all respects except for his signature. It is clear from Ryan's testimony that Todd was unhappy, promptly (in very early June) informed him that he had "money problems" with Harris, and that he did not think he should sign off on Ryan's recommendation. Ryan conveyed this to Harris, who "volunteerly (sic) removed" his signature from the evaluation form (Agency Exh. 2).

I dwell on this latter point somewhat because of the vigorous effort and to show that the appraisal was changed after Todd became aware of Harris' Union office through the June 18 posting or the July 2 distribution of the list of appointed/elected officers. It is clear that Todd registered his unhappiness with what Ryan had done before the election even occurred.

It becomes necessary to review the evidence of Harris' performance during the fiscal year ending on June 30, 1991. He received kudos in the form of a letter of commendation on [PAGE 10] September 11, 1990 from Commander Donahue, Supervisor of Shipbuilding, Conversion and Repair (Supship), for a suggestion concerning use of the Type Desk Management Information System; a letter of appreciation on May 8, 1991 from Donahue for his efforts in managing the finances that attended delivery of the USS Merrimack; and another letter of commendation from Donahue for his efforts in connection with overhaul of the USS Stump. While dated December 6, 1991, this project was underway throughout the appraisal period. While it is difficult to measure the meaning of the commendations, it does appear that they were rather generously provided to those associated with a project. 6

On December 26, 1990, pursuant to a complaint made by Catherine Snelson, the Comptroller, a meeting was held involving her, Harris and Lt. Commander Sumner about there being insufficient funds to cover the price negotiated for certain repairs. In a January 2 memo sent by Sumner to the Deputy Supervisor of Shipbuilding (and courtesy copied to Todd), Sumner described the matter as clearly a failure by Harris. Harris' job description was reviewed and found not to have an "iron clad" element respecting the need to keep a job in the black. Other steps were taken to prevent a reoccurrence of the problem. Sumner concluded that, while the matter did not have to be reported as a violation of the Anti - Deficiency Act, he did "not view it as any less serious a problem". (Agency Exh. 13).

In a memo from Harris through Sumner to Todd, Harris had, on December 20, indicated a conciliatory attitude about rectifying the mistakes he "may have" made (G.C. Exh. 18). Whether or not a violation of the Anti - Deficiency Act occurred, it is clear that the Comptroller and Sumner viewed what had happened as a serious matter. Thereafter, in March, Sumner wrote Harris in reply to a memo from Harris about Job Order EH-63 (Agency Exh. 15). Sumner set forth for three pages what he thought were errors by Harris. Harris responded

on March 25, in a memorandum to Todd, in which he described the memo from Sumner as "inane and an insult to my intelligence and position" (Agency Exh. 14). He said that he had explained the matter several times to Sumner, and that the job was now at a point where it was not in the best interests of the government to "quibble about the viability of statistics therefore, I do not intend to revisit the issues...".

It is not clear when Sumner's memo reached Todd's desk. On January 14, Todd signed off on a Progress Review of Harris' work describing his performance as one which "exceeded the majority of work plan objectives during the first" six months of the rating year (G.C. Exh. 4). That, of course, is not inconsistent with Todd's final appraisal.

On June 3, 1991, Sumner provided Todd with his "Input for Evaluation of C620 (Doug Harris)" (Agency Exh. 9). He found that Harris exceeded the majority of work plan objectives (3 out of 5), and recommended a rating of Exceeds Fully Successful. He said the following:

Objectives C & E were met but 2 significant problems occurred. In the case of maintaining cost accounting records, we obligated more funds than we had for APL repair. In the case of cost data for the customers, improper, inaccurate and misleading data was provided to SURFLANT. This did not lead to formulating repair decisions in the best interests of the government.

Lastly, there was conflict over an LOE, or Light Off Examination. While there is no documentary evidence of it, it is clear from both sides that there was very strong disagreement over establishing an Examination Coordinator. Todd simply recited as an element justifying his downgrading, that Harris had in that connection lied to him, had denied it, and that one Ron Finley had corroborated management's view concerning what Harris said to Finley. In recalling the LOE incident, Harris said that Todd, Sumner and Welding ("an unsavory character") had conspired to retain a "beltway bandit" to be the Coordinator because Lt. Cmdr. Gonyier should but could not handle the job. When Harris made it clear that he knew what was going on, and that everyone could go to jail, Todd and Sumner allegedly had a secretary destroy the data base files recording their activity and called off the conspiracy. Sumner then instructed Harris not to talk to the surveyors anymore. Harris testified that he told them "You don't goddamn tell me what I - you don't pick, and choose on my PD what I do." This, coupled with a threat to go over their heads convinced Todd, he says, to relent.

Whatever the truth of this matter, it at least establishes deep distrust between these parties, and further reason for management not to share Ryan's enthusiastic views of Harris' performance. Nor, oddly, is there any indication that Ryan was even aware of the conflicts recited above, even those memorialized in documents. Some flavor of the existing attitude, at least on Harris' part, is provided by him. Thus he said the Command, as concerned the ongoing expenditures on the Stump, "was in an embarrassing position, because I was letting the customer know where the money was going ... I was the only one doing my job in there, as far as trying to keep the money sacred" (Tr. 587). And he said, that "ship has been broke, basically, since it got out of here," casting some doubt, to say the least, on the value of the many commendations issued to those who worked on it. Whatever else, it is obvious that Harris' relationship with Todd and Sumner was not entirely smooth that year. There was criticism flowing in both directions, there was friction and strong words were used.

To return to the appraisal process, it will be recalled that Ryan essentially blind-sided the second-level supervisor, by prematurely rating, and then sharing both the rating and an apparently extraordinary 20% award recommendation with Harris before ever involving Todd in the process. One has to doubt that he would have dared to do such a thing were it not the prelude to retirement, and one has to wonder whether such conduct does not support Todd's claim that Ryan and Harris (as well as Ball) were social friends and drinking buddies. Whatever one makes of it, the performance rating occurred at about the usual time, on July 11. The accounts of what was said could not differ more sharply, as one might expect from what was, essentially, a collision of egos. Harris said he was simply told he was being reduced to an Exceeds Fully Successful, and

that no explanation was offered beyond the right of the Repair Officer to do as he wished. He further asserted he was told that he could not grieve his unhappiness because there was no Union contract, and that he was asked to predate his signature to July 1. Todd said that he intended to explain his decision, but that, upon telling Harris he could not "support an outstanding award ... he stood up and said 'I'm rolling over to the other side,' ... (and) ... stormed out of the room", and returned a few seconds later to get a copy of the appraisal. There was no further discussion of performance, and no change was made in the narrative written by Ryan in support of the Outstanding. 7 Instead, the check marks indicating Outstanding were whited out and marks for Exceeds Fully Successful were substituted. In addition, the June 1, 1991 date following Ryan's signature and Harris' original signature (as in G.C. Exh. 4) were changed to July 1 and July 11 (as in G.C. Exh. 10). Thereafter the July 11 date following Harris' name was inexplicably changed to July 12 (Agency Exh. 1).

I do not regard either Todd or Harris as a totally reliable witness, but in the main believe the former. I was particularly impressed by Sumner and by Gonyier, seeing no indication that either man was prone to bend the truth. Harris' assault on the integrity of them and virtually the entire management team in the repair shop (or any one else whose testimony was adverse to his claims) and his frequently conveyed sense of his own unique competence and honesty give one pause, as does the lack of corroboration for many of his statements. 8 Given his own description of angry encounters with his superiors, it was to be expected that the evaluation meeting would erupt in an angry outburst. And the unusual words "I'm rolling over to the other side", as reported by Todd, have the ring of truth as opposed to being products of Todd's imagination. I credit Todd's account of what transpired, and of how, specifically, Harris aborted any discussion of performance by abruptly leaving. As it was not denied (Todd never having been asked about it), I find that Todd did indicate that Harris would be unhappy about the lower evaluation, but that there was no union contract through which he could grieve. It hardly sounds plausible, given other statutory avenues of redress but the record leaves no alternative.

Incontestably, ample reason existed for finding Harris' performance less than outstanding or undeserving of a money award. The "money matter", the conflict over the "beltway bandit", and the allegedly inaccurate information conveyed "over the heads" of Sumner and Todd to Pat Conroy, the headquarters Type Desk, all show sharp conflict over the merits of Harris' performance. Sumner, who had previously joined in an Outstanding rating for Harris, recommended an Exceeds Fully Successful for the year at issue, noting such shortcomings. As noted, I was particularly impressed by Sumner, and perceived no reason not to fully credit his evaluation as honest and free of any taint. 9 And Harris' responses to Sumner's criticisms, while smacking strongly of insubordination, tend also to admit he may have been in error, and to show he was less than anxious to follow through to resolution the question whether Sumner was not, in fact, right about those criticisms. Thus, focusing on the shortcomings of Harris' actual performance, as well as the strong feelings expressed in connection with criticisms of his work as well as what he appears to have considered whistleblowing of a sort in his effort to keep others honest, it is clear that sufficient reason existed for the treatment he received. The question, then, is whether they, his protected activity, or a mixture, were the real reason.

The Letterkenny analysis (35 FLRA 113) applies to such an undertaking. It requires that General Counsel establish a prima facie case (one which will survive a motion to dismiss) that the employee allegedly discriminated against was engaged in protected activity and that such activity was a motivating factor in the agency's treatment of him/her in connection with some condition of employment. Should the General Counsel fail to make such a showing, the case ends without further inquiry. Even in the event such showing is made, no violation will be found if the Agency demonstrates, by a preponderance of the evidence, that there was legitimate justification for its action and that such action would have been taken even in the absence of protected activity.

Clearly Harris was an organizer of the Union and that fact was known to Todd. The next question is whether Todd's statements suffice to establish a prima facie case that Harris was reduced from a recommended Outstanding to an Exceeds Fully Successful and was denied a money award because of those activities. We

are not presented here with a manager who expressly and unequivocally predicted adverse consequences for those who bucked his hostility to unions. I doubt the Authority would rely on a statement(s) that a union would do nothing for the people as one suggesting punishment for those daring to disagree. Disparagement of a union's purposes or usefulness, or a statement that a union is neither necessary nor desirable, hardly evidence a disposition to discriminatorily act against those whose words or actions indicate they disagree. As the Authority said in Letterkenny (page 119) "courts use the concept of a *prima facie* case to mean 'not only that plaintiff's evidence would reasonably allow conclusion plaintiff seeks but also that plaintiff's evidence compels such a conclusion if the defendant produces no evidence to rebut it.'" (emphasis mine). A clear and unmistakable threat to deal with union supporters followed by action taken against them would, if unanswered, obviously compel a conclusion that a violation had occurred. But would a statement that a union is not necessary, or would not help employees, or even would hurt employees compel the conclusion that any adverse change in the employment conditions of a union supporter was an act of discrimination? Do any and all statements of disdain for, or hostility to labor organizations translate alone into compelling proof that refusal to promote a steward is unlawful? I think it far from clear that an affirmative answer lies, but view as the only safe course placement of the burden of Respondent to demonstrate it was motivated by considerations of performance and would have followed such course even in the absence of protected activity.

Here we have proof that legitimate justification existed for concluding that Harris was neither Outstanding nor deserving of an award for outstanding work. That does not demonstrate however, as Letterkenny requires, that Respondent would have withheld both forms of recognition in the absence of Harris' protected activity. Proving a negative is never easy, but it is clear that Harris was remiss in important aspects of his performance, was engaged in a disrespectful manner in disputes about his job with his superiors, and was the beneficiary of an evaluation by a supervisor which is itself suspect. The General Counsel argues that the timing here gives rise to suspicion, the evaluation having "occurred immediately after he (Todd) found out that Harris was elected Executive Vice - President of the Union." Yet it is clear from Ryan's testimony that Todd said he had a problem-a "discrepancy in the money fund" as soon as he saw the prematurely executed evaluation and award recommendation, even before the union election, and that early July was the normal time to handle evaluations. It is difficult in any event to see how timing required by regulation and hence outside of the alleged wrongdoer's control, can ever be a factor giving rise to suspicion. There is, in addition, the recognition accorded Fontaine, despite his strong pro - Union views and Hitt, who wore a Union button (assuming, as General Counsel argues, that such buttons were even noticed). In such circumstances I conclude that deprivation of the Outstanding rating and the cash award has been shown by a preponderance of the evidence to be consistent with Harris' performance shortfalls, i.e. that an Exceeds Fully Successful would seem appropriate in the circumstances. The less than compelling nature of the animus shown, when fortified by the award given Fontaine, persuade me that Respondent would have done the same had there been no Union. In short, the General Counsel has not carried the ultimate burden of persuasion.

B . Richard Ball

Ball was first appraised as a ship surveyor for the period from January through June, 1989. His first-level supervisor, James Cravey and Ryan rated him Fully Successful. 10 The same supervisors gave Ball an Exceeds Fully Successful for the year ending June 30, 1990, for which he received a cash award. So much is clear. What followed is confusing to say the least.

On January 8, 1991, within the appropriate time frame for a mid-year "Progress Review", Ball was rated Outstanding on a form which was not checked to designate either an "interim appraisal" or a "rating of record". That form also contained a narrative, in the space reserved for the supervisor's comments, called a "Final Appraisal", which, as in the case of Harris, had an entirely inappropriate recommendation that Ball receive a performance award. The testimony of Ryan and Cravey indicates, as does Joint Exhibit 2, that a rating is not made during a progress review. Thus Cravey denied that he rated Ball "at the progress review", and denied that he had (or knew who had) checked the box designating an outstanding performance and

written the narrative labeled a "Final Appraisal". 11

That document (G.C. Exh. 14) was then apparently used by Ryan for the year-end appraisal which he executed on June 1 (Agency Exh. 11). The form contains the undated signature of Ball but none by the immediate supervisor, Hughes. Whatever this document was to be, Hughes was unaware of it. Todd testified that Personnel twice rejected appraisals of Ball as incorrectly done, leaving open the possibility that the midterm "progress review" (G.C. Exh. 14), and/or the June 1 incomplete document (Agency Exh. 11) and/or the July 1 appraisal (G.C. Exh. 15) were sent back. Ryan did not address this and Todd was not clear. What is clear is that all three were faulty.

If the "progress review" was, in fact, exactly that, it should not have contained a rating or a "final appraisal" containing an award recommendation. The June 1 appraisal should have been accomplished upon Hughes' initiative (but at the proper time) rather than excluding him from the process, and likewise should not have contained an award recommendation. The July 1 appraisal, on its face, was confined to Ball's performance during the latter half of the year, but in its narrative was identical to the narrative done on January 8, i.e. it did not consider the new work to which he had been transferred. If, as is entirely possible, the January 8 "progress review" was intended to be a "close-out" occasioned by the transfer for which a rating would be given, new standards appropriate to the new position should have been fashioned and discussed with Ball. That was never done, so that any rating of Ball for the period after the transfer would be based on work for which appropriate standards for judging performance had never been created, never mind communicated to him. Obviously, Ryan made a mess of things.

I credit Todd's statement that Personnel rejected the June 1 incomplete and erroneous appraisal, despite the absence of documentary evidence. It certainly should have been rejected, lacking a signature and containing an erroneous award recommendation as well as a narrative saved from the January "progress review" and thus having no relevance to his performance under new supervision. Ryan was instructed to straighten matters out. He did so by striking through the narrative and writing an undated note: "see evaluation of 8 Jan 91/30 June 91 for final appraisal". That appraisal, on its face not covering the full year falsely shows that new standards of performance were fashioned on January 8, the alleged date of Ball's transfer to new supervision. It clearly happened in June, presumably contemporaneously with preparation of the July 1 or June 30 appraisal to which it makes reference. That appraisal, in the supervisor's comments, deletes the award recommendation and adds the transfer, but is otherwise identical to the "Final Appraisal" of the old job. In theory Hughes should have been the initiator of the rating. However, he said he was in fact only a "supervisor of record" and was unfamiliar with Ball's performance, even working on a different ship. From what little he knew, he did not believe the Outstanding was unwarranted. It is hardly clear why he was the supervisor if he had so little contact, and the appraisal signed only by Ball and Ryan strongly suggests Ryan was not anxious to receive input as opposed to usurping the supervisor's function once again. 12

That appraisal appears to have been rejected also, although again there is no documentary proof. Whatever, Todd said he was unhappy with the rating. Although Todd said he could not recall such an incident, I credit Hughes' testimony that Todd visited him, apparently upset that Ryan had prepared the evaluation without taking "into account what might have happened in the first six months", 13 and disagreeing with Ryan's assessment, asked Hughes "if ... (he) ... would consider changing the evaluation". Hughes told Todd that he did not believe the evaluation should be changed. It was not. Hughes knew nothing about the award recommendation until shortly before the August 8 meeting, when Todd told him that they were to meet with Ball, permit the Outstanding rating to stand, but reject the award recommendation.

Todd said he received input from Cravey, who reported it was necessary to monitor consistently Ball's work, from Summer, who reported that Ball was often hung over and incapacitated and from one Steve Walker who likewise allegedly said that he did not do business with Ball after lunch because of the smell of alcohol and

incoherency. Todd himself said he caught Ball sleeping on the job, and directed Cravey to counsel him. Ball denied he slept on the job, or that he was counselled about it. Cravey said he did counsel him in late October 1990. I found Todd convincing as he added details in various examinations—that the ship was in drydock, that when a man is snoring he thinks he is sleeping, and that on a later occasion, perhaps at the August 8 conference, Ball said he was "brainstorming".

Todd said he finally decided to leave Ryan's rating of Ball undisturbed in order to give him the benefit of the doubt because his evaluations had been messed up by the Agency, and because both Hughes and one Stewart said he was doing fine (in the latter half of the year), while Cravey, who was critical, had a personality conflict with him. He nevertheless determined not to gild the lily with an award, in the circumstances, including the sleeping incident. He so informed Ball during the August 8 meeting, and Ball, he said, appeared to be satisfied. Ball testified that he told the Commander that he was "screwed up", using an expletive.¹⁴ Hughes could not remember the details of what Todd had to say to Ball, his "best" recollection being that Todd told Ball that "he didn't believe his work performance rated outstanding, and he wasn't going to concur with it and he wasn't going along with the evaluation". Particularly because of such testimony, I am satisfied that Todd told Ball of his reservations concerning the evaluation, of his decisions to leave it alone as well as his decision to deny the award. For the same reason I reject the suggestion in Ball's testimony that the sleeping incident was the only factor considered and proffered by Todd in explanation of his decision to withhold the award.

It is not clear when Todd approached Hughes about his disapproval of the rating Ryan and Hughes had given Ball, it had to have been after July 1, when they signed off. It cannot be determined whether Ball's status as a steward had by then been communicated to management by the Union. There is no evidence that management knew before such information was released (on July 5 and July 18) that Ball was an activist, and it is notable that he neither heard nor was he the recipient of anti-union remarks or interrogation. We do know that Todd had such information before the August 8 meeting. The record therefore fails to establish that Todd was aware of Ball's union office before he communicated to Hughes his disapproval of the action taken by Ryan and Hughes. Nor is there any evidence that Todd was otherwise aware of Ball's role in the Union or the organizing effort. In such circumstances, I conclude that the Letterkenny threshold requirement has not been met, i.e. there has been no showing that Respondent was motivated by Ball's protected activity in deciding to withhold the award recommended by Ryan.

Ultimate Conclusions

Having found the evidence does not support the alleged violations of § 7116 (a) (2) involving Doug Harris and Richard Ball, it is recommended that these allegations be dismissed.

Having found that employees overheard Commander Todd making remarks to the effect that the Union would do nothing for the people, would cause trouble and hurt careers, and "was going too far", and having further found that Todd asked an employee whether he was active in organizing the Union, and informed that employee that the Union would only hurt careers, all in violation of § 7116(a) (1),¹⁵ it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Department of the Navy, Supervisor of Shipbuilding, Conversion and Repair, New Orleans, Louisiana, shall:

1. Cease and desist from:

- (a) Making statements to, or within earshot of employees which suggest that union representation will do nothing for them, or will only cause trouble and hurt careers, thus interfering with, restraining or coercing employees in the exercise of their statutory right to form, join or assist a labor organization.
- (b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor - Management Relations Statute.
2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor - Management Relations Statute:
- (a) Post at its facilities at Department of the Navy, Supervisor of Shipbuilding, Conversion and Repair, New Orleans, Louisiana, 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 Commanding Officer, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.
- (b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Dallas Region, 525 Griffin Street, Suite 926, LB 107, Dallas, TX 75202, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, February 18, 1994

JOHN H. FENTON Chief Administrative Law Judge

NOTICE TO ALL EMPLOYEES
AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY
AND TO EFFECTUATE THE POLICIES OF THE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE
WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT make statements to, or within earshot of employees which suggest that union representation will do nothing for them, or will only cause trouble and hurt careers, thus interfering with, restraining or coercing employees in the exercise of their statutory right to form, join or assist a labor organization.

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

(Activity)

Date: _____ By: _____ (Signature) (Title)

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 of the Federal Labor Relations Authority, Dallas Region, 525 Griffin Street, Suite 926, LB 107, Dallas, TX 75202-1906, and whose telephone number is: (214) 767-4996.

FOOTNOTES

Footnote 1 Hitt also wore a Union button and solicited membership. But, like Fontaine, he received an Outstanding rating and a cash award.

Footnote 2 I conclude this remark is hearsay relayed by Fontaine. While susceptible to the interpretation that it was made in Harris' presence, as reported at Tr. 77-78, it seems clear from the colloquy at Tr. 136-137 that Fontaine told Harris about it.

Footnote 3 This, as well as Harris' statement that most of the organizational effort took place in peoples' homes, strongly suggests that the campaign was somewhat circumspect and that the undescribed buttons were either inconspicuous or seldom worn or both.

Footnote 4 Ryan hedged somewhat in explaining his action. When asked why he recommended a 20% of base salary award he said he did not know. He further said "(f)rom what I seen in the first six months he was doing an outstanding performance ... (a)gain I was out at Avondale for the last five and a half, six months, and I was so busy with the AOJ project, I didn't have much to do with Mr. Harris". Thus the problems experienced with Harris may have postdated their close association, or not been connected to Ryan's AOJ work.

Footnote 5 I say prematurely done, although Ryan was on the verge of retirement, because he did come back to rate Ball on July 11. The regulations called for a Yearly Accomplishment Report to be submitted by Ryan to Todd not more than seven days after close of the appraisal year, i.e. July 7.

Footnote 6 Thus, despite the many commendations for the Stump overhaul, it was, according to Harris, a project that thereafter ran into many problems.

Footnote 7 I credit Todd's assertion that he intended to provide an explanation, there being no reason to believe he would have treated Harris differently than he treated Ball. It is clear from Hughes' account that Ball received an explanation.

Footnote 8 That is, only he, for no apparent reason, seems to have been singled out in one-on-one statements, while others merely overheard.

Footnote 9 Harris testified (Tr. 550-551) that he had several conversations with Sumner about the Union's usefulness. There is no indication Sumner initiated such talks or that Harris was at all fearful about expressing pro-Union views.

Footnote 10 Other supervisors in another organizational code gave him the same rating, in his capacity as a mechanical engineering technician, for the overlapping months from July 1988 through May 1989.

Footnote 11 I credit Cravey, particularly because Ryan gave the same treatment to Hughes, effectively eliminating his role as supervisor. In doing so I must discredit Ball, who said Cravey participated in (or at least signed off on) the decision to rate him Outstanding and recommend an award. Ball also said his July 1

rating contained the award recommendation, which was thereafter whited out. But then Ball said that Ryan alone gave him his rating, something which surely happened with respect to the June 1 rating that does not contain Hughes' signature. There is no suggestion Hughes was not present for the July 1 appraisal which he signed and which, after all, was designed to repair the flawed June 1 document which, among other things, did not contain the required immediate supervisor's signature. I am strongly inclined to credit Todd's statement that Ryan told him he took the January 8 "progress review/rating" out of the hands of Cravey, in the belief Cravey "would screw it (up)", because Ball was his friend. These factors and the dispute between Cravey and Ball (as related by Ball) about Ball's alleged failure to properly monitor a contractor, give support to Todd's claim that he believed Ryan wrote the January 8 appraisal after Cravey had signed off on a progress review (a discussion) because Cravey "did not have a high opinion of Ball". Cravey and Ball essentially agree that Cravey told him, at what Cravey undoubtedly thought was a progress review, "to keep up the good work".

Footnote 12 I found Hughes an impressive witness. He said that while he concurred in the Outstanding rating he neither concurred in nor recommended an award - he was not involved. He, too, made it clear that awards play no part in the appraisal process.

Footnote 13 While the appraisal's narrative section in fact looked back to the first six months (i.e. was identical to the January 8 performance narrative) the form said it covered the second six months.

Footnote 14 Ball testified "I believe I said he was '(expletive) up', but I signed it and was just acknowledging I was not particularly pleased with it, and advised him it did not happen...". I do not believe a seriously insubordinate challenge to Todd occurred. If the word was used, it suggests to me that it was not out of the ordinary.

Footnote 15 I find no persuasive evidence that the (largely undated) remarks were made after the election petition was filed. Such evidence as there is supports Todd's claim that he received and obeyed instructions about the neutrality required of management officials once an election campaign is underway. I therefore do not find that Respondent breached its duty to remain neutral.