

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

LANGLEY AIR FORCE BASE

LANGLEY AIR FORCE BASE, VIRGINIA

Respondent

and

Case No. WA-CA-50391

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES,

LOCAL R4-106, SEIU, AFL-CIO

Charging Party

Captain William R. Kraus For the Respondent

Daryl Adams, Esquire Jeanne Marie Corrado, 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. <sup>(1)</sup>, and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether an employee was disciplined for asserting his rights as a union representative.

This case was initiated by a charge filed on April 10, 1995 (G.C. Exh. 1(a)); and the Complaint and Notice of Hearing issued on August 28, 1995 (G.C. Exh. 1(b)) and set the hearing for November 2, 1995; but later, on the same day, August 28, 1995, a corrected Complaint issued (G.C. Exh. 1(c)) which set the hearing for November 7, 1995, pursuant to which a hearing was duly held on November 7, 1995, in Norfolk, Virginia, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which Respondent exercised. At the conclusion of the hearing, December 7, 1995, was fixed as the date for mailing post-hearing briefs and Respondent and General Counsel each timely mailed an excellent brief, received on, or before, December 9, 1995, 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. Mr. Wade Clements is now employed by Kitchen Design, a cabinet shop in Newport News, Virginia, as an installer (Tr. 11).

2. Before his employment by Kitchen Design, Mr. Clements had been employed by Respondent as a GS-7, woodworker and forklift operator in the transportation squadron (Tr. 11); had been a member of the National Association of Government Employees, Local R4-106 (hereinafter, "Union") since April, 1988 (Tr. 12); had been appointed shop steward in 1989 and had been elected Chief Steward in 1989 (Tr. 12).

3. Mr. Clements' immediate supervisor in Respondent's packing and crating section was Technical Sergeant George Wallace (Tr. 12, 115) and his second line supervisor was Mr. Emilio Trevino, Jr. (Tr. 12-13; 75). Mr. Trevino is Traffic Management Officer and is in charge of shipping, packing and crating and passenger movement (Tr. 75). He has a total of 12 military and 12 civilian employees under his supervision (Tr. 75). Mr. Trevino reports to the Transportation Squadron Commander, Major Kyle Johnson (Tr. 75).

4. Mr. Trevino stated that he tried to have a staff meeting each week but sometimes it would be two weeks (Tr. 76), with which Mr. Clements agreed (Tr. 20). Mr. Trevino sometimes calls the staff meeting, sometimes Sgt. Wallace calls it (Tr. 116, 126, 127); in like manner, sometimes Mr. Trevino conducts the staff meeting (Tr. 21, 94, 131) and sometimes Sgt. Wallace does (Tr. 21, 80, 94, 131). Mr. Clements stated that all employees in the packing and crating section and all employees in the surface freight section attend the staff meetings (Tr. 20) which, he stated, consisted of a total of six or seven bargaining unit employees (Tr. 21) and, in addition, military employees also attend the staff meetings (Tr. 84-85, 131, 133, 134, 138, 143). All employees present are required to attend (Tr. 87, 127).

5. The purpose of the staff meeting was described as the medium for passing out information that the Traffic Management Office receives from the Squadron Commander, which he receives from the Wing Commander (Tr. 76); to give information about what needs to be done or what is going to happen, such as exercises; there may be safety briefings; and there is team building - to communicate so that things run smoothly (Tr. 76, 116). Mr. Trevino stated that he was well aware of his obligation to notify the Union if conditions of employment were to be discussed at a staff meeting and that he did so (Tr. 76-77). Sgt. Wallace denied that he talked about changes in how he wanted work done at staff meetings. He stated, ". . . I instruct them basically on what their requirements are. . . . Of working there, and the contract as far as what is in their job description" (Tr. 123) and stated that he discussed better ways to do their work, "Within guidelines by the Air Force." (Tr. 124).

6. Mr. Trevino called and conducted the staff meeting of January 3, 1995 (Tr. 57, 77), which Sgt. Wallace said was, ". . . basically to give us praise for, to say thank you for the work that we had did (sic) in the previous year, and to give us direction on how he wanted us to go into the new year." (Tr. 116). Mr. Trevino described it in a similar manner as, ". . . passing out some information, general information, and I had passed out some information of what we had done in the past year, what we had excelled in and what we had

shortcomings in and that we needed to improve in --communications or training and items like that." (Tr. 77).

7. There is no dispute that the January 3, 1995, staff meeting proceeded smoothly and harmoniously until Mr. Trevino opened the meeting for ". . . discussion, questions or comments." (Tr. 32, 78). At that point, Mr. Clements raised his hand and said the following took place,

"A I told him that I wanted to bring to his attention a comment that he had made back on November the third and that I wanted to get some clarification on it. I stated, you told me -- you called me by name and said, Mr. Clements, you are here as an employee and not as a Union representa-tive. And then I said, I want it understood that as I am speaking right now, I am speaking in the capacity of a Union representative, and I wanted to state that his comment was a restriction of my rights as a Union representative under Article 8 of the Union contract, and that he was in violation of my rights in that regard.

"Q Did you indicate that you were there as a Union steward?

"A Yes, ma'am.

"Q Why did you make this statement?

. . .

"A Because I didn't want there to be any misunderstanding as to what capacity I was speaking in.

"Q Okay. And what was Mr. Trevino's response to your statement?

"A He immediately showed a look of exasperation on his face and then quickly said we need to discuss that in private.

"Q And what did you say?

"A And I reminded him that he made the comment to me in an open meeting, which conveyed the impression that he could dominate and control me as the shop steward, and that he could neutralize me and restrict me in my capacity --

"Q Excuse me. Can you clarify in what open meeting did he make that comment?

"A On the November 3rd meeting.

"Q Okay.

"A And that I felt that it was important that I clarify in the January 3rd meeting, as I'm speaking, that in accordance with Article 8 of the Union contract, that he could not legally restrict me in that capacity.

"Q When Mr. Trevino said he wanted to discuss it in private, did you respond to that statement?

"A That's when I reminded him that, you know, he had restricted me in an open meeting and that I needed to clarify that in an open meeting. But subsequent to that meeting, he didn't even bother.

"Q Did you indicate at that meeting that you wanted to discuss it now?

"A I indicated at the meeting that I wanted to make that clarification at that time.

"Q And did Mr. Trevino ask you to leave the meeting at that point?

"A Yes. At one point he said, Mr. Clements, you can leave.

"Q Did you ask him why?

"A I asked him, I mean, you just want me to leave and no other employee. And then I indicated that I considered that to be another indication of an adversarial attitude towards me as a Union representative.

...

"Q Okay. Did the meeting continue after that exchange?

"A No.

"Q Who called the meeting off?

"A Mr. Trevino.

"Q Did you meet with Mr. Trevino privately regarding that conversation?

"A Immediately at the close of the meeting.

...

"A In his office.

"Q And were you alone?

"A Yes.

"Q Did Mr. Trevino counsel you about your statement?

"A No. He didn't counsel me. We discussed it. But he didn't counsel me." (Tr. 33-36).

Mr. Clements said, "I didn't stand up . . ." (Tr. 60); and, on cross-examination stated that, "I spoke a little louder than normal. I believe he may have also." (Tr. 60).

Mr. Larry Lamb, a woodworker for Respondent, who has been a member of the Union for 12 to 14 years, stated that at the November, 1994, meeting,

". . . the meeting was opened and brought to an opening. And then he [Mr. Trevino] addressed Mr. Clements to inform him that he was there as an employee, not as a Union representative.

...

"Q Do you recall if Mr. Clements had any response to that statement?

"A Yes, ma'am. I believe -- yes, ma'am. He addressed Mr. Trevino to let him know that any time that he was in a meeting of that nature, that he was acting under a Union capacity.

"Q Did he make that statement at the same meeting?

"A Yes, ma'am.

"Q Did Mr. Clements say he was there acting as a Union representative, or as an employee?

"A No. He said anytime that he was in a meeting of any nature that he was also there acting as a Union employee to protect people's rights." (Tr. 67-68).

Mr. Lamb further stated that at another meeting, one of the shop employees had the floor and was discussing things that were making his job harder, having to redo government bills of lading when,

". . . Mr. Clements addressed him about that and told him that he wasn't a supervisor and if he had a problem with anything like that he should go to his supervisor and let his supervisor address the meeting about such issues as that.

. . .

"A . . . It started out with just making statements to each other. But then they got a little heated." (Tr. 69).

Mr. Lamb stated that at the January 3, 1995, meeting Mr. Clements did speak (Tr. 71) but he didn't remember what was said (Tr. 71).

8. Mr. Trevino testified that the following occurred at the January 3, 1995, staff meeting:

"A I opened the meeting for discussion, questions or comments.

"Q Did Mr. Clements have a comment he wanted to make?

"A Yes, sir. He did.

. . .

"A He said he wanted to discuss -- at a previous staff meeting where I had tried to stop him from carrying out his Union views, Union steward views --

"Q Okay. Did you make a comment like that at the November 3rd meeting?

"A I made a comment that, yes, that he was there as the employee and not as the Union representative because I was not going to discuss any formal changes or policy changes, or anything like that.

. . .

"Q Okay. What was your response to Mr. Clements' statement at the January 3rd meeting?

"A I said that this wasn't the time or place to discuss this issue and that I would discuss it with him in private in my office.

"Q And what was his response?

"A He said no, we'll discuss it now.

"Q What was his tone of voice?

"A He raised his voice. . . .

"Q Was he standing or sitting?

"A No. When he said that, I said again that Mr. Clements, we'll discuss it later. And that's when he stood up and started walking to me and started saying, we'll discuss it now. You don't have the authority over me to tell me when or where I will assert my Union duties. And he started walking towards me and, you know, he started talking and raising his voice higher and higher. I said, Mr. Clements, please, we will discuss it in my office in private. And he just kept going. He said he wanted to discuss it now and all of that.

"Q What did you do next?

"A I asked him if he could dismiss himself from the meeting and we'll talk about it later. And he said no, I'll have none of that. You're discriminating against me. He just kept on raising some more. I finally was embarrassed in front of my other subordinates, and I dismissed all of everybody else. I said we'll discontinue this meeting and have it later, after things settled down.

"Q Had you covered everything you wanted to cover at that meeting to that point?

"A No, sir, I hadn't.

"Q So you were forced to stop because of Mr. Clements' behavior and statements.

"A Yes, sir.

"Q As a result of that, did you decide to consider disciplinary action?

"A Yes, sir, I did.

"Q Were you aware if Mr. Clements had done things like this prior to this meeting?

"A Yes, sir. Sergeant Wallace had briefed me on several occasions before.

"Q About what?

"A That he would disrupt his staff meetings. . . ." (Tr. 78-80).

On cross-examination, Mr. Trevino was asked about a meeting with Mr. Clements after the staff meeting was terminated and stated as follows:

"Q And you had a subsequent meeting with Mr. Clements about what took place?

"A Yes. He followed me to my office.

"Q And during that subsequent meeting, you didn't counsel Mr. Clements at that time, did you?



"A We had a discussion.

"Q You just had a discussion at that time.

"A I was trying to resolve the matter.

...

"Q And during this private meeting, were you basically talking in a very -- the two of you, you and Mr. Clements -- were you talking in a very normal tone of voice?

"A No. He was still upset and enraged about it, that he was -- I didn't have authority, nobody had authority over him, that at any meeting he was equal to, or anybody else, even the General who is in charge of headquarters there -- man to man --and that he would decide when he would be asserting his Union rights." (Tr. 106).

Mr. Trevino, on cross-examination, also responded as follows:

"Q . . . Isn't it true that Mr. Clements makes it a habit of basically being very vocal about his concerns about his employees' working conditions?

"A Yeah.

"Q Fairly regular basis. Do you get tired of hearing it after awhile, yes or no?

"A That's part of my job to hear it. Yeah, I get tired of it like everybody else gets tired.

"Q He could be rather taxing at times. Is that true?

"A Yes. He can be." (Tr. 100-101).

Mr. Trevino stated that he did not remember ever saying to Mr. Clements that he was not doing his job because he was too involved in the Union (Tr. 101) or that he [Clements] was not working for Langley

because he was working for the Union (Tr. 102); however, he said that he did say, ". . . maybe Mr. Clements, you know, that they can give you a permanent job with the Union because I need a worker here, or something to that effect, you know. But that was wishful thinking." (Tr. 102). Mr. Trevino denied that he would like to get rid of Mr. Clements but stated, ". . . I needed somebody to do the job full time" (Tr. 102) and ". . . I get concerned about it. . . . About the job not getting done." (Tr. 103).

9. Sergeant Wallace affirmed that Mr. Clements brought up an incident that took place in November; that Mr. Trevino told Mr. Clements, ". . . if he would please wait, . . . that this wasn't the forum for the discussion that he was planning, and asked him to wait and they would discuss it later"; that Mr. Clements, ". . . did not want to drop the subject at that time. . . .; but Mr. Clements' voice, ". . . went up . . . a little bit, it was raised. He wanted to discuss what he wanted -- he wanted to discuss what had taken place in November"; that they went back and forth a couple of times and, "Mr. Trevino went ahead on and canceled the meeting and asked Mr. Clements if he would please come to his office." (Tr. 117).

Staff Sergeant Daniel Lawrence Bermudez (Tr. 130) testified that Mr. Clements had a comment he wanted to make, ". . . it was his Union business. It was something that occurred before and Mr. T told him that this wasn't the time or place."; that "He [Clements] wanted to talk about it then and there."; that Mr. Clements ". . . was kind of angry."; and Mr. Clements started to get loud (Tr. 132); that Mr. Clements stood up; that they [Mr. Trevino and Mr. Clements] went back and forth three or four times, ". . . Mr. T kept saying that if he just waited, we could talk about it later. Mr. Clements was, no, I want to talk about it now." (Tr. 133); and that the meeting was dismissed (Tr. 133). Sgt. Bermudez stated that he had seen Mr. Clements do similar things at other staff meetings (Tr. 133).

Airman David Allen Lurz, Jr. (Tr. 137) testified that Mr. Clements, ". . . wanted to talk about some previous thing that had happened in the last few months before that meeting. And basically he was told to just wait until after the meeting was over . . ." (Tr. 139); that, Mr. Trevino, "just asked him if he could please just wait until after the meeting was done and they would speak about this matter." (Tr. 139); but Mr. Clements, ". . . was very abusive towards Mr. Trevino and Sergeant Wallace, could not address them correctly. . . . He was very loud, just very -- it was a very obnoxious term." (Tr. 139); and "They had to break the meeting right then and there and ask everyone to leave, so they could speak to Mr. Clements about that -- the whole issue, right then and there." (Tr. 140).

Airman William A. Joyce stated,

". . . Mr. Clements started saying, yes, I have something about what you had said in our very first meeting back somewhere in mid-November of '94. And he started saying, I don't like the way you said that I'm not here as a Union representative, I'm here as a fellow worker, a team player. And Mr. Trevino said, if you are unhappy with that, we can sit aside from the meeting to talk about that. And he goes, no, I want to talk about it now. And Mr. Trevino said, we'll talk about something like that after, but that is not what this

meeting is about.

"And he started -- Mr. Clements apparently started to get angry. And Sergeant Wallace tried to calm him down, and then he got mad at Sergeant Wallace and started addressing Sergeant Wallace as Wallace, and Mr. Trevino as just Trevino.

"And after they couldn't get him to calm down, in about two or three minutes Mr. Trevino finally said, the meeting is adjourned and everybody started exiting the room." (Tr. 144).

Airman Joyce said Mr. Clements raised his voice, ". . . He was a little agitated that they didn't want to talk about it then and there" (Tr. 144); but Mr. Trevino did not raise his voice, ". . . He tried to -- he stayed calm and tried to keep saying, look, Mr. Clements, let's talk about it later." (Tr. 144-145).

On cross-examination, Airman Joyce was asked about the November 3rd meeting and stated,

"A When the meeting first started, all Mr. Trevino said was, Mr. Clements, you are here as one of the fellow workers, a team player. This is not a meeting to -- this is a morale building meeting, a meeting for all of us to say what can we do to help each other, the job better for everybody. And Mr. Clements, if I remember right, he was nodding his head. He didn't say a word." (Tr. 146).

10. On February 9, 1995, Mr. Trevino issued notice of a proposed three-day suspension of Mr. Clements for his conduct at the January 3, 1995, staff meeting. The notice provided, in pertinent part, as follows:

"1. This is notice that I propose to suspend you from your position as a Wood Worker (Fork Lift Operator), WG-4604-07, without pay for 3 Calendar days. The reasons are: a) insubordinate defiance of authority, b) interfering with the production of others, and c) insolence.

"2. Specifically,

"a. When I opened the 3 Jan 95 staff meeting for general comments, you asserted that I had previously prevented you from performing your duties as a union representative. I informed you that this was not the place to bring this up and

I would talk to you in private about it. You rudely and disrespectfully (sic) responded 'No, we will discuss it now.' You continued to try to discuss the subject even though I had directed you to stop and assured you that we could discuss it in private.

"b. Due to your insistence on discussing the topic I was unable to continue with the staff meeting, and had to dismiss the assembled employees.

"c. Despite previous counseling that, when you attended staff meetings, you are there as an employee and not as a union officer, you insisted that you would decide when you would assert your union duties and that your position as Chief Steward for the union was equal to or higher than anyone at any meeting. When I later tried to discuss the matter with you in private you asserted that no one was higher than you at any meeting, not even General Loh.

"3. You are authorized up to 4 hours of official time without charge to leave in which to contact me and/or review the material used in support of this proposal, to obtain advice and assistance, to obtain affidavits and statements, and to prepare and submit your answer. . . .

"4. You may reply to this notice orally, in writing, or both. . . .

"5. In addition, you are entitled to obtain advice and assistance, from a representative of your choice, in preparation of your reply. . . .

. . . .

"7. No decision has been made or will be made until after the time allowed for you to reply. Any reply you make will be given careful consideration before a final decision is made. . . ." (G.C. Exh. 5).

11. The decision to suspend was made by Major Kyle Johnson, Commander, 1st Transportation Squadron, on April 4, 1995. Major Johnson stated, in pertinent part, as follows:

"1. In his letter dated 9 Feb 95, Mr. Trevino informed you that he proposed to suspend you from duty without pay for 3 calendar days, for insubordinate defiance of authority, interfering with the production of others, and insolence.

"2. I have considered your oral reply, as well as your past disciplinary<sup>(2)</sup> and performance records, and the reasons specified by Mr. Trevino in paragraph 2 of the proposed suspension letter. I noted that you do not deny these actions took place. In view of the above, I find the suspension to be supported by the evidence and for such cause as to promote the efficiency of the service. You are advised that further violations of Air Force rules and standards could result in additional disciplinary action, including removal. Your suspension will begin on 11 Apr 95 and end on 13 Apr 95. You should return to duty at your scheduled time on 14 Apr 95.

"3. If you consider this action improper, you may submit a grievance under the provisions of Article 40 of the negotiated agreement between the National Association of Government Employees and Langley AFB. Your grievance must be submitted within 10 workdays of your receipt of this letter.

. . ." (G.C. Exh. 6).

12. Mr. Clements served the three-day suspension and stated that he lost approximately \$300.<sup>00</sup> as a result. (Tr. 39-40).

## Conclusions

### 1. Background

General Counsel makes no contention that the staff meeting of January 3, 1995, was a formal discussion, or that staff meetings in general are necessarily formal discussions requiring notice to the Union and an opportunity to be represented (Tr. 43, 46). Mr. Trevino stated that he was well aware of his obligation to notify the Union if conditions of employment were to be discussed at a staff meeting and that he did so (Tr. 76-77, 105); but, because most staff meetings were simply to pass along information and to communicate so things run smoothly (Tr. 76, 116), and he had told Mr. Clements that he, Clements, was at such meetings as an employee and not as a Union representative because he, Trevino, was not going to discuss any formal changes or policy changes. Mr. Clements stated that at a meeting with Mr. Trevino which he [Clements] had requested on October 26, 1994, to discuss other matters, primarily the securing of the building (Tr. 23), he and Mr. Trevino

discussed staff meetings, ". . . And Mr. Trevino insisted during our private meeting that I was attending the staff meetings as an employee, not as a Union representative, and furthermore insisted that he wasn't discussing policy and there was no need for the Union to be present" and that he, Clements, had responded, ". . . I reminded him that in accordance with the Union contract that he, as a management official, should notify the Union, and that I was present as an employee. But as a shop steward in the work place, I feel like -- when I feel like I have cause to do so, that I should have the right to act in the capacity of a Union representative, as the shop steward in that work place." (Tr. 24). Mr. Trevino said he told Mr. Clements, ". . . if there was going to be any requirement for him -- for Union representation to be there, I would let him know about it." (Tr. 105).

There is no dispute that at the staff meeting of November 3, 1994, Mr. Trevino told Mr. Clements he was there as an employee and not as a Union representative (Tr. 30, 78, 124). Mr. Clements said he made no response on November 3 (Tr. 31); but Mr. Lamb very credibly <sup>3/</sup> testified that at the November 3, 1994, meeting,

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3/ I am aware that Airman Joyce, the only other witness asked about the November 3 meeting, stated, on cross-examination,

"A When the meeting first started, all Mr. Trevino said was, Mr. Clements, you are here as one of the fellow workers, a team player. This is not a

(continued...)

". . . he [Mr. Trevino] addressed Mr. Clements to inform him that he was there as an employee, not as a Union representative." (Tr. 67).

and that Mr. Clements responded as follows:

". . . He addressed Mr. Trevino to let him know that any time that he was in a meeting of that nature, that he was acting under a Union capacity.

"Q Did he make that statement at the same meeting?

"A Yes, ma'am.

"Q Did Mr. Clements say he was there acting as a Union representative, or as an employee?

"A No. He said anytime that he was in a meeting of any nature that he was also there acting as a Union employee to protect people's rights." (Tr. 67-68).

## 2. THE JANUARY 3, 1995 STAFF MEETING

As stated above, there is no dispute that the January 3, 1995, staff meeting proceeded smoothly and harmoniously until Mr. Trevino opened the meeting for discussion, questions or comments. The testimony of General Counsel's witnesses: Messrs. Clements and Lamb; and of Respondent's witnesses: Mr. Trevino, Sgts. Wallace and Bermudez and Airmen Lurz and Joyce, concerning this meeting has been set out in detail because there is a vast difference concerning attitudes, tenor and occurrences as portrayed by General Counsel and by Respondent. I did not find Mr. Clements to be entirely

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(continued...)

meeting to -- this is a morale building meeting, a meeting for all of us to say what can we do to help each other, the job better for everybody. And Mr. Clements, if I remember right, he was nodding his head. He didn't say a word." (Tr. 146)

I found Airman Joyce a credible witness; but I also found Mr. Lamb a wholly credible witness and because his recollection, both of Mr. Trevino's statement and of Mr. Clements' response, was sharper, I have credited Mr. Lamb's testimony and conclude that Mr. Clements did respond on November 3, 1994. Nor is his response inconsistent with Airman Joyce's testimony that, while Mr. Trevino was speaking, Mr. Clements was nodding his head.

forthright; in some respects he was shown to have been untruthful; and repeatedly his representation of fact was, in actuality, his heavily embroidered imagination. For example, Mr. Clements represented himself as always protecting the rights of employees; but Mr. Lamb credibly

testified that Mr. Clements chastened a shop employee who had the floor at another meeting by telling him he wasn't a supervisor and if he had a problem with anything he should go to his supervisor and let his supervisor address the meeting and that the exchange with the employee became a little heated (Tr. 69); indeed, Mr. Clements conceded that when Mr. Trevino opened staff meetings for comments, opinions, questions and concerns and rank and file employees made comments, he [Clements], ". . . would speak up and remind these individuals that they're not anybody's supervisor and that performance counseling is done by the employee's immediate supervisor, and done in private." (Tr. 25). When asked specifically, "Sergeant Wallace did not do a verbal counseling with you for disrupting a staff meeting he called and attempted to hold?", Mr. Clements answered, "None that I can recall." (Tr. 61). Sgt. Wallace credibly testified that he, ". . . had verbally counseled him . . . And I had given him a letter of warning for disrupting staff meetings. . . ." (Tr. 118) and Respondent's Exhibit 3 showed, inter alia, "21 Sep. 94, Letter of Warning for vituperation, threats and disrupting a staff meeting. . . ." Neither Sgt. Wallace's testimony nor Respondent's Exhibit 3 was challenged or refuted; indeed, as General Counsel Exhibit 6 shows, Major Johnson stated, in part that, "I have considered your . . . past disciplinary . . . records . . . . I noted that you do not deny these actions took place. . . ." (G.C. Exh. 6, par. 2). Mr. Clements testified that on October 26, 1994, he and Mr. Trevino discussed staff meetings and Mr. Trevino's insistence that he was attending as an employee and not as a Union representative because he wasn't discussing policy (Tr. 24); but later he stated he had never spoken to Mr. Trevino alone about the statement before January (Tr. 31). Mr. Clements testified that he did not stand up at any point on January 3, 1995, during his exchange with Mr. Trevino (Tr. 60); but Mr. Trevino testified that Mr. Clements, ". . . stood up . . ." (Tr. 79) as did Sgt. Bermudez (Tr. 133). As I found the testimony of Sgt. Bermudez and Mr. Trevino credible and wholly consistent with the entire record, I credit their testimony that Mr. Clements did stand during the confrontation. Mr. Clements, with respect to staff meetings, asserted, ". . . I reminded him that in accordance with the Union contract that he, as a management official, should notify the Union. . . ." (Tr. 24), whereas, as General Counsel conceded, the Union has no contractual right to attend staff meetings (Tr. 45) and Respondent is required by the Statute to give the Union notice of a meeting only when there is a "formal discussion" (Tr. 43, 46).

On the other hand, I found the testimony of Mr. Trevino credible and corroborated by the testimony of Sgt. Wallace, Sgt. Bermudez, and Airmen Lurz and Joyce each of whom impressed me as wholly credible witnesses. Accordingly, I credit the testimony of Mr. Trevino and do not credit Mr. Clements' testimony where it is contradicted by other witnesses.



As Mr. Clements conceded, when Mr. Trevino opened the staff meeting of January 3, 1995, for discussion, Mr. Clements stated that he wanted to talk about a comment Mr. Trevino had made at the November, 1994, staff meeting. Mr. Clements' comments were entirely unprovoked by anything that had occurred at the January 3, 1995, meeting, were unrelated and immaterial to any matter under discussion. Mr. Trevino told Mr. Clements that this wasn't the time or place to discuss the issue and that he would discuss it with him in his, Trevino's, office; but Mr. Clements raised his voice and said no, we'll discuss it now. Again Mr. Trevino told Mr. Clements ". . . we'll discuss it later." (Tr. 79, 139, 144-145). Mr. Clements stood up and started walking toward Mr. Trevino, saying, louder and louder, "You don't have the authority over me to tell me when or where I will assert my Union duties." (Tr. 79). Once more Mr. Trevino said, "Mr. Clements, please, we will discuss it in my office in private" (Tr. 79); but Mr. Clements, ". . . just kept going. He said he wanted to discuss it now . . . ." (Tr. 79, 132, 133). Then, Mr. Trevino asked Mr. Clements to leave the meeting and ". . . we'll talk about it later." (Tr. 79, 117). Mr. Clements refused to leave, saying, ". . . no, I'll have none of that. You're discriminating against me." (Tr. 79). Finally, because Mr. Clements' conduct had wholly disrupted the meeting and he had refused all entreaties to discuss the matter later and/or to leave the meeting so that it could proceed, Mr. Trevino was compelled to terminate the meeting, telling them that, ". . . we'll discontinue this meeting and have it later, after things settled down." (Tr. 80).

As noted above, the staff meeting of January 3, 1995, was not a formal discussion; Mr. Clements attended as an employee; and nothing whatever occurred at the meeting to provoke his comments. Nevertheless, he was Chief Steward and presumptively acted under color of protected activity. In Department of the Air Force, Grissom Air Force Base, Indiana, 51 FLRA No. 2, 51 FLRA 7 (1995), the Authority stated, in part, as follows:

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

"In determining whether an employee has engaged in flagrant misconduct, the Authority balances the employee's right to engage in protected activity, which 'permits leeway for impulsive behavior, . . . against the employer's right to maintain order and respect for its supervisory staff on the jobsite.' Department of Defense, Defense Mapping Agency Aerospace Center, St. Louis, Missouri, 17 FLRA 71, 80 (1985) (Defense Mapping Agency) (quoting Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington, 2 FLRA 54, 55 (1979) (Puget Sound)). Relevant factors in striking this balance include: (1) the place and subject matter of the discussion; (2) whether the employee's outburst was impulsive or designed; (3) whether the outburst was in any way provoked by the employer's conduct; and (4) the nature of the intemperate language and conduct. Defense Mapping Agency, 17 FLRA at 80-81 (1985) (Authority adopted Judge's decision which noted the foregoing factors to be considered in determining whether an action constitutes flagrant misconduct). However, the foregoing factors need not be cited or applied in any particular way in determining whether an action constitutes flagrant misconduct. Cf. U.S. Department of Defense, Defense Logistics Agency and American Federation of Government Employees, Local 2693, 50 FLRA 212, 217-18 (1995) (Authority denied agency's exceptions contending that an arbitration award was contrary to law because the arbitrator did not apply all of the Defense Mapping Agency factors in determining that the grievant's language did not constitute flagrant misconduct)." 51 FLRA at 11-12).

Here, Mr. Clements conduct occurred at a staff meeting attended by all civilian and military employees; his comments were designed and planned, were not impulsive; his comments were neither responsive to, nor provoked by, anything that had taken place at the meeting before he made his comments; he refused repeated requests to discuss the matter at a later time; refused to leave the staff meeting; and totally disrupted the meeting and caused it to be terminated. Respondent is correct that Mr. Clements' conduct closely resembled the conduct of the steward who was expelled from a meeting in Defense Logistics Agency, Defense Depot Tracy, Tracy, California, 16 FLRA 703 (1984) (hereinafter, Defense Depot Tracy), in which the Authority adopted the Chief Judge's findings and conclusion, ". . . that the behavior of employee Thomas constituted flagrant misconduct which was beyond the ambit of protected activity. . . ." (16 FLRA 703). Chief Judge Fenton had stated, in part, as follows:

". . . This is not a case in which an employee, in the heat of a discussion about a grievance, lost his cool and uttered words which sounded in insubordination or disrespect for authority and which would be wholly inappropriate at the work place if management is to maintain order and discipline on the job . . . whatever his purpose, he chose to challenge ground rules which, according to all witnesses except himself (and

possibly Taberna), were simply designed to assure that all who wished to speak had opportunity to do so, and to finish what they had to say without interruption. In essence, Roethe said that the meeting was to be conducted with dignity and with respect for one another, presumably including himself. . . .

"Nevertheless, . . . Thomas loudly made it clear that he would speak as he wished to speak. When assured that he could say what he wanted to say, but that he should "keep it down," he repeated that he would "talks the way I want to talks." He repeatedly and defiantly -- without adding anything of substance to the discussion stated that he would ignore the ground rules. . . .

. . .

"Whether or not Thomas was in attendance as a Union agent as well as an employee, I conclude that is (sic) behavior amply meets the standard of flagrant misconduct. Particularly in the light of there being no rational discussion of either a grievance or its manner of presentation underway, and no semblance of provocation, or other mitigating factors, his conduct was in the circumstances indefensible. The reasons for the doctrine which affords employees broad latitude in grievance discussions are absent here, and the facts are in essence closer to garden-variety insubordination on the plant floor. . . .

"For the same reasons, . . . his right, as an employee, not to be subjected to discipline for outspoken and even disrespectful conduct which occurs in connection with the presentation of a grievance, but which falls short of inexcusable, did not even attach here. If it did, it was forfeited by a plane (sic) and obstinate refusal to accept reasonable rules for the conduct of the meeting. This was no example of uninhibited (sic), robust and wide open debate. Nor is it an example of a discussion getting out of hand in the heat of the moment. It is, instead, a very deliberate flouting of the employer's initial effort to impose rudimentary standards of appropriate conduct for the meeting so as to maintain a modicum of order and respect." (16 FLRA at 714-716).

To like effect, see, Wiggins v. National Gallery of Art, 980 F.2d 1436 (Fed. Cir. 1992), in which the United States Court of Appeals for the Federal Circuit affirmed the decision of the Merit Systems Protection Board upholding the removal of a guard upon charges of insubordination and insolence, failure to carry out specific orders, and creating a

public disturbance at a morning roll call. The Court stated, in part, as follows:

"As in other institutions, administrators at the National Gallery employ roll calls as the essential means of presenting crucial, day-to-day information to a security staff of over one hundred individuals. During this official formation, officials dispense daily work assignments, apprise guards of security operations, and provide training. William D. Wiggins, a security guard at the National Gallery, attended such a meeting on September 19, 1990. During the morning roll call, Chief Jay W. Chambers of the Office of Protective Services announced that the captain of the guard force was on leave because his father was ill, but that the captain would soon return to work. At that point, Wiggins and another guard, Charles Leggett, interrupted the proceedings. Although Wiggins had been warned five months earlier that disruption of roll call would not be tolerated, both he and Leggett complained about disparate leave documentation standards with raised voices. Chief Chambers told Wiggins that he was out of order and asked him to sit. When Wiggins continued to comment loudly, Chief Chambers requested that Wiggins, Leggett, and another commenting guard, Walter T. Monroe, meet with him following the roll call. . . ." (980 F.2d at 1437).

The Court then held, in part, as follows:

"Wiggins does not contest the occurrence of the above incidents on September 19, 1990, at the roll call and subsequently. He contends, however, his actions were allowed because of his status as his union's Chief Shop Steward. Under 5 U.S.C. § 7114 (1988), a union representative is entitled to be present at any formal discussion between the agency and employees concerning grievances, personnel policies and practices, and conditions of employment. . . . Chief Chambers' announcement of the reason the captain of the force was on leave was not the start of a formal discussion on leave documentation standards, and the roll call meeting, thus, did not implicate section 7114.

"5 U.S.C. § 7116 (1988) also fails to excuse Wiggins' behavior. Although section 7116 lists actions that constitute unfair labor practices, such as interference by an agency with an employee's union activities, . . . it grants no right to engage in repeated and public insubordination. . . ." (980 F.2d at 1438).

Accordingly, because Mr. Clements, like steward Thomas in Defense Depot Tracy, loudly made it clear that he would talk about what he wanted to talk about, notwithstanding that it had no relevance, repeatedly refused to cease and talk about it later, defiantly without adding anything of substance to the discussion stated that he would talk about what he wanted to talk about, refused to leave the staff meeting, there was no provocation by Respondent and no mitigating factors for his conduct, I conclude that his conduct constituted flagrant misconduct which was beyond the ambit of protected activity.

General Counsel asserts that "Respondent's Basis for Clements Suspension Was Pretextual and the Suspension Was, in Fact, Discriminatorily Motivated by Clements' Protected Activity. . . ." (General Counsel's Brief, p. 15). I do not agree. The record plainly shows, and I find, that Respondent's decision to discipline Mr. Clements was solely because of his misconduct in disrupting the staff meeting on January 3, 1995; however, General Counsel is correct in part, namely, that the record does show that Respondent in considering the discipline to be imposed - a three-day suspension - did, impermissibly, consider Mr. Clements' Union activity. Thus, for example, Mr. Trevino set forth as factors considered in the penalty selection,

"2. . . . In his role as a union representative which he is constantly involved, he has contact with high management Officials military and civilians at all levels.

. . .

"4. . . . He does not get along well with fellow workers because he considers himself superior to them because he is a union representative. They feel that he does not do his share of the work because of his constantly involvement with union matters. He is not dependable in his normal duties because he is constantly away doing union business, writing letters or on the telephone.

. . .

"11. . . . In my opinion, employee has let the status of being a Union representative go to his head and is abusing the authority that goes with the position.

. . ." (Resp. Exh. 1)

Mr. Clements had been steward and Chief Steward since 1989, as an active steward had filed grievances and engaged in extensive protected activity

and, as Mr. Trevino conceded, he found Mr. Clements taxing at times; but his protected activity played no role in bringing about the disciplining of Mr. Clements. Rather, it was Mr. Clements' flagrant misconduct at the staff meeting on January 3, 1995, that caused disciplinary action to be brought against him. Nevertheless, whether, as I believe, protected activity was a consideration only in penalty selection, or whether, as General Counsel asserts, it was a consideration in the decision to discipline, and in either case constituted a prima facie showing of discrimination, Letterkenny Army Depot, 35 FLRA 113 (1990), Respondent rebutted by a preponderance of the evidence that there was legitimate justification for its action and it would have taken the same action even in the absence of protected activity, id., at 118. Thus, the record showed Mr. Clements' misconduct, an entirely legitimate jurisdiction for imposition of discipline. General Counsel's statement that ". . . other employees have engaged in heated discussions . . . [but] only Union steward Clements was disciplined. . . ." (General Counsel's Brief, p. 18), is not correct. Sgt. Wallace specifically testified, without contradiction, to the contrary (Tr. 128-129). General Counsel's assertion that; "Clements' statements at the January 3, 1995, staff meeting gave Trevino the opportunity that he had been waiting for, -- the means to get rid of Union steward Wade Clements." (General Counsel's Brief, p. 16), while proper argument, misrepresents the record. First, Mr. Trevino tried repeatedly at the staff meeting to dissuade Mr. Clements' disruption of the meeting and to discuss Mr. Clements' concerns privately. Second, the discipline was a three-day suspension - not, as General Counsel infers, removal. Third, as the record shows, Mr. Clements had been given a Letter of Warning on September 21, 1994, ". . . for vituperation, threats and disrupting a staff meeting." (Res. Exh. 3, Par. 3).

Respondent showed by a preponderance of the record that it would have taken the same action even in the absence of protected activity. Thus, as noted above, Mr. Clements had previously received a Letter of Warning for disrupting a staff meeting. Mr. Clements' response was to deny that he had ever been counseled on any prior occasion for disrupting a meeting (Tr. 61). Because Mr. Clements had engaged in like conduct in the past, suspension for his conduct on this occasion was a normal progression and Mr. Trevino testified, ". . . I looked at the -- I evaluated the past incidents. . . ." (Tr. 81); he testified he did not take the action because Mr. Clements is a Union steward (Tr. 85, 109); testified that his recommended discipline had nothing to do with Mr. Clements' asking for official time (Tr. 85); had nothing to do with his having filed grievances (Tr. 109); and was not because he was a Union steward (Tr. 110).

Accordingly, I find that Respondent did not violate §§ 16(a)(1) or (2) of the Statute and recommend that the Authority adopt the following:

ORDER

The Complaint in Case No. WA-CA-50391 be, and the same is hereby, dismissed.

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WILLIAM B. DEVANEY

Administrative Law Judge

Dated: April 30, 1996

Washington, DC

1. 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)(2) will be referred to, simply, as, "16(a)(2)".
2. 2/ Major Johnson's memorandum, dated March 10, 1995, to Mr. Richard Eugene Rose, Civilian Personnel Office, set forth Mr. Clements' disciplinary record for the last 18 months as follows:

"21 Sep. 94, Letter of Warning for vituperation, threats and disrupting a staff meeting. 1 Nov. 94, Letter of Counseling for disrespect and yelling at his supervisor. 8 Nov. 94, Oral Admonishment for yelling and showing disrespect to his supervisor. 10 Feb. 95 Notice of Reprimand for failure to follow a direct order and disrespect." (Res. Exh. 3).