

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

DEPARTMENT OF THE AIR FORCE, 911TH AIRLIFT WING,
CORAOPOLIS, PENNSYLVANIA

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2316,
AFL-CIO

Charging Party

Major Regina E. Quinn, Esq. For the Respondent

Gary J. Lieberman, Esq. For the General Counsel of the FLRA

Christopher Mason For the Charging Party

Before: SAMUEL A. CHAITOVITZ Chief Administrative Law Judge

Case No.
BN-CA-70249

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101 *et seq.* (Statute), and the Rules and Regulations of the Federal Labor Relations Authority (FLRA or Authority), 5 C.F.R. § 2411 *et seq.*

Based upon an unfair labor practice charge filed, and amended, by American Federation of Government Employees (AFGE), Local 2316, AFL-CIO (AFGE Local 2316 or Union), a Complaint and Notice of Hearing was issued on behalf of the General Counsel (GC) of the FLRA by the Regional Director for the Boston Region of the FLRA. The complaint alleges that the Department of the Air Force, 911th Airlift Wing, Coraopolis, Pennsylvania (911th Airlift Wing or Respondent) violated section 7116(a)(1) and (2) of the Statute by lowering the performance appraisal for the period of July 1, 1995 to June 30, 1996 of Christopher Mason because of his activities as an AFGE Local 2316 steward. Respondent filed an Answer denying it had violated the Statute.

A hearing was held in Pittsburgh, Pennsylvania, at which all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. The 911th Airlift Wing and GC of the FLRA filed post hearing briefs, which have been fully considered.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

A. Background

The primary mission of the 911th Airlift Wing is to provide support for C-130 cargo planes at the 911th Air Force Reserve Base, Coraopolis, Pennsylvania. At all material times AFGE Local 2316 has been the certified exclusive representative of a unit of employees appropriate for collective bargaining at 911th Airlift Wing, representing WG and GS employees.

Mason is an employee within the meaning of section 7103(a)(2) of the Statute and is in the above described collective bargaining unit. Mason began his employment with the 911th Airlift Wing in April 1994 as a Maintenance Worker Helper, WG-5, in the Civil Engineering Division. During his tenure at 911th Airlift Wing Mason's immediate supervisor, and the individual responsible for completing his performance evaluations, has been Merle Barry, Maintenance Supervisor.

B. The Civil Engineering Division and Mason's Duties

The primary mission of the Civil Engineering Division is to provide routine maintenance to the 911th Airlift Wing's roads, grounds and buildings. Robert Moeslein is the Base Civil Engineer; Thomas Kutchenriter is the Chief of Operations and Maintenance. Barry, the Structural Maintenance Supervisor in the Civil Engineering Division, oversees about 12 employees including carpenters, painters, laborers, and heavy equipment operators, including Mason.

Mason's primary responsibilities as a Maintenance Worker Helper are landscaping/grass cutting during the summer and snow removal during the winter months. The position also requires Mason to perform general maintenance work in accomplishing minor repairs and support higher graded workers in accomplishing major repairs. These maintenance duties range from road repair, concrete work, painting, trash pickup, and the cleaning of storm drains. Mason performs these duties all across the base and is permitted to carry out his assignments with minimal reporting requirements or supervision.

C. Mason's First Appraisal

During Mason's first appraisal period, April 17, 1994 to July 15, 1994, the majority of his assignments were grass cutting and landscaping. Mason, who had prior painting experience at the Philadelphia Naval Shipyard before being hired, also assisted David Wuenstel, a Maintenance Worker, WG-9, in several painting projects during the first appraisal period.⁽¹⁾

The Performance Plan for a Maintenance Worker Helper contains nine performance elements and indicates whether the individual performance elements are critical or non-critical.⁽²⁾ The six critical elements include:

(1E) makes repairs to facilities such as roofs, walls, floors, ceilings, doors, locksets, etc.; (2E) repaints all traffic lines and arrows, airplane taxiways and flightline, base parking lots and all other structural recurring maintenance tasks; (3E) performs snow and ice removal basewide; (4E) performs various landscaping, gardening and chemical-type duties basewide; (5E) places and rough finishes concrete and asphalt; and (6E) operates various types of mowers, saws, pumps and air-cooled engine equipment.

The three non-critical elements for the position include preventive maintenance and minor repairs on tools, observes all safety rules and regulations and uses total quality principles and techniques.

In order to receive an overall appraisal of "Excellent" an employee must exceed more than one-half of the critical elements, and meet all other elements of the performance plan. A "Fully Successful" rating requires an employee to meet the requirements of all the elements of the Performance Plan. Employees are also rated on their manner of performance with a rating of 1, 2 and 3 being a Low Range; 4, 5 and 6 being a central range; and 7, 8 and 9 being a High Range. A rating of 5 is designated "fully successful"; 6 is "slightly above fully successful"; 7 is "above fully successful"; 8 is "far above fully successful" and 9 is "outstanding." Mason received an overall appraisal rating of "Fully Successful" from Barry for the abbreviated appraisal period April 17, 1994 to July 15, 1994. At the time Mason received this appraisal Barry informed him that his work was excellent, and that he would have given him a higher overall rating had it not been for the shortened rating period.

D. Mason's 2nd Appraisal Period, July 1, 1994 to June 30,1995

During Mason's second appraisal period, which covered the period July 1, 1994 to June 30, 1995, Mason continued to perform his normal duties, including grass cutting, trash pickup and, during the winter months, snow removal. Barry also assigned Mason numerous painting jobs during this period, including the painting of boiler rooms, buildings, pipe lines, restrooms and offices.

1. Mason is assigned to paint Building 129.

In April 1995, Barry assigned Mason to paint Building 129 located on the flight deck.⁽³⁾ Building 129 is a large aircraft hangar that has adjacent rooms where maintenance activities are performed. This was a very large task, involving painting many rooms, some of which were very large, with 20-foot ceilings.

Building 129 was in bad shape and needed a paint job. There had been prior attempts by the building manager to secure a paint job, however, the requests were not acted on by the Civil Engineering Division. However, on April 18, 1995, after a planner reviewed the project, Kutchenriter signed off on a work order for materials to be ordered for the painting of Building 129. The work order estimated that the job should have two employees, and should take 129 labor hours.⁽⁴⁾ When the work order was drafted the job was given a low priority, as was the case with most paint jobs at the base.

Barry selected Mason for the assignment of painting Building 129 because of his prior painting experience. When Barry assigned Mason the job in April or May 1995, he informed Mason that it was a big job, and that he should take his time and make sure he did a good job. Barry also informed Mason that he would be

performing this job until he "retired." Mason was told the painting job was not a priority assignment and was not given a deadline. Barry emphasized that Mason still had his other priority assignments, grass cutting and snow and ice removal.

The complex nature of the job Mason was assigned to perform alone in Building 129 became apparent to him in May 1995 during his initial visit to the building.⁽⁵⁾ After the preparation work, and a delay in the availability of materials, Mason began painting in May or June of 1995.

Mason used a 20-foot ladder to paint and after painting 3 or 4 feet to his left and right from the ladder, Mason had to gather and move his paint, poles, and other equipment, move the ladder, and methodically work his way around the room. In addition to the size of the structure, painting in the building was complicated by the fact that the beams, vents, and piping were situated close to the walls near the ceiling.

Shortly after Mason began the painting job in Building 129, the supervisor in Building 129, Harvey Nelson, discussed with Wuenstel the possibility of assisting Mason in the painting job. Both Wuenstel and Nelson believed that the job was too difficult for one person, and that Mason should receive assistance. Wuenstel asked Barry on two or three occasions to let Wuenstel volunteer to assist Mason in the painting job. Barry responded not to worry about Mason, and that Wuenstel had other job orders to do. Lou Fix, a WG-9 painter, who had informed Mason that assigning one employee to the job was ridiculous, also asked Barry if he could assist Mason.

2. Mason receives 2nd appraisal, "Excellent" rating and a performance award.

On August 2, 1995, Mason received his second appraisal from Barry for the period July 1, 1994 to June 30, 1995. The appraisal was drafted by Barry, and reviewed by Kutchenriter. Mason received an overall appraisal of "Excellent," exceeding performance standards in 4 out of the 6 critical elements. The narratives to justify the elements that were exceeded were as follows:

- 3E All snow removal tasks were performed flawlessly without exception.
- 4E All duties were performed professionally and expeditiously. No complaints registered
- 5E All tasks were performed I.A.W. given specifications. All finishes were done expertly without exception.
- 6E All equipment was operated very skillfully with no call-backs noted. All work was done on or

ahead of schedule.

The two critical elements that Mason met, but did not exceed, were 1E (repairs to facilities) and 2E (repainting and recurring maintenance tasks). In the appraisal Barry rated Mason in the high range (7's, 8's and 9's) in all the categories in the manner of performance.

Mason was told by Barry at the end of this appraisal period that he was doing a good job in Building 129, and to continue his work.

On August 1, 1995, Moselein, the Base Civil Engineer, approved an award of 1 percent of Mason's salary for his performance. During this appraisal period Mason was not a steward for the Union, nor did he engage in any protected activity under the Statute.

E. Mason's 3rd Appraisal Period, July 1, 1995 to June 30, 1996

During the appraisal period July 1, 1995 to June 30, 1996, Mason regularly performed his other duties in addition to the painting of Building 129. He would work two or three times a week in Building 129, and continued with his usual duties of grass cutting, ice and snow removal, and other paint jobs. Due to a shortage of personnel in the summer months, Mason usually worked on grass cutting to cover for the staff shortage.

According to Barry, the winter of 1996 was the "worst winter in history." Because snow removal was the first priority during inclement weather, employees under Barry's supervision were pulled from their jobs to conduct snow removal duties as part of a team. Mason was often pulled from his job in Building 129 to perform snow removal duties, and there was never an occasion where Mason remained in the building painting when his team was performing snow removal. Mason was never instructed to continue painting when snow removal duties were required.

From July 1995, the start of the appraisal period, until shortly after Mason became a Union Steward on March 14, 1996, Barry never counseled Mason concerning his performance in Building 129 or on any other aspect of his performance. Barry never even questioned Mason about the painting project until after he became Union Steward in March 1996.

1. Mason becomes Steward and requests official time to represent employees in grievances.

On March 14, 1996, Mason was appointed a steward by Union President Harry Davis. AFGE Local 2316 notified the 911th Airlift Wing of Mason's appointment by letter, and the notification was distributed to all supervisors and posted in work areas.

On the same day, March 14, 1996, Mason submitted a steward's official time request form to Barry for the purposes of meeting with Donna Hajduk, the Civilian Personnel Director. Barry approved the official time request after confirming Mason's appointment as a steward.

As Union Steward, Mason represented three employees in grievances under the parties' collective bargaining agreement. In addition to two security police guards who had overtime grievances, Mason represented John Rothoff, who also worked in the Civil Engineering Division under the supervision of Kutchenriter and Moeslein. Mason filed thirteen grievances on Rothoff's behalf ranging from safety concerns, changes in Rothoff's position description, and harassment.

Mason requested official time from Barry to attend grievance meetings with Rothoff's supervisor and Moeslein. Initially, Barry permitted Mason to verbally request official time, or simply leave a steward request form on his desk.

2. Barry "counsels" Mason on performance in Building 129 and Mason completes project the same week.

Mason was nearing the completion of the project in Building 129 after being appointed steward. The only remaining room that needed to be cleaned and painted was the men's bathroom. About the third week of March 1996, while working in the bathroom, Mason had a discussion with Barry about the project. Barry asked Mason how long it was going to take him to finish the job. Mason responded that it should be finished by Friday of that week. After Barry asked Mason what still needed to be done, Mason led him around the bathroom pointing out the dirtiness and the peeling paint. Mason informed Barry that before painting the room he first needed to wash the walls to remove the dirt. Barry suggested that Mason should not worry, and that he should paint on top of the dirt and peeling paint. Mason, concerned about the quality of the job, convinced Barry that the preparation work should be done properly or the paint job would only be temporary. Barry agreed, and commented that the rooms looked great and much brighter. The meeting lasted several minutes.

Sometime thereafter, Barry entered on Mason's AF 971, a form used by the Respondent to record personnel actions, counseling sessions, awards, and kept in the personnel folder, the following:

March 1996	Counseled employee on length of time he has taken to complete a painting job order in Bldg 129. No improvement shown.
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The painting of Building 129 had to be completed prior to an Operational Readiness Exercise, that was to take place in June 1996. Mason testified that he did not consider the meeting with Barry in the bathroom to be a counseling session and that he was unaware of the entry in his AF 971 form until a few weeks before the subject hearing.

Mason completed the painting job in Building 129 later that week, a day earlier than he told Barry it would be finished. Nelson, who had never complained at all to Barry about Mason's performance while on the job and was never asked about Mason's performance by Barry, complimented Mason that he had done a good job.

After Mason told Barry that the job was finished he was given another assignment. The painting project was finished by Mason in March 1996, well before the Operational Readiness Exercise scheduled for June 1996. Barry had no problems with the quality of the job Mason did in Building 129.

3. Procedure changes for Mason's use official time as Steward.

In April 1996, Barry informed Mason that he could no longer verbally request official time, or leave an official time request form on Barry's desk. Barry told Mason that Barry was getting heat from above. Instead, Mason would be required to hand the form to Barry or, if he was not available, to Kutchenriter. The reason for the change, according to Barry, was because of the frequency of Mason's official time requests.

Although Mason had not been counseled about not reporting to Barry before Mason left the job site on Union business, Barry, apparently, filled out an AF 971 to that affect on April 16, 1996.

On May 1, 1996, Mason submitted to Barry a steward request form to attend a grievance meeting scheduled for the next day. Upon submitting the form, Barry commented to Mason that he was using a lot of official time, doing a lot of union business, and that Barry needed Mason to do his job assignments. Barry stated that Mason was not spending enough time on the job. Mason explained that his presence was necessary because it was a scheduled grievance meeting. Barry proposed the establishment of an official time tracking system, and limiting Mason's official time to one hour per week. After Mason said that Barry's proposal was unworkable, Barry demanded that Mason decide whether it was going to be his job, or was it going to be the union. Mason then had the official time request approved by Kutchenriter.

Thereafter, Barry continued to try to limit Mason's official time to one hour per week, apparently at the request of Moeslein, the Base Civil Engineer, until the matter was resolved through the intervention of the personnel department.

4. Mason's performance during the appraisal period.

Other than the "counseling" session in March 1996 concerning Building 129, Mason was not counseled at all about his performance during the year, nor did Barry inform him that his work was somehow deficient or below the efforts of the previous year.

In the appraisal period ending June 30, 1996, Mason performed grass cutting, snow removal and trash pick up, as was the case in the prior period, and was never told by Barry that his performance had slipped, or that he was not producing as much. No specific complaints were registered by other supervisors concerning Mason's performance during the appraisal year.

5. Mason receives his performance appraisal.

On August 9, 1996, Barry presented Mason with his appraisal for the period July 1, 1995 to June 30, 1996. The appraisal, completed by Barry and reviewed by Kutchenriter, was lower than the previous year's appraisal. Mason received an overall appraisal of "Fully Successful," and did not exceed any of the critical elements. In the manner of performance section of the appraisal, six out of nine of the factors were in the central range, three were in the high range. Mason did not receive a performance award for the year.

After Barry furnished Mason with his appraisal Mason retrieved the previous year's appraisal and questioned Barry on each of the elements in which Mason was rated lower. Mason attempted to go through each element and specifically ask Barry what he did and how he needed to improve. Barry became agitated, and said that Mason knew what he had to do to improve. Mason asked whether it was getting out of the Union, and Barry did not respond. Mason raised the element of "Productivity," which had dropped from a 7 to a 5, and Barry commented that Mason did not produce as much this year. Mason asked whether it had to do with his Union activities. Barry became irritated, and Mason signed the appraisal and the meeting ended.⁽⁶⁾

Barry testified about his rationale for giving Mason a lower appraisal, and why he was rated lower on the critical elements. Barry asserted that in order to rate Mason as having exceeded performance standards Barry would need to see a performance that is over and above a sustained period of time, and that Mason's performance could not justify a higher rating than he received. Specifically, Barry raised the painting project in Building 129 as a project that Mason did not perform at the exceptional level. The painting assignment was evaluated under element 1E of Mason's Performance Plan.⁽⁷⁾

Compared to the prior year's appraisal, Barry rated Mason lower in elements 3E, 4E, 5E, and 6E. Barry offered explanations for lower ratings in elements 3E (landscaping), 4E (snow and ice removal) and 6E (operations of mowers). With regard to 4E and 6E, Barry maintained that Mason was not as professional and "it just seemed like there was a lot of times when the weed whacker was like apart. . ." As a rationale for rating Mason lower in element 4E (snow removal), Barry offered two explanations. First, Barry raised an instance in which Mason did not show up for the 3:00 a.m. snow removal because of car trouble and road conditions, and because his performance seemed to be dropping off.

Barry also testified that he could not site any specific errors made by Mason, and that Mason's snow removal duties are performed with a team. I find these justifications offered by Barry to be unpersuasive.⁽⁸⁾

Discussion and Conclusions of Law

The GC of the FLRA alleges that the 911th Airlift Wing violated section 7116(a)(1) and (2) of the Statute by lowering the performance appraisal of Mason because he had engaged in activity protected by the Statute.

A. Analytical Framework

In *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letter-kenny*), the Authority set out its framework for deciding discrimination cases under section 7116(a)(2) of the Statute. *See also, Department of the Air Force, Warner Robins Air Logistics Center, Warner Robbins Air Force Base, Georgia*, 52 FLRA 602, 605, (1996) (*Warner Robins*); *Federal Emergency Management Agency*, 52 FLRA 486, 490 n.2 (1996); and *United States Air Force Academy, Colorado Springs, Colorado*, 52 FLRA 874, 878 (1997) (*Air Force Academy*).

Under the Authority's analytical framework for resolving complaints of alleged discrimination in violation of section 7116(a)(2) of the Statute, the GC of the FLRA has, at all times, the overall burden to establish by a preponderance of the evidence that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment. As a threshold matter the GC of the FLRA must offer sufficient evidence on these two elements to withstand a motion to dismiss. However, satisfying this threshold burden establishes a violation of the Statute only if the respondent offers no evidence in its defense. The respondent has the burden to establish by a preponderance of the evidence, as an affirmative defense that: (1) there was a legitimate justification for its action; and (2) the same action would have been taken even in the absence of the protected activity. *Air Force Academy*, at 878-79, and *Warner Robins*, at 605.

B. The *Prima Facie* Case

1. Mason was engaged in protected activity

Mason became an AFGE Local 2316 Steward on March 14, 1996 and immediately began to participate in Union activities, including representing employees in a number of grievances. On the day of his appointment as Steward, Mason submitted a steward's official time request to Barry for the purposes of meeting with the Civilian Personnel Director.

Union Steward Mason represented three employees in grievances under the parties' contract, including an employee in the Civil Engineering Division. In the course of representing these employees, Mason informed Barry, or Kutchenriter, either verbally or in writing, of his requests for official time. Moreover, Mason attended grievance meetings with the Base Civil Engineer Robert Moeslein, who attempted to limit Mason's official time to one hour per week.

Thus Mason was engaging in union activity protected by the Statute.

2. Mason's Union activity was the reason his rating was lowered

a. Timing

Soon after Mason became a Union steward and started engaging in the activities on behalf of the Union, all of which was known to Barry and other management officials, Barry gave Mason a yearly appraisal which, although "fully success-ful", was lower than Mason's appraisal for the prior year. This timing is suspicious and is evidence that the protected activity was a motivating factor for Barry's action, taken on behalf of the 911th Airlift Wing. *See U.S. Department of Veterans Affairs Medical Center, Northampton, Massachusetts*, 51 FLRA 1520 (1996); *U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba*,

Kentucky, 49 FLRA 1020 (1994) (*Forest Service*); and *United States Customs Service, Region IV, Miami District, Miami, Florida*, 36 FLRA 489 (1990).

b. Union Animus

The record herein establishes Barry's hostility to Mason's union activity and to his use of official time to perform these protected activities. Barry, and his superiors, at first gave Mason time to perform his union activities with little interference. But, as Mason began spending more time on these activities Barry put more obstacles in Mason's way, until Barry and Moeslein attempted to limit Mason's official time to one hour a week. Finally, Barry apparently became so frustrated at Mason's use of official time that on May 1, 1996 Barry told Mason that Mason had to choose between the Union and his job.⁽⁹⁾

In light of the foregoing, I conclude that the timing of the lowered appraisal and Barry's expressed hostility to Mason's union activity establishes a *prima facie* case that Mason's appraisal was lowered because he had engaged in protected activity. *See Letterkenny* at 119.

c. 911th Airlift Wing's reasons are pretextual

911th Airlift Wing has failed to establish by any credible evidence that there was a legitimate reason for lowering Mason's appraisal from the previous year. During the appraisal period prior to Mason's involvement in protected activity he received an overall appraisal of "Excellent," exceeding performance standards in 4 out of the 6 critical elements, and was given a performance award. In this appraisal, Barry wrote glowing comments about Mason's work performance. The following year, after Mason became a steward, Mason's appraisal dropped dramatically. Mason was rated lower in almost all critical elements, four out of six⁽¹⁰⁾, and in manner of performance, eight out of nine.

One of the primary reasons offered to justify why Barry lowered Mason's appraisal was his performance in painting Building 129. An examination of this assignment reveals that Mason effectively performed a difficult job that should have been assigned to more than one employee. Mason finished well before the deadline concerns of Barry, and yet was still "counseled." Furthermore, Mason's rating was not lower than the prior year's rating in this element.

When Mason was assigned the job of painting Building 129 in April or May of 1995, Barry was aware of the magnitude of the job, and that Mason had other priority assignments, i.e. grass cutting and snow removal. Barry informed Mason to take his time, that the painting job was not a priority and that he would be painting the building until he "retired." The complexity of the job, caused by the proximity of the piping and vents to the high ceilings, and the overall size of the building, made the job ill-suited, for one employee. Mason had to work methodically around the two largest rooms, painting off a 20-foot ladder.

David Wuenstel, a thirteen year veteran, an experienced painter, and a higher graded employee, had never been assigned by Barry to complete a painting job of the nature of Building 129 by himself. Wuenstel asked Barry on two or three occasions to assist Mason in the painting job and was denied. Harvey Nelson, the supervisor in the building, concurred with Wuenstel that the job was very difficult for one person and that Mason should have received assistance. The overwhelming evidence demonstrates that Mason was assigned a job that he should not have been doing alone. To justify a lower rating because of this assignment is untenable.

The record also revealed that Mason's ability to complete the job was hindered by his other priority assignments, grass cutting and snow removal. Mason worked only two or three days a week on the painting project. Shortages in staff during the summer months required Mason to perform extensive landscaping duties. During the winter months, the worst winter in history according to Barry, Mason was often pulled from his job to perform the priority job of snow removal.

The "counseling" that Barry asserted that he had with Mason about the project, and the subsequent notes made in Mason's AF 971 form, does not withstand scrutiny. As stated above, I find Barry to be a totally unreliable witness and do not credit any of his testimony with respect to the quality and timeliness of Mason's work. In this regard I note that Nelson, the supervisor in the building, complimented Mason on the job and never told Barry otherwise.

Furthermore Mason's performance in Building 129 should not have had any impact on his overall appraisal because Mason's performance did not drop in this critical element from the previous year's appraisal. The painting job in Building 129 falls under critical element 1E. Barry rated Mason as having "met" this element for the period ending June 30, 1996. The year before, Barry also rated Mason as having "met" this element. Thus, Mason's performance in Building 129, and other painting jobs, could not have had any impact on Mason's performance being lower than the previous year's.

The critical elements that Mason were rated lower in compared to the prior year, were 3E, 4E, 5E and 6E. The 911th Airlift Wing has failed to establish that there were legitimate basis for lowering Mason's ratings in these areas. Other than Barry's unreliable bare assertions, the record reveals no corroborating testimony, or documentary evidence, to support Barry's justification for the lower appraisal.

In light of the foregoing, I conclude the 911th Airlift Wing has failed to rebut the *prima facie* showing that Mason's appraisal was lowered because he had engaged in protected activity and thus violated section 7116(a)(1) and (2) of the Statute.⁽¹¹⁾ See *Letterkenny*. Further I conclude that the 911th Airlift Wing's submitting false reasons to justify the action taken against Mason, is itself evidence of an unlawful motivation. See *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2749 (1993); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978); See also Victoria A. Cundiff and Ann E. Chaitovitz, *St. Mary's Honor Center v. Hicks: Lots of Sound and Fury, But What Does it Signify*, 19 Employee Relations Law Journal No. 3 (1993-1994).

I conclude that the 911th Airlift Wing violated section 7116(a)(1) and (2) of the Statute when it gave Mason a lower appraisal in 1996 than it had given him in 1995 because he had engaged in protected activity on behalf of the Union.

C. Remedy

The GC of the FLRA requests that a nontraditional remedy is appropriate in this case. The traditional remedy in a case like this, when an agency lowered an employee's performance appraisal because the employee engaged in protected activity under the Statute, is to require the agency to rescind the appraisal, properly reappraise the employee without taking into consideration the employee's protected activity, and to provide the employee with any benefits as a result of the reappraisal. *Forest Service*, at 1036-37; *Ogden Air Logistics Center*, at 901-02.

The GC of the FLRA argues that the traditional remedy would not effectuate the purposes and policies of the Statute, including the deterrence of future violations. He argues that a supervisor, after being named in an unfair labor practice, cannot properly reappraise an employee's work. Inevitably, the supervisor's evaluation of the employee would be tainted by the unfair labor practice case process and the reappraisal of the employee would not be very different. Moreover, the GC of the FLRA argues that allowing the supervisor another opportunity to reappraise an employee without unlawfully taking into consideration the employee's protected activity, would not deter the supervisor from taking the same course of action in the future. In completing another employee's appraisal in the future, the supervisor would be secure in the knowledge that if he gets it wrong the first time, and is motivated by an employee's protected activity, he or she would always have another shot to reappraise the employee with only small consequences.

A more appropriate remedy, argues the GC of the FLRA, would be for 911th Airlift Wing to be ordered to rescind the appraisal received by Mason for the appraisal period July 1, 1995 to June 30, 1996. In its place, the GC of the FLRA argues that the 911th Airlift Wing should be ordered to furnish Mason with the same appraisal he received for the appraisal period July 1, 1994 to June 30, 1995, before he engaged in protected activity, and provide Mason with any benefits to which he would be entitled as a result of the reappraisal.

In requesting this non-traditional remedy, the GC of the FLRA relies on the Authority's approach and discussion of non-traditional remedies in *F.E. Warren Air Force Base, Cheyenne, Wyoming*, 52 FLRA 149 (1996); and *United States Department of Justice, Bureau of Prisons, Safford, Arizona*, 35 FLRA 431, 444-45 (1990).

These arguments, although persuasive, must be rejected. Thus, although it was established that Mason's protected activity was a cause for the lowering of the appraisal in 1996, and the 911th Airlift Wing did not establish that it would have lowered Mason's appraisal even if he had not engaged in the protected activity, nevertheless, GC of the FLRA did not establish that Mason, in fact, was entitled to the same appraisal he had received in 1995.

Further, there has been no showing that there was a pattern of unlawful conduct either by the agency or Barry. Nothing in the record establishes that, when instructed to re-evaluate Mason using only lawful considerations, Mason's supervisors could not or would not do so. Accordingly, I conclude that the traditional remedy, as set forth in *U.S. Forest Service* and *Ogden Air Logistics Center*, is appropriate in this case.

Having concluded that the 911th Airlift Wing violated section 7116(a)(1) and (2) of the Statute, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, the Department of the Air Force, 911th Airlift Wing, Coraopolis, Pennsylvania, shall:

1. Cease and desist from:

(a) Discriminating against Christopher Mason, or any other employee, by unlawfully taking into consideration in appraising his performance his activities on behalf of the American Federation of Government Employees, Local 2316, AFL-CIO, the exclusive representative of its employees.

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

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

(a) Rescind the appraisal received by Christopher Mason for the appraisal period July 1, 1995 to June 30, 1996, and furnish Mason with a new and fair appraisal for the appraisal period July 1, 1995 to June 30, 1996, without taking into consideration Mason's activities on behalf of American Federation of Government Employees, Local 2316, AFL-CIO; and provide Mason with any benefits to which he would be entitled as a result of the new appraisal.

(b) Post at its facilities copies of the attached Notice To All Employees on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Wing Commander, Department of the Air Force, 911th Airlift Wing, Coraopolis, Pennsylvania, 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.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Boston Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, September 17, 1997

SAMUEL A. CHAITOVITZ

Chief Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of the Air Force, 911th Airlift Wing, Coraopolis, Pennsylvania, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

We hereby notify our employees that:

WE WILL NOT discriminate against Christopher Mason, or any other employee, by unlawfully taking into consideration in appraising his performance his activities on behalf of the American Federation of Government Employees, Local 2316, AFL-CIO, the exclusive representative of our employees.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of rights assured by the Statute.

WE WILL rescind the appraisal received by Christopher Mason for the appraisal period July 1, 1995 to June 30, 1996.

WE WILL furnish Christopher Mason with a new and fair appraisal for the appraisal period July 1, 1995 to June 30, 1996, without taking into consideration Mason's activities on behalf of American Federation of Government Employees, Local 2316, AFL-CIO.

WE WILL provide Mason with any benefits to which he would be entitled as a result of the new appraisal.

(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, Boston Region, 99 Summer Street, Suite 100, Boston, Massachusetts 02110-1200, and whose telephone number is: (617) 424-5730.

1. In the thirteen years that Wuenstel has worked at the base, and under Barry's supervision, he was normally assigned to perform painting jobs alone. Although, on larger jobs he has always been given assistance by another employee.
2. The Performance Plan has 6 critical and 3 non-critical elements. It is unclear why Mason was rated on 6 critical elements and only 2 non-critical elements in his first performance appraisal.
3. Barry testified that Mason was not assigned the task of painting Building 129 until January 1996. The overwhelming evidence, including the candid testimony of Mason, and the testimony of the supervisor in Building 129, Harvey Nelson, demonstrated that the assignment was made much earlier. Barry's recollection of the circumstances surrounding this assignment, and other events relating to Mason's appraisals are suspect.

I find Barry's overall testimony at the hearing to be unreliable. In addition to his demeanor, I do not credit his testimony because it is inconsistent with that of other witnesses and surrounding circumstances. He seemed to come up with justifications for his actions too conveniently and there was no corroboration.

Mason's testimony, on the other hand, was believable and generally consistent with surrounding circumstances and the testimony of other witnesses.

4. The work hours are estimates that are generated "from a book," and do not account for the intricacies of the job. These estimates are sometimes inaccurate.
5. No other employee, including thirteen year veteran David Wuenstel, a WG-9, had ever been assigned to perform a job of this size and nature alone without any assistance.
6. The meeting lasted an hour.
7. Mason's performance in this element, the only element in which Mason was allegedly "counseled," did not decline from the prior year's evaluation. Barry rated Mason as having "met" this critical element during both the appraisal periods July 1, 1994 to June 30, 1995 and July 1, 1995 to June

30, 1996.

8. They are more of an attempt to rationalize an act already taken than as the reasons the act was taken. Accordingly, I do not credit Barry's testimony that these were the reasons for his ratings of Mason.

9. This statement is evidence of Barry's *union animus* and of the reason he lowered Mason's appraisal. It is not considered as a separate and independent violation of the Statute. See *Kaumagraph Corporation and United Steelworkers of America*, 316 NLRB 793 (1995). Further, this statement clearly was not an attempt to reach an accommodation between Mason's job and union activity. See *Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah*, 35 FLRA 891, 897 (1990) (*Ogden Air Logistics Center*).

10. The four he had previously received "exceeds" requirements.

11. In this case, where there is direct evidence of *union animus* and unlawful motivation for the agency's act, it is not necessary to analyze whether there had been disparate treatment. See, *Department of the Air Force, Grissom Air Force Base, Indiana*, 51 FLRA 7 (1995) and *U.S. Department of Veterans Affairs Medical Center, Jamaica Plain, Massachusetts*, 50 FLRA 583, 586-87 (1995); but see, *American Federation of Government Employees, AFL-CIO*, 51 FLRA 1427, 1439 n.11 (1996).