

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

DEPARTMENT OF DEFENSE
DEPENDENTS SCHOOLS
Respondent

and

Case No. CH-CA-60439

FEDERAL EDUCATION ASSOCIATION
Charging Party

Leonard L. Bransford

Representative of the Respondent

Julie Spencer

Representative of the Charging Party

Philip T. Roberts

Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER

Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that the Department of Defense Dependents Schools (Respondent or DODDS), by Ora C. Flippen-Casper, Principal, Giessen Elementary School, Giessen, Germany, violated section 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116(a)(1) and (2), by giving Deborah Wertz, a teacher and bargaining unit employee, a low assessment of potential for advancement in Respondent's educator career program (ECP) because Wertz engaged in representational activities on behalf of the Charging Party (Union or FEA).

Respondent's answer denied any violation of the Statute. Respondent alleged that Ms. Flippen-Casper evaluated

Ms. Wertz' potential to serve as an administrator solely on the basis of Ms. Flippen-Casper's observation of Ms. Wertz' performance and her interaction with Ms. Wertz.

For the reasons set forth below, I find that a preponderance of the evidence supports the alleged violations.

A hearing was held in Wiesbaden, Germany. The Respondent, Union, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs. Based on the entire record, including my observation of

the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The Respondent and the Union

The Respondent's mission is to provide high quality education, kindergarten through grade 12, for eligible minor dependents of military and civilian personnel stationed overseas. The Union is the exclusive representative of a unit of teachers appropriate for collective bargaining at the Respondent, including the Respondent's schools in Giessen, Germany.

Ora C. Flippen-Casper

Ora C. Flippen-Casper has been a principal for 12 years. In August 1995, she became the new principal at Giessen Elementary School. Before that, she had been a teacher for five years and an assistant principal for a year and a half.

Jill Ann Drascher, former Union representative, known as the faculty representative spokesperson (FRS), from approximately 1990 to 1993 at Buedingen Elementary School, testified that she had a good working relationship with Flippen-Casper, the principal at Buedingen, and Flippen-Casper encouraged her to apply for advancement and recognition. Drasher stated that Flippen-Casper was always willing to work with the FRS to resolve issues at the school level. There were times when they disagreed on issues, but that disagreement did not rise to a personal level. Drascher never filed any grievances or unfair labor practices.

Deborah Wertz

Deborah Wertz is a teacher of the fourth grade at Giessen Elementary School. During the 1995-96 school year, Wertz taught a combined class of fourth and fifth graders. She has taught at Giessen Elementary for nine years. For the past four years, she has been the FRS at Giessen Elementary. For the five years preceding the 1995-96 school year, Wertz consistently received exceptional ratings - the highest possible rating - on her annual performance appraisals.

Wertz as Acting Principal

Shortly after arriving at Giessen Elementary, Flippen-Casper had to be away from Giessen for two weeks due to an emergency. During her absence, Wertz was designated acting principal, a position she had regularly assumed in the absence of the principal since March 1995. Wertz continued to serve in that capacity on a number of occasions when Flippen-Casper was absent up until January 1996.

The October Observation

The principal normally conducts three formal class observations of teachers during the course of the year for the purpose of evaluating the educational process and the teachers' strategies. The observation is followed by a post-observation conference with the principal.

Wertz had her first post-observation conference by Flippen-Casper on October 12, 1995. Flippen-Casper's comments on Wertz' performance were very positive. Among other things, Flippen-Casper said that Wertz' classes were well-organized, transitions were smooth, students had an opportunity to practice skills and were active participants, and Wertz' lesson plans were well-organized, easy to read, and very specific. The only negative remarks concerned the quality of students' writing, which were the subject of dispute with the Union, and will be discussed in more detail below.

Wertz' Comments to Flippen-Casper as FRS

At the end of the October 12, 1995, post-observation conference, Flippen-Casper asked Wertz if there were other concerns. Wertz replied that there were, and she would like to address them as the FRS.⁽¹⁾

Wertz explained in detail that the teachers were concerned that Flippen-Casper had changed past practices concerning post-observation conference procedures, pop-in visits, and the scheduling of post-hearing conferences pursuant to the agreement.

Flippen-Casper was not pleased to receive this criticism. With respect to Wertz' comments concerning the post-observation conference procedures and pop-in visits, Flippen-Casper responded that "if teachers were concerned, then they must be insecure and have something to hide." Concerning the scheduling of post-hearing conferences, Flippen-Casper

replied that Wertz did not need to quote the contract to her; that she was aware of it.

Wertz' Comments at Heidelberg Course

Robert G. McNeil, Jr., a Department of the Army employee, testified that he attended a University of Oklahoma master's in education course with Wertz and others in Heidelberg, Germany. During the October 13-16, 1995 classes, Wertz identified herself as the Union representative and sometimes-acting principal at the school. Wertz said other teachers came to her with their concerns, and she criticized her "administrator's" handwriting and observation policies which, she said, were destroying the staff's morale. McNeil suggested that Wertz convey these concerns directly to her administrator or she would be part of the problem. Later, according to McNeil, during a December 1995 class, Wertz announced that she and other staff members had lodged a grievance against the administrator.⁽²⁾

Wertz' Departure for Conference

Around October 23, 1995, Wertz was asked to fill in at the last minute as the FEA's representative on a DODDS/FEA technology task force which met the following week in Arlington, Virginia. Wertz left on October 26 and did not return until November 6, 1995.

The "Pop-in" Visits

A "pop-in" visit is an unscheduled visit by the principal to a teacher's classroom. Upon Wertz's return, Flippen-Casper conducted a "pop-in" visit her first day back on the job. Normally, "pop-in" visits are not conducted the day after a teacher returns from an absence. Thereafter, Flippen-Casper "popped-in" to Wertz' classroom several times, as she did to other teachers.

On November 28, 1995, Flippen-Casper met with Wertz to provide some feedback on these "pop-in" visits. Flippen-Casper criticized Wertz for sitting down while conducting class, instead of circulating and monitoring the students, during four of her "pop-in" visits. Wertz gave an explanation for sitting on these occasions, but when she received a memorandum the next day from Flippen-Casper setting forth the same criticism for the record, Wertz filed a grievance.

The Grievance

In her grievance of November 30, 1995, Wertz reiterated her reasons for being seated, alleged that the "pop-ins" were invalidated due to the failure to provide follow-up conferences within two days, and requested that the memorandum be removed from her file.

Flippen-Casper denied the grievance on December 5, 1995. Wertz elevated it to the Area Superintendent who also denied the grievance on January 4, 1996. The Area Superintendent found nothing improper in the memorandum and stated that "pop-in" visits were not formal observations requiring discussions within two days under the agreement.

The Clifton Talbert Program Decision

On December 4, 1995, at the regularly scheduled monthly faculty meeting, Flippen-Casper brought in a staff development specialist from the District Superintendent's office to talk about the staff's possible participation in a cultural diversity program to be led by the noted author Clifton Talbert. The program would require teachers to use some of their own time and purchase a book with their own funds. It would be conducted only if a majority of the staff agreed to participate. Flippen-Casper remarked that it would certainly benefit the staff to have Clifton Talbert work with them.

Following the faculty meeting, the Union conducted its regular monthly meeting during which the eleven teachers present discussed whether or not they wanted to participate in the Talbert program. They voted unanimously not to participate in the program as designed, but to pursue the possibility of having Mr. Talbert come in and work directly with the students.

Wertz, as the FRS, drafted a memorandum reflecting that "the staff discussed the presentation" and the "decision was unanimous that we not participate." She added that the staff would be very interested in having Mr. Talbert work with the students. Wertz left it in Flippen-Casper's box the next day. Flippen-Casper found it hard to believe that the decision of the staff was unanimous, since she had gained the impression that some members of the faculty were interested. She called a mandatory staff meeting to address the matter.

During the meeting, Flippen-Casper read to the group the part of the memo about the teachers not wishing to participate, and repeatedly stated, "I just can't believe this." After two teachers, both non-Union

members, and therefore ineligible to participate in the December 4 Union meeting, spoke up that they had not been consulted about the memo, Flippen-Casper turned to Wertz and said that the Union⁽³⁾ had no right to take this poll; it was no concern of theirs.

At the suggestion of one teacher, Flippen-Casper announced that she would re-poll the staff herself. The next day, ballots were placed in all the teachers' distribution boxes. When these ballots were tallied, eleven teachers voted against participation in the Talbert program and six voted for it. In a faculty bulletin, Flippen-Casper announced that the staff would not be participating in the Clifton Talbert program in view of the results of the poll.⁽⁴⁾

The Handwriting Policy Issue

On three occasions from October 1995 to January 1996, Wertz, on behalf of the teachers, sought clarification from Flippen-Casper concerning her handwriting policy. The DODDS curriculum required that De'Nelian handwriting (a method of printing letters with tails at the end) be taught in grades kindergarten through second grade and that cursive handwriting be taught and reinforced in grades three to six. Some teachers gained the impression that Flippen-Casper required students in grades three to six to do all of their work in cursive. This requirement, they felt, would circumvent their professional judgment concerning an individual child's development and change the past practice in this respect. These teachers were also aware that Flippen-Casper concentrated on this work in "pop-ins" and formal observations and were concerned that Flippen-Casper's opinion of the quality of the students' cursive handwriting would be reflected in the teachers' evaluations. For these reasons, the teachers asked Wertz to request Flippen-Casper for an explanation of her objectives.

Wertz was not satisfied that the staff's concerns about the amount or the quality of the students' cursive writing had been answered by Flippen-Casper. As the FRS, she took up the matter with Dr. Gene Knudsen, district assistant superintendent, on January 4, 1996, when he visited her classroom. In her capacity as Union representative, Wertz showed him a current copy of Flippen-Casper's weekly bulletin in which Flippen-Casper discussed the scheduling of teachers' formal observations and stated that her emphasis on these occasions would be on handwriting and cursive writing assignments and the quality of such writing. Wertz made a copy of the bulletin for Dr. Knudsen and asked him if there was a DODDS policy on handwriting, particularly whether it specified how much of a child's work had to be done in cursive. Dr. Knudsen said that surely Flippen-Casper had been misunderstood, but he would address the matter with Flippen-Casper and get back to Wertz concerning the written policy.

Two days later, Flippen-Casper called Wertz in for a meeting, at which time Flippen-Casper had a copy of the DODDS policy. Flippen-Casper told Wertz, "I really don't appreciate that you went over my head, because it appears that I don't have good communication with my staff." Wertz replied that she just wanted to get clarification of the policy "that we hadn't been able to clarify."

The Host Nation Substitute Negotiations

On January 16, 1996, Flippen-Casper advised Wertz, as the FRS, that the host nation teacher would be absent and no substitute teacher would be hired as it would use up the number of substitute days available. The host nation teacher instructs students two or three times per week for 45 minutes on local language and culture. The regular teachers use this time for preparation for their other classes. The decision not to hire a substitute would significantly reduce the amount of preparation time available to the teachers. On January 18, 1996, Wertz sent a memo to Flippen-Casper asking to meet and discuss the change and to hold it in abeyance until they could resolve the matter.

Flippen-Casper met with Wertz on January 19, 1996. Flippen-Casper said that the change was driven by the fact that DODDS was limiting the number of days substitutes could be hired in a given school year, and she did not want to hire a substitute until the teachers came up with an alternate plan concerning what would be done in the event the allotted days were used up. She also requested that Wertz poll the staff to make sure the teachers would be in agreement to have a substitute and were aware of the potential problem.

Wertz replied that, as the FRS, she spoke for the staff in requesting the hiring of a substitute. She said the allotted days were not a teacher problem, the teachers were not responsible to have an alternate plan, and she had been told by Union officials at the district level that substitute days were not a problem. Flippen-Casper adamantly disputed this, but agreed to hire a substitute for one or two days contingent upon Wertz informing the staff of the situation concerning substitute days.

Based upon this meeting, Wertz drafted minutes which Flippen-Casper did not agree to, but modified in some respects. Later, Flippen-Casper issued her own memo to the staff on the subject, pointing out the limitation on the number of substitute days and the need for the staff to give some thought to an alternate plan, or the various ways in which the staff could cut back if the limit were reached.

Flippen-Casper testified that Wertz' position could have put her in a bind to figure out how to cover the classes. This is why she wanted Wertz to speak with the staff and come up with an idea and also asked her on this occasion, "Okay. You are interested in becoming an administrator. How would you deal with this?" Wertz said that the first thing she would do would be to contact the FRS. Flippen-Casper said, "Well, is there another option?" Wertz said she couldn't think of one, to which Flippen-Casper responded, "Well, think again." Flippen-Casper testified that, from such occasions, when she asked Wertz to get in the mode of thinking as an administrator, "that was something that I thought that she lacked, trying to wear a different hat, so to speak, and not think as a teacher, but to think as an administrator."

The School Secretary Petition

On February 2, 1996, Wertz, in her capacity as Union representative, drafted a petition to Flippen-Casper, which was signed by the staff of Giessen Elementary School, objecting to the termination of the school secretary, Jackie Stoneback. Copies of the petition were designated for the district superintendent and chief of employee relations. Stoneback was not a member of the bargaining unit, but was responsible for many routine daily operations at the school, such as time and attendance cards and relaying messages to and from parents and teachers. The petition pointed out that the staff had a high regard for Stoneback's ability, found it difficult to understand her termination, and believed that her departure would have a detrimental effect on their working conditions. Flippen-Casper never responded to this petition.

The Educator Career Program Application

In January 1996, Flippen-Casper, being aware that Wertz was working toward a master's degree in administration, brought the Educator Career Program (ECP) to Wertz' attention and encouraged her to apply. The ECP is a program through which DODDS employees are placed in principal, assistant principal, and other supervisory, managerial, and specialist positions within DODDS. To be considered for the ECP program, a DODDS employee must fill out an extensive application package and include an assessment of potential filled out by the employee's immediate supervisor.

Wertz filled out the application and requested Flippen-Casper to complete the assessment portion. Flippen-Casper gave Wertz her completed assessment of potential on February 2, 1996. In this assessment of

potential, Flippen-Casper rated Wertz "Low Average" in sixteen categories, "Low" in seven categories, "High Average" in six categories, and "High" in two categories. This resulted in a summary recommendation of "Low Average." Flippen-Casper described Wertz' limitations as "Lack of understanding of the rule [sic] and responsibilities of an Administrator" and "Support of non-good teaching practices and DODDS policies."

Wertz Resigns as School Improvement Chairperson

On February 5, 1996, Wertz submitted her resignation to Flippen-Casper as school improvement chairperson and member of the school improvement team. She stated, "In light of your recent below-average/low appraisal of my skills in areas that are critical to the success of the School Improvement Process, I feel I no longer have your trust and confidence that are critical to the success of the School Improvement Process."

The Fruit Exercise

On February 5, 1996, Flippen-Casper conducted a staff development meeting to assist teachers to deal with an increase of conflict among students, which she attributed to many of the students' parents being deployed to Bosnia. In her exercise, Ms. Flippen-Casper used a basket of fruits, including apples, oranges, grapes, and an over-ripe banana, to represent the diverse student body. Teachers were to relate the pieces of fruit to their students and decide how to use peer mediation and conflict resolution to solve the problems that were occurring, e.g., how to prevent the bad fruit from destroying the beautiful fruit. Flippen-Casper also said that this exercise could also be applied to working with colleagues.

Wertz believed she was being identified as the "bad banana," because she felt the only conflict that had taken place between colleagues was between Flippen-Casper and herself. However, there is no evidence that Flippen-Casper indicated that the exercise was directed against Wertz or the Union, and she did not identify Wertz as a "bad banana."⁽⁵⁾

The February Observation

On February 5, 1996, Flippen-Casper met with Wertz to discuss the second scheduled observation session for the year, which took place on February 1, 1996. Unlike the October conference, where Flippen-Casper's observer's comments had virtually nothing but praise for Wertz' teaching methods, Flippen-Casper's comments for the February conference merely gave an account of what went on in the class and then stated that the

objective of Wertz' lesson was unclear.

Post-Assessment Conference

On or about February 15, 1996, Wertz met with Flippen-Casper concerning another matter, and Flippen-Casper brought up the assessment of potential. Flippen-Casper said she did not consider Wertz' role as the FRS in writing the assessment. She told Wertz that communication was very important and there were times when Wertz did not communicate with her at all. She said, "You . . . may be displeased because something has been addressed with you. But that's the administrator's responsibility." She also said that Wertz had been very negative about Flippen-Casper's comments with regard to Wertz sitting down and concerning the handwriting policy. Flippen-Casper told Wertz that the assessment was not written in stone and could always be changed, but it was contingent upon Wertz. She said that Wertz did not seem to understand the roles and responsibilities of an administrator and lacked the ability to wear different hats and not think as a teacher, but as an administrator. Flippen-Casper stated, "When I wanted to be an administrator, I started to think differently."

Subsequent Evaluations

On April 8, 1996, after the instant charge had been filed on February 23, 1996 and investigated, Wertz had the third and last regularly scheduled observation of the year by Flippen-Casper. Flippen-Casper's remarks were much more complimentary this time. For example, she said that "Ms. Wertz displayed considerable skill with the lesson. The objective of the lesson was clear. The use of time, momentum and preparation were appropriate and effective. Students were involved during the entire lesson. High expectations were clear. She displayed very positive rapport with her students. It appeared objectives were met. The students were very enthusiastic about their projects."

On May 15, 1996, Flippen-Casper issued her annual performance appraisal to Wertz. She rated Wertz "Exceeds" in four out of seven elements.

Action Taken on Wertz' ECP Application

Regardless of anything else in Wertz' application package, the "Low Average" assessment by Flippen-Casper would have effectively prevented Wertz from being rated "Best Qualified" through the ECP process and would have prevented her from being considered for promotion through the ECP.

However, Wertz had not completed her course work for the master's degree at the time of her application, a basic educational requirement of the positions for which she was applying. She expected to do so by March 15, 1996, or at about the same time as the ECP panel was meeting, and she expected the degree to be awarded some time later, as it was on May 11, 1996. Wertz explained these facts in her application and asked for a waiver of having the degree in hand, contingent upon receiving the degree as scheduled.

The waiver was not granted. Dean Wiles, Chief, Educational Division, DODDS Europe, who was chairperson of the panel and responsible for some 50 recent panels, knew of no instance where a panel had granted such a waiver, due to the many problems which can occur before the final completion of a degree. However, the parties stipulated that DODDS has, in fact, granted such a waiver at some time in the past.

Wilis testified that the ECP panel members never saw the principal's assessment of Wertz. Once an administrative review of Wertz' application showed no evidence that she had completed the basic educational requirement of a master's degree, her application was placed aside and the rest of the panel never evaluated it. Thus, the assessment of potential evaluation given to Wertz by Flippen-Casper played no part in the rating of "Not Qualified" subsequently given by the ECP panel in March 1996.

Wertz received her master's degree as scheduled and is eligible to apply again to the ECP program. There are about three ECP panels scheduled per year. The panel considers an applicant's current submission and would not automatically have access to a previous submission. If an applicant submits a new assessment of potential from a principal, that would be the one considered by the panel. Principals, including Flippen-Casper, are often asked to participate in the panels, but, as panel members, they do not evaluate the applications of their own employees. Flippen-Casper, who was a member of the March 1996 panel, did not review or rate Wertz' application.

Flippen-Casper's Testimony Concerning the ECP Assessment

Flippen-Casper testified that she had no animosity toward the Union or its representatives and the assessment of Wertz was not an attempt to get back at her for her Union activities. Flippen-Casper said that she based her assessment on her observation and contact with Wertz as a teacher and her evaluation of Wertz' potential as an administrator. According to Flippen-Casper, many policies and practices must be reinforced as an administrator, and Wertz appeared not to understand an administrator's role and responsibilities. Flippen-Casper rated her based on her reaction to these policies and procedures, which, if she were an administrator,

she would have to reinforce and implement. Flippen-Casper said that Wertz had a negative reaction to Flippen-Casper's criticism of her sitting during the pop-in visits and a negative reaction to the cursive writing policy. She lacked the ability "to wear a different hat, so to speak, and not think as a teacher, but to think as an administrator."

Flippen-Casper stated that she rated Wertz differently as a teacher, using different criteria, because a person can be a good teacher and not a good administrator, and vice versa.

Flippen-Casper said she certainly stood by her ECP assessment of Wertz and would do it again.

Comparison of Some Position Related Abilities Rated in the Assessment of Potential and During Post-Observation Meetings in October 1995, April 1996, and in Wertz' Annual Performance Appraisal in May 1996. The Numbered Category at the Top Reflects the Position Related Abilities in the Assessment of Potential:

4. Completes assignments effectively and efficiently - *no rating*.

Wertz' appraisal says that she "submitted, posted and communicated her grading policy . . . in advance of the suspense requirement" and that she submitted her progress report grades in a timely manner. It also says that "to help her students focus on instructional tasks, Wertz minimized classroom management duties so they were completed efficiently and effectively."

5. Employs appropriate testing or assessment techniques - *no rating* and

24. Assesses progress toward goal achievement - *low average* and

25. Reviews work of others effectively - *low*.

During the October 1995, observation, Flippen-Casper noted that Wertz "Checked students understanding through the use of various questions."

Wertz' appraisal says that "to evaluate and document student work, she used oral assessments, essays, written reports, and a variety of testing

formats." It also says that she "used effective assessment methods in her classes to consistently keep students involved in learning" and that her assessment records were "accurate and neat."

7. Applies appropriate principles of financial management - *low average* and

8. Maintains a supportive logistic system - *low average*.

Wertz' appraisal notes that she was "knowledgeable of the school's supply and maintenance procedures and effectively used these procedures to maintain optimal operating conditions in the classroom. [She] established an effective system of accountability for school property" and she "reconciled sub-hand receipts with the supply clerk as required."

10. Adapts easily to a wide variety of changes and workloads - *low average*.

In her October 1995, observation, Flippen-Casper noted that "Management of both classes [a combined class of 4th and 5th graders] appeared to have been very well organized. Students in both grade levels appeared to have been on task while [Wertz] worked with another grade level. Smooth transition from one grade level to the other."

In her April 1996, observation, Flippen-Casper said "Students then transitioned smoothly . . . [Wertz] monitored all groups."

On the annual appraisal, Flippen-Casper said Wertz was "always prepared to teach her combination class" and that she "made a quick and smooth transition between the two grade levels."

11. Maintains consistently high qualities of work - *low average*.

Wertz' appraisal indicates that "[t]hroughout the school year, Ms. Wertz was conscientious in planning for instruction." It also said that "[h]er classroom was well organized and arranged for a high degree of learning."

14. Communicates student progress to students and parents - *low average*.

Wertz' appraisal says that she "made every effort to help students understand and keep up with their progress through communications submitted to parents." "She provided parents her home telephone number for better communication regarding their child's progress. She clearly explained the grading policy to students during the first week of school and provided their parents with a written explanation."

15. Demonstrates skill in explaining, instructing and conversing with others in a clear and effective manner - *low average*.

During the October 1995, observation, Flippen-Casper said that Wertz' use of "Personalized experiences assisted in the clear explanation of 'tradition.'"

During the April observation, Flippen-Casper noted that Wertz "communicat[ed] to [the students] their tasks for the day and her expectations" and that she "circulated continuously observing, assisting, providing guidance or checking for understanding."

On the annual appraisal, Flippen-Casper remarked that Wertz had formulated "an effective plan to clearly communicate behavior expectations, consequences and rewards."

Items 2 and 3 of the Assessment of Potential reflects that Wertz was rated "high" in both the categories of "Demonstrates skill in oral expression" and "Demonstrates skill in written expression," and Flippen-Casper also noted Wertz' strengths, her "[a]bility to articulate well" and "[a]bility to organize groups," categories which would appear to be directly related to the position related abilities measured in Item 15.

16. Inspires others to action; accomplishes goals by having a positive influence on the behavior of others - *low*.

In connection with the October 1995, observation, Flippen-Casper noted that "Students were active participants." In the April 1996, observation, she said that "Students were involved during the entire lesson. [Wertz] displayed very positive rapport with her students. The students were very enthusiastic about their projects."

In the annual appraisal, Flippen-Casper stated that "[Wertz] provided opportunities for all students to participate, maximized instructional time and students were rarely off task." "Students were made to feel

special and as a result their sense of self worth increased." "[Wertz] developed a behavior management plan which was well thought out and highly appropriate in its expectations for fourth/fifth grade students. This plan placed an emphasis on positive recognition and rewards to reinforce correct behavior." "[Wertz] established a very healthy rapport with students."

The "low" assessment for this item is inconsistent with Flippen-Casper's comment that one of Wertz' strengths is her "[a]bility to organize groups."

22. Demonstrates fairness and understanding when working with students and staff - *no rating*.

Wertz' annual appraisal says that she "demonstrated fairness and consistency in the handling of student problems."

23. Evidences initiative in willingness to go beyond work requirements - *low average*.

Wertz' annual appraisal says that she "enriched and expanded DODDS required textbooks and supplemental materials through the use of cooperative learning activities, writing projects, computer assisted instruction and teacher made activities."

26. Considers new ideas and divergent points of view - *low*.

Wertz' annual appraisal notes that she "welcomed resource educators into her room and followed through on their suggestions and recommendations."

27. Defines assignments and projects clearly - *low average*.

During the October observation as well as in the annual appraisal, Flippen-Casper makes note of how Wertz had prepared a comprehensive folder for substitute teachers which clearly spelled out, day-by-day, all the necessary information regarding subject areas, times, specials, recess and duty schedules. Flippen-Casper remarked that Wertz' instructional outline was "detailed, well organized, and indicated a thorough understanding of the DODDS curriculum goals and objectives."

34. Pursues balanced program of self improvement - low.

Flippen-Casper testified that the reason she gave Wertz the forms for the ECP program was because she knew that Wertz was pursuing her master's degree.

Wertz' Requested Remedy

Wertz testified that she could no longer work with Flippen-Casper in a productive management-union relationship and wished to be transferred with her husband, who is also a DODDS teacher, out of the situation. She requested to be placed on leave with pay until the case is decided or a transfer is granted.

Discussion and Conclusions

Under the Authority's analytical framework for resolving complaints of alleged discrimination under section 7116(a) (2) of the Statute, the General Counsel 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 agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment. Letterkenny Army Depot, 35 FLRA 113, 118 (1990) (Letterkenny). See also Federal Emergency Management Agency, 52 FLRA 486, 490 n.2 (1996). Where the respondent offers evidence that it took the disputed action for legitimate reasons, it 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 protected activity. Letterkenny, 35 FLRA at 118.

There is no dispute that Wertz was engaged in protected activity and the Respondent had knowledge of such activity. A preponderance of the evidence also establishes that such activity was a motivating factor in giving Wertz a low assessment of potential for the educator career program. This discriminatory motivation is shown by: (1) the closeness in time between Wertz' extensive protected activity from October 1995 up to the low assessment on February 2, 1996; (2) the acting official's, Flippen-Casper's, antagonism towards some of the protected activity; and (3) the lack of legitimate reasons for the assessment.

The record, as set forth in detail above, reflects that, beginning in October 1995, Wertz brought the bargaining unit's concerns to

Flippen-Casper regarding several alleged changes in past practices. Wertz also sought clarification for the bargaining unit concerning Flippen-Casper's handwriting policy. In late November, Wertz filed a grievance over her counseling by Flippen-Casper. In early December 1995, Wertz reported to Flippen-Casper that the staff did not want to voluntarily participate in a cultural diversity program which Flippen-Casper had urged upon the staff as beneficial. In January 1996, Wertz advised Flippen-Casper that the staff disagreed with her decision not to hire a substitute and negotiated with Flippen-Casper over the matter. And, on the day Flippen-Casper gave Wertz the low assessment for the educator career program, Wertz had presented Flippen-Casper a petition objecting to the termination of the school secretary. Thus, during this period, Wertz was an active and aggressive Union leader who could have been considered a thorn in management's side. Cf. United States Forces Korea/Eighth United States Army, 11 FLRA 434, 436 (1983).

The most notable examples of Flippen-Casper's antagonism towards Wertz' protected activity are as follows: When Wertz, in October 1995, brought the bargaining unit's concerns to Flippen-Casper relating to several alleged changes in past practices, Flippen-Casper did not respond well to this criticism and curtly dismissed Wertz' observations. She also was clearly upset with the Union's response to the cultural diversity program, stating that the Union had no right to take a poll and she would re-poll the staff herself. In January 1996, when Wertz spoke to the assistant superintendent in a legitimate Union capacity about DODDS' policy on handwriting instructions, an issue which Wertz, acting in her capacity as Union representative, had raised with Flippen-Casper on several occasions, this bothered Flippen-Casper. Flippen-Casper told Wertz that this made her (Flippen-Casper) look bad. While not as direct, but noteworthy, are Flippen-Casper's comments to Wertz during her mid-year appraisal regarding Wertz' "inability to wear different hats" and Flippen-Casper's comment, "When I wanted to be an administrator, I started to think differently."

The evidence, as set forth in detail above, also shows that the assessment of potential rating, concerning position related abilities, is inconsistent with the ratings Wertz received on numerous of the abilities during the rest of the school year. While it is true that the overall ratings served different purposes, one to judge her potential as an administrator, and the others, her performance as a teacher, I agree with Counsel for the General Counsel that it is inconceivable that, in appraising several of the specific position rated abilities, Wertz' abilities were adequate-to-stellar throughout the school year, except for that period on or around February 2, 1996, following particularly heavy Union activity on Wertz' part.

The Respondent's Defenses

The Respondent contends that the above incidents⁽⁶⁾ represent personality conflicts and disagreements in management style between Flippen-Casper and Wertz, but do not support the charge of union animus. The Respondent claims that Wertz' protected activity played no part in Flippen-Casper's assessment, but was based on Flippen-Casper's observation of Wertz and a professional assessment of Wertz' potential to become an administrator.

As noted, Flippen-Casper testified that she had no animosity towards the Union or its representatives and the assessment of Wertz was not an attempt to get back at her for her Union activities. Flippen-Casper said that she based her assessment on her observation and contact with Wertz as a teacher and her evaluation of Wertz' potential as an administrator. Flippen-Casper stated that she rated Wertz differently as a teacher, using different criteria, because a person can be a good teacher and not a good administrator, and vice versa. According to Flippen-Casper, many policies and practices must be reinforced as an administrator, and Wertz appeared not to understand an administrator's role and responsibilities. Flippen-Casper said she rated Wertz based on her reaction to these policies and procedures, which, if she were an administrator, she would have to reinforce and implement. Flippen-Casper said that Wertz had a negative reaction to criticism of her sitting during the "pop-in" visits and a negative reaction to the cursive writing policy. She lacked the ability "to wear a different hat, so to speak, and not think as a teacher, but to think as an administrator." During Flippen-Casper's post-assessment meeting with Wertz, Flippen-Casper also mentioned that Wertz' communication with her was a problem, and there were times when Wertz did not communicate with her at all. Flippen-Casper said that she stood by her rating and would do it again.

Flippen-Casper says that what troubled her from Wertz' standpoint as a potential administrator was not Wertz' sitting down during class, but rather Wertz' "negative reaction" to the counseling for sitting during class. Flippen-Casper did not explain what Wertz "negative reaction" was, or in what manner her reaction to the counseling was, at the time, inappropriate. While it is obviously important that an administrator be able to give and receive criticism, the prime "negative reaction" of Wertz revealed in the record is that she filed a grievance concerning the counseling, which is clearly protected activity.

The second key example cited by Flippen-Casper of Wertz' unsuitability as an administrator is that Wertz reacted negatively to Flippen-Casper's handwriting policy. Flippen-Casper said she had to reinforce her policy with Wertz and other teachers during "pop-in" visits and Wertz reacted negatively. Wertz' "negative reaction" to the handwriting policy, as shown by the record, was that Wertz questioned Flippen-Casper, in her capacity as Union representative, concerning whether Flippen-Casper's handwriting policy was a change in past practice and whether the quality of the students' handwriting would be reflected in the teachers' evaluations, again clearly protected activity on Wertz'

part.

With regard to Flippen-Casper's general criticism of Wertz' not communicating with her, Flippen-Casper provided no specific example of Wertz' refusing to speak to her. It is noted that Flippen-Casper was upset with Wertz' communication when Wertz contacted the assistant superintendent regarding the Union's concern over Flippen-Casper's handwriting policy. Flippen-Casper felt this made it appear that "I don't have good communications with my staff."

Contrary to Flippen-Casper's testimony, I conclude, based on the entire record, that Flippen-Casper did not base her low assessment of Wertz' potential solely on her observation and assessment of Wertz' individual performance as a teacher applying for an administrative position, and that Flippen-Casper would not have rendered the same assessment even in the absence of the protected activity.

I conclude that a preponderance of the evidence establishes that the Respondent violated section 7116(a)(1) and (2) of the Statute, as alleged, by giving Deborah Wertz a low assessment of potential for advancement in Respondent's educator career program because Wertz engaged in protected representational activity on behalf of the Union.

Remedy

The General Counsel requests that the Respondent be ordered to have a new assessment of potential completed by Wertz' previous principal, who had ample opportunity to observe her work and who apparently harbored no union animus, inasmuch as Flippen-Casper testified that she would give Wertz the same rating again. Since Wertz also testified that she can no longer work with Flippen-Casper in a productive management-union relationship, the General Counsel also requests that the Respondent be ordered to give Wertz (and her husband), at her request, higher priority for transfer than anyone else in the next round under the Respondent's world-wide transfer program. The General Counsel states that this would place Wertz in a position where she would feel free to exercise her right to act as a Union representative.

The Authority recently discussed its approach to evaluating requests for nontraditional remedies in F.E. Warren Air Force Base, Cheyenne, Wyoming, 52 FLRA 149 (1996) (Warren) and Department of Veterans Affairs Medical Center, Phoenix, Arizona, 52 FLRA 182 (1996). In Warren, the Authority concluded that nontraditional remedies must satisfy the same broad objectives that the Authority described in United States Department of Justice, Bureau of Prisons, Safford, Arizona, 35 FLRA 431, 444-45 (1990) (Safford). That is, assuming there are no legal or public policy

objections to a nontraditional proposed remedy, the questions are whether the remedy is reasonably necessary and would be effective to "recreate the conditions and relationships" with which the unfair labor practice interfered, as well as to effectuate the policies of the Statute, including the deterrence of future violative conduct. Warren, 52 FLRA at 161; Safford, 35 FLRA at 444-45. As the Authority additionally noted in Warren, the above questions are essentially factual and therefore should be decided in the same fashion that other factual issues are resolved: the General Counsel bears the burden of persuasion, and the Judge is responsible initially for determining whether the remedy is warranted.

The Respondent established that Flippen-Casper's assessment played no part in the rating of not qualified reached by the ECP panel in March 1996, because, at the time, Wertz did not meet the basic educational requirement of a master's degree. Wertz received the degree in May 1996, and would have been eligible to reapply for the educator career program in subsequent months. However, Flippen-Casper's low assessment based on Wertz' protected representational activity and her expressed intention to "do it again" would have effectively prevented Wertz from being qualified for advancement through the program had she applied later. Therefore, I agree with the General Counsel that the Respondent should be ordered to have a new assessment of potential executed by a previous, qualified first line supervisor of Wertz, and that such assessment be accepted for the purposes of any new application she may file in the educator career program. I will not specify that the assessment be completed by "her former principal," as requested by the General Counsel, but will leave this assignment of work to the Respondent's discretion, noting that Wertz received "exceptional" yearly appraisals in the five years prior to 1996 and such assessment should be completed by a first-line supervisor in that time frame. I will also recommend that the Respondent expedite the evaluation and review of any new application Wertz may submit for the educator career program.

I will not recommend that Wertz (and her husband) be granted highest priority consideration for transfer under the Respondent's world-wide transfer program. As explained by the General Counsel, this would involve giving Wertz and her husband consideration before any other employee, including requests by teachers for compassionate reasons, requests by teachers assigned only to one-year areas, and employees requesting transfers pursuant to settlement agreements. From a public policy standpoint, the General Counsel has not persuaded me that Wertz' circumstances demand placement ahead of all employees in these categories. Nor do I find that the remedy, essentially involving a transfer of the employee to another location, is reasonably necessary and would be effective to "recreate the conditions and relationships" with which the unfair labor practice interfered, as well as to effectuate the policies of the Statute, including the deterrence of future violative conduct. The violative conduct occurred at the Giessen Elementary School under the supervision of Principal Flippen-Casper. A traditional cease and desist order, in addition to the above remedy, would be the most effective in recreating the conditions and relationships and deterring

future violative conduct at this installation.

Based on the above findings and conclusions, 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, it is hereby ordered that the Department of Defense Dependents Schools, shall:

1. Cease and desist from:

(a) Lowering Deborah Wertz' assessment of potential for the educator career program, or otherwise discriminating against her in connection with hiring, tenure, promotion, or other conditions of employment, because she engaged in protected activity on behalf of the Federal Education Association.

(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 Statute:

(a) Upon request of Deborah Wertz, have a new assessment of potential completed by a previous, qualified first line supervisor of Wertz and accept such assessment in connection with any new application she may file for the educator career program.

(b) Expedite the evaluation and review of any new application Deborah Wertz may submit for the educator career program.

(c) Expunge from official files all copies, and all references to, the assessment of potential for Deborah Wertz which was completed by Ora C. Flippen-Casper on February 2, 1996.

(d) Post at its facilities at Giessen Elementary School 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 Superintendent, Department of Defense Dependents Schools, Hessen District, 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 ensure that such Notices are not altered, defaced, or covered by any other material.

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Chicago Regional Office, 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, March 17, 1997.

GARVIN LEE OLIVER

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 Defense Dependents Schools 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 lower Deborah Wertz' assessment of potential for the educator career program, or otherwise discriminate against her in connection with hiring, tenure, promotion, or other conditions of employment, because she engaged in protected activity on behalf of the Federal Education Association.

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.

WE WILL, upon request of Deborah Wertz, have a new assessment of potential completed by a previous, qualified first line supervisor of Wertz and accept such assessment in connection with any new application she may file for the educator career program.

WE WILL expedite the evaluation and review of any new application Deborah Wertz may submit for the educator career program.

WE WILL expunge from official files all copies, and all references to, the Assessment of Potential for Deborah Wertz which was completed by Ora C. Flippen-Casper on February 2, 1996.

(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, Chicago Regional Office, Federal Labor Relations Authority, 55 West Monroe, Suite 1150, Chicago, IL 60603-9729, and whose telephone number is: (312) 353-6306.

1. Wertz was the main witness for the General Counsel and Flippen-Casper was the primary witness for the Respondent. There were few differences in their testimony concerning the chronology of events. Flippen-Casper mainly differed with Wertz in broad terms over the purpose or significance of the events. I found Wertz' testimony concerning the details of the various meetings to be forthright and direct and have credited her testimony.

2. ' - -

3. - " " " " ' - " " " "

4. On December 12, 1995, the Union filed a pre-charge notice of intent to file a unfair labor practice charge concerning the December 6 meeting. The notice reflected that a copy was designated for Flippen-Casper, but there is no evidence that she received it. On February 8, 1996, the Union did file a charge with the Chicago region (CH-CA-60422) over the December 6 meeting. An agent of the FLRA General Counsel came to the school to investigate the case in late February or early March 1996 and interviewed Flippen-Casper, among others. The charge was withdrawn on May 17, 1996.

5. On March 11, 1996, the Union filed an unfair labor practice charge against the agency concerning the "bad banana" exercise. The charge was withdrawn on May 17, 1996 (CH-CA-60483).

6. The Respondent established that the three unfair labor practice charges referred to herein were filed after the

February 2, 1996, assessment, and there was no evidence that Flippen-Casper had knowledge of the December 12, 1995, pre-charge in CH-CA-60422.