U.S. DEPARTMENT OF COMMERCE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, NATIONAL OCEAN SERVICE, COAST AND GEODETIC SURVEY AERONAUTICAL CHARTING DIVISION, WASHINGTON, D.C. Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2640, AFL-CIO Charging Party	Case Nos. WA-CA-40661 WA-CA-40662 WA-CA-40665 WA-CA-40668 WA-CA-40701 WA-CA-40812

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **JUNE 19, 1995**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

JESSE ETELSON
Administrative Law Judge

Dated: May 19, 1995
Washington, DC

MEMORANDUM DATE: May 19, 1995

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF COMMERCE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, NATIONAL OCEAN SERVICE, COAST AND GEODETIC SURVEY AERONAUTICAL CHARTING DIVISION, WASHINGTON, D.C.

Respondent

and Case Nos. WA-CA-40661
WA-CA-40662
AMERICAN FEDERATION OF GOVERNMENT WA-CA-40665
EMPLOYEES, LOCAL 2640, AFL-CIO WA-CA-40668
WA-CA-40701
Charging Party WA-CA-40812

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF COMMERCE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, NATIONAL OCEAN SERVICE, COAST AND GEODETIC SURVEY AERONAUTICAL CHARTING DIVISION, WASHINGTON, D.C. Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2640, AFL-CIO Charging Party	Case Nos. WA-CA-40661 WA-CA-40662 WA-CA-40665 WA-CA-40668 WA-CA-40701 WA-CA-40812

Frances C. Silva, Esquire
Bruce I. Waxman, Esquire
For the Respondent

Arnold A. Hammer, Esquire
Stephen G. DeNigris, Esquire
Laurence M. Evans, Esquire
For the General Counsel

Before: JESSE ETELSON
Administrative Law Judge

DECISION

Statement of the Case

These consolidated cases involve a number of allegations that the Respondent ("NOAA" or "the Agency") violated provisions of the Federal Service Labor-Management Relations Statute (the Statute). Included in the complaints in these cases are allegations that NOAA violated sections 7116(a)(1), (2), (4), and (5) of the Statute. Some of the cases were consolidated before hearing and the others were consolidated at the hearing for the purpose of making a single record. At the request of Counsel for the General Counsel, I have kept all of the cases consolidated for the purpose of issuing a single decision. Counsel for the General Counsel and for NOAA filed post-hearing briefs, in traditional form and on

diskettes, which were useful in the preparation of this decision.[1]

General Background

The events underlying all of these cases occurred at the Aeronautical Charting Division (ACD) of Coast and Geodetic Survey, a "line office" within National Ocean Service, an activity within NOAA, a primary national subdivision of the Department of Commerce. The Charging Party (the Union) is the exclusive representative of some of ACD's employees in Riverdale, Maryland, and Washington, D.C. Other employees at the Riverdale facility were unrepresented at the time of these events. The union activities of Brian Anthony-Jung (Anthony), who plays a central role in most of these cases, will be described first under Case No. WA-CA-40701 and, as later activities of his become relevant, in the cases that follow.[2]

CASE NO. WA-CA-40665

In this case, it is alleged that Foreman Melissa Hartman implemented a Total Quality Management (TQM) program in the Photographic Unit, part of the Reproduction Branch of ACD, without providing the Union with notice and an opportunity to negotiate on the decision to implement the program. NOAA admits that it implemented the program, but denies, most notably, the allegation that it implemented "the change" (referring to the implementation of the program) without giving the Union notice and opportunity to bargain. NOAA argues, among other things, that implementation had no more than *de minimis* impact on employees' conditions of employment.

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[1] Counsel for NOAA moved for the correction of numerous minor errors in the transcript of the hearing. After seeking clarification from the parties, I grant that motion with the following modifications:

(1) NOAA withdrew its request to correct pp. 100, 346, and 771.

(2) On p. 694, l. 8, "that any more" is corrected to "not any more."

[2] Counsel for NOAA made extensive use of incidents in Anthony's history for impeachment purposes. I have not been persuaded that Anthony is an inherently incredible witness. However, I do not agree with Counsel for the General Counsel that there was anything improper about the manner in which the impeachment effort was pursued.

Evidence Presented

General Counsel's Case

Norman Rhodes is the President of AFGE Local 2640. The unit represented by the Union consists of the Reproduction Branch located in Washington, D.C. and the Distribution Branch in Riverdale, Maryland. Rhodes works in the photographic unit in the Reproduction Branch, in a bargaining unit position. During his tenure as President of the Union, Rhodes has negotiated collective bargaining agreements, processed grievances and generally represented unit employees in labor relations matters. He characterized the relations between the Union and management for the year and a half preceding the hearing as "very poor."

Melissa Hartman became foreman of the photographic unit on March 7, 1994. One of Hartman's first priorities upon assuming her new job was to implement TQM in her shop. She mentioned TQM to Rhodes but never met formally with him in his capacity as Union president. Rhodes never saw the draft of the TQM implementation plan that Hartman said she left with him on March 29. Because Hartman did mention the concept of TQM to Rhodes, however, he discussed the topic with the Union Executive Board. Rhodes told Hartman that he had no problem with the concept of TQM, and that, in fact, he thought it could be a useful tool if implemented and managed properly. However, he consistently expressed his concern that implementation should be broader than only in Hartman's shop.

Rhodes testified that the Union's position about TQM is based on the fact that the product that the photographic unit produces begins in the Aeronautical Charting Division in Silver Spring. Unless TQM included the Silver Spring employees, the product would reach the photographic unit in a state not subject to TQM, begun by employees who were unaware of the needs of the photographic unit. The Union felt that for TQM to be effective, it had to apply to the product throughout the entire production process.

The Union's practice is to discuss any proposals or items that affect the employees it represents among members of its Executive Board, to respond to all proposals, even those with which the Union agreed. Rhodes met on April 9, 1994, with the Executive Board, consisting of himself as President, Brian Anthony-Jung (Anthony), Vice President, and Chief Shop Steward Claude Travis. Rhodes expressed his concern that Hartman was talking about implementing TQM only within the photographic unit. They agreed that the Union would agree to TQM, but that they would want to negotiate its implementation beyond the one unit level, meaning either at the Branch or Division level. They agreed that, as "there was a lot of talk

going around," they would wait to be presented with specific proposals.

On April 18, Rhodes received Hartman's memo explaining TQM (G.C. Exh. 2) in his mail box at work. Rhodes again called the members of the Executive Board to let them know he had received the document, describing how TQM was supposed to work in the photographic unit alone. They "determined, the same as before, that we wanted to negotiate before implementation of the TQM." Rhodes instructed Anthony to draft a letter for Rhodes' signature to Carol Beaver, head of the Aeronautical Charting Division, objecting to the unilateral implementation of TQM.

The next day, April 19, Anthony called Robert Souders, Chief of the Reproduction Branch and told Souders that the Union's position was generally in favor of TQM, but that they did not want it in only the one unit. Souders told Anthony that he was concerned with having to meet with the Union and treat it "as pretty much equal managers." Regarding the Union's position on TQM, Souders said that he was not "up to speed on that subject" and would get back to Anthony.

On April 21, Rhodes and Chief Steward Travis met with Hartman and Palmer Rutledge, a supervisor in the pre-press unit, in the office of Earnest Shepard, then chief of pre-press operations. Rhodes reiterated the Union's position that it did not agree to implementation of TQM at the unit level without negotiations. Nevertheless, Hartman took her draft memo to Souders and obtained his approval.

On the following day, April 22, Hartman conducted a meeting with the employees of the photographic unit. The agenda sheet for the meeting included the following:

> 3. TQM:
>
> -Concurrence by branch chief to implement TQM in the Photo Unit. Effective immediately.
>
> -Return attachments to me by 4/29 to indicate your areas of interest.

After the Union learned of implementation of TQM, on April 18, Rhodes had asked Anthony to prepare a letter to Carol Beaver, Chief of the Aeronautical Division, protesting the unilateral action. That letter, dated April 28, 1994 and signed by Rhodes, stated, in part:

> The Employer does not have nor has the Employer ever had the Union's permission to create or imple-ment TQM anywhere within the bargaining

unit. Ms. Beaver, you should know that the Authority's position in case law on TQM is very clear. You must have the Union's prior permission before you can implement or even create TQM, see case the Depart-ment of the Navy, Pearl Harbor Ship Yard, Pearl Harbor, Hawaii, 29 FLRA 1236 (1987).

The Respondent did not answer that letter.

NOAA's Case

(The sequence of events, as presented in the General Counsel's case, is largely undisputed insofar as representatives of management were involved. I shall present here those aspects of NOAA's evidentiary showing that differ materially from the version of General Counsel's witnesses or add potentially significant details not previously covered.)

TQM was not a new concept at the Reproduction Branch. As early as 1991, TQM existed in the Reproduction Branch. It also existed at the Division level. Foreman Hartman was aware of the 1991 TQM initiative in the Reproduction Branch and of the Photo Unit Process Improvement Team, as well as other Agency actions since then. She also was aware, however, that the group leader of the TQM team in the photo unit had passed away a few months before Hartman became foreman. TQM was dormant in the photo unit when she took over. She sought "to breathe some life back" into it.

One of Hartman's first acts was to meet with Mr. Rhodes to establish a working relationship with him as the president of the Union and to share ideas and philosophies, including those on TQM. Rhodes told her that TQM was a very good instrumental tool. Hartman specifically solicited his ideas on TQM. Moreover, Rhodes attended a meeting on March 11, 1994, with all photo unit employees where Hartman discussed her thoughts on TQM.

About two weeks later, on March 29, Hartman developed a draft of her proposed TQM program and left the draft for Rhodes in his office. The draft indicated on its face that it was a draft. Hartman placed a "yellow sticky" on the draft, dated it, signed it and placed it on Rhodes' desk.

On several occasions after having left the draft for Rhodes, Hartman inquired whether he had any changes to her draft initiative. She had at least four conversations with Rhodes about her draft. On one of those occasions, Rhodes told her that her draft "looked fine, that if anything, maybe he'd have some minor suggestions to make."

Thus, after receiving nothing from Rhodes in writing and after having inquired about any input he might have on her TQM draft on at least four occasions, Hartman asked both her supervisor, Mr. Shepard, and NOAA's Labor Relations Office if she had given the Union sufficient time to respond to her TQM draft. Both Shepard, who had asked Hartman periodically if she had received a response from Rhodes, and NOAA's Labor Relations Office concluded that she had allowed Rhodes sufficient time to respond and present any proposals.

On April 18, Hartman put her draft initiative into its final form by placing the draft on letterhead and adding the names of those who would be given copies. She then placed a copy of the memorandum in each photo unit employee's mailbox.

Mr. Souders testified that he never spoke to Anthony about TQM. Although, as an industrial engineer, he does not accept TQM as a viable concept, he would have remembered had he spoken to a Union official about TQM because, "[w]hile I may have a lack of interest in TQM, I am not disinterested in what the Union tells me."

At the April 21 meeting attended by Hartman, Shepard (not Rutledge, as Rhodes testified) Rhodes, and Travis, Hartman specifically asked Rhodes if he would accept TQM in the photo unit if Branch Chief Souders concurred on the initiative. Rhodes said he would accept TQM at that level. He never indicated that the Union wanted to negotiate over the issue, but stated that, if Hartman's initiative was endorsed at the branch or division level, the Union would accept it.

Hartman left the meeting, went to Souders, and showed him the initiative. He concurred and signed the memorandum. The next day, April 22, Hartman saw Rhodes in the hallway and handed him the TQM memorandum with Mr. Souders' signature. She also told Rhodes there would be a photo unit meeting later that day to discuss TQM and other issues. Hartman posted a notice of the meeting, which she set for 11 a.m. that day, on the bulletin board for all general employee notices.

The meeting started about ten minutes late. Rhodes arrived in the meeting almost ten minutes later. Hartman stopped the meeting to brief Rhodes on what had taken place so far. During the meeting, Rhodes raised several concerns about overtime, performance appraisals, and TQM.

Evidence on the Nature of the TQM Implementation

(At the hearing, I expressed concern as to what the witnesses meant when, as they all agreed, Hartman "implemented" TQM. In response, the General Counsel elicited uncontradicted testimony from Hartman on cross examination.)

Hartman explained that she formed evaluation teams, or process evaluation teams, and had asked for areas of interest in an attachment to the memorandum that was distributed on April 18. The teams were to look at new equipment or technology and provide input into the review of equipment and techniques used in the unit, including new materials and equipment under review for possible use in the shop. Unit employees have been directly involved in new material testing and review, and some employees have had the opportunity to go on review trips to look at new equipment. At the time of the hearing, they had not begun to meeting regularly in their teams.

Findings of Fact

For reasons that will appear shortly, I find it unnecessary to resolve any of the disputed issues of fact. I accept the occurrence of those events that undisputedly did occur--that certain documents were issued and certain meetings were held. Whether other conversations occurred, and whether the account of one witness or another is more accurate, I find to be irrelevant for the disposition of this case. I rely principally on the undisputed testimony of Hartman as to what actually occurred when she "implemented" TQM.

Conclusions

Section 7116(a)(5) of the Statute makes it an unfair labor practice for an agency to refuse to bargain with an exclusive representative of its employees. An agency must provide the exclusive representative with notice of proposed changes in negotiable conditions of employment affecting unit employees and an opportunity to bargain over those aspects of the changes that are negotiable. Even if the subject matter of the change is outside the duty to bargain pursuant to section 7106(a) of the Statute, the agency must bargain about the impact and implementation of a change in conditions of employment that has more than a *de minimis* impact on unit employees. *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Hartford District Office, Hartford, Connecticut*, 41 FLRA 1309, 1317 (1991). If an agency seeks to change a matter over which the union is not required to bargain, even giving the union an opportunity to bargain is insufficient; the agency must secure the union's **concurrence**. *Department of the Navy, Pearl Harbor Naval Shipyard, Pearl Harbor, Hawaii*, 29 FLRA 1236, 1257 (1987) (*Pearl Harbor*).

Counsel for the General Counsel contends that NOAA failed to meet its bargaining obligation before implementing its TQM program. Counsel asserts, moreover, based on *Pearl*

Harbor, that the TQM program was a **permissive** subject, requiring not only negotiations but the Union's consent.[3] NOAA contends that it did afford the Union notice and opportunity to bargain, but that the Union President either agreed to the TQM program on a condition that NOAA met--approval at a higher level--or slept on the Union's right to request bargaining. NOAA also argues that implementation of the program was not a change but merely a "revitalization" of an existing program, and that if there were any changes they were *de minimis*. In the conclusion to its brief, NOAA reformulates that argument to contend that there were no changes in terms and conditions that required bargaining. That is the key to this case.

Section 7106(a) of the Statute gives an agency the right to perform certain functions without bargaining over the decision to exercise its managerial authority in those enumerated respects, even if such exercise changes employees' conditions of employment. Such exercise of authority is, in the parlance of Authority case law, "nonnegotiable" as to substance. Among the enumerated nonnegotiable decisions is the assignment of employees (section 7106(a)(2)(A)) and of work (section 7106(a)(2)(B)). Section 7106(b)(1), however, makes certain exercises of management authority permissive subjects for bargaining at the election of the agency. Among these managerial decisions are "the technology, methods, and means of performing work[.]" Under existing Authority precedent, however, the nonnegotiability of a matter under subsection (a) makes its status under subsection (b) irrelevant except in circumstances not present here. *See District No. 1, Marine Engineers Beneficial Association (AFL-CIO), Panama Canal Area and Panama Canal Commission*, 49 FLRA 461, 465 n.3 (1994); Federal Labor Relations Authority, Office of the General Counsel, *Memorandum: Referral of a Major Policy Issue for a General Ruling* 6-7 (February 28, 1995).[4]

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[3] "Permissive" subjects are those matters which are excepted from the obligation to negotiate by section 7106(b)(1) of the Statute and those matters which are outside the required scope of bargaining under the Statute. *U.S. Department of the Treasury, Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Cincinnati, Ohio District Office*, 37 FLRA 1423, 1431 (1990).

[4] In this memorandum, together with the simultaneously released *Advice Memorandum No. 95-3*, the Authority's General Counsel implicitly acknowledges that, notwithstanding Executive Order 12871 (October 1, 1993), a refusal to bargain over a change that falls within both sections 7106(a) and (b)(1) does not violate the Statute, at least unless the change was susceptible to union proposals that were responsive **and** that would not implicate 7106(a).

In *Pearl Harbor*, on which Counsel for the General Counsel relies here, the Authority found a particular "Quality Circle Program" to be a matter that the agency could not impose on the union, or even compel it to discuss. The Authority adopted Judge Arrigo's factual finding that the quality circles (QCs) were authorized to consider "matters concerning personnel policies or practices or other general conditions of employment[,]" and that they dealt with matters related to employee training, establishing a lunch facility, water fountains, safety, and awards. 29 FLRA at 1257. Judge Arrigo concluded that "by design and practice, the QCs performed the function of dealing with management concerning conditions of employment, the rightful and exclusive role of the collective bargaining representative." *Id.* at 1528.

Judge Arrigo's (and the Authority's) conclusion that the creation and operation of the QC Program was a permissive subject of bargaining for the Union was based on the rationale of *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1960). The *Cabot Carbon* rationale, as adapted in *Pearl Harbor*, is that "dealing" with management over matters about which it is "normally the exclusive right of the Union" to represent the employees (29 FLRA at 1528) usurped the Union's function. *Cabot Carbon* and decisions of the National Labor Relations Board following it were concerned with the provision of the National Labor Relations Act (NLRA), section 8(a)(2), making it an unfair labor practice for an employer to dominate, interfere with, or support a "labor organization." [5]

The Statute's definition of "labor organization," (section 7103(a)(4)) is generally similar to the NLRA definition regarding the organization's **purpose**. It differs in other respects, notably that one element of the definition is that employees not only participate but also pay dues. This is an unlikely feature of an employee participation program such as TQM, thereby presumably avoiding a violation of section 7116(a)(3), the Statute's counterpart to section 8(a)(2) of the NLRA. Nevertheless the **policy behind** *Cabot Carbon* informs the Authority's conclusion in *Pearl Harbor* that an exclusive representative should not be required to bargain over the establishment of a program that would infringe on its exclusive status by performing its statutory functions.

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[5] Section 2(5) of the NLRA defines "labor organization," as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of **dealing with** employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or **conditions of work**" (emphasis added).

The Labor Board has been called upon more recently to examine various forms of employee participation programs in light of the *Cabot Carbon* doctrine. In a highly publicized decision in which the Board found that certain "Action Committees" were "labor organizations," it also noted that "an organization whose purpose is limited to performing essentially a managerial or adjudicative function is not a labor organization under Section 2(5)." *Electromation, Inc.*, 309 NLRB 990, 995 (1992).

Not long after *Electromation*, the Board considered the question of what activities of an employee committee, irrespective of the matters it addressed, constituted "dealing with" management. At issue was whether, in a situation like the instant case, where there is an exclusive representative, establishment of the employee committee constituted an unlawful bypass of the union and a consequent violation of the duty to bargain. A majority of the participating Board members held that "brainstorming" was not "dealing," if its purpose was simply to develop "a whole host of ideas" rather than to make proposals to management. Nor is the sharing of information with the employer "dealing," the majority decided, even if management participates by having members on the committee, as long as their powers on the committee do not include the rejection of proposals. *E.I. du Pont de Nemours & Co.*, 311 NLRB 893, 894-95 (1993).[6]

Like the QCs in *Pearl Harbor*, the TQM teams in the instant case are designed to address matters that could affect conditions of employment. However, the "permissive subject" finding in *Pearl Harbor* is based on the QCs having a purpose of "**dealing with**" management concerning **negotiable** subjects.

Putting aside the question of whether the TQM program was new or merely revitalized, everyone agrees that Hartman "implemented" a TQM program in her unit. However, "TQM" and "implement" are terms of art. It is essential that we know what we are talking about when we talk about implementing a TQM program and this TQM program in particular.

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See also Electromation at 994 n.21. Member Devaney, concurring in *du Pont*, was "uncomfortable" in some respects with the majority's discussion of the meaning of "dealing with," but agreed that "a brainstorming group of employees who work together, with or without managers, to come up with suggestions and recommendations for management to consider is not 'dealing with'." 311 NLRB at 902 n.10. One of the persuasive considerations for Member Devaney was that participating employees understand that they are acting on management's behalf. *Id.*

In a report to the President, the Merit Systems Protection Board described TQM, "as applied in Federal agencies[, as] a voluntary Governmentwide initiative to promote quality throughout the Civil Service. Some of its key features are its emphasis on customer needs, teamwork, long-term planning, and continuous improvement of every aspect of how work is done." U.S. Merit Systems Protection Board, *Federal Blue-Collar Employees: A Workforce in Transition* 35 (1992). The report quotes another study defining TQM as "involving everyone in an organization in controlling and continuously improving how work is done, in order to meet customer expectations of quality." *Id.*, quoting David K. Carr and Ian D. Littman, *Excellence in Government: Total Quality Management in the 1990s* 3 (no publication date given). TQM might, however, also mean other things to other people. What is directly pertinent is the substance and the implementation of the TQM program that gave rise to this case.

The TQM program that Hartman implemented here involved the assignment of employees to teams to develop and share information about the technology, material, and "process" of the unit's operation, including consideration of new technology and equipment and alternative materials. This is classic section 7106(b)(1) subject matter. However, even if these were negotiable subjects, there is no basis for finding a bargaining obligation.

The alleged violation here is a unilateral change in a negotiable condition of employment. That is the conduct Authority case law refers to when it speaks of "implementing" before bargaining. *See, e.g., Space Systems Division, Los Angeles Air Force Base, Los Angeles, California*, 45 FLRA 899, 903-05 (1992). The only change in conditions of employment that occurred here, if any, was that employees were assigned to the teams. There is no evidence of any changes in other conditions of employment resulting from the consideration that the TQM teams gave to them. Moreover, there is no evidence of "dealing with" management. The record is silent about any presentation of ideas to management, in the form of proposals or otherwise, and does not even show how management participates, if at all, in the teams' work.

The Authority has considered the negotiability of assignments of employees to TQM teams. In *American Federation of Government Employees, Local 2612 and U.S. Department of the Air Force, Griffiss Air Force Base, Rome Laboratory, Rome, New York*, 46 FLRA 578 (1992) it held that a proposal to prohibit mandatory employee assignments to TQM teams was nonnegotiable as to substance and impact. The Authority also held that the proposal was not an appropriate arrangement within section 7106(b)(3) of the Statute because it interfered

excessively with management's right to assign work. *Id.* at 581.

Shortly after *Griffiss*, the Authority had before it in *U.S. Department of Defense, Defense Contract Audit Agency, Central Region and American Federation of Government Employees, Local 3529*, 47 FLRA 512 (1993) (*DCAA*), a similar proposal to insure that participation in TQM was voluntary. The Authority reaffirmed that such a proposed provision is nonnegotiable as to substance and does not constitute a negotiable appropriate arrangement. It also held that the subject of the proposed provision was not a permissibly negotiable matter under section 7106(b)(1) but involved a work assignment within the meaning of section 7106(a)(2)(B). Further, the Authority rejected the union's contention that the provision was a negotiable procedure, finding that such a restriction would directly interfere with the agency's right to assign work. *Id.* at 519-21. *See also American Federation of Government Employees, AFL-CIO, Local 1395 and Social Security Administration, Great Lakes Program Center, Chicago, Illinois*, 14 FLRA 408, 409-10 (1984) (proposal for joint labor-management committee to develop performance expectations was nonnegotiable under section 7106(a) because union participation directly interferes with management right to direct employees and assign work).7

I therefore conclude that NOAA's implementation of this TQM program was not the kind of action the Authority finds unlawful when it determines that an agency has unilaterally "implemented" a change in conditions of employment. I find no refusal or failure to provide the Union with the opportunity to bargain over negotiable changes because no negotiable changes were made, were imminent, or were even specifically

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This does not imply that such employee involvement, or union participation in such programs by voluntary agreement, is to be discouraged. *See* Member Haughton's concurring opinion, *id.* at 414-15.

In the instant case, the only aspect of the TQM program over which the Union expressed any specific concern, according to its representatives, was the scope of the organizational unit in which the program should be implemented. This goes to the substance of the decision to implement a TQM program, not to "procedures" to be observed in exercising managerial authority. Nevertheless, I do not find that the Union waived its right to bargain over any negotiable impact and implementation issues connected with changes resulting from the TQM program. *See Bureau of Engraving and Printing, Washington, D.C.*, 44 FLRA 575, 583-84 (1992). No negotiable changes having been made yet, or even announced, the Union has not yet had occasion to request such bargaining.

contemplated. If and when such changes are contemplated, bargaining may be required consistent with the Statute. *See DCAA* at 522. Accordingly, I recommend that the Authority dismiss the complaint in Case No. WA-CA-40665.

CASE NO. WA-CA-40701

In this case it is alleged that a reprimand given to Brian Anthony-Jung (Anthony) on June 22, 1994, was a form of discrimination, motivated by Anthony's protected activities, including the filing of unfair labor practice charges and a representation petition. The complaint alleges violations of sections 7116(a)(1), (2), and (4) of the Statute.

Findings of Fact

Union President Rhodes, a bargaining unit employee, works in the Reproduction Branch of ACD in Washington, D.C. Riverdale, Maryland, is a few miles outside of Washington. Until 1993, the Union had no active presence at Riverdale in the form of a Union official who was stationed there. This changed in February 1993, when Anthony, who had been employed there, in a unit position in the Distribution Branch, since 1991, became the Union's vice-president.

Anthony took on an active role. He filed unfair labor practice charges and grievances and negotiated the settlement of charges. In February 1994 Anthony testified, at an unfair labor practice hearing, that the chief and deputy chief of the Distribution Branch made coercive statements to him with respect to his union activities, and that his supervisor told him she was giving him a lower rating on his performance progress review because his union activities were keeping him away from his work and that "the people upstairs" had problems with him because of the negotiations, so that she had no choice but to rate him poorly.[8]

In March 1994 Anthony became a computer specialist in the Systems Development Group (SDG) within the Requirements & Technology Staff of ACD, an organizational unit that was outside the bargaining unit. While it is not clear exactly how extensive Anthony's union activities had been up to that point, they had been sufficiently noted by management that his new supervisor, Robert Douglas, had been instructed, on the first day that Anthony reported in, to make sure Anthony understood that no union activities were to be conducted during business hours (Tr. 714).

Douglas had a somewhat vague impression that the Union had negotiated a scheduled 15-minute break in the morning and

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[8] The date of the unfair labor practice hearing is admitted in the answer. I take official notice that Anthony so testified, as reported in OALJ 95-19, Case Nos. WA-CA-30663, 30834, 31012, and 31015. The findings and conclusions of Judge Oliver in those cases are, however, irrelevant to my consideration of the **merits** of the instant cases.

the afternoon for bargaining unit employees (Tr. 707).[9] On March 16, nine days after Anthony began in SDG, Douglas asked Fred Anderson, new Chief of the Distribution Branch, to sit in on a meeting to which he called Anthony.[10] Douglas directed Anthony to discontinue any union activities during his working hours and said that union activities were permitted before and after work and during lunch. The next day, March 17, Anthony filed a representation petition for a unit of SDG employees.

On May 17, Douglas issued a written warning to Anthony for disrupting operations in the Distribution Branch by interrupting Anderson at work on three occasions without having scheduled an appointment. On May 27, during his lunch hour, Anthony delivered a letter to Anderson's office, complaining about an alleged failure to comply properly with a May 6 order of the Authority, involving the Distribution Branch, in an earlier unfair labor practice case.

That afternoon, Anderson discovered Anthony talking to "Lilly" Musolino, a Distribution Branch employee, at her desk. Anderson had just left a meeting with Union President Rhodes, on a union-management matter, and Rhodes was now also in the vicinity. Anderson asked Musolino whether she was on a break. Musolino answered with an ambiguous shoulder-shrug, and Anderson asked her to help him find a letter on the desk of a supervisor who was not there at the time. Anderson and Musolino left and returned shortly. Anderson told Anthony that he was interrupting work and returned to his office.

An undisclosed but apparently short time later, Anderson went back to where the previous conversation occurred and saw Anthony and Rhodes near the door to a salesroom nearby. While the witnesses differ sharply as to what occurred next, all that I find relevant is that Anderson believed he heard Rhodes talking about having to renegotiate the schedule for salesroom hours, the subject of the letter Anthony had delivered to Anderson a few hours earlier.

Anderson returned to his office and called Musolino in. His testimony is that he asked her again whether she had been

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[9] I have not been able to find a definitive reference to this provision in the record. However, the parties seemed to have understood that such a provision existed. NOAA, in its brief, refers to the fact that Anthony, now being outside the unit, could not rely on any past practices governing work in the Distribution Branch. Whatever practices these may have been, I infer that management **believed** that Anthony, while in the Distribution Branch, had used break time for union activities.

[10] Charles Frederick Anderson had formerly been in Anthony's chain of command but was no longer, nor was he in Douglas'.

on her break when she was talking with Anthony. Musolino told him that she still didn't know, but that Anthony had walked up to her when she was at the soda machine and that they had gone back to her desk and started talking. Anderson then asked Musolino whether she had had a break that afternoon. She told him that she had not. Anderson told Musolino that he had no problem with anything she did and that that was the end of it.

On May 31, the following working day, Anderson wrote a memorandum to Douglas, consisting of a report of Anthony's conducting union business in front of the sales room (Tr. 608, 640-41). On June 22, Douglas issued an official reprimand to Anthony. In pertinent part, it states:

> On May 27, 1994, at approximately 3:20 PM, you were observed and heard by Mr. Anderson conducting union business with the President, AFGE Local 2640, Norman Rhodes.
>
> * * *
>
> You were on clear notice that you are not to engage in union business during working hours. I find your continual union activities during your tour of duty to be a flagrant disregard of my instructions to you on this matter. I note that you were issued a memorandum of warning dated May 17, 1994, which warned you to refrain from activities that are disruptive to operations of the Distribution Branch. Your failure to follow my instructions negatively impacts on operations and is disruptive to normal behavior. I will not tolerate future misconduct of this nature.

Analytical Framework

The parties agree that the basic framework for analysis of this case is to be found in *Letterkenny Army Depot*, 35 FLRA 113 (1990), where, at 118, the Authority articulated the requirements for making a *prima facie* showing in all cases of alleged discrimination. Thus, the General Counsel must establish that:

> (1) the employee against whom the alleged discrim-inatory action was taken was engaged in protected activity; and
>
> (2) such activity was a motivating factor in the agency's treatment of the employee . . . .

This, however, is only an outline, not a complete blueprint, of a *prima facie* case. The complexities of the instant case require more detailed consideration of the kind of showing necessary to establish part (2) of the *Letterkenny* formulation. Since the issue is motivation, there must be some evidence to connect the protected activity and the agency's treatment. Ordinarily that linkage is shown by evidence that the agency knew of the protected activity and that there was antiunion animus. *Veterans Administration Medical Center, Bath, New York and Veterans Administration, Washington, D.C.*, 12 FLRA 552, 577 (1983).

The evidence of each element of discriminatory motivation may be circumstantial, the actual motive for the action taken being a state of mind, something rarely susceptible to direct proof. *Id.; Abiline Sheet Metal, Inc. v. NLRB*, 619 F.2d 332, 338-39 (5th Cir. 1980); *NLRB v. Warren L. Rose Castings, Inc.*, 587 F.2d 1005, 1008 (9th Cir. 1978). An inference of antagonism toward a particular exercise of protected activity may be drawn, in appropriate circumstances, even without direct evidence of animus. *See Sawyer of Napa*, 300 NLRB 131, 152 n.46 (1990); *cf. United States Forces Korea/ Eighth United States Army*, 11 FLRA 434, 436 (1983) (alleged discriminatee was "an active and aggressive union leader who could have been a thorn in management's side"). Thus, an action taken against a leading union advocate whose services were previously valued by the employer may be sufficient evidence in itself of antiunion animus. *NLRB v. Ri-Del Tool Mfg. Co.*, 486 F.2d 1406 (mem.), 84 LRRM 2630, 2631 (7th Cir. 1973); *cf. 22nd Combat Support Group (SAC), March Air Force Base, California*, 27 FLRA 279 (1987) (discriminatory motivation found where only direct evidence of agency official's reaction to employee's filing of a grievance was his statement that he had been straightforward with employee but that employee had brought the union into the dispute).[11] And where animus is an element of the proof, the relevant inquiry is the acting official's attitude toward the protected activity most closely related to the time the action was taken, whether or not animus was engendered by the employee's previous protected activity. *See Department of the Army,*

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This is not to say, of course, that an inference of animus **must** be drawn whenever certain factors are present, or that such inferences should be drawn lightly.

Headquarters, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina, 43 FLRA 1414, 1428-29 (1992).[12]

Under *Letterkenny*, the agency can rebut the General Counsel's *prima facie* case by demonstrating, by a preponderance of the evidence, 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.

There is, in addition, an important aspect to the instant case that requires a weighing process beyond, but perhaps to be exercised in conjunction with, the *Letterkenny* formulation and its normal components. This special consideration arises from the fact that the reprimand was given expressly as discipline for Anthony's suspected union activities. The suspected union-related conversation, if it occurred, occurred during time not officially excluded from the working day. Nor was Anthony authorized to use official time for union activities. An agency is free to prohibit activities not connected with their work during working time. *Peyton Packing Co.*, 49 NLRB 828, 843 (1943).[13] However, I conclude, in agreement with the Labor Board, that such a prohibition may not single out union activities, and that disciplining an employee for engaging in union activities in those circumstances constitutes unlawful discrimination. *Premier Maintenance*, 282 NLRB 10, 16 (1986); *Montgomery Ward*, 269 NLRB 598, 599 (1984). The factual issue to be determined in such cases is whether the purpose of the discipline was to promote workplace efficiency or to cool the employee's union advocacy. *See Restaurant Corp. of America v. NLRB*, 827 F.2d 799 (D.C. Cir. 1987) (*Restaurant Corp.*); *Brigadier Industries*, 271 NLRB 656 (1984), review denied *sub nom. Clothing & Textile Workers v. NLRB*, 776 F.2d 365 (D.C. Cir. 1985).

It remains to complete the analytical framework by deciding how the *Letterkenny* formulation can be harmonized

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There may be cases where unlawful motivation is shown by linking the treatment of one employee to the protected activity of another. The occasion to discuss such a situation, as well as the applicability of the "inherently destructive" principle in lieu of **any** proof of antiunion motivation, arose before me in *Department of the Navy, Naval Underwater Systems Center, Newport, Rhode Island*, Case No. 1-CA-90022 (1990), ALJ Decision Reports, No. 91 (Aug. 29, 1990).

13
Except for the availability of official time under circumstances set forth in section 7131 of the Statute, the *Peyton Packing* doctrine is presumably applicable in the Federal sector.

with the principle that discipline for engaging in union activities even during working time is unlawful if such activities are singled out. I conclude that, as in any other case of alleged discrimination, the General Counsel must establish a *prima facie* case based on an employee's **protected** activity.[14] At that point, if the agency relies on the union activities conducted during working time as its legitimate justification, it would normally be required to show, by a preponderance of the evidence (either direct or circumstantial) at least that its action against the employee was consistent with its treatment of employee activities of comparable disruptive effect.[15] Contrary indications would be that the union activities in question were monitored more vigorously or treated more harshly than other non-work-related activities during working time. *See Restaurant Corp.* at 806-09; *Imco Container Co.*, 208 NLRB 874, 878-79 (1974).

Discussion and Conclusions

Anthony's prominence as an aggressive union official is undisputed. I find it highly significant that, immediately upon his transfer to the SDG, his new supervisor was instructed that Anthony was not to conduct union activities during working hours. Regardless of the legitimacy of this concern, it indicated management's heightened sensitivity to Anthony's union role.

Until then, Anthony's union activities had been at least tolerated, and, as NOAA notes, had not prevented him from receiving a promotion into his SDG position. However, not only did he continue his aggressive monitoring of existing union-management disputes, but he promptly filed a petition to have the Union certified as the exclusive representative of previously unrepresented employees within the Requirements &

14
Here, for reasons set forth under "Discussion and Conclusions," I find that there is a *prima facie* case based on Anthony's previous protected activities. Therefore I need not address the question of whether, for *Letterkenny* purposes, his alleged union-related conversation conducted during working time was presumptively protected, subject to the agency's showing that it was prohibited for legitimate work-related reasons, or was presumptively unprotected, subject to a showing that it was prohibited because it was union-related.

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In *Brigadier Industries*, at 664, the administrative law judge applied to such a situation the Labor Board's *Wright Line* analysis, which is the same as *Letterkenny*. *See Letterkenny* at 122.

Technology Staff, of which SDG is a component.[16] The day of the incident that prompted Anderson, on the following working day, to report Anthony's conduct, Anthony had delivered a letter to Anderson complaining about an alleged failure to comply properly with an order in a previous unfair labor practice proceeding. Anderson's report itself involved suspected union activity, albeit during working hours.

This combination of circumstances warrants the inference that Anthony's previous and undisputedly protected activities were at least a motivating factor in Anderson's decision to make a written report to Supervisor Douglas. Douglas, as noted, had been instructed about management's concern over the extent of Anthony's union activities, as soon as Anthony had been assigned to him. Douglas apparently made no independent investigation into Anthony's alleged May 27 misconduct but based his determination of what occurred on Anderson's report. Douglas testified that "other people in the Distribution Branch . . . backed up what Mr. Anderson said," but none of the alleged incidents involving the other people he named are even suggested in the reprimand letter as contributing factors. Therefore, (as stated in NOAA's brief) I find that it was Anderson's report that resulted in the reprimand. As Anderson's report was motivated at least in part by Anthony's union activities, including the representation petition he filed, I find that the General Counsel has established a *prima facie* case that the reprimand was issued in violation of sections 7116(a)(1), (2), and (4) of the Statute.

NOAA contends that the reprimand was a legitimate and relatively mild corrective action in response to a "blatant disregard of supervisory instructions" to refrain from union activities during working hours. Even if it had considered Anthony's protected activity, which it denies, NOAA states that it would have issued this reprimand in its absence.

I find these arguments unavailing. Having concluded that the protected activity was a motivating factor, I must require NOAA to demonstrate a legitimate business justification that eliminates the protected activity as an actual cause of the discipline. *See Letterkenny* at 118-19. As a preliminary matter, I have no way to evaluate the suggestion that Douglas took "the least harsh corrective action warranted." In order to be equipped to do so I would have to know more about NOAA's personnel policies or to take

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The petition, signed by Anthony, was required to be served on the agency. The circumstances, including the fact that Anthony had become virtually synonymous with the Union's presence at the Riverdale facility, warrant the inference that management, including Anderson and Douglas, knew or suspected by May 27 that it was Anthony who filed the petition.

notice of other applicable rules for discipline of unrepresented employees, the nature of which I have not been made aware.

I am not persuaded that Anderson's reaction to the May 27 incident was a concern for efficiency apart from his belief that Anthony was talking about union business. Anderson observed Anthony briefly during two different conversations over a time span that has not been established. Anthony was undoubtedly away from his work station during this period, and was not on an official break, but he was not subject to any restriction about leaving his work area "to get a cup of coffee or something like that." The expected practice was simply to avoid interrupting someone else who was working. (Tr. 706-08.) The first conversation in which Anderson discovered Anthony was with employee Musolino, who apparently was not on an official break while talking to Anthony. However, when Anderson later questioned Musolino about it, she told him that they had met at the soda machine and had gone back to her desk. Anderson did not testify that he attempted to allocate the responsibility, between Anthony and Musolino, for continuing their meeting in this fashion. In any event, he told Musolino that he had no problem with anything she did. Nor is there any evidence that he included this conversation in his report to Douglas.17

Instead, it was the second conversation, occurring shortly afterward, involving Rhodes and, at least in Anderson's mind, union business, that gave Anderson sufficient concern to report it. Rhodes was not at work, having just finished a meeting with Anderson on union-management business, and Anderson expressed no concern about Rhodes' return to his worksite. Anderson testified that he reminded Anthony that he had been warned about interrupting branch operations. He also told Rhodes, or both of them, that they were blocking the door to the sales room. Anderson said nothing to Anthony about being away from his work station. He did not ask Anthony whether he was on a break, explaining, when asked at the hearing, that Anthony was not his employee (Tr. 639).

I conclude that Anderson did not act out of a concern that work was being interrupted or being neglected. The absence of evidence on the length of Anthony's self-selected break, or any comparison to other employees' breaks, precludes a finding that it was unusually long. The only other arguable disruption was the alleged blocking of the doorway, which could have been, at most, a trivial matter with only a tenuous connection to the kind of conduct about which Anthony had been

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The written report itself is not in the record. Anderson was cross-examined about it and about his conversations with Douglas about the matter (Tr. 640-42).

warned. Nor is there any evidence that it played a part in either Anderson's report or the reprimand. The reprimand itself, and apparently the report that prompted it, focus exclusively on the **subject** of the conversation with Rhodes.

The written reprimand specifies Anthony's May 27 conversation with Rhodes, allegedly about union business, as a violation of previous instructions not to engage in such activities during working hours. It also refers to the May 17 warning about disrupting operations.[18]

The reprimand letter's expressed concern about "conducting union business" signifies that Anderson's reaction was directed toward what Anthony **was** doing with this time rather than what he **was not** doing--that is--work. Therefore, I conclude that the suspected union activity was not a legitimate justification for the action taken. Moreover, the incident, even as described by Anderson, was relatively trivial. While it is arguable that such an incident could have sparked a "corrective action" against an employee who, like Anthony, had previously been warned about disruptions, the evidence is not persuasive that Anderson would have gone to the trouble even to return to the scene, if Anthony had not been an aggressive union advocate. *See Funk Mfg. Co.*, 301 NLRB 111 (1991). I conclude that the reprimand was a form of discrimination within the meaning of sections 7116(a)(2) and (4) of the Statute, also interfering with his right to act for a labor organization in violation of section 7116(a)(1).

CASES NOS. WA-CA-40661, 40662, AND 40668

These cases concern allegations that NOAA, through Supervisor Douglas, discriminated against Anthony by removing the flexibility of his lunch period and by restricting his work breaks, and further interfered with, restrained, or coerced Anthony in the exercise of his statutory rights by a statement concerning the nonunion status of the "shop."

Evidence Presented

It is undisputed that prior to the events in question, which occurred on June 1, 1994, the employees in SDG had been

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Neither party dealt more than fleetingly with the significance of the May 17 written warning, which cites three incidents of Anthony's interrupting Anderson at work without an appointment. There is no direct evidence that the alleged interruptions concerned union-management matters, and the written warning does not say so. NOAA's brief, however, characterizes the warning as "counseling [Anthony] to refrain from disrupting the Distribution Branch's activities while [pursuing] Union business."

permitted to take a one hour flexible lunch break (1/2 hour paid and 1/2 hour unpaid) anytime between 11:30 a.m. and 1:30 p.m. On May 31, Anderson reported Anthony's May 27 activities to Douglas. Anthony testified, and Douglas did not deny, that on May 31 Douglas asked him what specific time he had taken lunch on May 27. Anthony told Douglas he did not know the exact time and asked him why he wanted to know. Douglas answered that Mr. Anderson wanted to know exactly when he had distributed the May 27 letter he had delivered to Anderson as set forth under Case No. WA-CA-40701. Anthony told Douglas, at some point during that conversation, that he had distributed it during his lunch. (Tr. 480-81.) Within the next day, Douglas informed all three of the employees he supervised that their lunch hours would be cut to 1/2 hour. Anthony was apparently the last to be informed.

Anthony testified that at about 8:00 a.m. on June 1, Douglas informed him of the change. According to Anthony, he asked Douglas why he was cutting the lunch hour, and told him that he "really need[ed] this time to do union matters[.]" Douglas told Anthony that he didn't care, that the matter was not an issue of negotiation. Douglas also said, Anthony testified, that he thought Anthony was "through with the Union [.]" Anthony told Douglas that Douglas' supervisor, Pierre Richard, had told Anthony that the lunch was to be a full hour. Douglas agreed to check this out, and returned later to tell Anthony that Anthony was right and that the length of the lunch break would not change (Tr. 482-83.)

Douglas told Anthony, however, that it was necessary to schedule Anthony for a fixed hour instead of an elective period within the previous 2-hour range. According to Anthony, Douglas explained that the reason for the change was that, because of the distribution of the May 27 letter, Anderson wanted to know specifically when Anthony was on lunch, so that he would know when he was actually doing union business. According to Anthony, Douglas offered him a choice between 11:30-12:30 and 12:30-1:30 as his lunch hour. Douglas told him, in a third meeting later that day, that he did not have a 15-minute break. He also told Anthony that:

> [It] was not a union shop, it was not for negotiation, that that was the way it was going to be and that there was no -- no discussion going to take place on it.
>
> Anthony testified that Douglas further explained that Anthony could have a coffee, soda, or bathroom break. However, he could no longer take a break at Liliana Musolino's desk, as he had in the past. (Tr. 485.)

Douglas testified that the reason he decided to adjust the lunch periods was that his attendance at meetings in the previous two or three weeks, plus a major hard disk crash on his personal computer that required his undisturbed time "to try to get this project back on track, demanded that he be relieved of covering the telephone around the noon hour. The change was designed to have Anthony cover the period when the other employee who lunched during that period was on her lunch break. Douglas agreed with Anthony's testimony about the sequence from the proposed cut to 1/2 hour and the reconsideration of that option. He did not deny having the conversation regarding union business, about which Anthony testified, during their first meeting of the day.

Before their second meeting, Douglas testified, he had given to his more senior employee the choice of lunch periods, and she selected 11:30-12:30. He then offered Anthony either 12:00-1:00 or 12:30 to 1:30. Anthony objected, but Douglas told him he wanted office coverage and that Anthony had to choose. Anthony then selected 12:30-1:30. Douglas denied that Anderson had directed him to schedule Anthony's lunch breaks at any particular time. (Tr. 677.) However, he did not deny that he mentioned the May 27 letter and told Anthony that Anderson wanted to know when Anthony was "on lunch."

Douglas did not testify specifically about any third meeting on June 1, as Anthony did. However, he was asked about any discussion he had with Anthony about work breaks. He answered that they had discussed this on several occasions. The gist of their conversations was that there were no established 15-minute breaks in the morning and the afternoon in that unit (as in the unionized part of the facility), but that the employees were free to use the bathroom or get coffee (Tr. 679, 707). Douglas did not deny the statement Anthony attributed to him about "it" not being a union shop. However, he denied that he had told Anthony "several times" that he was determined to keep his office nonunion (Tr. 687).

Findings and Conclusions

A. The Lunch Policy Change

The undisputed evidence warrants a finding, which I make, that the General Counsel has established a *prima facie* case that Anthony's union activities were a motivating factor in the change to a fixed lunch hour. The timing of this action is a major ingredient in this finding. As discussed in Case No. WA-CA-40701, Douglas' relationship with Anthony had been colored from the beginning by management's identification of Anthony as a union activist whose activities required Douglas' attention. Beside the fact that Anthony's activities of May 27 were freshly before Douglas in the form of the

May 31 report from Anderson, there is also the undenied testimony that, on May 31, Douglas asked Anthony when he had taken his lunch on May 27 because Anderson wanted to know when Anthony had distributed the letter. I credit this testimony, which shows that Anthony's union activities were on Douglas' mind around the time he decided to do something about the lunch periods. The report from Anderson prompted Douglas to issue the reprimand that is the subject of Case No. WA-CA-40701. However, for some reason, he was not ready to act on the reprimand until June 22. Meanwhile, it seems likely that he was motivated to respond in some way to Anderson's concern about when Anthony was free to engage in union activities.

Deciding whether NOAA's evidence successfully rebuts the *prima facie* case is a more difficult matter. There was no challenge to Douglas' testimony that he had suffered a hard disk crash that destroyed eight months' work, or that he had many meetings to attend that required him to be out of the office at times when telephone coverage had to be arranged. Also, Douglas was quick to accede to Anthony's objection to cutting the lunch period to 1/2 hour. If cutting the lunch hour had been his plan to limit Anthony's union activities, he need not have been dissuaded merely by the fact that his supervisor confirmed the existing practice.

On the other hand, Douglas' explanation does little to justify the timing of the action. The timing, and Douglas' reference on May 31 to Anderson's concern about Anthony's distribution of the May 27 letter, lend credence to Anthony's further testimony that, on June 1, Douglas mentioned the May 27 letter distribution again, and told Anthony that Anderson wanted to know when Anthony took his lunch.19

Douglas did not say when the disk crash occurred, how long he expected his recently expanded meeting schedule to continue, or how he came to decide at that particular time that such action was necessary. Moreover, if I credit Douglas' testimony that he offered Anthony the choice of 12:00-1:00 or 12:30-1:30, Anthony's selection of 12:00-1:00

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This is not inconsistent with Douglas' denial that Anderson "direct[ed]" him "to schedule [Anthony's] lunch breaks at a particular time." Nor do my findings necessarily imply that Douglas falsely denied that his actions were taken "in reprisal" for Anthony's union activity (Tr. 680). Discrimination under section 7116(a)(2) covers a broader spectrum of actions than reprisal. In the instant case, Douglas' action, from his own point of view, was more likely designed to "discourage" future activities that would cause him problems with higher levels of management than to retaliate against Anthony for his past activities.

would have left 1:00-1:30 uncovered, giving Douglas no more than half of what he claims to have needed. I do credit Douglas in this respect. Anthony's version (that he was offered 11:30-12:30 or 12:30-1:30) would have given him a preference over the more senior employee that none of those involved would have expected.

Finally, I note that neither of the reasons that formed Douglas' asserted business justification for the change seem on their face to be permanent circumstances. Yet as of the date of the hearing, five months later, there was no evidence that any further consideration had been given to the necessity of continuing this restriction, which applies to no other SDG employee. This casts some further doubt on the assertion that the change was made primarily for business reasons. I conclude that the requirement of a fixed lunch hour violates section 7116(a)(2) and (1) of the Statute. I find no evidence to link the change specifically with any of Anthony's activities that fall within section 7116(a)(4). I find it unnecessary to speculate about such a link, since an additional section 7116(a)(4) finding would be cumulative and would not, in my view, affect the appropriate remedy.

B. The Work Break Allegation

I credit the substance of Anthony's testimony about the work break conversation on June 1, which corresponds in general to what Douglas testified he discussed with Anthony on several occasions. This was, of course, not the first time Anthony had been informed that he had no official 15-minute break. The SDG section was not covered by the collective bargaining agreement, and Anthony, upon leaving his bargaining unit position for a position in SDG, could reasonably expect only to enjoy the terms and conditions of employment of SDG employees. When he arrived in SDG in March, this was made clear to him, along with the instruction that the informal breaks he might take were not for union activities.

NOAA was entitled to restrict Anthony's activities during working hours to the same extent it restricted other SDG employees. However, in Case No. WA-CA-40701, as I have found, NOAA overstepped its legitimate managerial prerogative by restricting union activity **because** it was union activity. Likewise, there is no evidence that Douglas' June 1 restatement that Anthony had no official 15-minute break was in response to a concern that Anthony was staying away from his desk too long. It appears rather to have been prompted by the suspicion that he was continuing to use his breaks for union activity, as stated in the June 22 reprimand letter.

Did this, then, constitute an **additional** violation of the Statute? The validity of the original restriction has not

been challenged in this case. However, at the time it was reaffirmed, the Agency had demonstrated that the restriction was aimed at union activity, not considerations of efficiency. It therefore could no longer enjoy the presumption of validity. *See, e.g., Restaurant Corp., supra; Montgomery Ward & Co.*, 202 NLRB 978, 979-80 (1973). I conclude that Douglas' restatement of the unavailability of an official break, in a context reinforcing the restriction on union activities, constituted discrimination within the meaning of sections 7116 (a)(2) and (4) of the Statute and interference, restraint, or coercion within the meaning of section 7116(a)(1). *See Premier Maintenance, supra*, 282 NLRB at 16.[20]

C. The "Union Shop" Statement

I credit Anthony's uncontroverted testimony about the statements made by Douglas on June 1 alleged to constitute an independent violation of section 7116(a)(1). The relevant allegation in the complaint is that Douglas told Anthony that "the Requirements and Technology Staff is non-union and would stay that way." The General Counsel contends that the statements Douglas made justify the complaint's characterization, in that they convey a message that union activity would not be appreciated and would be futile. I disagree.

Douglas' statement about "it" (presumably referring to the Requirements and Technology Staff) not being a union shop, taken in its full context, does not justify the General Counsel's characterization. First, this was part of the conversation about Anthony's break. The flow of Anthony's testimony implies that the "union shop" statement followed Douglas' statement that Anthony would no longer have 15-minute breaks (Tr. 485). Its most natural meaning, as I see it, is that Anthony was no longer entitled to an official 15-minute break, as were employees in the "union shop" in which Anthony was previously employed. I do not hold anyone to Anthony's exact words in reporting what Douglas said, but his version is that Douglas next said, "[I]t was not for negotiation, that that was the way it was going to be . . . ." Given that the word, "it," is the closest we can come to what Douglas said was not for negotiation, I cannot infer that "it" meant anything except Anthony's break. Finally, "that was the way it was going to be" means just that, still referring to the work break. I do not read any more into it. The test, of

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I have noted NOAA's argument that the restriction of Anthony to a fixed lunch hour did not actually impede his union activities. I make no factual finding in this regard. The restriction was either lawful or unlawful according to its motivation, with respect to sections 7116(a)(2) and (4), and according to its tendency, with regard to section 7116(a)(1), irrespective of its effect.

course, is whether **Anthony**, not I, could **reasonably** have drawn a coercive inference from the statement. *Department of the Air Force, Scott Air Force Base, Illinois*, 34 FLRA 956, 962 (1990). I do not believe he could.

Since we are stuck with Douglas' purported use of the word, "it," to describe the subject of the allegedly coercive statement, the issue hinges in the first instance on what Anthony could reasonably have believed "it" was. I understand the General Counsel's theory to be that "it" meant union activities or unionization of the "shop." I can understand how someone in Anthony's position could have heard it that way, in the larger context of his situation. But that alone does not make it a reasonable interpretation. In the immediate context of the conversation, I do not believe that Douglas could have made it much clearer that he was talking about the work break, nor can he reasonably be charged with anticipating that what he said could be interpreted differently. I do not find this to be an ambiguous statement, which puts the speaker at peril of there being an alternative reasonable interpretation that is coercive.

Counsel for the General Counsel relies in addition on Douglas' statement to Anthony in an earlier conversation, according to Anthony, that "I thought you were through with the Union." Counsel would have this statement read in conjunction with the statement discussed above. Douglas did not deny the "through with the Union" statement. However, counsel for NOAA had no reason to question him about it or request him to supply any needed context. The statement, on its face, has no connection with any allegation in the complaint. NOAA had no notice that the statement would be used to augment the General Counsel's theory about the meaning of the alleged "non-union and would stay that way" statement. Especially in a long and complicated hearing, as this was, I do not think it is reasonable to expect counsel to attempt to controvert every statement made by the opponent's witnesses, no matter how remotely connected with the issues that have been joined. Nor should such a course be encouraged. In these circumstances I believe it would be unfair to make a credibility finding about the "through with the Union" statement. Moreover, even assuming that Douglas said that, I do not believe it changes the meaning of the statement that was put in issue. I shall recommend that the alleged independent violation of section 7116(a)(1) be dismissed.

CASE NO. WA-CA-40812

This case involves allegations of further acts of discrimination against Anthony. It is alleged that on July 21, 1994, NOAA ordered Anthony not to remain in the building where he works while on annual leave. It is further alleged

that on August 24, NOAA refused Anthony's request for annual leave to perform union activity, that it detailed Anthony to a room without a telephone and limited his phone use, prohibited him from entering the computer room where he had been assigned until that date, instructed him not to visit the work area of employees in the distribution branch, and informed him that "suitability issues" require management to take measures against him, all in reprisal for his protected union activity.

Findings of Fact

A. July 21 Ban from Building While on Annual Leave

On July 21, Supervisor Douglas gave Anthony a memorandum relating to Anthony's use of the telephone and his presence at the facility while he was on annual leave. The complaint contains no allegation concerning this memorandum's reference to telephone use. The part that this case concerns reads:

> Also, be advised that from now on when you have signed out on official annual leave you are to leave this government facility. You are not to linger here and continue to work or conduct any other business. This is a violation of government policy.

Anthony protested this ban, apparently immediately on being handed the memorandum. Anthony told Douglas that the ban would interfere with his legitimate union activities. Douglas testified that he told Anthony that he would check out his claim that he had a right to remain there to conduct union business, and that he would get back to Anthony. Douglas further testified that later the same morning he checked with "Labor Relations" and was told that Anthony had the right to remain and conduct union business if he followed appropriate procedures. Douglas says he called Anthony back into his office immediately after lunch the same day, and told him that if he had prior approval from the supervisors of employees with whom he was to meet, and followed appropriate procedures, he could come back while out on leave and conduct his union business. Anthony confirmed that Douglas had given him some additional information about the ban the same day. However, he denied that Douglas admitted he was incorrect in banning him. Anthony also denied that Douglas told him he could be in the building while on annual leave to conduct legitimate union representational functions, scheduled meetings, or grievance processing. Anthony's answer to each of these questions, put to him on cross-examination, was: "No, sir. That's not what took place." However, he never testified about what "additional information" Douglas did give him."

Douglas' testimony on this matter is more credible. Anthony's concession that Douglas spoke to him again persuades me that Douglas accurately portrayed their first conversation, in which Douglas told Anthony he would get back to him. Anthony's pregnantly negative answers to a series of questions designed to elicit his version of what Douglas said during their second conversation, coupled with his failure at any point to state what it was that Douglas told him, persuades me that Douglas' version is essentially accurate. Even more persuasive are two requests for annual leave (part of R.

Exh. 30), approved by Douglas on July 22 and 26, for Anthony to conduct union business in the building. However, Douglas' willingness to place the ban on Anthony initially, for no plausible legitimate reason, is noteworthy.

B. August 24 Refusal of Annual Leave

Anthony testified that he requested a few hours of annual leave to perform union business and that Douglas initially refused to accept the Form SF-71 application from him. Anthony then went to his second-level supervisor, Pierre Richard, who looked at Anthony's hours and told him that he saw no problem with the leave request and that he would talk to Douglas. Douglas came back to Anthony later and told him that, although he knew that Anthony had talked to Richard, Frank Wilkins, Chief of the Requirements & Technology Staff and Richard's supervisor, had decided to disapprove the leave request. Anthony also testified that normally, formal requests for annual leave of two or three hours were not required, nor were employees asked for the purpose of leave.

Douglas denied that the incident occurred at all and denied that he had **ever** disapproved a request by Anthony for annual or sick leave. Wilkins corroborated Douglas in denying any conversation about annual leave for Anthony, and testified that he was away from the facility, taking a class at the Department of Commerce. Richard was not called to testify.

For the following reasons, I credit Anthony. On August 25, he submitted an SF-71 annual leave request to Douglas for the express purpose of preparing a grievance. On the face of the SF-71 is the following note:

> cc: Mr. Richard -- This is not in lieu of request made on 8/24/94

Douglas approved the August 25 request (R. Exh. 30). I infer that the note quoted above was on the SF-71 when Douglas signed it, as it is on the copy of the form that NOAA placed in evidence. Further, I draw an adverse inference from NOAA's failure to call Richard to deny his part in the events of August 24 as described by Anthony. NOAA's brief represents that the General Counsel subpoenaed Richard but failed to call him as a witness. Richard is a management official who might consider himself at risk if he testified against the Agency. His failure to testify to **corroborate** the Agency's version of the event is more telling. Finally, Douglas' credibility on this issue is weakened by his denial that he had ever refused Anthony's requests for leave. This testimony appears to be contradicted by a disapproved SF-71 request for August 8. Anthony's testimony about the normal practice for requests for a few hours of leave stands uncontradicted.

C. Relocation, Detail, and Restrictions

(1) Background

Anthony had applied for the position of computer specialist. He testified that in February 1994, Personnel Management Specialist Beverly Smith informed him that he had been selected and asked him whether he would accept the position. Anthony told Smith he would not be sure until she checked into his current status with regard to his dismissal from his previous job, so that it was thoroughly reviewed and discussed with the managers to ensure that there were no problems. He later met with Smith, who told him she had discussed the matter with Requirements & Technology Staff Chief Wilkins, and that the previous dismissal would not be a problem unless new information turned up during his background investigation. Smith gave Anthony a "partial" SF-85P packet (standard form for a "moderate risk" position) to complete. Smith testified as to the routine nature of the investigation, and did not contradict Anthony as to any of the details.

Pursuant to the requested investigation, an investigator for the U.S. Office of Personnel Management (OPM) interviewed Anthony on July 14. The investigator's report of the interview indicates that the matters discussed included Anthony's personal and employment history. Part of that history was his dismissal from a job with the U.S. Army in 1986 for falsifying his job application, and his explanation of both the underlying events and his subsequent efforts to clear his record. These efforts had been successful to the extent that in 1989 OPM determined that he was suitable for competitive Federal service, making him eligible at least for certain positions. The falsification charge was that Anthony failed to disclose a conviction for a misdemeanor in Korea. (When Anthony success-fully applied for his first job with NOAA in 1991, his Form 171 included the fact of his 1986 removal, along with Anthony's explanation of the conviction and his earlier failure to disclose it.)

OPM issued a report to the Department of Commerce on August 3. That report was turned over to Labor Relations Specialist James Faulkner around August 12. Faulkner notified Wilkins, Douglas, and ACD Chief Carol Beaver. The report is entitled "Report of Agency Adjudicative Action on OPM Personnel Investigations." It states that certain investigative material compiled by OPM is attached, and that OPM had reviewed the material and made the following suitability adjudication determination:

> There are potentially actionable issues which, standing alone, may very possibly be disqualifying under security/suitability considerations. You

> are required to complete this form and return it to OPM. If you made a favorable determination without contacting the person (item 1), state briefly in the remarks section what you considered in making your determination.

Following this recitation is a list of alternative "adjudicative actions" from which one, ranging from favorable determination to removal, was to be selected. At the bottom of the form, the recipient agency is instructed that it is required to report to OPM its adjudicative action "within 90 days of receipt of all OPM investigative material."

According to Faulkner, the case was assigned to a "specialist" who had more experience in suitability cases. I infer, in the absence of evidence to the contrary, that the OPM investigative material was attached to the Report, and that it included the substance of the investigator's report of his interview with Anthony. According to ACD Chief Beaver, she also received a call about the matter from Distribution Branch Chief Anderson, who had a copy of the relevant Form 171's submitted by Anthony. Beaver agreed to Anderson's suggestion that he and Douglas should "look at it" together.

(2) The General Counsel's Evidence

Douglas wrote a memorandum to Anthony, dated August 17, which he delivered on August 23 or 24 together with an August 23 memorandum from Staff Chief Wilkins.

The August 17 memorandum informs Anthony that he is being "temporarily reassigned to work on another project in another location." The other location was room 210, upstairs in the same facility. Anthony testified that room 210 is in an unoccupied section of the building, about 100 feet from the nearest phone and "completely isolated from any of the other employees that would normally be there." The work assignment consisted of some computer-related projects, for which a computer with the necessary software had been furnished.

The August 23 Wilkins memorandum is also addressed to Anthony and has, as its stated subject, "Temporary Detail." Its text is as follows:[21]

> This memorandum is to advise you that recent suitability issues concerning you have been brought to the attention of management that requires management to take immediate precautionary measures to insure the operational integrity of

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[21] The Automated Distribution System (ADS) mentioned in the memorandum is a unit within SDG. Douglas is its chief.

> the Automated Distribution System (ADS). In concurrence with these actions, effective Wednesday August 24, 1994, you are hereby temporarily detailed for 30 days to perform unclassified duties for the Systems Development Group in another location within the same facility. The duties that you will be performing during your detail will be furnished to you under separate cover by your supervisor.
>
> You are not to use the ADS in any form, for any reason while on this detail. Also, you will not be allowed access to the computer room at any time nor will you use any computer terminal connected to the ADS.
>
> Your status within the Systems Development Group remains unchanged. There will be no change in policy, working hours, lunch break nor any other previously established working relationship. Robert N. Douglas will remain your immediate supervisor and will require work schedules, bi-weekly reports and will assist you as required. Your duties will not necessitate any contact with the Distrbution Branch, so there will be no reason to visit their work areas. If you require use of a phone, the one in room 207 will be used. The same phone restrictions are in effect as were used in the computer room, no more than 5 minutes per phone call. Mr. Douglas will make periodic visits to assist you or answer questions as required. He may be reached on intercom number 707.
>
> Failure to adhere with the guidelines described in this memorandum may result in disciplinary action being taken against you.

Anthony testified that he read the Wilkins memorandum in Douglas' presence and asked him whether the reference to contact with the Distribution Branch meant that in no circumstances was he to have any contact with any employees of that branch. Douglas answered that that was so and that Anthony had no reason for contact with them because he had no work assignments there (Tr. 745). Douglas did not deny that conversation. Moreover, there is evidence of other occasions on which Douglas attempted to keep Anthony away from Distribution Branch employees because of what he regarded as Anthony's disruptions of their work. I credit Anthony.

Wilkins extended the original 30-day detail for "at least another 30 days" (Tr. 888). It was apparently still in effect at the time of the hearing.

(3) The Agency's Evidence

Wilkins testified that he decided to detail Anthony away from his former position because he was "concerned with the problems that we may have encountered with [Anthony] . . . working with the automated distribution system." His concern, more specifically, was that Anthony "would do something that would cause the system to malfunction . . . ." Wilkins' first stated reason for this concern was that a number of incidents had been brought to his attention where Anthony "had been disruptive . . . ." He gave as examples of this disruptive behavior that Anthony had gotten into an argument and had used a fax machine without permission. (Tr. 873, 895.)

Questioned further on his reason for not being able to trust Anthony in the computer room, Wilkins stated that Anthony had in his possession, at an Authority hearing, two invoices belonging to a contractor of the Distribution Branch that should not have been in Anthony's possession, and which, according to the contractor, had been altered.[22] Adding to Wilkins' concern was certain information he had received from Douglas that Anthony had told an employee of a contractor that he could bring the operation to its knees.[23] Finally, Wilkins mentioned that "about the same time . . . there was some questions raised about his suitability[;] . . . they were conducting a background investigation," in the course of which Douglas had been asked to characterize his relationship with Anthony. Wilkins testified that he had, at that time, asked Labor Relations Specialist Faulkner whether the investiga-tion had been completed.

Later, in response to questions from the bench, Wilkins added that one of his concerns was that Anthony had made some false claims of unfair labor practices, the falsity of which reflected on Anthony's honesty.

Not included in his list of concerns by Wilkins, but mentioned by ACD Chief Beaver in her testimony, was that in a memorandum from Douglas received in June or July, Douglas had indicated that some documents had disappeared from the computer room and that a program he had spent months on had

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The hearing was held on July 27, in Case No. WA-RO-40052, pursuant to the petition Anthony had filed in March.

23
No further information concerning this alleged statement was elicited. The record is silent as to how and when it came to Douglas' attention.

disappeared.[24] There was evidence of a July 13 meeting among management officials at which Douglas' suspicions about Anthony's involvement in these events was discussed and no conclusions reached. Wilkins was cross-examined about any evidence linking the problems in the computer room with Anthony. He disclaimed having any such evidence.[25]

Discussion and Conclusions

A. July 21 Ban from Building

I have found that Douglas attempted to ban Anthony from the building while on annual leave, but, on checking out Anthony's protest, rescinded the ban. The very morning that he issued the ban, Douglas approved two hours of annual leave for Anthony to engage in "Pre hearing preparation," and, as noted earlier, he approved another two hours of leave the following day specifically for union business in the building. I conclude that the ban never went into effect. Douglas' actions, in conjunction with his credited testimony that he told Anthony he would get back to him regarding his protest of the ban, indicate that the ban never went into effect and that Anthony understood this. The rescission was not complete, in that Douglas told Anthony he could conduct union business in the building only if he had prior approval from the supervisors of the employees he was to meet and if he followed "appropriate procedures." However, the General Counsel has not contended that these conditions were unlawful. Nor does the complaint allege that the contemporaneous restriction on Anthony's telephone use was unlawful. I shall recommend that the allegation of the complaint referring to the July 21 memorandum (paragraph 12(a)) be dismissed.

B. August 24 Refusal of Annual Leave

Having found that Douglas, purportedly with Wilkins' concurrence, denied Anthony's request for annual leave on August 24, I am left, by their denial that they did so, without any explanation for the refusal. In fact, NOAA's

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24 This appears to refer to the "hard disk crash" mentioned in Cases Nos. WA-CA-40661, 40662, and 40668. Douglas was not asked, as part of NOAA's case, about suspecting Anthony. However, he took the opportunity on cross-examination to repeat the suspicions he apparently had expressed in his memorandum to Beaver. The memorandum is not in evidence.

25 Although I regard as pertinent to the issues presented here what information NOAA had before it, rather than what Anthony actually did (*see GHR Energy Corp.*, 294 NLRB 1011, 1014 (1989)), I note that Anthony denied on the record any responsibility for the problems in the computer room.

brief states that "[w]hether there was a violation with regard to this specification is strictly a matter of credibility." I therefore conclude that Anthony's request for annual leave was an act of discrimination within the meaning of sections 7116(a)(2) and (4) of the Statute, and was also coercive within the meaning of section 7116(a)(1).

C. Relocation, Detail, and Restrictions

1. Framework for Discussion

Although alleged in the complaint as a separate count of discrimination, the statement in Wilkins' August 23 memorandum that "recent suitability issues . . . [require] management to take certain precautionary measures . . . .," is, in my view, rather the vehicle for announcing the actual "measures" that were taken, both under Wilkins' memorandum and the accompanying memorandum from Douglas. This statement helps to frame the issue of whether those actions were discriminatory within the meaning of sections 7116(a)(2) and (4).

Like the "suitability issues" statement, but for different reasons, that part of complaint allegation 12(c) that refers to a 5-minute restriction on phone calls is not properly the subject of an independent decision on the merits. Wilkins' memorandum did not implement that restriction. It was implemented by Douglas on or before July 21, according to Anthony (Tr. 736). Its implementation at that time not having been alleged as an unfair labor practice, I do not believe NOAA was required to defend its mere announcement a month later that the restriction was still in effect.

In defending the remaining actions, NOAA has placed much emphasis on asserting the incredibility of Anthony's testimony at the hearing. However, I find the proper focus of inquiry to be the Agency's motivation for actions that are essentially undisputed. Anthony's credibility comes into play only to the extent that it can cast any light on management's motivation.

2. *Letterkenny* Analysis

I find with respect to each of the remaining allegations that the General Counsel has established a *prima facie* case. The history of the actions taken against Anthony, combined with the predictable effect of the latest actions on his ability to use his nonworking time to conduct union business, provide the essential elements of the initial showing required by *Letterkenny*. I note also Wilkins' reliance on Anthony's prior unfair labor practice allegations that Wilkins deemed to be false. I find irrelevant the extent to which room 210 had been occupied previously. Room 210 undisputedly isolated Anthony to some degree. The issue arising out of his

relocation **there**, as well as the other "measures" taken, is whether there is an adequate *Letterkenny* defense.

The Agency's defense is somewhat confusing, particularly with respect to management's use of the term, "suitability." At first blush, Wilkins' August 23 reference to "recent suitability issues" relates to the OPM report containing a "Basis Suitability Adjudication Determination." Faulkner received that report on August 12 and informed Wilkins, among others in management, about it. However, as Wilkins testified concerning the decision to take various "measures," the suitability questions raised by the OPM report came out almost as merely incidental to the main reasons, which concerned events preceding the report.

I shall attempt, for purposes of discussion, to put the Agency's position in the best possible light, consistent with the evidence. Thus, a number of unusual things occurred during the time Anthony was stationed in the computer room, when few people had ready access to it. Other conduct, regarded by management as breaches of trust, was attributed to Anthony by third parties, either directly or by hearsay. On July 13, management officials discussed these matters and could not decide that there was enough evidence to take any action. On or after July 27, it was discovered that Anthony had in his possession two invoices to which his normal duties as an employee should not have given him access, and it was reported that the invoices had been altered. Finally, the OPM report indicated that some "potentially actionable issues" required further investigation and could possibly disqualify Anthony from his present position. Management therefore decided it had to take "immediate precautionary measures to insure the operational integrity of the [ADS] . . . ."

This position has some appeal as an explanation for some of the temporary measures taken, like a temporary relocation and a detail of duties that did not require access to the computer system that had experienced the "suspicious" problems or was subject to damaging mischief. The legitimacy of the relocation to the particular room Anthony was assigned, with its distance from a telephone, is difficult to evaluate as a distinct "measure" because there was no evidence one way or the other about the availability of other rooms. None of the considerations mentioned by Wilkins, however, appears to address the necessity for a restriction on **any** contact with Distribution Branch employees. On this point, the memorandum is sufficiently ambiguous that it could be construed to refer only to working-time contacts. I have credited Anthony's uncontradicted testimony that he questioned Douglas on it and learned that he was barred from **any** "visits" to their area.

If, for argument's sake, something like a 30-day detail and relocation was a plausible response to a series of troublesome incidents, it is what has, and has not, occurred since the action was taken that casts the greatest doubt on its legitimacy. To the extent that the action was based on the OPM report, such "precautionary measures" were not required by the report itself. The report required a further investigation into the matters that prompted the "Basic Suitability Adjudication Determination," namely, the events underlying Anthony's previous dismissal. OPM required the Department of Commerce to report its final adjudicative action within 90 days of receipt of the August 3 report. When the hearing in these cases closed, the 90 days had almost expired. Yet there was no evidence that a final determination had been made, nor was any indication given about the nature or progress of the investigation.[26] The subject of the inquiry, of course, was one that Anthony himself had put forward to the personnel specialist before accepting his position. The specialist represented that she discussed it with Wilkins, who approved Anthony's entering into the position unless new information turned up. Nothing in the record indicates that there was any significant new information on this subject.

Regarding the matters that preceded the OPM report, there is similarly no evidence of further attempts by the Agency to determine whether the suspected misconduct that could not be linked with Anthony by July 13 could now be linked. If the Agency made any further investigation, it had taken no action as of the time of the hearing consistent with a positive finding. Instead, Wilkins extended the 30-day detail to an undisclosed date after the hearing closed.

On August 31, responding to a request for information about the Agency's basis for the action taken, Wilkins had informed Anthony that "management is in the process of finalizing its evaluation of the suitability issues raised concerning you, and considering appropriate action(s)". (GC Exh. 16). This response warrants the inference, in the absence of evidence to the contrary, that the investigatory stage of the Agency's inquiry had been completed, at least substantially, by the end of August. After a reasonable opportunity to evaluate any new information, it was time for the Agency to fish or cut bait. If there was new evidence that confirmed any of the suspicions or hearsay reports of misconduct, warranting further action, the Agency was obliged to determine what further action to take, if any. Instead, it

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[26] It is not to be expected that the Agency would reveal confidential matters about its investigation, at least not without measures to protect their confidentiality. In this instance, however, no attempt was made even to represent in general terms how the required investigation was proceeding.

had, up to the time of the hearing, left this employee in limbo. Whether or not the effect was consciously inflicted, the metaphor, "twisting in the wind," comes to mind.

I find that, whatever legitimacy the original 30-day detail and the accompanying actions may have had, a reasonable time to resolve the issues behind the asserted reasons for the detail had expired without the Agency having taken such steps as would be considered normal in the absence of Anthony's protected activities. I conclude that the Agency has not rebutted the *prima facie* showing of discrimination. Since it will not affect the appropriate remedy (discussed below), I find it unnecessary to decide whether imposition of the original detail was discriminatory. I conclude that barring Anthony from any contact with Distribution Branch employees, and imposing an unnecessarily long detail, relocation, and barring from the computer room, violated sections 7116(a)(1), (2), and (4) of the Statute.

D. Summary of Conclusions in Case No. WA-CA-40812

NOAA has violated sections 7116(a)(1), (2), and (4) by refusing Anthony's request for annual leave on August 24, by barring him from contact with Distribution Branch employees, and by detailing, relocating, and denying him access to the computer room for longer than was necessary to resolve his "suitability issues." The General Counsel has not established that NOAA banned Anthony from the building when he was on annual leave, that it unlawfully limited Anthony's phone calls to five minutes on or about August 24, or that the statement that suitability issues require management to take measures against Anthony is an independent unfair labor practice.

THE REMEDY

Counsel for the General Counsel seeks some non-traditional and extraordinary remedies. The basis for these requests is the history of the unfair labor practices the Agency has been found to have committed over approximately the past two years, and the nature of the allegations in the instant cases, several of which I have sustained.

The requested remedy that has engaged most of the parties' attention is that the Authority direct the Agency to initiate disciplinary proceedings against supervisors Anderson and Douglas because of their respective roles in the unlawful acts of discrimination against Anthony.

The General Counsel acknowledges this remedy to be unprecedented, and I infer that I am to understand that no General Counsel of the Authority has sought such a remedy before. This is not the first time that such a remedy has

been sought in an Authority unfair labor practice proceeding, however. In a decision without precedential significance, (yet admirably uncovered by counsel for NOAA) Judge Cappello considered a charging party's request for a similar remedy, although different in one respect. *Veterans Administration, Audie L. Murphy Memorial Hospital, San Antonio, Texas*, Case Nos. 6-CA-1372, 6-CA-1373, 6-CA-1375 (1983), ALJ Decision Reports, No. 21 (March 4, 1983) (*Audie L. Murphy*). The difference in the remedy requested in that case was that the Authority was to act as "the de facto Special Counsel" and actually impose the discipline after providing appropriate due-process procedures. Judge Cappello examined the pertinent language in section 7118(a)(7) of the Statute, which provides that an Authority remedial order may direct an agency to take certain actions specified in the subsection, **"or such other action as will carry out the purpose of this chapter"** (emphasis added).27 She decided that this grant of remedial power did not extend to the requested remedy. Judge Cappello went on to indicate why she did not regard such a remedy as appropriate to the particular case. She did, however, order that the notice required to be posted be **read** to a group of employees who worked outside and may not have had ready access to places where notices are customarily posted. The notice was to be read by the higher of two supervisors who committed the unfair labor practices, in the presence of the lower-level supervisor and all other supervisory personnel of the section, at an employee meeting to be convened for this purpose.

Judge Capello did not find it necessary to present in further detail her reason for concluding that the discipline remedy sought was beyond the Authority's power. In any event, the General Counsel's purposeful pursuit of this alternative to the Authority's traditional remedies warrants serious reconsideration of its possibilities.

It becomes necessary to refer again to the section of the National Labor Relations Act that is most comparable to the applicable provision of the Statute. That is section 10 (c), which authorizes the Labor Board to order a "person" found to have engaged in an unfair labor practice **"to take such affirmative action . . . as will effectuate the policies of this Act[.]"** The power thus granted to command affirmative action is remedial, not punitive, and such an order is within the Board's power only to the extent that the action ordered can be said to aid the Board in restraining violations or in

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See also section 7105(g)(3) (". . . require [an agency] to take any remedial action [the Authority] considers appropriate to carry out the policies of this chapter.").

removing the consequences of violations. *Local 60, Carpenters v. NLRB*, 365 U.S. 651, 655 (1961).[28]

The courts have long struggled with the problem of articulating an approach to reviewing Board orders that are under attack for being "punitive." This began in *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 219 (1938), where the Supreme Court stated:

> We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.

On the other hand, the Court gave a somewhat different impression only a few years later, when it held that the Board's decision as to remedies must be upheld "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943). The latter statement has been cited in support of the proposition that "the imposition of remedies is a matter of special administrative competence, subject to very limited judicial review." *Steelworkers v. NLRB*, 646 F.2d 616, 629 (D.C. Cir. 1981) (*Steelworkers*).

Our focus here, of course, is on the limits of "remedial" powers under the Federal labor relations statutes. Justice Frankfurter pointed the way to a more nuanced approach when, in writing for the Court he stated:

> It is the business of the Board to give coordinated effect to the policies of the Act. We prefer to deal with these realities and to avoid entering into the bog of logomachy . . . by debate about what is "remedial" and what is "punitive." It seems more profitable to stick closely to the direction of the Act by considering what order does . . . and what order does not, bear appropriate relation to the policies of the Act.

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"The primary purpose of the provision for other affirma-tive relief has been held to be to enable the Board to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice." *Id.* at 657 (Harlan, J., concurring).

NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 348 (1953).[29] The District of Columbia Circuit, in particular, has had occasion to consider the practical application of Justice Frankfurter's *dictum* to cases involving recidivist violators. Thus, in *Steelworkers*, that court attempted to reconcile the need to impose more stringent remedies against recidivists with the stricture that Board orders not be punitive. It found justification for remedies that, while they might appear "punitive" in the context of an individual case, are clearly "remedial" in the context of the total conduct of a recidivist violator because "[e]mployees may be affected deeply by the mere fact that an employer has demonstrated a staunch willingness to violate the act in defiance of past Board orders." *Id.* at 631. The court also endorsed the suggestion that the imposition of remedies in the case of a recidivist violator particularly demands the sensitive exercise of administrative judgment and expertise. *Id.* at 631 n.34.

Even in *Steelworkers*, however, the District of Columbia Circuit reaffirmed the principle that the Board may not justify an order solely on the ground that it will deter future violations. *Id.* at 360. Finally, that court has given some more recent guidance that, although directed to the question of the imposition of a different non-traditional remedy--the "forced public reading" of the Board's notice by the employer--cannot be ignored here. Thus, in *Food & Commercial Workers v. NLRB*, 852 F.2d 1344, 1348 (1988), the court stated that it will not enforce such orders when the record fails to indicate "particularized need" for the order.

From all of this, I find it difficult to justify a flat statement that "other action as will carry out the purpose of this chapter" may never include an order to initiate disciplinary proceedings against someone who is responsible for an unfair labor practice.[30] However, a highly "sensitive exercise of administrative judgment and expertise" is demanded

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logomachy: contention in words that are used wholly or almost wholly without real awareness of their meaning or that have little or no actual relation to reality.

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I do not rely on *U.S. Department of Justice*, 39 FLRA 1288 (1991), or the court's decision denying review, *U.S. Dept. of Justice v. FLRA*, 961 F.2d 1339 (D.C. Cir. 1993). That case, involving discipline awarded by an arbitrator, dealt with authority derived from the parties' **contract**, not from the Statute. Moreover, the court's jurisdiction to review the Authority's decision was of the very narrow scope permitted by *Leedom v. Kyne*, 358 U.S. 184 (1958), and limited the court to concluding that no specific provision in the Statute specifically withheld such power from an arbitrator's jurisdiction.

when deciding whether there is a "particularized need" for such a remedy. *See Steelworkers*, *supra*, at 631 n.34.[31]

Ultimately, several considerations persuade me that the requested discipline remedy is not appropriate in these cases.[32] First, notwithstanding the history of unfair labor practices at the Riverdale facility (all but one apparently within the Distribution Branch of ACD), the magnitude of the violations committed must be viewed in perspective. As indicated in *Steelworkers*, the Labor Board has normally reserved its use of extraordinary remedies for cases involving a history of massive, pervasive, and very serious unfair labor practices--the industrial equivalent of a blitzkrieg.

On the other hand, the remedial response should be proportionate to the violations and to the particular circumstances. Justice Frankfurter's remarks in *Seven-Up* should provide sufficient caution to avoid the semantic trap of requiring a showing of "extraordinary" violations in order to justify anything that could be labelled an "extraordinary" remedy. That the Federal sector provides less opportunity for violations on the magnitude of a J.P. Stevens does not mean that non-traditional and innovative remedies are out of place.

The particular remedy of discipline for two of the supervisors involved in the instant consolidated cases does not respond with the necessary careful tailoring, in my view, to the situation presented by the violations found to date. The rationale for imposing it would be that Agency employees may be deterred from exercising their statutory rights because of Anthony's experience, unless they have confidence that their supervisors understand clearly that taking similar action would put them at risk of unwanted consequences.

Any prediction of the effects of the outcome of this case is by its nature speculative to some extent. However, there is at least some reason to believe that the restoration of the *status quo ante* with respect to Anthony will enhance the status of the Union in the minds of the employees, including the potential voters in the event of a representation election if one is held pursuant to Anthony's

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[31] For example, in *United States Postal Service*, 309 NLRB 13 (1992), the Board fashioned a novel remedy for a backlog of grievances caused by the respondent's unfair labor practice of continuous failure to process grievances in a timely manner. The Board imposed an accelerated grievance procedure to clear the logjam created by the unfair labor practice.

[32] For this reason I find it unnecessary to deal with NOAA's arguments regarding the impact of such a remedy on the rights of supervisors against whom disciplinary action is sought.

petition. Anthony having been largely vindicated and his rights restored, I believe that both the represented and the unrepresented employees will sense the value of having an active and aggressive union.

Certainly worthy of consideration for remedial purposes is that all of the unfair labor practices I have found here were directed at one individual. There was no retaliatory action against other employees or union officials, either to exert pressure to curb Anthony or otherwise. Anthony himself is not easily deterred. He was not noticeably deterred by the discrimination he suffered, and, although this is only one factor to be considered, I am confident that he will not be residually deterred in the absence of the discipline sought.

Nor do the actions of the supervisors whose discipline is sought rise to the level of defiance of prior orders of the Authority. Of the three Authority orders that had been issued at the time of the unfair labor practices in the instant cases, none involved discrimination, and only one, Case No. WA-CA-31011, involved a direct, rather than a "derivative" interference with employee rights. There is also a qualitative difference in the nature of these unfair labor practices, which, notwithstanding their seriousness, distinguishes them from many of the blatant violations that characterize the classically "defiant" recidivist. Thus, the very fact that these acts of discrimination were cloaked as responses to legitimate management concerns demonstrates a grudging respect for the rights protected by the Statute, or at least a recognition of accountability. That is not to say that pretextual action is less culpable by virtue of its hypocrisy. Here, however, there were arguably legitimate reasons for most of these actions. I have only found, for the most part, that these reasons did not eliminate the unlawful reasons as motivating factors under the *Letterkenny* standard. Not present here, as might be found in a more flagrant case, is the premeditated trumped-up charge or the fictitious set of circumstances contrived to provide the asserted justification.

The violative actions themselves are serious but not breathtaking. Anthony received a reprimand, a temporary detail and relocation that might have had an indefinite duration but for the availability of recourse to the Authority, and some restrictions that could have made his union activities more difficult. On one occasion among many he was denied annual leave for union business. Anthony had unleashed an almost incredible storm of filings, challenging, it would appear, a substantial proportion of the managerial actions that came to his attention. Other conduct attributed to him that is otherwise peripheral to these cases does at least allow for a credible degree of managerial annoyance that was not union related. In these circumstances the actions

taken against him are no more remarkable for their harshness than for their restraint. They do not necessarily signal employees that any union activity will put them at risk.

Targeting Douglas and Anderson for disciplinary action seems misdirected for some additional reasons. These two, one a first-level and the other a mid-level supervisor, were not involved in any of the earlier unfair labor practices. In fact, the totality of their conduct seems no more serious than that of at least one supervisor who was involved in some of the earlier cases and Mr. Wilkins in the latest cases. Aside from the appearance of arbitrariness, there is a sense in which, if the situation is serious enough to warrant extraordinary remedies, the focus on Douglas and Anderson alone might even trivialize the problem.

Also to be considered is how such a remedy meshes with the other remedial measures to be ordered. The General Counsel justifiably requests that Anthony be reinstated to his former position if he so desires. Such restoration will put him in close contact with Douglas and may be expected to cause Douglas some humiliation. In the circumstances, this may be unavoidable. To cause him the further humiliation of discipline could, with their restored contact, have results adverse to one of the key purposes of the Statute, "an efficient and effective Government." Section 7101. Before imposing that risk, I would require a stronger showing of necessity than has been made here.[33]

In summary, I do not find that the case has been made for the extraordinary remedy of disciplining these supervisors. In addition, I have identified some reasons why I believe the remedy, even if it has some arguable usefulness, is inappropriate here. I do not find it necessary to decide whether any of the negative or affirmative reasons, standing alone, would warrant the same result. I shall not recommend that remedy to the Authority.

Counsel for the General Counsel also requests that the notice to be posted be signed by the Secretary of Commerce. I find, as Judge Oliver did in the earlier cases in this series, that the NOAA Assistant Administrator for the National Ocean Service, not any higher official, is the proper official to sign the notice. The unfair labor practices have been localized within the level of this activity, and it has not been shown that they reflect a broader Agency policy.

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The Agency may, of course, do as an exercise of managerial authority what the General Counsel would have it ordered to do. The Agency, however, is better equipped to weigh the managerial consequences.

The third and last extraordinary remedy requested is an employee meeting conducted by the Deputy Undersecretary for NOAA to explain the circumstances of the violation in Case No. WA-CA-40701 and to assure employees that such activity will cease and that the Agency will discipline "any supervisor who intentionally discriminates or retaliates against a union official because of protected activity." Such a meeting goes far beyond the "extraordinary" Labor Board remedy designed for the J.P. Stevens' of the industrial world--the reading of the notice by a company official.[34] The centerpiece of the requested meeting is the commitment to discipline "any supervisor who . . . ." The procrustean nature of this commitment is not mitigated by its limitation to cases of "intentional" discrimination. If there is such a thing as **unintentional** discrimination because of union activity, I cannot envision whom to entrust with making the distinction.

Absent the unsatisfactory disciplinary subject of the requested meeting, its stated purpose is too unfocused to be of much use, and I shall not recommend it. As the General Counsel has pointedly not requested the notice-reading remedy, I shall not recommend it either.

I shall, however, recommend a broad cease and desist order and some non-traditional language in the notice to reflect the finding of past violations and further assure employees that, despite this history, the Agency recognizes their statutory rights. I shall also recommend, as requested by the General Counsel, that the Agency be required to restore to Anthony any annual leave he used to conduct union business as a result of the unlawful restriction on his lunch hour and his breaks. Accordingly, I recommend 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 U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Ocean Service, Coast and Geodetic Survey, Aeronautical Charting Division, Riverdale, Maryland shall:

1. Cease and desist from:

(a) Interfering with the right of employees to assist a labor organization by enforcing rules regarding work breaks in a discriminatory manner.

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[34] As noted above, Judge Cappello ordered such a reading in the *Audie L. Murphy* case, but for different reasons.

(b) Discriminating against employees to discourage union membership, or because they have filed a complaint, affidavit, or petition, or given information or testimony under the Federal Service Labor-Management Relations Statute, by reprimanding them, by restricting the flexibility of their lunch hour, by selective enforcement of work break rules, by refusing their requests for annual leave, by prohibiting them from having contact with other employees, and by reassigning, relocating, and restricting them from certain locations for longer than necessary to resolve issues of their suitability.

(c) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Rescind the June 22, 1994 reprimand of Brian Anthony-Jung.

(b) Restore Brian Anthony-Jung's flexible lunch hour and any annual leave he used to conduct union business as a result of unlawful restrictions on his lunch and break time.

(c) Offer to Brian Anthony-Jung reinstatement to his former work assignment and location.

(d) Post at its facility in Riverdale, Maryland, 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 NOAA Assistant Administrator for the National Ocean Service, 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.

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Washington Region, 1255 22nd Street, NW, 4th Floor, Washington, DC 20037-1206, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that all remaining allegations of the complaints in these cases are dismissed.

Issued, Washington, DC, May 19, 1995

JESSE ETELSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

The Federal Labor Relations Authority has found that we violated the Federal Service Labor-Management Relations Statute, and have done so in the past, and has ordered us to post and abide by this notice.

WE WILL NOT interfere with the right of employees to assist a labor organization by enforcing rules regarding work breaks in a discriminatory manner.

WE WILL NOT discriminate against employees to discourage union membership, or because they have filed a complaint, affidavit, or petition, or given information or testimony under the Federal Service Labor-Management Relations Statute, by reprimanding them, by restricting the flexibility of their lunch hour, by selective enforcement of work break rules, by refusing their requests for annual leave, by prohibiting them from having contact with other employees, or by reassigning, relocating, and restricting them from certain locations for longer than necessary to resolve issues of their suitability.

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

WE WILL rescind the June 22, 1994 reprimand of Brian Anthony-Jung.

WE WILL restore Brian Anthony-Jung's flexible lunch hour and any annual leave he used to conduct union business as a result of unlawful restrictions on his lunch and break time.

WE WILL offer to Brian Anthony-Jung reinstatement to his former work assignment and location.

(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, Washington Region, 1255 22nd Street, NW, 4th Floor, Washington, DC 20037-1206, and whose telephone number is: (202) 653-8500.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by JESSE ETELSON, Administrative Law Judge, in Case Nos. WA-CA-40661, WA-CA-40662, WA-CA-40665, WA-CA-40668, WA-CA-40701 and WA-CA-40812, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Frances C. Silva, Esquire
Bruce I. Waxman, Esquire
Office of the General Counsel
Department of Commerce
14th & Constitution Ave., NW, Room 5897
Washington, DC 20230

Arnold A. Hammer, Esquire
Stephen G. DeNigris, Esquire
Laurence M. Evans, Esquire
Federal Labor Relations Authority
1255 22nd Street, NW, 4th Floor
Washington, DC 20037-1206

REGULAR MAIL:

Ms. Penney Baile
National Labor Relations and
Employment Branch
1315 East West Highway
Silver Spring, MD 20910

Brian Anthony-Jung, President
American Federation of Government
Employees, Local 2640
P.O. Box 721
Greenbelt, MD 20768

National President
American Federation of Government
Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

Dated: May 19, 1995
Washington, DC