OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

DEFENSE COMMISSARY AGENCY
ALBANY COMMISSARY
MARINE CORPS LOGISTICS BASE

ALBANY, GEORGIA
Respondent

and Case No. AT-CA-40242

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2317
Charging Party

W. Wilson Burr, Esquire For the Respondent
Richard S. Jones, Esquire For the General Counsel
Before: WILLIAM B. DEVANEY Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.[1], and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, etseq., concerns whether Respondent lowered employee Bryson F. Benson's performance appraisal rating and denied him a performance award because of his protected activity.

This case was initiated by a charge filed on January 12, 1994 (G.C. Exh. 1(a)), which alleged violations of § 16(a)(1) and (2), and by a First Amended charge filed on March 3, 1994 (G.C. Exh. 1(c)), which alleged violations of §§ 16(a)(1), (2) and (4). The Complaint and Notice of Hearing issued on April 28, 1994 (G.C. Exh. 1(e)), alleged violations of §§ 16(a)(1), (2) and (4) of the Statute, and set the hearing for a date, time and place to be determined. By Order dated June 29, 1994 (G.C. Exh. 1(g)), the hearing was set for September 13, 1994; however, pursuant to Respondent's Motion For Continuance (G.C. Exh. 1(h)), by Order dated September 12, 1994 (G.C. Exh. 1(i)), the hearing was rescheduled for November 9, 1994, in Warner Robins, Georgia, pursuant to which a hearing was duly held on November 9, 1994, in Warner Robins, Georgia, before the undersigned.

All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which Respondent exercised. At the close of the hearing, December 9, 1994, was fixed as the date for mailing post-hearing briefs. General Counsel timely mailed an excellent brief, received on December 12, 1994, which has been carefully considered as well as Respondent's closing argument. Upon the basis of the entire record[2], I make the following findings and conclusions:

Findings

1. The Complaint alleged, Respondent did not deny (G.C. Exh. 1(b)), and I find as alleged (G.C. Exh. 1(e), paragraphs 9-11), that, pursuant to an agreement between the Defense Commissary Agency (DCA) and the American Federation of Government Employees (AFGE), American Federation of Government Employees, Local 2317 ("Union") represented Respondent's employees at all times material.

2. Mr. Bryson F. Benson is a meat cutter at the Albany Commissary, a job he has occupied for fourteen years (Tr. 16). He is the sole Union steward in Respondent's Commissary, and has been for seven or eight years (Tr. 17, 35). The Commissary employs 28 to 30 employees (Tr. 17).

3. It is undisputed that Mr. Benson has been an active steward and has filed grievances and unfair labor practices throughout his eight or nine year tenure as steward (Tr. 35) including at least one grievance and two unfair labor practice charges during the 1992-93 appraisal period as set forth in Paragraphs 13, 14 and 15 of the Complaint (G.C. Exh. 1(e), Paragraphs 13, 14, 15), and as Mr. Benson testified (Tr. 19-20).

4. Except for the first six month period of his employment when he received a "satisfactory" rating (Tr. 18), Mr. Benson through the 1991-92 appraisal period was rated "Exceeds Fully Successful" every year but one when he was rated "Outstanding" (G.C. Exh. 5; Tr. 18, 54). For the 1992-93 appraisal period, Mr. Benson was rated "Fully Successful." (G.C. Exh. 6).

5. At some point, apparently at or near the beginning of fiscal year 1993, the separate Navy, Army-Air Force Commissaries were merged into the unified Defense Commissary Agency (DCA). While the effective date of DCA's creation was not shown, Mr. Benson's Performance Plan, on DCA Form 50-3, was signed by Mr. Benson on October 1, 1992 (G.C. Exh. 2), i.e., at the commencement of the 1992-93 appraisal period.

6. The Navy form, NAVSO 12430, was used through the 1991-92 appraisal period (G.C. Exh. 5) and DCA Form 50-4 was used for the 1992-93 appraisal period (G.C. Exhs. 6, 7, 8; Res. Exh. 1). Each form has five rating levels. The levels on the Navy form were: Unacceptable (level 1); Minimally Successful (level 2); Fully Successful (level 3); Exceeds Fully Successful (level 4); and Outstanding (level 5) (G.C. Exh. 5). The Navy form did not define any of the rating levels, including "Exceeds Fully Successful" or "Outstanding". DCA levels are: Unacceptable; Minimally Acceptable; Fully Successful; Excellent; and Outstanding; the DCA form defines each rating level. Thus, "Fully Successful" is defined as, "Employee meets the requirements of all of the elements of the performance plan"; "Excellent" as, "Employee exceeds more than one-half of the critical elements and meets all other elements"; "Outstanding" as "Employee exceeds all of the elements of the performance plan" (G.C. Exhs., 6, 7, 8; Res. Exh. 1). Consequently, the DCA form on its face, by quantifying "Excellent" [exceeds more than one-half of the critical elements and meets all other elements] makes that rating quite different than the unquantified "Exceeds Fully Successful" of the former Navy form.

7. Mr. Jimmie R. Burgess, Personnel Officer for DCA, Southern Region (Tr. 45), testified that, ". . . It [the Navy system] was a different system. The standards, job standards and the mechanics of the system were quite different . . . the . . . [DCA] system . . . we implemented, roughly in the 1992 timeframe. . . . [DCA] was more precise . . . With that preciseness, it had a downward effect on the overall rating system. If you look at the ratings for these four employees in the meat department . . . [91-92 Navy system versus 92-93 DCA system] you will notice that all four employees went down one adjective rating . . . ." (Tr. 45-46).[3]

8. Mr. Burgess testified that performance ratings dropped throughout the Commissary, not just in the meat department (Tr. 47); that in the meat department Messrs. Gann and Shiver went from "Outstanding" in 1991-92 to "Excellent" in 1992-93 (Tr. 46; G.C. Exhs. 7 and 8; see, also, Tr. 33, 51-52, 54, 55, 58-59); and that Messrs. Coleman and Benson went from "Exceeds Fully Successful" in 1991-92 to "Fully Successful in 1992-93 (G.C. Exhs. 5, 6; Res. Exh. 1; Tr. 18, 29, 46, 52, 54). Mr. Eason testified that under the DCA system the ratings for all four meatcutters (Gann, Shiver, Coleman and Benson) came down "one adjective or one block on the rating when we changed to the . . . [DCA] system" (Tr. 57); that he rated Mr. Benson individually on each element (Res. Exh. 2) and ". . . the sum of the elements . . . was used to determine what his overall rating was" (Tr. 58); that Mr. Benson's Union activity had not interfered with his performance of duties and that Mr. Benson's Union activity did not "figure" into his decision as to Mr. Benson's final rating (Tr. 58). Mr. Ridley testified that not only did Mr. Benson's rating go down as the result of the change from the Navy system to DCA's system, but that this was true throughout the Commissary (Tr. 51-52); indeed, that his own rating went down one level (Tr. 52). Mr. Ridley further testified that the only reasons for Mr. Benson dropping from "Exceeds Fully Successful" to "Fully Successful" were, ". . . the change in grading systems and the actual observa-tion of performance done by Mr. Benson" (Tr. 52). For reasons fully set forth in n.3, supra, General Counsel's assertion concerning the absence of performance appraisals has been rejected.

9. Mr. Benson, even when shown his 1991-92 appraisal (G.C. Exh. 5), demonstrates a lack of understanding of the Navy ratings. Thus, in 1991-92, he was rated "Exceeds Fully Successful" (G.C. Exh. 5) not, "Highly Satisfactory" as he insisted (Tr. 18). His testimony that, ". . . it was never explained to me that there had been any change in our perfor-mance rating" (Tr. 32) was disproven by the DCA Performance Plan which he signed twice: October 1, 1992, and July 1, 1993 (Res. Exh. 2; Tr. 37). Mr. Eason testified that he informed each of the meatcutters of the new performance plan; told each it was the new grading system; and asked if they had any questions (Tr. 60); but he concedes that he did not tell them that under the new DCA system their ratings probably would decrease (Tr. 60).

10. Mr. Benson began with an erroneous assumption, namely, "Had my evaluation been the same as the other employees, just like it always has been, then they would have had to give me a cash award." (Tr. 22). In point of fact, Mr. Benson's rating for 1991-92 had been "Exceeds Fully Successful" (as had Mr. Coleman's), while Messrs. Gann and Shiver had been rated "Outstanding". Mr. Benson testified (Tr. 21-22) and Mr. Eason, agreed (Tr. 60), that in a prior year he and Mr. Shiver had been rated "Outstanding" and had been recommended for a cash award. It is conceded that because of the lack of funds for awards, no awards had been given for several years prior to 1993 (Tr. 61-62). Mr. Benson further testified that Mr. Gann previously had received an award (Tr. 23). Mr. Benson perceived improper motivation in Mr. Eason telling Messrs. Gann and Shiver not to tell anyone about it (Tr. 41); but conceded that Respondent did not announce cash awards (Tr. 24-25; see, also, Tr. 61); and Mr. Eason said that he, ". . . asked them not to mention it because . . . either the previous year or a year before that . . . I had recommended . . . [Benson and Shiver] for a cash award without ascertaining or confirming that the funds were available for that. And then I had to go back and announce to them that they were not going to get the cash award, and it caused controversy with me. It caused controversy with them and anybody else that was aware of the situation."

(Tr. 60-61).

Mr. Benson read Union animus in Respondent's saying DCA does not recognize the Union and denying training (Tr. 26-27); but conceded there was both a dispute, which the FLRA ulti-mately resolved in favor of the Union although, as Mr. Burgess testified, ". . . There was a point in time where the Authority had ruled that there was no successorship from the Navy to the . . . [DCA] organization for this unit . . . ." (Tr. 50), concerning representation following the consolida-tion which created DCA and a grievance concerning

training under a memorandum of agreement (Tr. 28).

Conclusions

Following the Supreme Court's decisions on dual, or mixed, motive cases in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) (hereinafter, "Mt. Healthy") and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 254 (1977), both the Authority in Internal Revenue Service, Washington, D.C., 6 FLRA 96 (1981) (hereinafter, "Internal Revenue") and the National Labor Relations Board, in Wright Line, 251 NLRB 1083 (1980), adopted the Mt. Healthy test for resolution of dual motive cases. Thus, the NLRB stated, in part, as follows:

> "Indeed, as is indicated by the above quotation of legislative history [93 Cong. Rec. 6678, 2 Leg. Hist. 1594 (1947)] and the citation of Great Dane [388 U.S. 26 (1967)], the shifting burden process in Mt. Healthy is consistent with the process envisioned by Congress and the Supreme Court to resolve discrimination cases, although the process has not been articulated formally in the manner set forth in Mt. Healthy. . .
>
> . .
>
> ". . . we shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct (footnote omitted)." (251 NLRB at 1088-1089)

Similarly, the Authority stated, in part, as follows:

> "In such circumstances the Authority finds that the burden is on the General Counsel to make a primafacie showing that the employee had engaged in protected activity and that this conduct was a motivating factor in agency management's decision . . . Once this is established, the agency

must show by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct.[1/]

[1/] Cf. Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) (involving conduct protected by the U.S. Constitution).

". . . If it is established by a preponderance of the evidence that the same action or decision of the agency would have taken place even in the absence of the protected activity, a complaint of violation of section 7116(a)(1) and (2) of the Statute will not be sustained. Conversely, if it is not established by a preponderance of the evidence that the action or decision would have taken place in any event, the Authority will find a violation under section 7116(a)(1) and (2) of the Statute." (6 FLRA at 99).

The Authority reaffirmed its holding in Internal Revenue, supra, with further clarification, in Letterkenny Army Depot, 35 FLRA 113 (1990) where the Authority stated, in part, as follows:

"First, the burden of proof always rests with the General Counsel. Section 2423.18 of the Authority's Rules and Regulations provides that '[t]he General Counsel . . . shall have the burden of proving the allegations of the complaint by a preponderance of the evidence.' This is true in all cases of alleged discrimination . . .

". . . the General Counsel must establish that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment. . . If the General Counsel fails to make the required prima facie showing, the case ends without further inquiry. . .

"Even if the General Counsel makes the required 'prima facie' showing, an agency will not

be found to have violated section 7116(a)(2) if the agency can demonstrate, 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. For example, IRS, 6 FLRA at 99 where the Authority referenced the approach taken by the Supreme Court in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) (Mt. Healthy). . .

"It is erroneous to conclude, however, that because a respondent agency has an opportunity to establish that it had legitimate justification for taking the disputed action, the ultimate burden of proof shifts to the respondent to do so. The burden of proving the allegations of the unfair labor practice complaint rests solely with the General Counsel.

"Second, even if the General Counsel makes the required prima facie showing, it is necessary to determine whether the General Counsel has proved the allegation in the complaint by a preponderance of the evidence. In this regard, a prima facie case consists only of 'sufficient evidence . . . to get plaintiff past . . . a motion to dismiss[.]' Black's Law Dictionary 1071 (5th ed. 1979) (citation omitted). Only if the respondent offers no evidence in its support does a prima facie showing alone equate to proof by a preponderance of the evidence. . .

"If, in response to a primafacie case established by the General Counsel, the respondent offers evidence, it is necessary to determine whether the respondent's evidence rebuts the General Counsel's prima facie showing. This determination is made on the basis of the entire record, including any evidence the General Counsel offers in rebuttal to the respondent's showing. If the respondent rebuts the General Counsel's prima facie showing by a preponderance of the evidence, thereby establish-ing that it would have taken the allegedly unlawful action even in the absence of protected activity, the General Counsel has not established a violation of the Statute." (35 FLRA at 118-119). cf.St. Mary's Honor Center

v. Hicks, -- U.S. --, 113 Sup. Ct. 2742, 2747 (1993).

The Authority further noted that,

". . . the analytical framework discussed herein is consistent with the framework applied in the private sector. The National Labor Relations Board (the Board) adopted the same test in discrimination cases arising under the National Labor Relations Act (the Act). See Wright Line, 251 NLRB 1083 (1980), enforced, 662 F.2d 889 (1st Cir. 1981), cert.denied, 455 U.S. 989 (1982). . .

"The Board's application of Mt. Healthy was sustained by the Supreme Court in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). . ." (35 FLRA at 122).

To like effect, see, also: United States Customs Service, Region IV, Miami District, Miami, Florida, 36 FLRA 489, 495 (1990); Department of Health and Human Services, Regional Personnel Office, Seattle, Washington, 47 FLRA 1338, 1342 (1993); U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky, 49 FLRA 1020, 1031 (1994).

A. General Counsel made a prima facie case.

I agree that General Counsel made a primafacie case of discrimination against Mr. Benson in violation of §§ 16(a)(1) and (2) of the Statute. It was not disputed that Mr. Benson was the only Union representative (steward) in the Commissary; that he filed at least one grievance and two unfair labor practice charges during the 1992-93 appraisal period; and that Respondent was well aware of his protected activity. General Counsel showed that Mr. Benson, after his initial six months of employment, when he was rated "Satisfactory", for thirteen years had never been rated less than "Exceeds Fully Successful"; but in 1993, his rating was reduced to "Fully Successful" even though Mr. Benson asserted his level of performance had not diminished. Mr. Benson further asserted that he had had the same rating as the other meat cutters but that only his rating was reduced. Further, while over half of the Commissary employees (eighteen of 28 to 30), including two of Mr. Benson's co-workers in the meat department, received cash awards, Mr. Benson did not. I have no doubt, as I stated in United States Department of the Interior, Office of the Secretary, U.S. Government Comptroller for the Virgin Islands, 11 FLRA 521 (1983),

". . . that in any case where action affecting the conditions of employment of an employee involves an employee known to be active in protected union activity there is a suspicion, or presumption, that the action was motivated by the employee's protected activity." (11 FLRA

at 532).[4]

Without more, it appeared that Mr. Benson had been discriminated against because of his protected Union activity. Letterkenny Army Depot, supra.

B. Respondent rebutted General Counsel's prima facie case.

Piece by piece, Respondent rebutted each element of General Counsel's case. First, for the 1992-93 appraisal period all employees of the Commissary were appraised and rated under the DCA system for the reason that the Navy Commissary at the Marine Corps Logistics Base, Albany, Georgia, had ceased to exist and the former Navy commissary had become part of the unified DCA (Army, Air Force, Navy). Contrary to Mr. Benson's assertion that, ". . . it was never explained to me that there had been any change in our performance rating" (Tr. 32), Mr. Benson, in fact, signed the DCA Performance Plan twice: on October 1, 1992, and on July 1, 1993 (Res. Exh. 2; Tr. 37).

Second, appraisals under the DCA appraisal system were lower throughout the Commissary because the job standards were different and the DCA appraisal system was more precise. For example, the Navy appraisal form (NAVSO 12430) did not define any of the rating levels, including: "Exceeds Fully Success-ful" or "Outstanding". However, the DCA form (DCA 50-4) defines each rating level. For example, "Fully Successful" is defined as, "Employee meets the requirements of all of the elements of the performance plan"; "Excellent" is defined as, "Employee exceeds more than one-half of the critical elements and meets all other elements"; and "Outstanding" is defined as, "Employee exceeds all elements of the performance plan" (G.C. Exhs. 6, 7, 8; Res. Exh. 1). The DCA appraisal form, on its face, by quantifying rating levels, e.g., "Excellent", as exceeds more than one-half of the critical elements and meets all other elements, makes that rating very different than the unqualified "Exceeds Fully Successful" on the former Navy appraisal form.

Third, all ratings of employees in the meat department decreased in 1992-93, from 1991-92, by one level. Thus, Messrs. Gann and Shiver, who had been rated "Outstanding" in 1991-92, were rated "Excellent" in 1992-93; and Messrs. Benson and Coleman, who had been rated "Exceeds Fully Successful" in 1991-92, were rated "Fully Successful" in 1992-93. This wholly rebutted Mr. Benson's dual assertions that he had always had the same rating as his co-workers and that only his rating was decreased in 1993.

Fourth, while General Counsel pointed to Mr. Benson's activity in filing unfair labor practice charges and a grievance during the 1992-93 appraisal period, Mr. Benson had, in fact, been the sole Union steward for seven or eight years and when asked if he had filed unfair labor practices and grievances before 1993, responded, "yes, sir -- I sure did." (Tr. 35), from which I conclude that he was an active steward throughout his tenure. Mr. Benson testified that throughout his service, except the first six months when he was rated "Fully Successful", he was never rated lower than "Exceeds Fully Successful" and that in one year he had been rated "Outstanding". He further testified that when he and Mr. Shiver had been rated "Outstanding", his supervisor, Mr. Eason, had recommended him for an award. Consequently, notwithstanding his long and active role as Union steward, the record reflects no discrimination toward Mr. Benson because of his protected activity. Indeed, the suggestion that his rating might have been lowered because he filed a grievance seeking "cold pay" is wholly unconvincing as Mr. Eason, who appraised Mr. Benson, would have benefitted if the grievance were successful (Tr. 29). Also, the suggestion that Respondent demonstrated Union animus because Mr. Ridley said DCA did not recognize the Union and/or that, ". . . we don't know if we have a Union or not" (Tr.

28) and in denying Mr. Benson official time for Union training, was refuted by testimony that demonstrated that there had been a legitimate question of representation (Tr. 50) and that his grievance seeking official time for training was not sustained (Tr. 28). Indeed, Mr. Benson had interjected that Respondent, notwith-standing its stated doubt as to the Union's representative status, had continued to deduct union dues (Tr. 20). Having considered the entire record, I find no indication of Union animus.

Fifth, the suggestion that Mr. Eason sought to conceal the awards to Messrs. Gann and Shiver for some improper motive when he told them, as Mr. Shiver testified, Mr. Eason said,

"A (sic) Now, were you given any instruction when you received this award not to tell anybody

about it?

"A Yes, I was.

"Q And did he give a reason for that instruction?

"A He just said that there would be some controversy.

"Q -- just controversy.

"A Because everyone did not get it, he said." (Tr. 41-42)

was refuted, first, by Mr. Shiver's admission that he was told not to tell anyone about the award at the time he signed his appraisal (G.C. Exh. 7) at which time the award had been recommended but not approved (Tr. 43); and second, by Mr. Eason's wholly credible testimony that he asked Messrs. Gann and Shiver not to mention their recommended awards because, ". . . either the previous year or a year prior to that . . . I had recommended . . . [Benson and Shiver] for a cash award . . . And then I had to go back and announce to them that they were not going to get the cash award, and it caused controversy. . . ." (Tr. 60-61). Further, Mr. Benson conceded that Respondent did not announce cash awards. Finally, although a cash award had been given only in one prior year in the meat department (to Mr. Gann), plainly in that instance only one employee received an award out of two or more employees in its meat department; and when Mr. Eason recommended Messrs. Benson and Shiver for an award, presumably in 1991 (for the 1990-91 appraisal year), only two, of three, or more, employees, were recommended for an award. Consequently the grant of awards to two employees, out of four, in 1993 was wholly consistent with prior practice.

General Counsel's argument that Respondent ". . . introduced only weak evidence -- the testimony of Jimmie Burgess, its Personnel Officer, located out of state at Maxwell Air Force Base, Alabama (footnote omitted). Clearly available to Respondent was the performance appraisals of all of the other commissary employees. If those appraisals had supported Burgess's (sic) claim, Respondent would have introduced them into evidence." (General Counsel's Brief, pp. 11-12), is without merit and is rejected. As noted in footnote 3, supra, General Counsel made no objection to the examination of witnesses about 1991-92 ratings without

production of the appraisals. This included, not just Mr. Burgess as General Counsel indicates, but, Mr. Benson (Tr. 33); Mr. Burgess (Tr. 46, 47); Mr. Ridley (Tr. 51-52, 54, 55); and Mr. Eason (Tr. 58-59). Moreover, General Counsel never requested any 1991-92 or 1992-93 appraisals. Having failed to object to testimony concerning 1991-92 appraisals and having failed to request any appraisals, General Counsel can not now complain of their absence. I found Messrs. Burgess, Ridley and Eason credible witnesses and fully credit their testimony.

Accordingly, I conclude that the preponderance of the evidence establishes that Respondent would have given Mr. Benson the same rating even in the absence of his protected conduct, Internal Revenue, supra, and further that the preponderance of the evidence demonstrates that there was a legitimate justification for its lowering Mr. Benson's rating and that it would have taken the same action even in the absence of protected activity, Letterkenny Army Depot, supra, and the complaint of violation of §§ 16(a)(1), (2) and (4) have not been sustained. Therefore, it is recommended that the Authority adopt the following:

ORDER

That the Complaint in Case No. AT-CA-40242 be, and the same is hereby, dismissed.

WILLIAM B. DEVANEY

Administrative Law Judge

Dated: May 11, 1995

Washington, DC

1. For convenience of reference, sections of the Statute hereinafter, are, also, referred to without inclusion of the initial "71" of the statutory reference, i.e., Section 7116(a)(2) will be referred to, simply, as, "16(a)(2)".

2. The reporter filed on November 21, 1994, the transcript with an incorrect cover sheet which showed both an incorrect listing of the parties and Case Number and on November 22, 1994, filed the same transcript with the correct Case Number but still showing the parties incorrectly. In like manner, the reporter filed the exhibits, and rejected exhibits, with correct Case Numbers but incorrect parties. On my own motion, I have corrected all cover sheets to reflect both correct parties and Case Numbers.

3. General Counsel's assertion that, "An adverse inference can and must be drawn from Respondent's failure to offer the performance appraisals of the other employees, including the 18 who received cash awards, into evidence . . . ." (General Counsel's Brief, p. 12), is rejected as baseless. First, there was no objection to examining witness about 1991-92 ratings without producing the appraisals. This included the examination of Mr. Benson (Tr. 33); Mr. Burgess (Tr. 46, 47); Mr. Ridley (Tr. 51-52, 54, 55); and Mr. Eason (Tr. 58-59). Second, the record shows no request by General Counsel for any 1991-92 appraisal. Third, Mr. Shiver did not, as General Counsel states, ". . . denied that his performance appraisal was lowered . . . ." (General Counsel's Brief, p. 13). To the contrary, Mr. Shiver did not recall whether his rating for 1992-93, for which he received an award, was "Outstanding or excellent" (Tr. 41). When asked if he recalled his 1991-92 rating, Mr. Shiver testified,

"A No, sir. I really --

"Q Did you get the highest possible rating, Outstanding?

"A I could -- honestly could not say. I don't really remember. Sir, I -- if I must say, I don't put a whole lot of stock in them, you know. I do my best, and that is all that --. . . ." (Tr. 42).

However, when he signed the 1992-93 appraisal he said, ". . . I saw that it was different from before." (Tr. 43).

4. Of course, I further stated, inter alia, that,

"The presumption is, of course, rebuttable . . . ." (11 FLRA at 532).