

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

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| U.S. DEPARTMENT OF THE AIR FORCE 315 th AIRLIFT WING CHARLESTON AIR FORCE BASE, SOUTH CAROLINA Respondent | Case No. AT-CA-90539 |
| and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1869 Charging Party | |

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. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **APRIL 17, 2000**, and addressed to:

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

JESSE ETELSON
Administrative Law Judge

Dated: March 16, 2000
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: March 16, 2000

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF THE AIR FORCE
315th AIRLIFT WING
CHARLESTON AIR FORCE BASE, SOUTH CAROLINA

Respondent

and

Case No. AT-CA-90539

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1869

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(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 transcripts, exhibits and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ 00-21
WASHINGTON, D.C.

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|---|----------------------|
| U.S. DEPARTMENT OF THE AIR FORCE 315 th AIRLIFT WING CHARLESTON AIR FORCE BASE, SOUTH CAROLINA Respondent | Case No. AT-CA-90539 |
| and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1869 Charging Party | |

Phillip G. Tidmore, Esq.
Maj. Douglas C. Huff, Esq.
For the Respondent

Paige A. Sanderson, Esq.
Sherrod G. Patterson, Esq.
For the General Counsel

James L. Bell, Esq.
For the Charging Party

Before: JESSE ETELSON
 Administrative Law Judge

DECISION

Statement of the Case

The General Counsel has undertaken the difficult task of showing that an employee's performance appraisal ratings were lowered because of her protected activities. The unfair labor practice complaint alleges that employee Sharon Richardson's supervisor, Georgia Fallaw, lowered the numerical ratings on seven out of nine Manner of Performance Appraisal Factors (from the ratings Fallaw had given her the previous year) on Richardson's performance for the period of April 1, 1998 to March 31, 1999 because Richardson engaged in these activities. Such conduct, as alleged in the complaint, violated sections 7116(a)(1), (2) and (4) of the Federal Service Labor-Management Relations Statute (the

Statute). Respondent's answer denies that the individual ratings were lowered because of Richardson's protected activities and that it committed the alleged unfair labor practices.

A hearing on the complaint was held on November 17, 1999, in Moncks Corner, South Carolina. Counsel for the General Counsel and for Respondent filed post-hearing briefs.

Findings of Fact¹

A. Background

Sharon Richardson has been employed in the Respondent's Air Reserve Program as an Air Reserve Technician (ART) for approximately ten years. Her occupational status within that job title is "aircraft structural repair technician." As an ART, Richardson performs civilian duties during the week and military duties on the weekends. Her military status is that of Technical Sergeant, and her job title is "aircraft structural maintenance journeyman" (G.C. Exh. 4). She must maintain her military position in order to retain her civilian job. Richardson's civilian and military positions require substantially the same skills and functions.

Since October 1997, Georgia Fallaw has been Richardson's first-line supervisor on the civilian side, for performance appraisal purposes.² Richardson had been an applicant for the position that Fallaw assumed in October 1997. After Fallaw assumed that position, other supervisors below her in the chain of command worked with Richardson on a day-to-day basis. Fallaw did not. Fallaw is also Richardson's second-level supervisor with respect to her military position.

¹

These findings are based on the entire record. There were no material conflicts in testimony. Richardson's accounts of appraisal interviews with her supervisor, Georgia Fallaw, did not elicit any challenge or, with minor exceptions, contradictory testimony, and is credited in substance. I neither credit nor discredit, as such, witnesses' opinion testimony regarding the motivation behind certain actions. Motivation here is an ultimate fact that will be analyzed later in this decision.

²

Fallaw's name is sometimes misspelled as "Mallow" in the transcript of the hearing.

Richardson and Fallaw both appeared as witnesses in an Authority hearing in July 1999, in Case No. AT-CA-90324, involving the same parties as the instant case. As the presiding judge in Case No. AT-CA-90324, I issued a decision on October 26, 1999, in which I found that:

Fallow came to believe that Richardson thought, and had "let me know," that Richardson, not Fallaw, should have been hired for that [supervisory] position, and that she was resentful of Fallaw's having received the job. At the same time, it appeared to Fallaw that, initially, Richardson wanted to tell Fallaw everything that she thought was wrong with the organization. Fallaw characterized their relationship as somewhat strained Richardson affirmed that she found it very difficult to deal with Fallaw.

Exceptions and cross-exceptions to that Decision have been filed, and the case is pending before the Authority. However, there were no exceptions to the findings quoted above, and I find it appropriate to take official notice of them for purposes of presenting a more complete picture of the background to the instant case.

Richardson also serves as the elected executive vice-president of the Charging Party (the Union), its woman's coordinator, and its shop steward for the "Fabrication Flight" plant. Richardson acts as a primary member on the Union's Memorandum of Agreement negotiating team and participates in other negotiations around the Charleston Air Force Base. Richardson provided Fallaw with a copy of her appointment to the negotiating team. As shop steward for Fabrication Flight, Richardson has the authority to file grievances and to represent employees in those grievances. Between October 1997 and November 19, 1999 (the date of the hearing in this case) Fallaw was mentioned in several grievances filed by Richardson and in several unfair labor practice charges filed by the Union.

Richardson has signed several unfair labor practice charges filed by the Union. The record does not reveal whether Richardson had a role with respect to any of the unfair labor practice cases involving Fallaw, but she had a

role in Case No. AT-CA-90324 as mentioned above.³ Additionally, Richardson's name and various titles also appear regularly on the Union's roster of representatives, which is provided to all management officials. Richardson performs her Union duties on official time approved by her immediate work supervisor. She advises the supervisor what she needs the time for and for how long, and completes the standard official time form to account for the time.

B. Richardson's Performance Appraisals

1. Civilian employee appraisal system in brief;
Richardson's earlier appraisal history

The appraisal form used for employees such as Richardson, AF Form 860A, contains spaces for two sets of ratings. On the front side of the sheet are listed nine "Appraisal Factors." A numerical score is to be given for each of these factors. A score of 1-3 is in what is designated as the "Low Range," 4-6 is "Central Range," and 7-9 is "High Range." The lowest score that appears on any of the appraisals in evidence here is 6. Form 860A describes a score of 6 more specifically as "Slightly Above Fully Successful." A score of 7 is described as "Above Fully Successful," 8 is "Far Above Fully Successful," and 9 is "Outstanding."

On the reverse side of Form 860A, space is provided for ratings of "N" (Did Not Meet), "M" (Met), or "E" (Exceeded) for each of the critical and noncritical elements in the appraised employee's "performance plan." These letter ratings determine whether the employee receives an overall performance rating of Superior, Excellent, Fully Successful, Minimally Successful, or Unacceptable. For example, an overall rating of Excellent may be achieved if the employee has "Exceeded" in more than half of the critical elements and has at least "Met" the requirements of all the performance elements.

In the two years preceding her first appraisal from Fallaw, Richardson had received overall performance ratings

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On cross-examination, over the General Counsel's objection, counsel elicited from Richardson that she filed 12 "EEO cases . . . against Ms. Fallaw as the alleged discriminating official or responsible management --" (Tr. 58). Although the probability that these filings were other than protected activity seems remote, the General Counsel has not urged any reliance on this activity and the record provides insufficient basis to find that this actually was protected activity.

of Excellent and no numerical scores on the appraisal factors below 8. The appraisal raters had been the immediate supervisors who assigned and evaluated Richardson's work. At some point a regulatory change required that the person in Fallaw's position serve as the rating official although she did not work as closely with Richardson as the immediate working-level supervisors did (Tr. 28-30).

2. Civilian appraisal for April 1997-March 1998

On April 16, 1998, Richardson received her first performance appraisal from Fallaw. It covered from April 1, 1997, to March 31, 1998. This was the appraisal immediately preceding the one at issue here. Richardson received an overall rating of "Fully Successful." Fallaw assigned her numerical scores of 8 on six of the "appraisal factors," a score of 7 on two others, and a score of 6 on one factor.

Richardson and Fallaw met in April 1998 to discuss this appraisal. Richardson questioned Fallaw about why she was rated "Met" and not "Exceeded" on a critical performance element called "Communications Discipline" (G.C. Exh. 2). Fallaw had written the following as part of her comment in the space provided for substantiation of the rating:

Ms. Richardson is adept in problem identification. Improved emphasis on linking observed problems with resolutions is a method to exceed in this area. (G.C. Exh. 2.)

Richardson asked Fallaw if the last sentence had anything to do with her union activity. Fallaw responded that it did not. Richardson then asked her what the comment referred to. Fallaw said just that there was room for improvement. Richardson then asked how she could exceed in that performance element. Fallaw had no further response. (Tr. 30-32.)

Richardson also asked Fallaw, among other things, whether her "Met" ratings on other performance elements were based on her union activities. Fallaw denied that they were. She asked Fallaw to explain a written comment on the critical element, "Work Habit Discipline," in which Fallaw stated that Richardson could "exceed in this area" by "[p]rofessional, courteous, and cooperative interaction with all coworkers, sections, and organizations" (language that Fallaw quoted from Richardson's performance plan). Fallaw answered that Richardson "would go outside of my chain of command and not use my chain of command," but gave Richardson no examples of that conduct (Tr. 33-34).

Richardson questioned a rating of "Met" rather than "Exceeded" on a noncritical element called "Extra Duties." Fallaw responded that Richardson was outside the shop, which prevented her from doing extra duties. Richardson asked Fallaw whether this related to her Union position. Fallaw answered that it did not. (Tr. 34.)

3. Military-side performance report and feedback

On November 13, 1998, Fallaw, in her capacity as Richardson's second-level supervisor on the military side, signed off as the "indorser" on an "Enlisted Performance Report" on Richardson's performance of her duties as a "TSGT" and aircraft structural maintenance journeyman (G.C. Exh. 4). This report covered the period of January 1, 1996 to September 30, 1998. The report has a different format than the civilian side AF Form 860A. It contains a set of ratings and comments by Msgt. Harley Wagner, Richardson's first-line military supervisor and "rater," and a concurrence, plus additional comments, by Fallaw as the "indorser."⁴ The report awards Richardson the highest rating in seven performance categories, and the next to highest rating in the seventh category. Rather than an overall performance rating, the Enlisted Performance Report contains a "Promotion Recommendation." Both the rater and the indorser gave Richardson the highest possible recommendation: "Immediate Promotion." As the indorser, Fallaw added the following comments to those of the rater:

- Expertly supervises, plans, and directs training and work assignments for eight traditional reservists
- Monitors proficiency of individual training and implements appropriate changes to meet standards
- Successfully completed Advanced Composite Repair Training
- Vigorously and professionally repaired C-17 tip-over strut door 12 hours ahead of projected time
- Provided guidance and technical expertise to three reservists in composite repairs of C-17 ram air duct
- Consistently produces accurate and timely results as flight's UTAPS Monitor, promote[.] (G.C. Exh. 4.)

On March 27, 1999, Msgt. Wagner presented Richardson with a "Performance Feedback Worksheet" containing updated notations, in a different format, on performance categories

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The transcript of the hearing identifies Harley as a "massive sergeant" (Tr. 41). I have no idea about the accuracy of the description, but I correct the transcript to read "Master Sergeant."

similar to those covered in the Enlisted Performance Report. Instead of fixed categories of ratings, however, this worksheet calls for the rater to place a mark in the appropriate position on a horizontal line representing the individual's need for improvement in each of the designated performance areas. Wagner placed marks at the extreme "needs little or no improvement" end of the lines for 21 performance categories and placed marks near the end of the line for 4 other subcategories. The subcategories in which the marks indicate some, although slight, room for improvement were "Timeliness of Work," "Support for Organizational Activities," "Initiative," and "Communication Skills-Written." On the reverse side of the worksheet, Wagner commended Richardson on several items and suggested one area for improvement: "Need to spend less time accomplishing administrative duties and more time interacting with team members." (G.C. Exh. 5.)

4. Civilian appraisal for April 1998-March 1999

On April 26, 1999, Fallaw gave Richardson her annual appraisal for the year ending March 31, 1999. Richardson retained the same ratings she had received the previous year on each of the "performance elements" and the overall rating of Fully Successful. However, her numerical scores on seven of the nine "appraisal factors" dropped by one point each. This "lowering" of her score is the basis of the complaint in this case. The scores that dropped were:

| <u>Appraisal Factor</u> | <u>1997-98 Rating</u> | <u>1998-99 Rating</u> |
|-------------------------|-----------------------------------|--|
| Work Effort | 8 (Far above fully successful) | 7 (Above fully successful) |
| Adaptability to Work | 8 | 7 |
| Problem Solving | 8 | 7 |
| Communication | 7 | 6 (Slightly above fully successful) |
| Work Productivity | 8 | 7 |
| Self-Sufficiency | 8 | 7 |
| Work Management | 7 | 6 |

(G.C. Exh. 2&3).

In preparing to rate Richardson for the 1998-99 period, Fallaw sought the input of the working-level supervisors who had observed Richardson most closely. At least two of them, Sergeant Longman, who supervised the work area in which Richardson spent most of her time, and Sergeant Childers, provided Fallaw with recommended appraisals on AF Form 860A.

Childers' recommended appraisal form was not available at the time of the hearing and presumably had been destroyed. Longman's appraisal, which covered the nine months up to January 1999, gave Richardson an overall performance rating of "Excellent" (based on ratings of "Exceeded" on four of the six critical performance elements, compared to three out of six given by Fallaw).⁵ Longman's ratings on eight of the nine "appraisal factors" were higher than those that Fallaw gave to Richardson for the full year:

| <u>Appraisal Factor</u> | <u>Longman's Rating</u> | <u>Fallaw's Rating</u> |
|-------------------------|-------------------------|------------------------|
| Work Effort | 9 (Outstanding) | 7 |
| Adaptability to Work | 8 | 7 |
| Problem Solving | 8 | 7 |
| Working Relationships | 7 | 6 |
| Communication | 8 | 6 |
| Work Productivity | 9 | 7 |
| Self-Sufficiency | 8 | 7 |
| Skill in Work | 8 | 8 |
| Work Management | 8 | 6 |

(G.C. Exh. 3&6).

Fallaw sought more specific information from both Longman and Childers regarding their recommended appraisals, but received none. She then proceeded to assign her own numerical scores to the "appraisal factors." With respect to "Work Effort," her score of "7" reflected Fallaw's view, according to her testimony at the hearing, that Richardson's effort was good but inconsistent. The score of "7" for "Adaptability to Work" was no higher because of some reports to Fallaw of occasions when Richardson had failed to wear the proper clothing or safety equipment in certain areas where they were required. Fallaw attributed Richardson's score of no higher than "7" in "Problem Solving" to her observation, reflected previously in the 1997-98 "Met" rating for "Communications Discipline," that Richardson often identified problems without offering suggested resolutions.

Fallaw explained Richardson's score of "6" on "Working Relationships" (the same as in the previous year) with the observation that she got along with some people but "had great difficulty getting along with others" and was weak in her sensitivity to fellow workers (Tr. 84). A similar relatively low rating in "Communication" was, according to Fallaw, a result of Richardson's frequent use of "improper

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Longman had also been Richardson's working-level supervisor during the 1997-98 appraisal year. His input to Fallaw's appraisal for that year was not explored at the hearing.

routes or channels" to communicate. Fallaw cited as an example an occasion when Richardson "tossed" a sheet of paper on Fallaw's desk, and, when Fallaw asked her what it was about, Richardson "directed" Fallaw to send her for some advanced training and to see Major Daley about it. Fallaw testified that Major Daley had no jurisdiction in that matter. (Tr. 88-89.) Chief Master Sergeant Wesley Freeman, Fallaw's reviewing official on this appraisal, testified credibly that Fallaw, in discussing the appraisal for his consideration, cited in connection with "Communication" that Richardson had failed to report safety hazards to her supervisors, as she was required to do, but instead filed safety reports on her own.

Richardson's "Work Productivity" suffered to some extent, according to Fallaw, from her lack of a sense of urgency with respect to some deadlines. Fallaw cited reports she received from working-level supervisors that they were afraid to put Richardson on jobs that had deadlines. Richardson's "Self-Sufficiency," where she again dropped from "8" to "7," was limited by a perceived failure to match the enthusiasm and initiative she demonstrated while working in the "composite area" with a similar approach to work required in other areas. (Tr. 90-93.) The final "appraisal factor" on which Richardson's score dropped in 1998-99 was "Work Management." Fallaw's explanation for the score of "6" was closely related to her observations regarding the other factors discussed in this paragraph. She also perceived that Richardson underperformed with respect to facilitating the continuity of work on each of her projects by those replacing her on the next work shift.

Fallaw again held an appraisal interview with Richardson when she gave her the AF Form 860A for 1998-99. Richardson asked again whether the "Met" ratings on some of the "performance elements" were due to her union activities, and Fallaw said again that they were not. Richardson testified that she then asked how she could exceed in those areas and that Fallaw gave her no response (Tr. 36, 71). Fallaw did not recall that such a conversation occurred (Tr. 125), but I find that the April 1998 scenario essentially repeated itself in this respect. Richardson also answered affirmatively to a question about discussing the lowered "appraisal factor" scores with Fallaw (Tr. 54). However, her testimony that Fallaw answered by saying that a questioned rating was "Met" indicates that the subject of her inquiry was not the numerical scores on the "appraisal factors" but the letter ratings on the "performance elements."

Analysis and Conclusions

As stated at the beginning this Decision, the task of proving that an employee's performance appraisal ratings were lowered because of that employee's protected activities is a difficult one. The reason is close at hand. Appraisal ratings are, even more so than many other management decisions affecting employees, based on subjective judgments. The Authority is not to substitute its judgment for that of the rater. Nor does it pass on the fairness of the ratings.

In order to make even a *prima facie* showing that the discrimination alleged in the complaint has occurred, the General Counsel must present facts "sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." *Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced*, 662 F.2d 889 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).⁶ Such an inference may be based on circumstantial as well as direct evidence. However, "[t]he mere fact that . . . prior appraisals . . . were numerically higher . . . does not, in the absence of antipathy toward [the employee] because of Union activities, indicate that the appraisal was discriminatorily motivated." *Internal Revenue Service, Washington, DC*, 8 FLRA 440, 449 n.7 (1982) (quoting *Department of the Treasury, Internal Revenue Service, Indianapolis, Indiana*, 7 A/SLMR 844, 881 (1977)).

The Authority has found a *prima facie* showing of discrimination where the appraising supervisor, in comments to the appraised employee, connected the employee's protected activities with the performance that was being evaluated, *U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky*, 49 FLRA 1020, 1024, 1032-33 (1994), or with the employee's chance of obtaining a higher performance appraisal. *Department of the*

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In Letterkenny Army Depot, 35 FLRA 113, 122 (1990) (*Letterkenny*), the Authority's leading decision on discrimination under the Statute, the Authority stated that *Wright Line* contained the same test (as the *Letterkenny* test) in discrimination cases arising under the National Labor Relations Act. In upholding the *Wright Line* test, the Supreme Court stated: "As we understand the Board's decisions, they have consistently held that the unfair labor practice consists of a discharge or other adverse action that is based in whole or in part on antiunion animus--or as the Board now puts it, that the employee's protected conduct was a substantial or motivating factor in the adverse action." *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 (1983).

Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah, 35 FLRA 891, 900 (1990). Similarly, a *prima facie* case was established when the supervisor lowered the employee's scores in every appraisal category from "9" to "5," shortly after the employee had filed a grievance, where the supervisor expressed chagrin over that filing, and where he testified that the employee's performance was "great" and had remained the same during the later appraisal period. *22nd Combat Support Group (SAC), March Air Force Base, California*, 27 FLRA 279, 283-85 (1987).

In these cases, the evidence included expressions of hostility toward protected activities, other strongly suggestive circumstances, or both. However, where there was evidence neither of antiunion animus on the part of the supervisor nor of any relationship between the employee's protected activity and his allegedly lowered performance appraisal, the Authority found that the evidence failed to establish that the employee was discriminated against because he engaged in protected activity. *Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 21 FLRA 53 (1986).⁷ See also *Department of Housing and Urban Development, Columbia Area Office, Columbia, South Carolina*, 21 FLRA 698, 710 (1986) ("Unless sufficient evidence appears in the record which reflects significant anti-union *animus*, the undersigned would be reluctant to conclude that the basis for Respondent's selection . . . , albeit deemed to be subjective, is a pretextual one.").

In the instant case, there is no direct evidence of antiunion animus on the part of the appraising supervisor. Is there, then, circumstantial evidence that would warrant the inference that Fallaw was motivated by Richardson's protected activity? It is insufficient that a number of the grievances that Richardson filed or the unfair labor practice case in which she was a witness involved Fallaw. Neither animus nor a propensity to retaliate can be *presumed* merely because one does not expect Fallaw to have welcomed this honor.

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In that pre-*Letterkenny* case, the Administrative Law Judge had recommended dismissing the complaint on the basis that, assuming that the General Counsel had established a *prima facie* case, the respondent had established what would now be considered a *Letterkenny* affirmative defense. *Id.* at 59-60. The Authority, however, treated the case in effect as one in which the General Counsel had not established a *prima facie* case. *Id.* at 53-54.

The General Counsel relies heavily but unpersuasively on the timing of the appraisal. The fact that the appraisal followed Richardson's protected activity is insignificant where, as here, the timing of the appraisal was not selected by the supervisor but was built into the system. See *Department of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 55 FLRA 1201, 1206 (2000) (*Robins*). Moreover, there has been no showing that Richardson's union activities had intensified, or that Fallaw was mentioned more often in the grievances Richardson filed during the period covered by the appraisal at issue than during the previous appraisal period.

In the General Counsel's view, one must consider Fallaw's appraisal of Richardson for the most recent previous period, April 1997-March 1998, as evidence of her unlawful motivation because it was then that Richardson's overall rating dropped from "Excellent" to "Fully Successful" and dropped below "8," for the first time in two years, on any individual appraisal factors. However, there is insufficient basis for inferring that the 1997-98 ratings were motivated by Richardson's protected activities. Those ratings might have been based entirely on Fallaw's opinion (as her new supervisor) of Richardson's performance, or have been colored, consciously or unconsciously, by personal animosity towards Richardson, or by some degree of insecurity with respect to Richardson.⁸

The possibility of personal animosity or insecurity is suggested by: (1) Fallaw's opinion (apparently shared by Richardson) that their relationship was strained; (2) Fallaw's impression that Richardson did not conceal her feeling that she had been unfairly rejected as an applicant for Fallaw's position; and (3) Fallaw's impression that Richardson was using her as a sounding board for her complaints about the organization. Such impressions could also account for Fallaw's unwillingness to give Richardson anything but conclusory explanations for some of the ratings at their appraisal interviews. Whatever the reason for these actions, the circumstances do not permit anything more than a suspicion that antiunion considerations were a contributing factor. In my view, the possibility that they were a contributing factor is, at best, no greater than that they

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Fallaw had been in a supervisory position with respect to Richardson's civilian position for only the last six months of the 1997-98 appraisal year. The record does not reveal what input she received from Richardson's working level supervisors for that year's appraisal.

were not. Therefore, that possibility cannot support an affirmative inference.

Much the same can be said about the appraisal ratings actually in issue here, although there are other circumstances to be considered. In her appraisal for the April 1998-March 1999 period, Fallaw gave Richardson exactly the same ratings as in the previous year with respect to each of the critical and noncritical performance elements. This resulted again in an overall rating of "Fully Successful." However, Fallaw reduced, by one point each, the numerical scores she gave Richardson for seven of the nine "appraisal factors," leaving Richardson with one "8" ("Far Above Fully Successful"), five "7's" ("Above Fully Successful"), and three "6's" ("Slightly Above Fully Successful").⁹

The three "6" scores, the lowest that Fallaw gave to Richardson, included one, in "Working Relationships," that equaled the score Fallaw had given her the previous year. Although the scores recommended by Sergeant Longman were generally higher than Fallaw's, Longman's recommended score of "7" on Richardson's "Working Relationships" was lower than any of the others he recommended for her, thus suggesting his concurrence with Fallaw that Richardson had not performed as well in this area as she had in others.

As the General Counsel notes, Richardson received, with Fallaw's concurrence, higher ratings for her performance on the military side of her job than those Fallaw gave her on the civilian side in overlapping periods. However, if this is an inconsistency it is not one that suggests an improper motive.

On the other hand, although the General Counsel deploras Fallaw's seeming disregard of the recommended civilian-side scores submitted by Sergeant Longman, Fallaw raised Longman's recommended rating on critical performance element No. 8, relating to Air Reserve training, from "Met" to "Exceeded." This change was consistent with the higher military-side ratings that Fallaw had approved for Richardson and with the rating she had given Richardson on this critical element the previous year. Such a change is somewhat inconsistent with a plan to retaliate against

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How such ratings comport with an overall rating of only "Fully Successful" as measured by the scores on the performance elements remains a mystery to me. However, the overall rating, despite the General Counsel's attempt to have it changed as a remedy for the alleged discrimination, is not within the scope of the complaint.

Richardson, and supports the view that Fallaw called her own shots without any predisposition.

Similarly, it is not to be presumed that Fallaw consciously "lowered" Richardson's numerical scores, or that, absent antiunion motivation, her assessment of Richardson's performance must have remained the same from year to year. Whether or not one believes that she justified the 1998-99 scores satisfactorily in her testimony, it was part of the General Counsel's burden to show that those scores were, at least in part, a response to Richardson's protected activities.¹⁰

Had Fallaw's explanations for such changes been patently baseless, or had the scores fallen more precipitously than could reasonably be accounted for by these explanations, a stronger case might be made for a "pretext" finding, and no greater showing might have been necessary in order to establish a *prima facie* case. However, the changes were relatively slight and there were several possible explanations for the scores. Thus, even if the scores are not fully supportable, and even if Fallaw's unhelpfulness at the April 1999 interview in response to Richardson's requests for elucidation is reprehensible, we are left with more than one alternative explanation. Nor does an antiunion explanation cry out for acceptance in these circumstances.

If the scores were colored by any bias, it appears to me at least as likely that such bias arose from personal considerations as that it arose from antiunion motivation.¹¹

To be clear, I am *not* saying that both of these biases entered into the appraisals. What I am saying is that any contributory bias might have included one, the other, both, or neither, and that the evidence that an antiunion-based

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The 1998-99 scores, and Fallaw's explanations for them, need not withstand the same degree of scrutiny as would be the case if Respondent were required to mount an affirmative defense to the General Counsel's *prima facie* case. Cf. *Robins*, 55 FLRA at 1205 ("[H]ad a *prima facie* showing of discrimination been established, a more thorough evaluation and analysis of Respondent's affirmative defenses would have been necessary.").

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As Fallaw cannot be expected to have admitted that she was influenced by personal bias against Richardson (that was unrelated to protected activities) even if she was and she realized it, her failure to claim that she was does not preclude my assessment of that possibility in determining whether there is a *prima facie* case.

bias played any role does not preponderate.¹² Thus, given the General Counsel's burden to establish motivation by a preponderance of the evidence, there is not a *prima facie* case here.

Accordingly, I recommend that the Authority issue the following Order.

ORDER

The complaint in Case No. AT-CA-90539, is dismissed.

Issued, Washington, DC, March 16, 2000.

JESSE ETELSON
Administrative Law Judge

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For example, there is good reason to believe that the relatively low scores for "Working Relationships" and "Communications" were influenced by Fallaw's dislike of the manner in which Richardson interacted with her on work-related matters. Such influence might reflect legitimate managerial considerations, personal bias, or both.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by
JESSE ETELSON, Administrative Law Judge, in Case No.
AT-CA-90539, were sent to the following parties:

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