

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

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION FORREST CITY, ARKANSAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 922 Charging Party	Case No. DA-CA-02-0204

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 her 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. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **SEPTEMBER 8, 2003**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20424

SUSAN E. JELEN
Administrative Law Judge

Dated: August 5, 2003
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: August 5, 2003

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
FORREST CITY, ARKANSAS

Respondent

and

Case No. DA-CA-02-0204

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 922

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 transcript, exhibits and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION FORREST CITY, ARKANSAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 922 Charging Party	Case No. DA-CA-02-0204

Greg A. Weddle, Esq.
For the General Counsel

Jennifer Spangler, Esq.
For the Respondent

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an unfair labor practice charge filed by the American Federation of Government Employees, Local 922 (Union) against the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Forrest City, Arkansas (Respondent), as well as a Complaint and Notice of Hearing issued by the Regional Director of the Dallas Region of the Federal Labor Relations Authority (FLRA). The complaint alleged that the Respondent violated § 7116(a)(1), (2) and (4) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, et seq. (Statute). Specifically, the complaint alleged that Respondent violated § 7116(a)(1) on or about August 9, 2001, when during a meeting with employee Joseph (Jody) Cook, supervisor Thomas Mathers denied Cook's request for union representation and stated that Cook would face repercussions if he did not step down as a Union steward. The complaint also alleged that the Respondent violated § 7116(a)(1) and (2) and § 7116(a)(1) and (4) by (1) significantly lowering

Cook's ratings in quarterly and annual performance reviews covering the period ranging from July 1, 2001 through March 31, 2002, and (2) assigning Cook substantially more work orders, many of which were outside the scope of his job description, than he previously received.¹ The complaint alleged that Respondent took the actions with respect to Cook's ratings and work assignments because he engaged in protected activity.

A hearing in this matter was held in Memphis, Tennessee, on March 4, 2003. The parties were represented and afforded a full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses and file post-hearing briefs. Both the General Counsel and the Respondent filed timely briefs.

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

Statement of the Facts

Background Information

Joseph "Jody" Cook was at all times material employed as one of two electrical worker supervisors, WS-9, assigned to the facilities division of the Respondent. (Tr. 24) The maintenance department is responsible for overall maintenance, renovation and repairs at the Respondent. (Tr. 118) That department is headed by the facility manager, who at all times material, was R.C. "Ricky" Martin. (Tr. 94) Two general foreman who were, in turn, responsible for supervising the electrical worker supervisors as well as the general maintenance supervisors and the electronics technicians reported to Martin. (Tr. 76-77, 94) Cook's function was to supervise and train inmate workers for electrical work. (G.C. Exh. 2, Tr. 47) Essentially, Cook served as a foreman for a crew of inmates who actually performed many of the tasks involved in the projects assigned to Cook.² (Tr. 45-47, 70-71) Cook was assigned

1

In the General Counsel's post-hearing brief, the General Counsel withdrew the allegation that Respondent violated section 7116(a)(4).

2

It was not clear from the record how many general maintenance supervisors there were; however, it appears that they oversee inmate crews and that each of those supervisors is assigned an "emphasis," or specialty, such as plumbing, carpentry, painting, or welding. (Tr. 27)

Electric Shop 1; Bill Danner, the other electrical worker supervisor, was assigned Electric Shop 2. (Tr. 120-23)

Thomas Mathers was the general foreman who was Cook's first level supervisor from approximately the end of 1999 to the end of 2002. (Tr. 28) Mathers was responsible for distributing work orders to the various foremen and their shops. (Tr. 118) Mathers was also responsible for reviewing the performance of the employees under his supervision including Cook. (Tr. 36-37)

Cook served as a Union steward for approximately 4 years prior to the hearing in this case. (Tr. 24-27) Cook was one of two stewards assigned to the facilities division; the other was Jeff Roberts, who was the electronics technician. (Tr. 27, 76) Cook testified that he dealt with Mathers on several issues in his capacity as a Union representative. The issues that Cook cited related to protective clothing and compressed work schedules (CWS). (Tr. 28-29; 60) Cook's perception was that these were "heated" or "major" issues and not easily resolved. (Tr. 29-39; 60)

At all times material, Cook was subject to a performance appraisal system that consisted of five levels of ratings and six job elements.³ (G.C. Exh. 3) Under that system, Cook received an annual appraisal and quarterly appraisals; Mathers was his rating official and Martin was the reviewing official. (G.C. Exhs. 3, 4, 5 and 6) For the two rating years ending March 31, 2000, and March 31, 2001, Cook received overall performance ratings of exceeds and either exceeds or outstanding in all of his job elements. (G.C. Exh. 3) In his quarterly reviews during those two leave years, Cook received ratings of either exceeds or outstanding in all of his job elements. (G.C. Exh. 4) This pattern continued during the quarterly review given Cook on or about July 7, 2001, for the period covering April 1, 2001, to June 30, 2001. (G.C. Exh. 4) Interestingly, although Cook may have felt the dealings relating to protective clothing and CWS were contentious, his quarterly review issued April 4, 2001, identified his initiative in ordering rain gear and jackets for the facilities staff and in working to facilitate the implementation of CWS and identified these efforts as demonstrating outstanding performance in two of his job elements. (G.C. Exh. 4)

3

The ratings were from lowest to highest: U (unsatisfactory), MS (minimally satisfactory), FS (fully satisfactory), E (exceeds), and O (outstanding). (G.C. Exh. 3)

The August 2001 Encounter Between Cook and Mathers

At some point around early August 2001, a meeting occurred between Cook and Mathers that is the focus of the allegation in the complaint that the Respondent denied Cook's request for a Union representative and made a statement that interfered with Cook's protected rights.⁴ The only witnesses involved in this meeting were Cook and Mathers and their accounts of the meeting differ in significant respect.

Cook described the meeting as occurring in early August 2001 when he went to Mathers' office in response to Mathers' request. (Tr. 30) Cook stated that when he arrived, Mathers told him to put his union hat on and proceeded to praise him as a good, responsive employee who was well-liked by management and, in Mathers' view, might be management material. (Tr. 31-32) Cook testified that Mathers then told him that if he did not resign as union steward, there would be repercussions. (Tr. 32) At the hearing, Cook stated that at that point he asked Mathers if he could have a Union representative and when Mathers did not respond, Cook left.⁵ (Tr. 32) Cook's testimony is inconsistent with the scenario as set forth in both the complaint and underlying charge, which described Cook as requesting a union representative **before** Mathers made a statement that there would be repercussions if Cook did not step down as a Union steward. (G.C. Exh. 1(a) and 1(c)) Apparently, the affidavit Cook gave during the investigation of the charge

4

The precise date of this event remains unclear. The complaint and the underlying charge allege that this meeting occurred "on or about August 9, 2001" or "on August 9, 2001" respectively. (G.C. Exh. 1(a) and 1(c)) None of the witnesses, however, pinpointed the exact date in their testimony and some identified August 9 as the date on which a subsequent meeting generated by the meeting between Cook and Mathers occurred.

5

The complaint in this case appears to indicate that Respondent's failure to accede to Cook's request for a union representative constituted a violation of section 7116(a)(1) of the Statute. However, counsel for the General Counsel made no arguments in his brief regarding this apparent allegation and has not mentioned the allegation in the remedial order that he proposed. In the absence of any contention in the General Counsel's post-hearing brief that the alleged denial of Cook's request for a union representative constituted a violation of section 7116(a)(1), I find that the allegation is no longer before me and will not address it further.

also described the latter order of events. (Tr. 63) Cook's affidavit was brought up in cross-examination and he was asked why he would ask for a Union representative in response to his supervisor complimenting him on how well he was performing. (Tr. 63) Cook responded that he did not know that the investigator was coming and had not reviewed his notes but that the account he gave during his testimony at the hearing was accurate. (Tr. 63)

Mathers testified that he had a couple of conversations with Cook on the subject of Cook remaining a Union steward. (Tr. 143-44) The first occurred "probably around February-ish 2001." (Tr. 144) Mathers thought that this conversation took place at the finish of a discussion between him and Cook about the latter's performance evaluation when Cook mentioned that he was considering resigning as union steward. (Tr. 144) Mathers testified that he responded that it was Cook's choice but urged Cook to continue being a union steward. (Tr. 144) Mathers thought the second conversation occurred around August or September of 2001. (Tr. 144) Mathers testified that he had walked into Cook's shop and they were talking about work-related issues when Cook mentioned that he was considering resigning as union steward. (Tr. 144) According to Mathers, he responded that it was Cook's choice but maybe it was a good time for Cook "to go ahead and get out." (Tr. 144-45) Mathers specifically denied that he said anything about repercussions or that Cook had to get out. (Tr. 145) At hearing, Mathers asserted that he was supportive of and had maintained membership in the union and that his comments to Cook were "in terms of a mentoring and experience potential." (Tr. 145) Mathers acknowledged being a relatively new supervisor at the time of these conversations and asserted that he identified with Cook, was favorably disposed towards him, thought he had a lot of potential as a leader, and wished to mentor him. (Tr. 144) With respect to the first conversation, Mathers explained at the hearing that he thought being a union steward was a good experience for Cook and that it would afford him the opportunity to interact with people and deal with some difficult issues. (Tr. 144) At the hearing, Mathers did not elaborate on how agreeing that Cook should "get out" was consistent with mentoring and experience potential.

I found Mathers credible as a witness. Although in some areas Mathers' recollections were faulty and uncertain, on the whole, he was forthcoming, offered a significant amount of detail and appeared very professional and candid. With respect to the August meeting between Mathers and Cook, the accounts that both Mathers and Cook offered throughout the proceedings in this case have been imperfect. I find,

however, that Mathers' version is closer to what is more likely. Under Cook's version, Mathers' alleged statement that Cook would suffer repercussions if he didn't resign his Union position appears to come out of the blue. This lack of context is very perplexing in view of the fact that only four months prior to the meeting, Mathers had praised Cook's efforts with respect to obtaining rain gear and jackets and implementing CWS as outstanding.⁶ In the absence of anything that would explain Mathers' shift in attitude about the value of Cook's union activity, I find Cook's account unconvincing. Mathers' account, on the other hand, offers a convincing context. It is evident from Cook's testimony that he found some of his dealings with management as a Union representative contentious. In view of that, it is not unlikely that he would have considered leaving his union position. Also in view of the highly favorable performance ratings that Mathers had been giving him at that point, it is not unlikely that Cook would have shared his thoughts in that direction with Mathers. Significantly, under either Cook's or Mathers' version, Mathers did convey to Cook that it might be good for him to resign his Union position, their testimony differs only with regard to the context and extent to which Mathers' predicted consequences if Cook did not do so.

The Meeting between Mathers, Martin and Union Representatives

Subsequent to this encounter, the Union initiated a meeting with Mathers. According to Roger Payne, Union President, he arranged the meeting after he received a call from Cook who expressed concern that he would be terminated because of his union activity.⁷ (Tr. 14) Mathers testified that he thought it was Roberts who contacted him and arranged the meeting. (Tr. 145) I credit Payne's account. Payne was more certain than Mathers on this point and Payne's account seems the more likely scenario. This meeting took place in Martin's office and he was also present along with Payne, Roberts and Cook. The exact date

6

I do not reach the question of whether it was appropriate for Mathers to evaluate Cook based on activities that appear to be union related. What is significant here is that Mathers' action indicates that he has a positive view of Cook's union activity.

7

Even under Cook's version of his encounter with Mathers, the belief that he was going to be terminated seems an overreaction and is an indicator that Cook may tend toward exaggeration in his perception and interpretation of events.

of the meeting is unclear; however, the evidence indicates that it occurred either on or after August 9, 2001.

As described by Payne, Roberts and Cook, Payne took the lead and essentially ran the meeting that resulted.⁸ (Tr. 16, 34, 79) During the meeting, Payne asked Mathers if he had told Cook that it would be in his best interests to step down as union steward or there would be repercussions. (Tr. 16, 34, 94-95, 146) Payne, Cook, Roberts, and Martin testified that Mathers did not respond verbally but shrugged or made a gesture like a shrug. (Tr. 17, 34, 79, 95) Payne persisted and Mathers responded that his comment was being taken out of context. (Tr. 17, 35, 79, 95, 146) According to Mathers, he further stated that he was not going to talk about it at the meeting. (Tr. 146) According to Payne and Roberts, Payne responded to Mathers' "context" comment by stating something to the effect that there was no context in which Mathers' statement could be viewed as acceptable. (Tr. 17, 79) It is undisputed that at the meeting there was no explanation by Mathers as to what he viewed as the context of the alleged statement. (Tr. 17, 35, 80, 146)

Subsequent Actions by Payne and Martin

Payne testified that after the meeting he met with Hector Ledezma, the Associate Warden, and told Ledezma that Mathers' comment was unacceptable and requested Ledezma to remove Mathers as a supervisor. (Tr. 19) Payne testified that Ledezma said that he would look into it. (Tr. 19) When Payne heard no response from Ledezma after about a week, he went to Marvin Morrison, the Warden, who told Payne

8

In his testimony, Mathers thought it was Roberts who played the principal role. (Tr. 145) According to Mathers' description, Roberts led off with "a lot of derogatory and very angry, ridiculing comments about me and my management style, made a lot of disparaging comments about Mr. Martin and comments about the department as a whole-very loud, very argumentative and very hostile in tone." (Tr. 145-46) I credit Payne, Cook and Roberts that it was Payne rather than Roberts who played the dominant role at the meeting. I find, however, that Mathers' perception that a significant amount of anger and hostility was directed at him was reasonable. It is clear from Payne's testimony that he was outraged about what he had heard from Cook and I have no doubt Payne successfully communicated this to Mathers and Martin at the meeting. With respect to assessing the allegations that Mathers subsequently engaged in discriminatory actions against Cook, it is not so much what actually happened at the meeting as Mathers' reasonable perception of those actions that is important.

that he would look into it. (Tr. 19) There is no evidence whether any report of Payne's overtures to Ledezma and Morrison filtered down to Mathers; however, it seems likely that to one degree or another some information about them did.

According to Cook's testimony, Martin telephoned him at home on the Friday following the meeting. (Tr. 36) Cook testified that Martin began by telling him how much Martin liked him and thought he was a good employee. (Tr. 36) According to Cook, Martin then asked him to reconsider what he was doing because it could damage Mathers' career. (Tr. 36) In his testimony, Martin corroborated the fact that he had called Cook. Under Martin's description, he asked Cook what the problem was and commented that "you all" seem to be targeting Mathers who was the one who was fully supportive of Cook "ever since you've been here." (Tr. 95-96)

Cook's Work Assignments

At the hearing in this case, Cook provided listings of the work orders that he completed during the period of approximately June 2001 through the end of October 2001 and copies of work orders assigned to him in August 2001. (G.C. Exh. 8 and 7) Cook testified that a number of the work orders he was assigned to beginning in August were for jobs unrelated to his job description.⁹ (Tr. 52-54) Specifically, Cook cited work orders for repairs on washers, dryers, urinals, and television sets as unrelated to his job description. (Tr. 52-54) The assignments to these types of work orders began on or about August 6, 2001, and continued

9

The complaint in this case alleged that subsequent to the two August meetings, Martin's telephone call to Cook and the filing of the unfair labor practice charge in this case, Cook was assigned substantially more work orders than he previously received. During the hearing, however, the General Counsel did not provide any evidence to support this particular allegation. Moreover, the General Counsel makes no argument whatsoever in support of this particular allegation in his post-hearing brief. In fact, the General Counsel is dismissive of the Respondent's attempt to show that Cook and Danner received a comparable number of work orders as "irrelevant to the issue of whether Respondent assigned work to Cook that is outside his job description." (G.C. Post-hearing brief at 19-20) Inasmuch as the General Counsel has failed to press this particular allegation, I shall treat it as no longer before me and not address it further herein.

until on or about October 2, 2001.¹⁰ (G.C. Exh. 7 & 8, Tr. 66) Cook testified that although Danner, the other electrical worker supervisor, was assigned work orders relating to washers, dryers and plumbing fixtures, he (Cook) had not been assigned such work. (Tr. 52-53) Cook testified that Danner, who had previous experience in general maintenance and was friendly with the general maintenance supervisor whose emphasis was plumbing, volunteered to take such assignments because the general maintenance supervisor was overloaded. (Tr. 53) Cook also testified that dishwashers were one of his own "volunteer special assignments" and that they were normally assigned to him and cited the high voltage associated with food service equipment as a reason justifying his involvement in such repairs. (Tr. 69)

Cook and Roberts testified that they believed that washer and dryer repairs should be assigned to the general maintenance supervisor who specialized in plumbing and television repairs should be assigned to Roberts, the electronics technician. (Tr. 52-53, 88) Mathers, however, testified that appliance repairs, including washing machines, dryers, buffers, televisions, and food service equipment, were normally assigned to the electrical shops. (Tr. 120) According to Mathers, televisions and washers and dryers typically were assigned to Danner's shop and buffers typically were assigned to Cook's shop. (Tr. 122-23) Mathers acknowledged that during August 2001, Cook was assigned over 20 work orders to repair washers and dryers.¹¹ (Tr. 172) Although Mathers suggested that this may have been because Danner was on leave or unavailable for some

10

The evidence shows that several work orders for repairs on washers, dryers and a urinal that were assigned to Cook were received on August 6 or 7, 2001, and work was completed on August 9, 2001. (G.C. Exh. 7 & 8) Other work orders for repairs on washers, dryers and television sets were received and completed at later dates. (G.C. Exh. 8) The majority were received during August and completed during that month or the following month. (G.C. Exh. 8)

11

It was never made clear how assignment of work orders for tasks allegedly outside Cook's job description worked to his detriment. In fact, in one of Cook's annual performance appraisals and one of his quarterly reviews, Cook was praised for frequently assisting other shops in troubleshooting and repairs. (G.C. Exh. 3 and G.C. Exh. 4) Although Mathers didn't mention it, it would seem that exposure to different areas might benefit Cook in terms of potential for promotion into a management position.

other reason, he couldn't verify this.¹² (Tr. 172-73) Mathers acknowledged that a work order to repair a urinal would not normally be assigned to Cook but pointed out that the request to repair the urinal was combined with another request that was for an appliance repair (washer), and suggested that he may have inadvertently failed to separate the two when he assigned the work order to Cook. (Tr. 121)

I credit Mathers that he would normally have assigned the washer and dryer and television work orders to Danner. Additionally, Mathers' explanation that the assignment of the urinal repair to Cook was through inadvertence is convincing and I credit it as well.

Cook's Performance Appraisals

On or about October 23, 2001, Cook received his quarterly review for the period July 1, 2001, through September 30, 2001. (G.C. Exh. 5) In this review, Mathers rated Cook as FS on three of his job elements and EX on three. In conjunction with the job elements on which Cook received an FS, the following narrative comments were included:

Mr. Cook needs to more closely monitor inmate work performance for workmanship.

Mr. Cook needs to communicate with his supervisor more on status of projects and work schedule and developments affecting daily functions.

Mr. Cook needs to correct inmate mistakes in a timely manner and refuse to accept work performance which is substandard.

(G.C. Exh. 5)

In a quarterly performance review covering the period October 1, 2001, through December 31, 2001, Cook received FS in four of his job elements and EX in two. (G.C. Exh. 5) In the quarterly review covering the period January 1, 2002, through March 31, 2002, Cook received FS in two of his job elements and EX in four elements. (G.C. Exh. 5) In the quarterly review covering the period April 1, 2002, through June 30, 2002, Cook received FS in two elements and EX in four elements. (G.C. Exh. 5) Narrative comments suggesting the need for improvement in specified areas similar to those quoted above also appeared in the last three quarterly

12

By the time of the hearing in this case, Mathers had transferred from Forrest City to an institution in Englewood, Colorado. (Tr. 118)

reviews. (G.C. Exh. 5) In his annual appraisal for the period April 1, 2001, through March 31, 2002, Cook received FS in two elements, EX in four, and an overall rating of EX. (G.C. Exh. 6) The only narrative comment that suggested the need for improvement related to element 4 and stated: "Cook still needs to improve on communicating with his supervisor on status of projects." (G.C. Exh. 6)

Mathers testified without contradiction that he nominated Cook for a number of awards. (Tr. 141) In 2000, Mathers nominated Cook for the employee of the year award, which he received. (Tr. 141) Mathers also nominated Cook for a special act award in July 2000, which he didn't receive. (Tr. 141) Mathers testified that Cook received a special act award at the end of August 2001 for which Mathers submitted a nomination in July 2001 and resubmitted the nomination in August 2001. (Tr. 141)

Mathers testified that he conducted a couple of counseling sessions with Cook. (Tr. 141-42) The first occurred on September 12, 2001. According to Mathers, he had walked into Cook's shop the day before and found him coloring a rubber glove. (Tr. 142) Cook said that he had been working on the glove for six hours and it was going to take him another six hours to finish it. (Tr. 142) When he discussed the matter with Cook the next day, Cook responded that he hoped Mathers would write him up, give him an "unsat," and fire him so that he could sue Mathers and "own" him. (Tr. 142) The second counseling session occurred in February 2002 when Mathers talked to Cook about his failure to timely turn in some of his work orders. (Tr. 142-43) In the course of the discussion, Mathers queried Cook about what the problem was and commented that Cook used to be employee of the year. (Tr. 143) Mathers testified that Cook responded that he used to like coming into work and now he hated working with the staff members whom he described as liars and back-stabbers and hated management, whom he described as always making a fight over everything. (Tr. 143)

When asked at the hearing about the reduction in the level of ratings that Cook was receiving on his appraisals, Mathers testified on direct examination that Cook had done nothing during the relevant quarters that warranted more than "fully successful" and in addition there were a couple of concerns and issues with Cook. (Tr. 140-41) The only examples of the latter that Mathers cited were "issues of his inmates being out in the field and his not following up on them" and Cook not reporting back to Mathers "on the status of certain projects." (Tr. 141) On cross examination, Mathers testified that there was a "dramatic"

decrease in Cook's performance. (Tr. 171) Mathers asserted that it was not one single instance but an on-going problem and he felt the need to document it. (Tr. 171) Mathers provided nothing more specific as justification for the decline in the level of ratings given Cook.

Discussion

Positions of the Parties

General Counsel

Counsel for the General Counsel contends that Respondent violated section 7116(a)(1) when Mathers made the statement that if Cook did not resign as a Union steward, he would face repercussions. The General Counsel argues that Cook's account concerning the alleged statement should be credited rather than Mathers'. The General Counsel also asserts that the work assignments and drop in his performance ratings that followed Mathers' statement demonstrate that Mathers followed through on this threat.

The General Counsel also contends that the Respondent violated section 7116(a)(1) and (2) when it lowered Cook's performance appraisals and assigned him work outside his job description in retaliation for his union activity. The General Counsel argues that Mathers' statement demonstrates union animus and supports a conclusion that Cook's union activity was a motivating factor in Mathers' actions in lowering Cook's performance appraisal and assigning him work unrelated to his job description. The General Counsel asserts the meeting in Martin's office, which Mathers described as very hostile in tone and which constituted protected activity on Cook's part, immediately preceded the lowering of Cook's performance appraisal and the work assignments. The General Counsel argues that even if Cook's account regarding the Mathers' statement is not credited, the proximity of that meeting to the change in Cook's performance ratings and work assignments establishes a *prima facie* case of discrimination.

The General Counsel contends that the Respondent failed to rebut this *prima facie* case by showing that there was a legitimate justification for lowering Cook's performance ratings and making questionable work assignments to him. The General Counsel argues that Mathers' testimony offered very limited justification for the decline in Cook's performance ratings and failed to provide specific details to support his assertion that Cook's performance was less praiseworthy after August 2001 than before. The General Counsel asserts that, moreover, some of the incidents that

Mathers cited in his testimony as evidence of a decline in Cook's attitude, such as the glove incident, were not referenced in the performance appraisals.

As to the disputed work assignments, the General Counsel contends that the evidence establishes that Cook had not been assigned work orders for repairs to washers, dryers, televisions and urinals prior to Mathers' statement to Cook about resigning his position as Union steward. As for Mathers' suggestion that the work orders pertaining to washers, dryers, and television sets may have been given to Cook in Danner's absence, the General Counsel asserts that the Respondent failed to offer any evidence establishing that Danner was indeed absent during the relevant period.

As remedy, the General Counsel requests that a cease and desist order be issued. The General Counsel also requests that the Respondent be ordered to rescind Cook's quarterly performance appraisals and the annual performance appraisal issued to Cook subsequent to August 2001; reappraise Cook for each of the rescinded appraisals without taking his protected activity into consideration; and post a notice to employees.

Respondent

The Respondent contends that the General Counsel has failed to establish a *prima facie* case for a violation of § 7116(a)(1) and (2) or (4).¹³ The Respondent argues that the General Counsel has not shown that Cook's protected activity as encompassed by either § 7116(a)(2) or (4) was a motivating factor in employment decisions. The Respondent asserts that Mathers did not tell Cook to step down as Union steward or face repercussions. The Respondent contends that the reason for the performance ratings that Cook received was that his performance declined. The Respondent also contends that there is no showing that Cook suffered any adverse employment action as a result of his protected activity. In support of this contention, the Respondent asserts that a rating of "fully successful" is not an adverse employment action and Cook's overall rating on his annual rating remained "Exceeds." The Respondent argues that the annual rating carries more weight than the quarterly ratings insofar as consideration for other jobs and promotion. As to work assignments, the Respondent asserts that Cook was assigned a comparable number of work orders as his counterpart in the electrical shop, Danner. The Respondent contends that appliance repair was assigned to the electric shops and that the likely reason that Cook was assigned the types of work orders that normally were assigned to Danner was that Danner was either absent or otherwise unavailable.

The Respondent argues that even assuming *arguendo* that the General Counsel has established a *prima facie* case, it has demonstrated legitimate, nondiscriminatory reasons for the performance ratings and work assignments. Specifically, the Respondent reiterates its claims that Cook's performance had dropped from previous levels and that appliance repair was normally assigned to the electrical shop and although washers, dryers and televisions normally were assigned to Danner, Cook filled in when Danner was absent or otherwise unavailable.

Analysis

Mathers' Comment Regarding Cook's Union Activity

13

As stated in note 1, above, the General Counsel withdrew the allegation that Respondent violated section 7116(a)(4) in his post-hearing brief. Consequently, that allegation will not be considered further.

Section 7102 of the Statute protects each employee in the exercise of the right to form, join, or assist a labor organization, including the right to act as a labor organization representative, or to refrain from any such activity, without fear of penalty or reprisal. Section 7116 (a) (1) provides that it is an unfair labor practice for an agency to interfere with, restrain, or coerce any employee in the exercise by the employee of such right. Section 7116 (e), however, protects the expression of any personal view, argument or opinion if the expression contains no threat of reprisal or force or promise of benefit and is not made under coercive conditions. See *Oklahoma City Air Logistics Center (AFLC) Tinker Air Force Base, Oklahoma*, 6 FLRA 159, 160-61 (1981) (*Tinker Air Force Base*).

As discussed above, I credit Mathers' account of the conversation between him and Cook. Under that account, Cook rather than Mathers raised the subject of Cook relinquishing his position as a union steward during a conversation that the two were having about work-related matters. Mathers' response was that it was Cook's choice but maybe it was a good time for him to go ahead and get out. As described by Mathers, he did not present his response as representing the position of agency management and did not suggest any consequences if Cook chose one way or the other. There is no evidence that any other bargaining unit employees were privy to the conversation, which occurred in Cook's work area. Thus, Mathers' comment was made in response to a remark by Cook, was not presented in a manner that indicated that it carried the weight of a management pronouncement, and was limited to a qualified suggestion that the time might be ripe for Cook to relinquish his union position. In view of these circumstances, I find the remark was only an expression of Mathers' personal view or opinion and that an employee would reasonably have recognized it as such. Mathers' comment did not contain any threat of reprisal or force or promise of benefit and it was not made under coercive conditions. Cf. *Department of the Treasury, Internal Revenue Service, Louisville District*, 11 FLRA 290 (1983) (although devoid of any explicit threat of possible retaliation, comments conveyed management's hostility toward employee's representational activity). In terms of their tenor, Mathers' comments were considerably milder than comments that the Authority previously has found were protected by section 7116(e). See *Department of Transportation, Federal Aviation Administration, Oakland Air Route Traffic Control Center, Fremont, California*, 14 FLRA 201 (1984) (finding supervisor's strongly stated comments disparaging the union were protected by section 7116(e)); *Tinker Air Force Base*, 6 FLRA 159 (finding comments by supervisor that were disdainful of the union were protected

under section 7116(e)). I find that Mathers' statement to Cook came within the ambit of section 7116(e) and did not constitute an unfair labor practice under section 7116.

The Alleged Retaliatory Actions Against Cook

The Analytical Framework

Under section 7116(a)(2) of the Statute, it is an unfair labor practice for an agency to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment. In *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*), the Authority articulated an analytical framework for addressing allegations of discrimination claimed to violate section 7116(a)(2). Under that framework, the General Counsel has at all times the overall burden to establish by a preponderance of the evidence that (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in connection with hiring, tenure, promotion, or other conditions of employment. *Indian Health Service, Crow Hospital, Crow Agency, Montana*, 57 FLRA 109, 113 (2001) (*Crow Hospital*); *Letterkenny*, 35 FLRA at 118. As a threshold matter, the General Counsel must offer sufficient evidence on these two elements to withstand a motion to dismiss. See, e.g., *Crow Hospital*, 57 FLRA at 113. Whether the General Counsel has established a *prima facie* case is determined by considering the evidence in the record as a whole, not just the evidence presented by the General Counsel. *Department of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 55 FLRA 1201, 1205 (2000) (*Warner Robins*).

Satisfying this threshold burden establishes a violation of the Statute only if the respondent offers no evidence that it took the disputed action for legitimate reasons. Where the respondent offers evidence that it took the disputed action for legitimate reasons, it has the burden to establish, by a preponderance of the evidence, as an affirmative defense that: (1) there was a legitimate justification for its action; and (2) it would have taken the same action even in the absence of protected activity. The General Counsel may seek to establish that the agency's reasons for taking the action were pretextual.

The Authority has held that although closeness in time between an agency's employment decision that is the focus of a discrimination allegation and protected activity may

support an inference of illegal motivation, it is not conclusive proof of a violation.

The Work Assignments Made to Cook

The General Counsel essentially asserts that Mathers' action in assigning work orders for repairs of washers, dryers, televisions and a urinal to Cook was in retaliation for his union activity. Applying the first part of the *Letterkenny* analysis, I find that it is undisputed that Cook was engaged in union activity and Mathers knew about it. I do not find, however, that the General Counsel has established that Cook's union activity was a motivating factor with respect to cited work assignments relating to urinal, washer, dryer, and television repairs.

I do not find that Mathers demonstrated any union animus in conjunction with the conversation regarding Cook's relinquishment of his Union position. Also, I do not find it reasonable that the conversation would have inspired any union animus on Mathers' part. As mentioned earlier, there is no evidence that Mathers bore any hard feelings or resentment about Cook's union activity in pursuing the issues of protective clothing and CWS; rather, the evidence suggests that Mathers viewed Cook's efforts as praiseworthy. Prior to the meeting in Martin's office, I can find no evidence that Mathers might have resented or begrudged Cook's union activity.

As discussed earlier, the evidence does not provide a basis for pinpointing the date on which the conversation between Mathers and Cook occurred. Although not entirely clear when it occurred, the evidence shows that the meeting in Martin's office occurred no earlier than August 9, 2001. Thus, there is no basis for finding that prior to August 9, 2001, Mathers would have been motivated to discriminate against Cook because of his Union activity.

The evidence shows that the work assignments to which Cook and the General Counsel object began prior to August 9, 2001. That is, a number of the work orders show receipt dates as early as August 6 and completion dates of August 9. I find Mathers' testimony that he normally assigned work orders relating to electrical appliances to the electric shops both credible and convincing. Also, the fact that Mathers regularly assigned work orders for washers, dryers, and televisions to Cook's counterpart in the electric shop, Danner, indicates that their assignment to Cook was not a

significant departure from normal practice.¹⁴ With respect to the urinal repair assignment, which as Mathers acknowledged was a major departure from normal practice, that work order shows a receipt date of August 6 and a completion date of August 9. I find, also, that Mathers' explanation that assigning this repair job to Cook was simply a mistake both credible and convincing.

I find that the General Counsel has failed to establish that the work assignments constituted discrimination for which Cook's union activity was a motivating factor.

Cook's Performance Appraisals

Although Cook's overall or summary rating remained the same as the two previous years, the ratings on several of his job elements dropped beginning with a quarterly review given him in October 2001. As discussed above, I find that there is no evidence that Mathers was motivated to discriminate against Cook in response to his activities relating to protective clothing and CWS. I find, however, that the meeting in Martin's office does offer a motive. The evidence establishes that Mathers found the meeting very hostile and indicates that Mathers felt betrayed and hurt by the accusations and comments made at that meeting. The evidence shows that Martin, who was Mathers' supervisor, was sufficiently troubled by what went on during the meeting to call Cook and seek an explanation as well as express his concern that the Union appeared to be targeting Mathers who had been very supportive of Cook. Also, there is evidence that Payne, the Union President, escalated the matter by taking the complaint to higher levels of management.

During the meeting in Martin's office, it is clear that Cook was engaged in activity specifically on behalf of the Union and, thus, protected under section 7102 of the Statute. In this regard, Cook attended that meeting, which the Union initiated for the purpose of complaining about a statement allegedly made to Cook by Mathers, in his capacity

14

Although not an expert in electrical matters or appliance repair, I remain skeptical that there is a significant difference between dishwasher repairs (Cook's acknowledged regular assignment) and washer and dryer repairs (Danner's regular assignment). Also, although the Respondent failed to provide evidence to verify Mathers' suggestion that Danner may have been absent or otherwise engaged during the relevant period, the General Counsel failed to provide any evidence to show that the work was diverted to Cook despite Danner's availability to perform the washer and dryer repairs.

as a Union steward. *Cf. Crow Hospital*, 57 FLRA at 125 (seeking union assistance, pursuing grievances and having union deal with employer on their behalf constituted protected activity by employees); *U.S. Department of Agriculture, Food Safety and Inspection Service, Washington, D.C.*, 55 FLRA 875, 879, 881 (1999) (attendance at meeting in capacity as acting union president constituted protected activity). The decline in his performance ratings began in the first performance review issued subsequent to that meeting. Although proximity of time between protected activity and an employment action does not constitute conclusive proof of a causal relationship between the two, it can nevertheless be evidence of such. Here, although Mathers professed sympathy toward unions and Cook, I find it reasonable to infer that an incident such as occurred in Martin's office could cause him to reevaluate his opinion of Cook and view Cook in a less favorable light.

Viewing the record as a whole, I find that the General Counsel has established a *prima facie* case that Cook's protected activity was a motivating factor in the decline in his performance ratings. Other than the showing that an incident occurred that had significant potential to affect Mathers' attitude toward Cook, the Respondent has failed to provide persuasive evidence that other factors motivated the decline in Cook's performance rating. The proximity of timing and the absence of an alternative explanation is sufficient to establish the General Counsel's *prima facie* case that a causal relationship existed between Cook's protected activity and the decline in his performance ratings.

The only evidence that the Respondent offered to show that there was legitimate justification for the decline in Cook's ratings was Mathers' testimony. Mathers testified that during the period beginning with that quarter, Cook did not do anything that warranted an Outstanding rating in any of his job elements or more than Fully Satisfactory in some of them. Mathers also testified that the lower ratings reflected problems and issues that developed with Cook. As set forth above, the only examples of problems and issues cited during Mathers' testimony were the glove incident; the discussion in which Cook allegedly expressed unhappiness with his job, co-workers and management; an instance or instances of Cook's inmates being out in the field with Cook not following up on them; and Cook not reporting back to Mathers on the status of certain projects. Mathers provided neither other examples nor further specifics as to the examples that he gave.

There is no reference to the glove incident and the discussion about Cook's unhappiness with his job situation in the narrative contained in Cook's appraisals. Reference is made, however, to Cook's failure to keep his supervisor adequately informed about the status of projects, and being in the shop rather than supervising his inmates. I find, however, that Mathers failed to identify or more fully describe specific incidents that underlay the criticisms he made in Cook's appraisal and in his testimony and that this significantly undercuts the persuasiveness of his testimony that Cook's performance has slipped. This is particularly true when juxtaposed against an incident that had significant potential to sour the relationship between the two men.¹⁵

In addition to lending support to the General Counsel's *prima facie* case, this failure to demonstrate that there was a legitimate justification for the actions with respect to Cook's performance ratings means that the Respondent has not met its burden under the second part of the *Letterkenny* analysis. By the same token, Respondent has failed to establish that it would have taken the same action even in the absence of Cook's protected activity.

I find that the Respondent violated section 7116(a)(1) and (2) by its actions in giving Cook lower ratings on his job elements beginning with the quarterly review given Cook in October 2001.

Summary

In summary, I find that the General Counsel has failed to establish that Mathers made coercive statements to Cook as alleged and, consequently, violated section 7116(a)(1). I find that the General Counsel failed to establish that Respondent violated section 7116(a)(1) and (2) with respect to work orders assigned to Cook. I conclude that the Respondent did not violate the Statute as asserted by those two allegations and recommend that the complaint be dismissed with respect to them. I find, however, that the General Counsel has established a *prima facie* case that Cook's protected activity was a motivating factor insofar as the ratings in his quarterly and annual appraisals beginning with the quarterly review given him in October 2001 and

15

Although I do not rule out the possibility that Mathers may have had good reason to conclude that Cook's performance was not as stellar as previously, given the shortage of specifics and detail, his testimony fails to persuade me that his conclusion was justified and was not influenced by Cook's accusations against him.

extending through his quarterly review given in June 2002. I further find that the Respondent failed to show by preponderance of the evidence that there was a legitimate justification for the decline in the rating, and that it would have taken the same action even in the absence of protected activity. Consequently, I conclude that the Respondent violated section 7116 (a) (1) and (2) of the Statute when it lowered Cook's ratings.

It is therefore recommended that the Authority adopt the following order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Forrest City, Arkansas, shall:

1. Cease and desist from:

(a) Discriminating against Joseph Cook, or any other employee, because of the exercise of protected rights assured them by section 7102 of the Statute.

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

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

(a) Rescind the quarterly performance reviews issued to Joseph Cook for the periods July 1, 2001, through September 30, 2001; October 1, 2001, through December 31, 2001; January 1, 2002, through March 31, 2002; and April 1, 2002, through June 30, 2002; and his annual performance appraisal issued for the period April 1, 2001, through March 31, 2002.

(b) Reappraise Joseph Cook for each of the above-listed quarterly performance reviews and annual performance appraisal without taking into consideration his protected activity and based on the reappraisal, make Joseph Cook whole for any privilege or benefit lost as a result of the rescinded reviews and appraisal.

(c) Post at its facilities at U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Forrest City, Arkansas, where bargaining-unit employees are located, 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 Warden, U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Forrest City, Arkansas, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall

be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Chicago Regional Office, Federal Labor Relations Authority, in writing, within 30 days of this Order, as to what steps have been taken to comply.

IT IS FURTHER ORDERED that the allegations in the complaint that the Respondent violated section 7116(a)(1) by statements made to Cook by a representative of the Respondent concerning his Union position and section 7116(a)(1) and (2) by assigning work orders to Cook that were outside his job description be, and they are, hereby dismissed.

Issued, Washington, DC, August 5, 2003.

SUSAN E. JELEN
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Forrest City, Arkansas, violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discriminate against Joseph Cook, or any other employee, because of their exercise of protected rights assured them by section 7102 of the Federal Service Labor-Management Relations Statute.

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

WE WILL rescind the quarterly performance reviews issued to Joseph Cook for the periods July 1, 2001, through September 30, 2001; October 1, 2001, through December 31, 2001; January 1, 2002, through March 31, 2002; and April 1, 2002, through June 30, 2002; and his annual performance appraisal issued for the period April 1, 2001, through March 31, 2002.

WE WILL reappraise Joseph Cook for each of the above-listed quarterly performance reviews and annual performance appraisal without taking into consideration his protected activity and, based on the reappraisal, make Joseph Cook whole for any privilege or benefit lost as a result of the rescinded reviews and appraisal.

(Respondent/Activity)

Date: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Chicago Regional Office, Federal Labor Relations Authority, whose address is: 55 West Monroe, Suite 1150, Chicago, IL 60603-9729, and whose telephone number is: 312-353-6306.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. DA-CA-02-0204 were sent to the following parties:

—

CERTIFIED MAIL:

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Issued: August 5, 2003
Washington, DC