

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

DEPARTMENT OF VETERANS AFFAIRS GOLDEN GATE NATIONAL CEMETERY SAN BRUNO, CALIFORNIA Respondent	
and LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1141, AFL- CIO Charging Party	Case Nos. SF-CA-02-0126 SF-CA-02-0286 SF-CA-02-0649

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 **SEPTEMBER 29, 2003**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
1400 K Street, NW, Suite 300
Washington, DC 20424-0001

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: August 28, 2003
Washington, DC

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

MEMORANDUM

DATE: August 28, 2003

TO: THE FEDERAL LABOR RELATIONS AUTHORITY

FROM: WILLIAM B. DEVANEY
ADMINISTRATIVE LAW JUDGE

SUBJECT: DEPARTMENT OF VETERANS AFFAIRS
GOLDEN GATE NATIONAL CEMETERY
SAN BRUNO, CALIFORNIA

Respondent

CA-02-0126 and Case Nos. SF-
SF-
CA-02-0286 SF-
CA-02-0649

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL 1141
AFL-CIO

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 transmittal form sent to the parties, and the service sheet. Also enclosed are the pleadings, motions, exhibits and briefs filed by the parties.

Enclosures

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

DEPARTMENT OF VETERANS AFFAIRS GOLDEN GATE NATIONAL CEMETERY SAN BRUNO, CALIFORNIA Respondent	
and LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1141, AFL-CIO Charging Party	Case Nos. SF-CA-02-0126 SF-CA-02-0286 SF-CA-02-0649

Joyce Lewis Barrett, Esquire
Donald C. Philips, Esquire
For the Respondent

Yolanda Shepherd Eckford, Esquire
Robert M. Bodnar, Esquire
For the General Counsel

Mr. James Odon
For the Charging Party

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 et seq., arises out of a charge in Case No. SF-CA-02-0126, filed on November 19, 2001 (G.C. Exh. 1(a)) and a Complaint in Case No. SF-CA-02-0126 issued on July 31, 2002 (G.C. Exh. 1(b)) which set the hearing for December 10, 2002; by a
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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)".

charge in Case No. SF-CA-02-0286, filed February 4, 2002 (G.C. Exh. 1(f)), and an Amended charge filed on June 12, 2002 (G.C. Exh. 1(g)). A Complaint in Case No. SF-CA-02-0286 issued on July 31, 2002, and set the hearing for December 10, 2002; by a charge in Case No. SF-CA-02-0649, filed on June 19, 2002 (G.C. Exh. 1(k)), and a 1st Amended charge filed on September 16, 2002; and on September 19, 2002, a Consolidated Amended Complaint and Notice of Hearing issued for Case Nos. SF-CA-02-0126, 0286 and 0649 (G.C. Exh. 1(m)) and set the hearing for December 10, 2002, pursuant to which a hearing was held on December 10, 2002, in San Francisco, California, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard and to introduce evidence bearing on the issues involved. At the conclusion of the testimony, the parties were offered the opportunity to present oral argument which each party waived. January 14, 2003, was set as the date for mailing post-hearing briefs, which time subsequently was extended, on Motion of Respondent, to which the other parties did not object, to February 13, 2003. General Counsel timely mailed an excellent brief, received on February 19, 2003, and Respondent filed by facsimile an

excellent brief on February 13, 2003², and on February 26 mailed an original and four copies of its brief, received on February 27, 2003. Case No. SF-CA-02-0126, concerns the allegation that Chief Steward James Odon on, or about

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General Counsel moved to strike Respondent's Brief because it was filed by facsimile and exceeded ten pages, the limit for facsimile filing set forth in § 2429.24(e) of the Regulations, 5 C.F.R. § 2429.24(e). Indeed, the Regulations state,

“. . . where facsimile equipment is available, motions; information pertaining to prehearing disclosure, conferences, orders, or hearing dates, times, and locations; information pertaining to subpoenas; and other similar matters may be filed by facsimile transmission, provided that the entire individual filing by the party does not exceed 10 pages in total length, with normal margins and font sizes.” (Id.) (Emphasis supplied).

Not only does § 2429.24(e) not authorize a facsimile filing in excess of 10 pages, it does not authorize the filing of briefs of any length by facsimile.

Contrary to Respondent's fallacious assertion, nothing in my comments concerning the fact that we accept the filing of motions for extension of time to file post-hearing briefs by facsimile transmission (Tr. 713-714) authorized the filing of briefs by facsimile. It is true, however, that I did not mention the 10 page limitation.

Nevertheless, we accepted Respondent's facsimile transmitted Brief and even notified Respondent that it must, pursuant to § 2429.25 of the Regulations, furnish an original and four copies of the Brief. This, Respondent did. There could be no possible prejudice to any party inasmuch as General Counsel and Charging Party each, in fact, received Respondent's Brief on February 13, 2003. Accordingly, General Counsel's Motion to Strike Respondent's Brief is denied. But, parties should be aware of the provisions of § 2429.24(e) and, in the future, our office will refuse to accept any document filed by facsimile transmission in excess of 10 pages unless specifically authorized.

General Counsel also moved, in the alternative to striking the whole of Respondent's Brief, that portion which: (a) “. . . suggests James Odon was not reliable because he was 'regularly calling in for leave on the day he

June 7, 2001, was not selected for the Cemetery Caretaker Leader position because of his protected activity; Case No. SF-CA-02-0286 involves two allegations: First, that Respondent, on, or about January 22, 2002, implemented the enforcement of a sign-in procedure for equipment without notice to the Union and by its refusal to bargain on the new procedure; and, Second, that Mr. Odon was given a letter of admonishment on, or about, January 25, 2002, because of protected activity; and Case No. SF-CA-02-0649 involves the allegation that on, or about June 17, 2002, Mr. Odon was suspended for 14 days because of his protected activity including the filing of unfair labor practice charges. Upon the basis of the entire record³, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

A. NON-SELECTION OF ODON

I fully agree with Mr. Philips, in his opening statement, that the testimony by General Counsel's witnesses portrays one story and Respondent's witnesses a completely different story (Tr. 16). Indeed, this carries over to the Briefs of the parties. I have reviewed the transcript and exhibits with care, as well as the Briefs of the parties, and my findings reflect a composite of testimony that seems most reliable and most probable.

Mr. James Odon is employed by Respondent Golden Gate Cemetery as a WG-5 Cemetery Caretaker (Tr. 24). Mr. Odon has been employed by Respondent since January, 1987 (G.C. Exh. 11); was a Steward with LIUNA Local 1276 from about 1990 until 1997 when he became Chief Steward; and has remained as Chief Steward with LIUNA Local 1141 since on, or about, December 20, 2001, when Local 1276 was dissolved and representation of Respondent's employees was transferred to Local 1141 (G.C. Exh. 19). From 1994 to 1998, Mr. Odon was detailed to San Francisco National Cemetery [Presidio] (G.C. Exh. 11). Mr. Odon completed an extensive 90-day training course, training 30 days in each of the cemetery's main operations: ground maintenance, internment and headstone setting (Tr. 51). While there is no question of Mr. Odon's knowledge and ability to perform the duties of a WG-5 Cemetery Caretaker, there is a great deal of evidence and testimony demonstrating his aversion to performing those duties. For example: Mr. Steve Lewis Muro, now Acting

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On my own motion, the following correction of the transcript is made: the reporter has erroneously added an, "s", to the word, "foremen" (see, e.g., Tr. 368, 371, 373, 374, 390). Accordingly, wherever the word, "foremens" appears, it is hereby corrected to read, "foremen".

Director of Field Program Services for the National Cemetery Administration, Department of Veterans Affairs, and from June 1999 until April 2001, had been Acting Director of Respondent (Tr. 347, 366; G.C. Exh. 10), whose testimony I found wholly credible, stated that Mr. Odon's quality of work is very low; that Mr. Odon likes to stand around and to avoid work (Tr. 352); that Mr. Odon was caught more than once watching TV during the workday (Tr. 375); that the TV was taken away and Mr. Odon brought in another TV (id.). Mr. Anthony Lewis Hill, a WG-5 Cemetery Caretaker (Tr. 616), stated that on many occasions he had seen Mr. Odon and Mr. Clydelho Frommothelydo (Fromo) sitting under a tree on their mowers about two hours doing no work and the grass had not been mowed (Tr. 629).

There were two applicants for the Cemetery Caretaker Leader position: Mr. Odon and Mr. Andrew Allen, Jr., known as "A.J." (Tr. 363). Each was rated "Well Qualified"; and each had identical ratings. Although Mr. Odon had many more years experience as a Cemetery Caretaker, he was not better qualified for this particular job than Mr. Allen, as Mr. Odon had not taken the training provided by the Sheriff's Department for supervising SWAP workers [San Mateo County Sheriff's Work Program for persons sentenced for community service for criminal or civil infractions (Tr. 356-357)] whereas, Mr. Allen had. I do not credit Mr. Odon's testimony that, "What I mentioned about the Presidio, and often on the weekends, I did the same operation with the Sheriff's Work Program (sic-as) at Golden Gate." (Tr. 58) for a number of reasons. For example, he testified that he, ". . . opened and closed up the cemetery . . . on a daily basis, secured the property." (Tr. 59) and on his application for the leader position he indicated he worked 40 hours per week (G.C. Exh. 11). Obviously, if he were present to open and close the cemetery daily and worked 40 hours, he could not have worked on the weekends. When asked if there was a supervisor on site at the Presidio, Mr. Odon replied, "No. We would get a visit probably once a week from the assistant director at that time [1994 to 1998]" (Tr. 59). But Mr. Odon earlier stated there was a work leader and an internment foreman (Tr. 58); Mr. Alex Smith was a supervisor at the Presidio from 1976 until 1996 or 1997 (Tr. 511, 519-520), although he was not Mr. Odon's supervisor at the Presidio (Tr. 562), and Mr. Odon's application for the leader position showed that his supervisor at the Presidio had been Mr. Bill Livingston (G.C. Exh. 11). Mr. Alex Smith stated that Mr. Odon did no procurement and did not direct other caretakers at the Presidio (Tr. 513) and an audit had determined that Mr. Odon was not working above his classification (Tr. 161). Nor did Mr. Odon "open" or

"close" the cemetery because the Presidio was open 24 hours a day, as Mr. Odon admitted on cross-examination (Tr. 161). Indeed, inasmuch as the SWAP program is from San Mateo County (Tr. 356-357), in which Golden Gate is located, and the Presidio is located in San Francisco County, there is no testimony or evidence, other than Mr. Odon's which I do not credit, that SWAP workers were furnished to the Presidio. Nor could Mr. Odon have meant that he often performed the same operation with SWAPs on weekends at Golden Gate because Mr. Odon did not work on weekends at Golden Gate (Tr. 366, 547).

The leader position came about as a strictly weekend shift when Mr. Muro learned that the cemetery could get 35 to 40 SWAP people on the weekends if there were someone present on the weekends to supervise them. Mr. Muro developed a Position Description, with which the Union agreed, and sent it to classification. Unfortunately, it came back as a regular caretaker 5 position (Tr. 357). So, to start the program, foremen Alex Smith and Darryl Ryan rotated coming in on Saturday or Sunday and took a day off during the week (Tr. 359). Then, Alex Smith volunteered to change his tour of duty to work Saturday and Sunday. All employees were solicited (Tr. 600) to work the weekend but only two volunteered: Andrew Allen, Jr. (A.J.) and a man named Napoleon (id.), who later left to work for United Airlines (Tr. 363). Mr. Allen had originally come to the Cemetery through the V.A.'s Compensated Work Therapy [CWT] program. He worked through the program; became a temporary employee; became a permanent employee; was promoted and had become a WG-5 Cemetery Caretaker (G.C. Exh. 12; Tr. 598). Mr. Smith, for about a year, trained A.J. on the different duties of keeping equipment up, the vehicle for transporting SWAP people to different sites, etc. Mr. Smith said A.J. ". . . just took it and ran with it." (Tr. 548). Indeed, before the weekend job, Mr. Allen had taken over the trimming crew, which is run by SWAPs (Tr. 599), and after training by Foreman Smith, A.J. had performed the job for six months, or more, and under Mr. Smith's supervision for another year (Tr. 599).

Mr. Allen and Mr. Odon each were WG-5s and their ratings for the leaderman position were the same. Absent discrimination against Mr. Odon, Respondent could have chosen either Mr. Allen or Mr. Odon. It chose Mr. Allen and there were various sound reasons for not choosing Mr. Odon which had no relation to his protected activity. For example, his tardiness problem; his refusing a direct order to perform work for which he received a three day suspension (Tr. 536-537) which is not alleged as a violation in this case. Respondent denies that it gave Mr. Odon's protected

activity any consideration whatever in making its selection for the leaderman position; but if it were found that his protected activity was a consideration, Respondent asserts that it would have made the same selection in the absence of protected activity. Letterkenny Army Depot, 35 FLRA 113 (1990). Reluctantly, I conclude that the controlling reason for Respondent's failure to select Mr. Odon was his protected activity; i.e., despite Mr. Odon's numerous problems, Respondent would have selected Mr. Odon but for his protected activity. Thus, after Mr. Allen had been selected, Mr. Odon and Foreman Smith had a discussion in Anthony Ray Washington's maintenance shop in "the beginning of this year" (Tr. 692) [2002 - and, I assume, January, 2002, the selection having been made on, or about, May 30, 2001 (G.C. Exh. 12)]. At that time, Mr. Washington testified,

"A I think James was saying he should have, you know, he didn't get an opportunity to have the job, and Alex -- they were talking back and forth, and Alex said you have to do some things to get somewhere.

"Q . . . is that what he actually said, or did he say something a little more colorful than that?

"A A little more colorful.

. . .

"A But I don't know if I should talk like that.

"Q Yeah, you should, you should say for the record what it was.

"A Sometime you have to eat a little shit to get somewhere.

"Q And did Smith say anything else along with that statement?

"A You know, that was pretty much it, you know, like, you know, sometime you have to eat a little shit to get something, get somewhere, you know, get things, you know.

"Q Did Mr. Smith mention -- while he was making this statement, did he make any statements about Mr. Odon's union involvement?

"A If he quit all this union stuff he might could get somewhere . . .

"Q And what did James Odon say to that?

"A He say, I'm not going to eat no shit to get no job" (Tr. 693-694).

I found Mr. Washington to be a very creditable witness and I fully credit his testimony.⁴ Moreover, Mr. Fitzgerald credibly testified that Mr. Smith had cursed him (Tr. 434) and if he cursed his supervisor there is no doubt that he used such language to employees. Just before Mr. Odon received the notification from Personnel (June 7, 2001, G.C. Exh. 12), Foreman Smith told Mr. Odon he had not been selected and Mr. Odon testified,

"I asked Alex, and he said that I had pissed Jim off, that -- well, Jim and Steve Muro because of my union activity, you know, fighting them on (sic) tooth and nail and everything. I'm not giving them anything, and I'm not supporting them. . . ." (Tr. 61).

Mr. Odon also wrote a statement, undated, which purports to memorialize the conversation he had with Mr. Smith during the week of June 11, 2001 (G.C. Exh. 13). He testified that his conversation was before he got the notification from Personnel [June 7, 2001] the preceding week. In his statement, he mentioned only ". . . Steve (Muro) . . . and me too. . . ." (id.). His testimony added "Jim" [Mr. Fitzgerald]. In his statement, he noted, "Steve (Muro) was going to give you that job but you pissed him off, fighting us. . . ." (id.). I conclude that Mr. Odon "invented" the reference to "Jim" [Mr. Fitzgerald] in his testimony and find that his written reference to Mr. Muro and Mr. Smith was more accurate and, therefore, I do not credit Mr. Odon's reference to "Jim" [Mr. Fitzgerald] in his testimony. Although not part of his testimony, I do credit the assertion in his written statement that, "Steve (Muro) was going to give you that job but you pissed him off, fighting us. . . ." (id.). I credit Mr. Odon's written

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Mr. Smith acknowledged a discussion with Mr. Odon in Mr. Washington's presence in the maintenance shop; but he did not mention that Mr. Odon referred to his non-selection and he said Mr. Odon said, ". . . yeah, baby brother say if I eat some shit like him, I can get somewhere" (Tr. 555). I found Mr. Washington's testimony more convincing and have credited him. I do not credit Mr. Smith in this instance.

statement, in part, because it was then recollection recalled in the immediate past; in part, because Mr. Smith never referred to any inquiry by Mr. Odon about not getting the job; Mr. Smith never denied the statements; and Mr. Smith, in reference to mowing Golden Gate in 2½ days, used the same phrase, ". . . that he [Odon] fought us tooth and nail. . . ." (Tr. 515) and Mr. Muro did not deny the statement.

Mr. Odon testified that on June 26, 2001, he asked Mr. Smith why he didn't get the job to see if they would say anything different and that, Mr. Smith ". . . informed me about that I didn't get the leaderman's job, and again telling me that I had to learn how to eat a little s--t, and -- so I wrote it down, just another notation, and just another experience with Mr. Smith." (Tr. 63). Mr. Odon's written statement, in part, was as follows:

" . . . I did not get the leadman's job because you don't know how to shut up, that is keep your mouth shut. . . . You've got to learn how to eat a little s--t until you get what you want" (G.C. Exh. 14).

Mr. Odon noted in his statement that Foreman Darryl Ryan had been present. I credit Mr. Odon's testimony and his contemporary written statement, in part, because Mr. Smith did not deny the statements; in part, because Mr. Ryan was alleged to have been present, which Respondent did not deny, and Mr. Ryan was not called as a witness; in part, because the June 26, 2001, statement is consistent with the early June statements, herein above; and, in part, because Mr. Smith with regard to the subsequent January, 2002, conversation in the maintenance shop about eating s--t, stated,

"A Well, I could have said well, if you work for me, then you need to probably practice it, you know. I -- yeah, I might have responded to something like that." (Tr. 555-556).

Since such language was admitted by Mr. Smith to have been used by him, the same phraseology in June, 2001, convinces me that Mr. Smith made the statement attributed to him. I do not credit Mr. Odon's written statement purporting to memorialize the January conversation in the machine shop. First, Mr. Odon's written statement that Darryl Ryan and Anthony Su Fac (G.C. Exh. 15) were present was denied both by Mr. Washington (Tr. 694) and by Mr. Smith (Tr. 555). I credit the testimony of each in this regard. Second, I have credited Mr. Washington's testimony as reflecting the most

accurate version of what occurred. Mr. Odon appears in his written statement (G.C. Exh. 15) to have greatly embroidered on the conversation and his version is not convincing and, in part, as noted, was not true.

Mr. Smith credibly testified that he, with Darryl Ryan, had been the selecting officials for the caretaker leader position (Tr. 582). Mr. Smith continued as follows;

"A We asked questions. We asked the same questions of both candidates. Me and Darryl both did the interview.

"Q . . . And what was your involvement after that?

. . .

"A Basically we talked amongst ourselves about who we thought was probably best qualified and we made the -- you know, we came to an agreement and we made the selection.

"Q . . . So this is you and Mr. Ryan?

"A Darryl Ryan and then we took it to Jim.

. . .

"Q Then you took . . . who you had decided, the name to Mr. Fitzgerald.

"A Yes. Yes, ma'am.

"Q . . . And to your knowledge, Mr. Fitzgerald approved your recommendation.

"A Yes, ma'am. . . ." (Tr. 582-583).

Mr. Fitzgerald testified that he was actually the selecting official for the weekend cemetery leader position (Tr. 415-416). There is no question that Mr. Fitzgerald could have rejected the recommendation of Messrs. Smith and Ryan, but he did not. I conclude that Messrs. Smith and Ryan did not select Mr. Odon because of Mr. Odon's protected activity, or, as Mr. Washington credibly testified, if Odon, . . . quit all this union stuff he might could get somewhere . . ." (Tr. 694). Mr. Smith, Mr. Washington and Mr. Odon demonstrated that they fully understood Mr. Smith's reference to eating s--t to mean curtailment of Odon's union activity. Indeed, Mr. Odon, in the January, 2002,

conversation responded to Mr. Smith, according to Mr. Washington, ". . . I'm not going to eat no s--t to get no job." (id.). While there were legitimate reasons why Respondent might not have selected Mr. Odon, the sole reason for his non-selection was his protected activity. Mr. Smith so informed him before notification by Personnel; reiterated it after notification by Personnel; and about seven months later, in January, 2002, Mr. Smith continued the same comment. Mr. Smith, having told Mr. Odon that he would have been given the job but for his protected activity, continued to taunt Mr. Odon at least as late as January, 2002, in the same vein which demonstrates that other asserted reasons were, actually, pretextual. Accordingly, Respondent violated §§ 16(a)(1) and (2) of the Statute by its failure and refusal to select Mr. Odon for the Caretaker Leader position effective June 7, 2001, because of Mr. Odon's protected activity. At the time of the hearing, the position was vacant because Mr. Allen, who had been chosen instead of Mr. Odon, had voluntarily stepped down. (Tr. 437).

B. JANUARY 25, 2002 ADMONISHMENT OF ODON

At roll call on January 22, 2002, Foreman Darryl Ryan, according to Mr. Odon, ". . . made the announcement that they had to keep better track of damages with regard to the equipment, and that from that point on, effective immediately, we had to sign in and out for the uses (sic) of the equipment." (Tr. 80). Mr. Smith was uncertain that he made any reference at roll call about the sign-in/sign-out sheet but said he might have said, ". . . Remember to do your sign -- I mean your sign-in/sign-out sheets." (Tr. 524). I credit Mr. Odon's statement concerning Mr. Ryan's announcement, in part because Mr. Ryan was not called as a witness and Mr. Odon's version of what Mr. Ryan said is not contradicted, as Mr. Smith was uncertain that he made any reference at roll call about the sign-in/sign-out sheet.

At the hearing, I rejected General Counsel Exhibit 45 (Tr. 148-149). Upon reflection, I was in error and I now reverse that ruling, receive General Counsel Exhibit 45 and have placed it in General Counsel's Exhibit file.

Mr. Odon testified that General Counsel Exhibit 25, a new sign-in and sign-out sheet was introduced on January 22, 2002 (Tr. 87-88). I do not credit Mr. Odon's testimony that this sign-in and sign-out sheet was introduced on January 22, 2002. Indeed, Mr. Odon in his letter of February 4, 2002, to Mr. Smith challenging the admonishment (G.C. Exh. 28) makes no reference to any new or changed

form. Rather, he stated he was concerned about the policy of signing out for equipment because CWT and SWAPs people also use the equipment. [In point of fact, Mr. Duran Orlando King, an irrigation plumber (Tr. 262), testified that both work groups, i.e., CWT and SWAPs, used the sign-in, sign-out sheets (Tr. 278, 283).] Moreover, as Mr. Odon stated, General Counsel Exhibit 46 came into use on June 18, 2002 (Tr. 150). Prior thereto, General Counsel Exhibit 45 had been in effect at least since October, 2001, and remained in effect in May, 2002 (See sheet signed by Thomas A. Miller dated April 2 at bottom and initialed by him April 3 - May 2, 2002). Indeed, Mr. Alford indicated he had used a form, ". . . we have to sign out for it, and sign in for it, sir, you know, not just the PM" (Tr. 304) and stated he had been using the form since 1992 (Tr. 304-305). Mr. Alford described General Counsel Exhibit 45, with "Daily Maintenance List" at the top and a sign-in [Dispatched]/sign-out [Returned] at the bottom with dates 1-30.

Mr. Smith was shown General Counsel Exhibits 25 (same form as G.C. Exh. 46) and 26 (VA Form 7051b), and said, ". . . I never used this sheet. . . ." (Tr. 525) by which he meant he had never used General Counsel Exhibit 26 because when asked about his familiarity with the sign-in/sign-out sheet, stated,

"A The sign-in/sign-out sheets, it's a mixture of the PM service maintenance sheets that the employees use which we take far as -- we try to have them sign in and sign out the sheets as far as trying to -- for them to -- sort of like a PM sheet for all equipment to make sure all the employees, when they get their equipment, they check on a daily basis oil, little lightweight maintenance, sharpening blades, tire pressure, and also we use it as a sign-in sheet of the equipment so we know pretty much who has what equipment out." (Tr. 517).

It was shown that the policy of signing out for equipment had been put in place by a former Director, Mr. Dennis Kuehl, about 1985-86 (Tr. 397, 518) and, while the form has changed, the policy has remained in force (Tr. 397, 519); however, enforcement of the use of the form has been sporadic. When Mr. King was on light duty in February - March, 2002 (Tr. 262) and assigned to the tool room (Tr. 263), Mr. Smith told him to make sure everybody signed out, ". . . for the vehicles." (id.) Mr. King said, ". . . some of them kept signing out for the vehicle, and some just wouldn't. . . ." (Tr. 264). The paucity of sheets from

October, 2001 through May, 2002, of General Counsel Exhibit 45 attests to the lack of universal compliance.

Consequently, General Counsel's theory that Respondent changed a condition of employment on January 22, 2002, by introducing a new and different sign-in, sign-out sheet; that Mr. Odon asked to bargain before this new sheet was put into effect, and Respondent's instructing Mr. Odon to use the new sheet violated the Statute, is not supported by the record. To the contrary, I agree with Respondent that on January 22, 2002, it changed no condition of employment but merely reaffirmed an existing policy which had been in effect since 1985 or 1986 and use of an existing form which had been in use at least since 2001 and, it would appear, since 1992 (Tr. 305-306, 323), Department of Defense, United States Army, Fort Sam Houston, Texas, 1 FLRA 588, 600 (1979); Department of Health, Education and Welfare, Region V, Chicago, Illinois, 4 FLRA 736, 737, 752 (1980); Department of the Treasury, Internal Revenue Service, Cleveland, Ohio, 6 FLRA 240, 241 (1981); Social Security Administration Mid-American Service Center, Kansas City, Missouri, 9 FLRA 229, 240 (1982); U.S. Department of Veterans Affairs, Veterans Administration Medical Center, Memphis, Tennessee, 42 FLRA 712, 714-715, 727 (1991); U.S. Immigration and Naturalization Service, Houston District, Houston, Texas, 50 FLRA 140, 144 (1995).

Nevertheless, I conclude that Respondent violated §§ 16 (a)(1) and (2) by its admonishment of Mr. Odon on January 25, 2002. Mr. Odon testified that on, or about January 17, 2002, Mr. Smith said,

" . . . he was tired of me fighting him on tooth and nail -- every tooth and nail, that he hadn't had time before now to concentrate on me, but now that he does, and he's going to give me 90 days, and he's going to process my ass out of Golden Gate." (Tr. 78-79).

Mr. Odon said this came about in connection with his protest of the rest room which was unclean, not operational, had sewage leaks, etc. (Tr. 77, 78, 79). Mr. Odon wrote a memorandum purporting to confirm this conversation (G.C. Exh. 23). Mr. Smith admitted, in substance, the statement except he said he did not say "90 days" (Tr. 533). Mr. Smith stated,

"A I never stated that I would terminate his employment in 90 days. I had a conversation with Mr. Odon about . . . trying to get a better working relationship with him and about working --

our working conditions and he blew up. . . . he blew up, called me ignorant, stupid, there you go again, Alex.

"And I said well, O, if you can't meet me halfway, I will generate the paperwork and I will just start the paperwork. But it wasn't like 90 days. No, I didn't say 90 days." (id.)

I am aware that Respondent places this conversation after the admonishment [January 25, 2002] but I credit Mr. Odon's time frame, in part, because he made a memorandum at the time and, in part, because Mr. King, in the early part of 2002, when on light duty, had been placed in charge of the tool room (Tr. 263-264), testified,

"I heard him [Smith] telling him [Odon] once about he had enough paperwork on him that he could have him out of there in 90 days. . . ." (Tr. 266).

Mr. Odon testified that after roll call he pulled Mr. Ryan to the side and expressed his concerns; that Mr. Smith started yelling; and he, Odon, was "bum-rushed" by Ryan and Smith, i.e., they, Mr. Ryan in particular, started advancing toward me in a threatening and provocative manner; and that "Duran King came up and grabbed me by the arm and said, 'O', don't fall into that. You see what they are trying to do. So I then, for peace sake, got on my mower -- went to the thing, signed out for -- on the sheet for the mower, and I went to work." (Tr. 84-85).

Mr. King did not support Mr. Odon's version. Mr. King testified as follows:

"Q . . . at this particular meeting when Mr. Smith was reminding employees to use the sign-in/sign-out sheet, did anybody object to that?

"A Nobody objected when -- Mr. Odon said it wasn't in the regulation for us, that we shouldn't have to do it.

"Q So Mr. Odon objected?

"A Yeah, he told them --

"Q Did anybody else object?

"A Not -- no.

"Q . . . And what did he tell Mr. Smith?

"A He said it wasn't in regulations, and the guys shouldn't have to sign out for the vehicles, because it wasn't in the regulations clause that we had to do it.

"Q . . . Did he say he was going to use the sign-in/sign-out sheets?

"A He didn't say he was going to use it.

. . .

"A But he did, or finally he did do it, but -- and at the time he didn't, right away, no.

"Q He did not use it right away?

"A No, he didn't." (Tr. 272-273).

I found Mr. King's version more convincing than Mr. Odon's and, accordingly, credit Mr. King.

Mr. King made it clear that others than Mr. Odon weren't using the sign-in/sign-out sheets. Thus, he stated,

"A Yeah, the other guys wasn't signing out either. Certain people -- it wasn't just him, it was more than just him [Odon]." (Tr. 283).

and that he, King, informed Mr. Smith and ". . . he (Smith) got back with them and told them to sign out for the vehicles." (Tr. 273). Mr. Smith, in his testimony, made no reference to Mr. Odon not signing the sign-in/sign-out sheet on January 22. To the contrary, his only reference was as follows:

"A I remember one time James said that -- he said something to me as, you know you guys are operating illegally, but I'm going to go along with this, but we need to talk about it or something." (Tr. 526).

Mr. Odon admitted that he initially refused to use the sign-in/sign-out sheets (Tr. 84) but said he then, ". . . signed out for -- on the sheet for the mower, and I went to work." (Tr. 85).

Nevertheless, on January 22, 2002, Mr. Smith wrote a memorandum to Mr. Odon re "Order To Follow Instructions" in which he stated, in part, as follows:

"2. This morning, January 22, 2002, I provided you . . . the sign-out sheet and asked that you complete your assignment including completing the work sheet. This notice now constitutes a direct order to comply with my verbal instructions to you, given on this date at 8:20 a.m. If these instructions are not followed in their entirety by close of business today, you will be subject to discipline for failure to follow a direct order." (G.C. Exh. 24).

Singling out Mr. Odon for a formal written order, when Mr. Smith knew other employees weren't signing out, and giving Mr. Odon a written order when he merely told other employees to sign out, discriminated against Mr. Odon because of his objection to having to sign out equipment. The reference to 8:20 a.m. is not supported by any testimony. While the record showed some "foot dragging" by Mr. Odon, the record does not show a refusal to sign out equipment, but, to the contrary, Mr. Odon said he did (Tr. 85) and Mr. King said, ". . . finally he did do it, but -- and at the time he didn't, right away, no." (Tr. 273). Mr. Smith did not say when, or how, his memorandum was delivered. Mr. Odon said,

". . . It was a little bit after lunch, Alex came back with a letter of instruction." (Tr. 86, 87).

Mr. Odon's testimony in this regard was unchallenged and is, therefore, credited. Finally, pursuant to subpoena, Respondent produced some maintenance - sign out sheets, but not one sheet for any employee on January 22, 2002. Indeed, there is only one sheet for any part of January, 2002, and it bears the initials of "RJM" Jan. 23, 29 & 30; and CDZ Jan. 24, 2002. (G.C. Exh. 45); and at the bottom, under date of 1/11 is the initials of RJM Dispatched 0700, Returned 330; 1/16 & 1/17 initials of CDL, Dispatched on 1/16 0700 Returned 0500; Dispatched on 1/17 0700, Return blank; 1/23 the initials of RJM, Dispatched 0700, Returned 1615; 1/24 signed "Chris", Dispatched 0700, Return blank; 1/28 initial not readable, Dispatched 0800, Returned 1600; 1/29 and 1/30 initialed by RJM, Dispatched 1/29 0700, Returned 1600, Dispatched 1/30 0700, Returned 1400 (id.). From the failure and refusal of Respondent to produce the sheets for January 22, 2002, I draw the adverse inference that had they been produced they would have shown that Mr. Odon had signed for the mower on the morning of January 22, 2002, as he testified he did; but that employees other than Mr. Odon had not signed for equipment on January 22, 2002.

The letter of Admonishment (G.C. Exh. 27) issued on January 25, 2002, and charged: I. That January 23, 2002, at approximately 7:20 a.m. Odon was seen in the maintenance yard not performing his assigned tasks and that he refused to sign out for equipment until 7:45 a.m.

Mr. Smith did not testify to any occurrence on the morning of January 23, nor did Mr. Odon until shown the Admonition and when asked if he delayed in complying with the order to sign for equipment, stated ". . . No, I didn't." (Tr. 90). If he again expressed concerns about the sign-in/sign-out procedure, January 23, 2002, was a Wednesday, when he was to present L/M concerns. Mr. Odon's response to the Admonition (G.C. Exh. 28) seems to place these events on January 22 rather than the 23d. In any event, because Mr. Odon's testimony, that he had not delayed signing for equipment on January 23, was not contradicted or challenged, I credit his testimony in this regard.

II. That January 23, 2002, at about 12:55 p.m. Mr. Odon was seen driving a truck from the shop area and was stopped and asked if he had signed for use of the truck.

Mr. Smith testified that, at some point, he had, ". . . a conversation with Mr. Odon about signing in/signing out equipment, and I believe I told Mr. Odon that if he didn't sign for the equipment that he didn't need to be on the equipment. . . . he did what he was told not to do, and I spotted him in the vehicle, and I pulled up on Mr. Odon, and I went to ask him. He told me to shut up and he drove off. . . ." (Tr. 531).

Mr. Odon testified that on January 23, 2002, he took a truck to drive, on premises, to Headquarters [Administration], not more than half a mile, to perform Union business during his lunch break. Mr. Odon testified, "When I got to the main office, I saw Alex and Fitzgerald out front, they were smoking -- having a cigarette, so Fitzgerald observed that I went in, I did my business, and I came back and Alex approached me, and asked me, had I signed for the van? And so I told him I didn't know I had to do that during breaks, because other employees use -- run errands during break time, and at lunch time, they even go to get lunch in the equipment, and they never have

to -- they never had to sign out for it, so I didn't know I had to." (Tr. 91). Mr. Odon said Mr. Smith asked him to sign out for the truck [van] and that he had done so (id.)

Mr. Fitzgerald did not testify concerning seeing, or not seeing, Mr. Odon at Headquarters on January 23, 2002.

I credit Mr. Odon's version, in part, because Mr. Fitzgerald was never asked if he, with Mr. Smith, had seen Mr. Odon drive the truck [van] up to Headquarters on January 23; in part, because Mr. Smith did not deny having been at Headquarters with Mr. Fitzgerald on January 23; and, in part, because it is more plausible in light of the assertion in the Admonition that Mr. Odon said, ". . . you did not have to." Indeed, Mr. Odon's statement, in part, was that, ". . . they never had to sign out for it . . ." (Tr. 91), of which the statement in the Admonition was a very close paraphrase.

Mr. Odon's statement that he signed for the truck [van] after the fact was not challenged or denied and must be accepted as true.

III. Disrespectful conduct towards a supervisor. On January 23, 2002, Mr. Odon told Mr. Smith "shut-up" and drove away.

For reasons stated above under Charge II., I have credited Mr. Odon's testimony and do not credit Mr. Smith's testimony. Moreover, the allegation here is wholly contradictory to the allegation in Charge II.

For all the reasons set forth above, I find that the Admonishment of Mr. Odon, issued January 25, 2002, was in retaliation for his protected activity as Chief Steward and treated Mr. Odon in a discriminatory manner, all in violation of §§ 16(a)(1) and (2) of the Statute.

C. FOURTEEN DAY SUSPENSION

There is no dispute that Mr. Odon on May 8, 2002, wrote Supervisor Darryl Ryan and asserted that Mr. Genaro Ocreto was being assigned to supervise contractors; that this was not consistent with his duties as a Caretaker; and asked if he had been promoted. (G.C. Exh. 29). On May 15, 2002, Mr. Odon again wrote Mr. Ryan; reminded him of his May 8

memorandum; and inquired about Rusty (maintenance man) as to whether he was working out of his Position Description; and asked if he were now the Supply Person (G.C. Exh. 30). On May 16, 2002, Mr. Odon wrote Mr. Fitzgerald and said it was his understanding that the Headstone operation had been contracted out and in this case, why were Golden Gate Employees being assigned to do Headstones? (G.C. Exh. 31). Mr. Odon did not receive a response until June 19, 2002 (G.C. Exh. 33), when Mr. Ryan wrote Mr. Odon that Mr. Ocreto was working within his Position Description; that government employees do not supervise private sector contractors; that Mr. Ocreto checked the work of the contractors for compliance with the contract; and that Mr. Garaygay's position requires him to be a purchase cardholder.

In the meantime, Mr. Odon confronted Mr. Ocreto and ". . . asked him why were the employees still being assigned in view of the contract. So he (Ocreto) said that the entire operation wasn't contracted out, that it was only about 80 percent of the operation that was contracted, and in-house people were responsible for the remaining 20 percent. And so I said, well, I disagreed with him He was kind of upset about it, and he went back and spoke to Alex about it. . . ." (Tr. 106-107). Earlier, Mr. Odon said he knew that Mr. Ocreto had been shown his, Odon's, memo of May 8, 2002, to Mr. Ryan, because Mr. Ocreto told him Ryan had shown it to him (Tr. 100). On cross-examination, Mr. Odon admitted that he also approached Mr. Ocreto about his working with the contractors (Tr. 196). As Mr. Ocreto did not testify, Mr. Odon's testimony is not contradicted as to what Mr. Ocreto said to him. Nevertheless, I did not find Mr. Odon to be an entirely credible witness. He steadfastly avoided any discussion he had with Mr. Ocreto about working with contractors, which is at the heart of this matter, until, on cross-examination, he grudgingly admitted he had approached Mr. Ocreto about his working with the contractors.

Mr. Smith credibly testified,

"He [Ocreto] approached me about Mr. James Odon coming out in the field, harassing him, telling him what he should be doing and what he can't be doing, about working with the contractors out there, and that he should stop work. . . ." (Tr. 540).

Mr. Smith said,

"At that point, when he approached me, he look -- I mean he had like a bewildered face. I

mean it's like -- it seemed like he was shook up about it, the way he was talking and" (Tr. 541). (See, also, Tr. 578).

Mr. Smith told Mr. Ocreto,

" I said, well, look Ocreto, I'm going to go talk to James. I'm going to ask him what's going on

. . . .

"A I approached Mr. Odon to talk to him, and that's when he went into, here you go with your shit again. You always start -- excuse my language, but the language got bad, and it got bad on Mr. Odon's part.

"And I said, well, James, I'm just -- I just want to talk to you about the thing that's going on with you and Mr. Ocreto, and that's where he start cranking up, you know, with the black motherfucker, the bad language, and --

"Q Did he threaten to kick your ass?

"A Yes, he did. . . .

"Q . . . Did he tell you to get the fuck out of my face?

"A He sure did. (Tr. 542-544).

Mr. Smith stated that Mr. Odon did not ask for a Union representative (Tr. 545), stating, "James always rejects having any kind of - James always - as him being the chief union steward . . . he has rejected union representation. A lot of time he says, oh, I can handle it myself. But he never ask me for any union representation." (id.)

On cross-examination, Mr. Smith testified as follows:

"Q . . . And you told him to get a union rep, didn't you?

"A No, I did not.

. . . .

"A He did not ask for a union rep either.

"Q . . . So you told him that you wanted to talk to him and you were going to do it at that time?

"A We were going -- I walked in there and I told him, I said, Mr. Odon, I need to talk to you, and before I can finish saying that, Mr. Odon jumped me and started cursing me.

"And so it really ended right there --

. . .

"A -- regardless the union rep --

"Q . . . So you had only said, Mr. Odon, I need to talk to you and Mr. Odon started cursing you; correct?

"A Yeah. Yes, ma'am." (Tr. 579)

Mr. Fitzgerald testified,

"A There was an exchange of words in the shop, maintenance yard area. The cemetery to me is a rather sensitive place. The things that we do are extremely sensitive. We can only do them once . . .

"In this particular situation, there was an exchange in the shop, maintenance area, rather loud, boisterous, foul language that later I felt was escalating to possibly a violent situation.

"Q How serious do you take violence in the work place?

"A It's zero tolerance. (Tr. 409-410)

"Q . . . What did Mr. Smith tell you about Mr. Odon's behavior?

"A That it was loud, that there were both loud, boisterous and cursing, that he felt as though he'd been threatened.

"Q By Mr. Odon?

"A Yes." (Tr. 410-411)

. . .

"Q . . . And at this point, did you consider the Douglas factors?

"A Yes.

"Q . . . Did you consult with HR?

"A Yes." (Tr. 412).

I found Mr. Fitzgerald's testimony entirely credible.

Mr. Odon testified,

"A . . . during break, I was in the shop having a sandwich, and Alex came in ranting and raving, yelling about how I threatened -- what did he say, I threatened Mr. Ocreto, I harassed him, and I told him that he had better not work with the contractors anymore.

"Q . . . had you stated that to Mr. Ocreto?

"A No.

"Q Had you threatened Mr. Ocreto?

"A No.

"Q Had you harassed him?

"A No.

"Q . . . And what was your response, if anything?

"A I told Alex that I didn't -- you know, I didn't want to talk. He started ordering me to get a steward and come to his office. So I was trying to get an effort to get away from him. I just walked out of the shop area. He followed me outside the shop, yelling, and again, ordering me to get a steward and come to his office.

"And so I exercised my rights in accordance with our agreement, I believe it was Article V, Section 3 of the collective bargaining agreement, and stated to him that I wanted to meet with Bob Purcell [Director, Public Employees Department, LIUNA, Pacific Southwest Regional Office,

Sacramento, California (G.C. Exh. 19)], as he's my representative, and after meeting with him, we would convene in a forum to discuss his concerns. (Tr. 107-108).

. . .

"A . . . He [Smith] got on the phone and called Fitzgerald again saying that he was having problems with me about that, and I overheard Fitzgerald say, tell him to -- hey, come in the office and write it out. (Tr. 109).

"Q Did you say anything while you were walking?

"A I just, again, Alex was still yelling and ordering me to go get Ray and come to his office. So I just, again, quoted Article V, Section 3, . . . I went and got on my mower. Him telling me, well, go to work, and so I said, okay, and I went and got on my mower." (Tr. 110-111).

. . .

"Q Now, did you have any conversations with any supervisors or management prior to your getting that document? [G.C. Exh. 34].

"A No.

"Q So you had no forewarning that you were going to get the document?

"A No. Well, yeah, Alex said he was going to write me up again because I refused to go to his office, but I had no idea it was going to result in that.

. . .

"A . . . It was later, in the locker room. He [Smith] said he was going to write me up" (Tr. 112).

Mr. Odon asserted he used words like "bull s--t" but never directed or was disrespectful (Tr. 115). Mr. Odon admitted he had attended anger management (Tr. 203-204, 209); Anthony Ray Washington, a steward since 1979, stated that he heard Mr. Odon and Mr. Smith yelling and using boisterous language at the front gate (Tr. 695); Mr. King stated that at a Union

meeting, Mr. Odon got upset and yelled at various employees who were talking to him and told Mr. Gabriel Pelesasa that he wouldn't represent him if he needed help (Tr. 276) and Mr. King said that Mr. Odon and Mr. Smith argue a lot (Tr. 271) and both cussed at each other (Tr. 286); Mr. Bill Smith, a cemetery caretaker, said a lot of us curse - it's like a normal conversation, we all cuss - I do too (Tr. 484, 503-504) using bad language is, "Sort of routine" (Tr. 504), and Mr. Bill Smith also affirmed Mr. Odon's statement at a Union meeting that he hated Gabriel [Pelesasa] and would not represent him (Tr. 496); Christopher Manuel Delosada, Jr. gardener, and previously a foreman, testified that he had initiated discipline against Mr. Odon for cussing him out and Mr. Odon received a reprimand (Tr. 662), that Mr. Odon raises his voice at supervisors all the time (id.)

Mr. Odon said Mr. Clydelho Frommoethelydo (Frommo) was going in the restroom, about 15 or 20 feet from where Mr. Odon's mower was parked (Tr. 111). I have serious reservations that Frommo was present in view of his testimony,

"Q Are you aware of the charges that he was suspended for? Charges they made?

"A Not really. I'm not really -- I didn't really go into detail what -- you know, I was too busy getting suspended myself.

"Q Okay. Well, what do you know about the charges?

"A All I know is it was supposed to have been -- he was supposed to have threatened the foreman, or something (Tr. 226-227).

Nevertheless, Frommo⁵ attempted to help his good friend, Mr. Odon by saying ". . . . about the time he (Odon) was arguing with the -- they were arguing at him, and he was standing out front of the lunchroom, and I was on the way to the restroom. . . . I was on the way to the lunch room . . . Well, on my way to the lunchroom. . . ." (Tr. 227). Mr. Frommoethelydo was not, in general, a credible witness. For example, he said "Clydelho Frommoethelydo" had been his name all his life (Tr. 234), but he entered military service, apparently in 1960 or 1961 (Tr. 254-255), as Clyde Lee Johnson and his military record was not changed until October 23, 1964 (Res. Exh. 12); he was born at Herman Kiefer Hospital, Detroit, Michigan on December 28, 1941 (Res. Exh. 9), but, to the military, he had given his birth date as December 25, 1943, in Mexico City, Mexico (Res. Exh. 10), and later claimed he was born in 1950 (Tr. 234); and with regard to his testimony, he said, ". . . I heard Alex say, I'm going to put paper on you . . ." (Tr. 228); but Mr. Odon said that it was ". . . later, in the locker room. He [Smith (Alex)] said he was going to write me up . . ." (Tr. 112); Mr. Odon said Mr. Ryan was present (Tr. 111) but said nothing about Mr. Ryan saying anything, but Frommo said Ryan and Alex both were shouting at Odon to go to work (Tr. 228). Mr. Odon said Mr. Smith had come into the shop, "ranting and raving" (Tr. 107), that Mr. Smith, still yelling, ordered him to get Ray and come to his office (Tr. 110), while Frommo said Ryan and Smith were shouting for Mr. Odon to go to work (Tr. 228). I did not find his testimony credible and do not credit his testimony.

Nor did I find convincing Mr. Odon's assertion that he asked for representation by Mr. Purcell, or by anyone else;

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Respondent's Exhibits 9 (Birth Certificate, City of Detroit); 10 (DD 214, Claiming birth in Mexico City, Mexico); 11 (DD 1343, Notification of Change in Official Record - Change of Name); 12 (AR 340-15, Change of Name); 13 (Change of Name, State of Michigan, Probate Court for Wayne County) each is an Official Record and each bears directly on Mr. Frommoethelydo's credibility concerning his use of the name Clyde Lee Johnson and the date and place of his birth. The Herman Kiefer Hospital's record of his birth there on December 28, 1941, *i.e.*, in Detroit, Michigan, has not been challenged or refuted by any credible evidence, although Mr. Frommoethelydo played fast and loose with his place of birth as well as his date of birth. Upon consideration of the record, I was in error in rejecting these exhibits and I hereby, on my own motion, reverse my prior rulings, (Tr. 253-254) and Respondent's Exhibits 9, 10, 11, 12 and 13 are hereby received in evidence and have been placed in Respondent's Exhibit File.

nor do I find it convincing that Mr. Smith asked to talk to him in his office. Accordingly, because Mr. Smith's version of events was much more convincing, I credit Mr. Smith's testimony. I credit Mr. Smith's version, not only because it was more convincing, but, in part, because Mr. Smith set forth the same statements in his letter of "Proposed Suspension", dated May 21, 2002, to which Mr. Odon filed no response (Tr. 113, 412); and, in part, because the record shows that Mr. Odon has a proclivity for making threats, not only to fellow Union members but even to an EEO Investigator (Res. Exh. 1, p. 11, n.4), and frequent, if not daily, use of profanity and yelled at Mr. Smith frequently (Tr. 286, 301, 484, 503-504).

As noted, there is no doubt that Mr. Odon was engaged in protected activity in writing Messrs. Ryan and Fitzgerald about Mr. Ocreto and Golden Gate employees doing Headstone work; nor is there any doubt that he was engaged in protected activity in asking Mr. Ocreto why Golden Gate employees were doing Headstone work and/or what work Mr. Ocreto was doing with the contractors. Mr. Odon had no protected right to threaten or harass Mr. Ocreto and, while Mr. Odon denied that he had, Mr. Ocreto believed he had and complained to Mr. Smith about Mr. Odon. Mr. Smith had an affirmative obligation to investigate the complaint by asking Mr. Odon what was going on. At this point, I do not believe Mr. Odon was engaged in protected activity and his unprovoked cursing of Mr. Smith in filthy language and screaming at Foreman Ryan that Foreman Smith, "isn't s--t, I'll kick his ass!", warranted discipline. If Mr. Odon were deemed to have been engaged in protected activity when Mr. Smith approached him, nevertheless, I find his remarks, "exceeded the boundaries of protected activity such as flagrant misconduct." U.S. Air Force Logistics Command, Tinker Air Force Base, Oklahoma City, Oklahoma and American Federation of Government Employees, Local 916, AFL-CIO, 34 FLRA 385, 389 (1990); Department of the Air Force, Grissom Air Force Base, Indiana, 51 FLRA 7, 11 (1995) (hereinafter, "Grissom AFB") "Remarks or conduct that are of such 'an outrageous and insubordinate nature' as to remove them from the protection of the Statute constitute flagrant misconduct." Naval Facilities Engineering Command, 45 FLRA at 156, Tinker AFB, 34 FLRA at 390; Grissom AFB, supra, 51 FLRA at 11. See, also, Old Dominion Branch No. 46, National Association of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264, 283 (1984). The Authority has indicated relevant factors to be considered between leeway for impulsive behavior and the employer's right to maintain order and respect for its supervisory staff on the job site: (1) the place and subject of the discussion; (2) whether the employee's outburst was impulsive or designed; (3) whether

the outburst was in any way provoked by the employer's conduct; and (4) the nature of the intemperate language and conduct. Department of Defense, Defense Mapping Agency Aerospace Center, St. Louis, Missouri, 17 FLRA 71, 80-81 (1985); Grissom AFB, 51 FLRA at 11-12. Here, the outburst occurred in the maintenance shop and just outside the shop; Mr. Odon's outburst initially was impulsive but his threat to Mr. Ryan that he would kick Mr. Smith's ass appeared designed; Mr. Odon's outburst was not provoked by Respondent's conduct; and the nature of Mr. Odon's cursing was directed at Mr. Smith, i.e., he called Mr. Smith, inter alia, a Black Motherfucker; and told another foreman he would kick his (Smith's) ass. The remarks were loud and threatening in nature and Mr. Smith believed Odon had threatened him and so informed Mr. Fitzgerald. Considering all factors and circumstances, Mr. Odon's remarks to Mr. Smith and to Mr. Ryan were of such outrageous and insubordinate nature that they were removed from protection of the Statute as flagrant misconduct. Accordingly, Respondent did not violate § 16(a)(1), (2) or (4)6 of the Statute. Moreover, even if it were deemed a mixed motive case, Letterkenny Army Depot, 35 FLRA 113 (1990), notwithstanding that I believe that at the time Mr. Odon was not engaged in protected activity and that protected activity was not a motivating factor in Respondent's discipline of Mr. Odon, nevertheless, Respondent has

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There is no credible evidence that Respondent considered anything except Mr. Odon's outrageous conduct on May 17, 2002. General Counsel in her Brief, p. 46, n.87, refers to a statement by Thomas A. Miller, a work leader who has been at Golden Gate 25 years (Tr. 321), that Mr. Smith asked, ". . . who the witnesses were regarding the complaints, or the charges. I says, well, I can't say anything to you about that, and I walked out." (Tr.329). General Counsel asserts, "Smith's statements to Miller demonstrate specific animus based on Odon's having filed an unfair labor practice charge." (General Counsel's Brief, p. 46, n.87).

[Mr. Miller placed this conversation in April, 2002 (Tr. 328) and at that time the only charge which had been filed was in Case No. SF-CA-02-0126, filed November 19, 2001 (non-selection of Odon as Cemetery Caretaker Leader)].

Mr. Miller further stated that fifteen or twenty minutes later, Mr. Smith had come out and threatened to sue him personally, told Mr. Miller he was a liar and he (Smith) was going to sue him. He said Mr. Smith did not say why he wanted to sue. (Tr. 329). Mr. Smith having asked who the witnesses were, and Mr. Miller declined to answer and left, does not show union animus; nor does the alleged threat to sue Mr. Miller personally. Consumer Product Safety Commission, 4 FLRA 803; 842-845 (1980).

demonstrated by a preponderance of the evidence that:
(1) there was a legitimate justification for its action, namely, Mr. Odon's outrageous, insubordinate and threatening conduct; and (2) Respondent would have taken the same action in the absence of protected activity (Tr. 409-410). Accordingly, I recommend that the Authority dismiss the complaint in Case No. SF-CA-02-0649.

Having found that Respondent violated §§ 16(a)(1) and (2) of the Statute in Case Numbers SF-CA-02-0126 and SF-CA-02-0286, I recommend that the Authority adopt the following:

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Federal Labor Relations Authority, 5 C.F.R. § 2423.41 (c), and § 18 of the Federal Services Labor Management Statute, 5 U.S.C. § 7118, the Department of Veterans Affairs, Golden Gate National Cemetery, San Bruno, California shall:

1. Cease and desist from:

(a) Discriminating against employees by denying them promotional opportunities or issuing letters of reprimand because they have represented employees or have engaged in other protected activity on behalf of Laborers' International Union of North America, Local 1141, AFL-CIO (hereinafter, "LIUNA"), the exclusive bargaining unit representative.

(b) Making statements that interfere, restrain or coerce employees in their exercise of protected activity.

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

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

(a) Promote Mr. James Odon to the position of Cemetery Caretaker Leader, retroactive to June 7, 2001, and make Mr. Odon whole by awarding him back pay and allowances equal to that which he would have earned had he been in this position for all days he actually worked from June 7, 2001, to the date of his promotion, less the compensation and

allowances that he received during this period as a Cemetery Caretaker, WG-5.

(b) Rescind the letter of admonishment issued to Mr. James Odon, LIUNA Chief Steward, dated January 25, 2002, forthwith, and expunge the document from all records.

(c) Reconsider any disciplinary action in which the letter of admonishment of January 25, 2002, was taken into account. If such reconsideration results in the imposition of lesser discipline, pay Mr. Odon back pay, as appropriate, in accordance with 5 U.S.C. § 5596.

(d) Post at its facilities at San Bruno, California, copies of the attached Notice on forms to be finished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Cemetery Director, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(e) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41(e) notify the Regional Director of the San Francisco Region, Federal Labor Relations Authority, 901 Market Street, Suite 220, San Francisco, CA 94103-1791, in writing within 30 days of the date of this Order, as to what steps have been taken to comply.

IT IS FURTHER ORDERED that the complaint in Case No. SF-CA-02-0649 be, and the same is hereby, dismissed.

—

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: August 28, 2003
Washington, DC

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Veterans Affairs, Golden Gate National Cemetery, San Bruno, California, 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 employees by denying them promotional opportunities or issuing letters of reprimand because they have represented employees or have engaged in other protected activity on behalf of Laborers' International Union of North America, Local 1141, AFL-CIO (hereinafter, "LIUNA"), the exclusive bargaining unit representative.

WE WILL NOT make statements that interfere, restrain or coerce employees in their exercise of protected activity.

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

WE WILL promote Mr. James Odon to the position of Cemetery Caretaker Leader, retroactive to June 7, 2001, and **WE WILL** make Mr. Odon whole by awarding him back pay and allowances equal to that which he would have earned had he been in this position for all days he actually worked from June 7, 2001, to the date of his promotion, less the compensation and allowances that he received during this period as a Cemetery Caretaker, WG-5.

WE WILL rescind the letter of admonishment issued to Mr. James Odon, LIUNA Chief Steward, dated January 25, 2002, forthwith, and **WE WILL** expunge that document from all records.

WE WILL reconsider any disciplinary action in which the letter of admonishment of January 25, 2002, was taken into account.

If such reconsideration results in the imposition of lesser discipline, **WE WILL** pay Mr. Odon back pay, as appropriate, in accordance with 5 U.S.C. § 5596.

Department of Veterans Affairs
Golden Gate National Cemetery
San Bruno, California

DATE: _____ BY: _____
Cemetery Director

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, San Francisco Region, Federal Labor Relations Authority, whose address is: 901 Market Street, Suite 220, San Francisco, California 94103-1791, and whose telephone number is: 415-356-5000. (Case Nos. SF-CA-02-0126 and SF-CA-02-0286)

DATED: August 28, 2003
Washington, DC