

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

MEMORANDUM

DATE: October 13, 2006

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF THE AIR FORCE
SEYMOUR JOHNSON AIR FORCE BASE
GOLDSBORO, NORTH CAROLINA

Respondent

and

Case No. WA-CA-05-0608

NATIONAL ASSOCIATION OF INDEPENDENT
LABOR, LOCAL 7

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

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

U.S. DEPARTMENT OF THE AIR FORCE SEYMOUR JOHNSON AIR FORCE BASE GOLDSBORO, NORTH CAROLINA Respondent	
and NATIONAL ASSOCIATION OF INDEPENDENT LABOR, LOCAL 7 Charging Party	Case No. WA-CA-05-0608

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 **NOVEMBER 13, 2006**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

PAUL B. LANG
Administrative Law Judge

Dated: October 13, 2006
Washington, DC

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

U.S. DEPARTMENT OF THE AIR FORCE SEYMOUR JOHNSON AIR FORCE BASE GOLDSBORO, NORTH CAROLINA Respondent	
and NATIONAL ASSOCIATION OF INDEPENDENT LABOR, LOCAL 7 Charging Party	Case No. WA-CA-05-0608

Ayo A. Clanton
For the General Counsel

Major Gail Crawford
For the Respondent

Shawn Futrell
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

On September 23, 2005, the National Association of Independent Labor, Local 7 (Union) filed an unfair labor practice charge (GC Ex. 1(a)) against the United States Department of the Air Force, Seymour Johnson Air Force Base, Goldsboro, North Carolina (Respondent). On May 30, 2006, the Regional Director of the Chicago Region of the Federal Labor Relations Authority (Authority)¹ issued a Complaint and Notice of Hearing (GC Ex. 1(d)) in which it was alleged that the Respondent committed an unfair labor practice in violation of §7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (Statute) by offering

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The case was transferred from the Washington to the Chicago Regional Office by Order dated October 25, 2005 (GC Ex. 1(b)).

Rebecca Proctor, a member of the bargaining unit represented by the Union, the choice of either receiving her original performance evaluation along with an award or an outstanding evaluation with no award. It was further alleged that this action was taken in retaliation for Proctor's having sought the assistance of the Union regarding her performance evaluation. The Respondent filed a timely Answer (GC Ex. 1(f)) in which it denied the alleged violation of the Statute.

A hearing was held in Goldsboro, North Carolina on July 26, 2006. The parties were present with counsel and were afforded the opportunity to present evidence and to cross-examine witnesses. This Decision is based upon consideration of the evidence, including the demeanor of witnesses, and of the post-hearing briefs submitted by the parties.

Positions of the Parties

The General Counsel maintains that she has presented a *prima facie* case of discrimination inasmuch as the evidence shows that Proctor had been engaged in protected activity and that her protected activity was the motivating factor in the Respondent's failure to give her a performance award. The General Counsel further maintains that the Respondent failed to establish an affirmative defense for its action. This is so because the Respondent's affirmative defense depends upon the testimony of Captain Russell Williams who was Proctor's supervisor. According to the General Counsel, Williams' testimony was not credible and should not be accepted.

As a remedy the General Counsel proposes an Order which, in addition to the customary posting of a Notice, requires the Respondent to make Proctor whole by granting her a performance award of \$1,000.00 plus interest.

The Respondent maintains that the General Counsel has not presented a *prima facie* case of discrimination since the evidence indicates that Proctor's protected activity was not a motivating factor in the denial of a performance award. Williams had decided not to recommend Proctor for an award before he presented her with the performance appraisal that prompted her to consult both the Union and Williams' superior. Therefore, Proctor's protected activity could not have motivated Williams to withhold a recommendation that Proctor receive an award. The Respondent further maintains that there is no evidence that Williams ever manifested anti-Union sentiment and that, to the contrary, he had dealt amicably with the Union on matters concerning other

employees. Furthermore, Williams had concurred on a recommendation for an award to an employee who had engaged in extensive Union activity.

The Respondent also maintains that, even if the General Counsel had presented a *prima facie* case of discrimination, it has presented a valid affirmative defense by showing that it had a legitimate reason for denying an award to Proctor and that it would have taken the same action in the absence of her protected activity. The Respondent argues that Williams' testimony was credible and that Proctor's testimony was unreliable.

The Respondent also argues that, even if it is determined that Williams made the statement alleged by Proctor, that statement did not constitute a violation of the Statute because it would not have had a coercive or intimidating effect on a reasonable employee.

Findings of Fact

The Respondent is an agency, or a unit of an agency, within the meaning of §7103(a)(3) of the Statute. The Union is a labor organization as defined in §7103(a)(4) of the Statute and is the exclusive representative of a unit of the Respondent's employees which is appropriate for collective bargaining. Proctor is an employee as defined in §7103(a)(2) of the Statute and is a member of the bargaining unit represented by the Union (GC Exs 1(d) and (f)).

The Annual Performance Evaluation and Awards Programs

At all times pertinent to this case a collective bargaining agreement (CBA) was in effect between the parties. Article 29 of the CBA, entitled "**PERFORMANCE EVALUATION**", (GC Ex. 7) states, in pertinent part:

Section 4. Each employee will be provided a copy of his annual performance evaluation. . . .

Section 5. The employee has a right to grieve all aspects of his performance evaluation. . . .

Section 6. To maintain a high-quality civilian work force and encourage employees to strive for top performance, supervisors should act as soon as they notice a performance problem or a decrease in the level of an employee's performance. The Employer will counsel employees in relation to their overall performance on an as-needed basis and when the employee's performance drops below a

satisfactory level. . . . Each employee will receive at least one feedback during the course of the year, near the mid-point of the performance cycle. . . .

The performance of civilian employees is evaluated by means of AF Form 860A (see GC Ex. 2). The front of the form allows for evaluation according to "critical elements" of the employee's Performance Plan; the two possible grades are "meets" or "does not meet". There is also a space for "Award Justification" and spaces to indicate whether the employee is to receive a performance award and, if so, what kind of an award.² There are signature lines for the Rater, who is the employee's immediate supervisor; the Reviewer, a second or higher level supervisor; and the Award Approving Official, who is on a still higher level. There is also a space for the employee to sign so as to indicate receipt, but not necessarily agreement with the evaluation; the spaces pertaining to the performance award are completed after the employee has signed (Tr. 68, 69).

The reverse side of the form contains a section entitled "Civilian Promotion Appraisal". A paragraph at the top indicates that the appraisal is used for:

. . . competitive in service placement actions, including promotions, reassignments or demotions to positions with known growth potential, and other such instances. . . .

The bottom portion of this side of the form lists nine appraisal factors, such as "Work Effort" and "Adaptability to Work". Employees are to be rated on each of the factors on a scale from 1 to 9; 1 is "Very Poor" and 9 is "Outstanding". There is nothing on the reverse side of the form which refers to performance awards.

Randy Houston is employed in the base Civilian Personnel Office as an advisor to management in both labor and employee relations, the latter of which includes the performance award program. According to Houston there are two Air Force instructions (neither of which is in evidence) pertaining to the management of the civilian performance and civilian recognition programs (Tr. 67). Each year the base command issues an appraisal policy letter (which is also not in evidence) for the appraisal period from April 1 to March 31. Pursuant to the policy letter, supervisors prepare appraisals, sign them and submit them to the

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Employees may receive two kinds of lump sum cash awards, step increases or time-off awards.

reviewing officials for signature. The appraisals are then returned to the supervisors and presented to the employees who sign the appraisals indicating receipt and receive copies. The supervisors then give the appraisals, with appropriate recommendations, to awards monitors who forward them to awards approving officials. Supervisors are advised not to inform employees of their awards recommendations (Tr. 68, 69).

Houston further testified that, contrary to the assumptions of many employees, the reverse side of the appraisal form does not have anything to do with awards. Specifically, Houston knows from a review of personnel records that not everyone who receives all 9s gets an award (Tr. 71, 72).

Proctor's Performance Evaluation

Prior to Proctor's retirement in March of 2006 she was employed as a Civilian Pay Technician; at all times relevant to this case her immediate supervisor was Captain Russell Williams (Tr. 17, 18). On May 2, 2005,³ Proctor met privately with Williams at which time he presented her with her annual evaluation (GC Ex. 2)⁴. Proctor testified that she was surprised to see that she had received 8s on certain of the appraisal factors⁵ because she "usually" got all 9s. Furthermore, she had not received any feedback which, according to her understanding of pertinent Air Force instructions, was required before evaluation grades were lowered. Proctor apparently did not ask Williams why she had received 8s or state that she had not received feedback. However, she testified that she asked him if her grades would have any bearing on her bonus, at which point he told

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All subsequently cited dates are in 2005 unless otherwise indicated.

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GC Ex. 2, which is the copy given to Proctor, was signed by her and by Williams. The complete evaluation form, which was subsequently signed by the Reviewer, was later introduced as Resp. Ex. 3. The spaces pertaining to performance awards have not been filled in on the completed form.

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Proctor was given 8s (denoting "Far Above Fully Successful") on three of the nine appraisal factors; she was given 9s on the others.

her that they would not.⁶ According to Proctor, she then asked Williams if he would change her grades; he said that he would not (Tr. 19-21, 25).⁷

After leaving Williams' office Proctor went to see a Union representative and the unit commander; however, she did not remember in which order this occurred. According to Proctor, the Union president told her that Williams had asked him whether a grievance would be filed and that the president had told Williams that it might be (Tr. 29). She told the unit commander, then Major now Lieutenant Colonel Sherman, that regulations required feedback before grades were lowered. Sherman told her that, while he could not order Williams to change the grades, he would strongly recommend that Williams do so (Tr. 30, 31).

Proctor testified that Williams called her into his office on May 5. When she entered the office Proctor saw that Williams was standing with his hand on an appraisal which had been changed to all 9s (GC Ex. 3). Williams told her that he also had an appraisal with 8s; according to Proctor, Williams told her that if she signed the appraisal with 8s he would recommend her for an award, but if she signed the appraisal with all 9s he would not recommend her for an award.⁸ Proctor told Williams that, since the evaluation would stay on her record for the rest of her career, she would take the one with all 9s (Tr. 31, 32).

Proctor stated that she thinks that she went back to the Union after leaving Williams' office, at which time Sean Futrell, the Union president, advised her to file an EEO (employment discrimination) complaint. She further stated

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Williams testified that, when Proctor asked about her bonus, he told her that he was not the awards approving official (Tr. 87, 88). The discrepancy is not crucial since there is no evidence that Williams either promised Proctor that she would receive an award or told her that she would not.

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Proctor also testified that employees who receive 8s sometimes get awards, but that she assumed that she would not be receiving an award because her grades had been lowered (Tr. 49).

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Proctor presumably meant that Williams wanted her to sign a second evaluation with 8s since she had already signed the original evaluation (Resp. Ex. 3). Proctor first testified that she did not sign the original evaluation, but later acknowledged that she did not remember (Tr. 37, 38).

that, after several months, she eventually filed an unfair labor practice charge (Tr. 33-35).⁹

Proctor also testified that she believes that virtually every employee who gets an appraisal of all 9s also gets an award. Her assertion is based upon her access to civilian pay records and the fact that her duties include the effectuation of all changes and additions to pay. She acknowledged that she does not have access to performance appraisals, but stated that she had discussions with the 54 timekeepers who worked for her¹⁰ as well as other employees who would call to see if their awards would be included in their next pay. Proctor further stated that, in the six years that she worked in her most recent position, she never saw a case where someone who received all 9s did not get an award (Tr. 40-42). She later acknowledged that she was not an expert and did not know what percentage of employees who received all 9s also received awards (Tr. 43). Proctor also acknowledged that, while she knew that some employees who received 8s also received awards, when she left Williams' office on May 2 she assumed that she would not be getting an award because her performance appraisal was lower than for the previous reporting period (Tr. 49).

Futrell confirmed that Proctor consulted him about her appraisal and award on May 2. According to Futrell, Proctor told him that, when she asked Williams whether her lower appraisal would affect her award, he replied that it would not and that she would still receive an award. Futrell told Proctor that she probably had grounds for a grievance and that the Union would look into the matter (Tr. 54).

Futrell had a previously scheduled meeting with Williams on May 3 to discuss issues regarding another employee. During that meeting Williams asked if the Union was considering filing a grievance on behalf of Proctor. Shortly thereafter Proctor came to see him. She seemed upset and wanted to go forward with a grievance (Tr. 55, 56). On May 5 Proctor told Futrell that Williams had changed her appraisal to all 9s and had given her a choice of accepting the 8s and receiving an award or taking the 9s without an award (Tr. 56, 57).

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It is possible that Proctor was confused as to the details of the unfair labor practice charge. In any event, there is no evidence of any such charge other than the charge filed by the Union (GC Ex. 1(a)) which gave rise to this case.

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Presumably Proctor did not mean that she supervised 54 employees, but only that they submitted timekeeping data to her.

Williams categorically denied giving Proctor a choice of receiving some 8s and an award or all 9s and no award. He also denied withholding a recommendation for an award because Proctor had gone to the Union (Tr. 86, 87). According to Williams, he had decided not to recommend Proctor for an award before he called her to his office to discuss her evaluation. He explained to Proctor the basis for the assigned grades and invited her questions. When Proctor asked if her evaluation would affect her award, Williams replied that he was not the award approving official. Williams did not tell Proctor that he was not going to recommend her for an award, nor did he promise to try to get her an award (Tr. 87, 88).¹¹ Proctor thereupon signed the appraisal and left the office (Tr. 89).

The next step in processing the appraisal was to send it, along with Proctor's personnel folder, to a senior civilian in the squadron and then to Sherman, the squadron commander. Williams testified that he forwarded Proctor's appraisal either that day or the next (Tr. 90, 91). Shortly thereafter, Sherman called Williams to his office.¹² After learning that Williams had not given Proctor any feedback he informed Williams that he could not lower her appraisal. Williams stated that he was annoyed (or, as he put it, "torqued") at the system. However, he did not think that Proctor had spoken to Sherman. Williams spoke to Houston to confirm that he could not lower Proctor's appraisal in the absence of feedback; he then changed the appraisal so as to give Proctor all 9s. Williams called Proctor back into his office and gave her the new appraisal. He informed Proctor that he had done so because of a lack of feedback. Williams did not remember Proctor asking any questions or raising the issue of her award. He had not planned to recommend Proctor for an award and did not change his opinion because of the need to revise her performance appraisal (Tr. 92-96).

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Williams acknowledged that, in hindsight, he should have told Proctor that he was not recommending her for an award, but he wanted to avoid a confrontation (Tr. 88). He also acknowledged that if a supervisor recommends an employee for an award, that employee would almost certainly get some sort of an award. Conversely, an employee would not receive an award in the absence of a recommendation from his or her supervisor (Tr. 104, 105.)

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Williams later testified that Sherman came to his office with Proctor's original appraisal and personnel folder (Tr. 93). It is unclear whether this was a change in Williams' testimony or if Sherman later came to his office.

After Williams submitted the revised evaluation he again met with Sherman. At that time Sherman informed him that Proctor had come to his office and had expressed concern over her performance award. Sherman stated that he had asked Proctor if Williams had promised her an award and that she said that he had not (Tr. 97-99).

Williams further testified that, some time after Proctor's second appraisal, she asked him for 15 minutes to consult with the Union; he told her that it was fine. He did not become aware of Proctor's contact with the Union until after he had changed her performance appraisal (Tr. 101). He did not recall discussing the filing of a grievance with Futrell and did not see how he would have had any reason to do so (Tr. 100, 101). In February of 2006, after Williams had returned from a deployment to Iraq, he was informed by Houston of the unfair labor practice charge (Tr. 99, 102).

Sherman testified that he saw nothing unusual in Proctor's evaluation until she came to his office. At that time she told Sherman that she had not received feedback, that she felt somewhat threatened if she mentioned it and that she thought that her evaluation should be changed so that she would get a bonus. Sherman told her that he would look into it. Sherman then asked Williams if he had provided feedback to Proctor; when he said that he had not, Sherman ordered him to change Proctor's evaluation. Williams raised no objections and agreed to make the change (Tr. 124, 125). Sherman also testified that Proctor told her that Williams had stated that if she argued about her ratings she might get them raised, but that she would lose the opportunity to get a bonus.¹³ Sherman subsequently asked Williams if he had mentioned a bonus to Proctor; Williams told him that he had not given her any indication as to a bonus (Tr. 125, 126). Sherman further testified that he met with Proctor again, at which time he told her that her appraisal would be changed to conform to the previous one. He also told her of Williams' contention that he never said anything about a bonus and that he did not threaten her. Proctor then stated that those were not the words that Williams had used (Tr. 127).

The Administration of the Awards Program

During the course of Houston's testimony he authenticated a document showing the performance appraisal

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Sherman apparently confused the sequence of events, since Proctor herself did not claim that Williams threatened her at their first meeting.

grades assigned to each of the employees in the Comptroller Squadron¹⁴ for the period ending March 31 (Resp. Ex. 1). Houston also authenticated a document showing whether those employees received performance awards for the same period (Resp. Ex. 2). My analysis of the documents indicates the following:

a. There were 23 employees in the squadron of whom 18 received all 9s.

b. Of those 18, only 2, including Proctor, received no award. This indicates that 88.9% of the employees who received all 9s also received awards.

c. 3 of the 5, or 60%, of the employees who did not receive all 9s received awards.

d. 19 of the 23 employees in the Comptroller Squadron, or 82.6%, received performance awards. The awards ranged from \$263 to \$2,200. 12 employees also received time-off awards.

The foregoing statistics tend to corroborate Houston's testimony that the distribution of performance awards is not strictly controlled by the grades assigned in performance appraisals. However, both simple logic as well as the statistics suggest that they are not totally unrelated since the level of performance that would result in an award would most likely also result in high grades on a performance appraisal. This supposition is supported by the fact that 16 of the 18 employees who received all 9s also received awards. Nevertheless, the fact remains that the receipt of all 9s did not automatically result in the receipt of an award.

Williams testified that he concurred on recommendations for awards for three other employees in the Comptroller Squadron who did not report directly to him.¹⁵ An examination of the evidence (Resp. Ex. 1) indicates that two of those employees did not receive all 9s on their performance evaluations. Williams concurred with an award

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Not all of the named employees reported directly to Williams.

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The names of the employees may be ascertained from the hearing transcript and the exhibits. In an effort to preserve their privacy I will not identify them in the Decision.

for an employee who had received two 8s¹⁶ because he had shown "drastic improvement" and had overcome personal differences with his direct supervisor (Tr. 106, 107). He concurred with an award for another employee who had received two 8s because of the quality of her work and her problem solving skills (Tr. 107). According to Williams, he had decided not to recommend Proctor for an award about a month before he prepared her original appraisal. His decision was based on his observation of her performance both when she reported to him indirectly and later directly; those observations led Williams to conclude that Proctor's performance was not "stellar" (Tr. 105).

The Determination of Credibility

The critical issue in this case is primarily a factual one: whether the Respondent, through Williams, withheld recommending Proctor for a performance award because she had consulted the Union with regard to her performance appraisal. I find as a fact that such a recommendation would have assured Proctor's receipt of an award in some amount and that the withholding of the recommendation was tantamount to a denial of the award.

In making the controlling factual determination I must first determine when Williams decided not to recommend Proctor for an award. If he made the decision before presenting the first appraisal to Proctor or had not yet made the decision, I must then determine whether he offered to make or change his decision in Proctor's favor in return for her acceptance of the original appraisal.¹⁷ In resolving these issues of fact I must necessarily assess the credibility of Proctor and Williams and, indirectly, that of other witnesses for the respective parties.

As to the time when Williams first decided not to recommend Proctor for an award, there is Williams' testimony that he made the decision about a month before he first presented Proctor with her performance evaluation. I place no significance on the General Counsel's failure to rebut that testimony because there is no way that William's assertion could be definitively confirmed or rebutted. However, I credit William's testimony because, regardless of the exact time when he decided not to recommend Proctor for an award, it stands to reason that the decision would have

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Proctor had originally been given three 8s (Resp. Ex. 3).

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The General Counsel has cited no other evidence to suggest discriminatory action by Williams.

been made before he prepared Proctor's original evaluation. As indicated by Houston, normal procedure was for Williams to complete the evaluation form and forward it to a senior civilian and then to Sherman without delay. The completion of the front of the form required Williams to state whether he was recommending an award and the justification for the award, if any. Therefore, it is reasonable to assume that Williams would have been ready to forward the form as soon as he had obtained Proctor's signature. The evidence indicates that, in fact, Williams forwarded the evaluation form without delay. In addition, it stands to reason that Williams would have made a decision regarding Proctor's award while he was considering how to grade her performance. I therefore find as a fact that Williams had decided not to recommend Proctor for an award before he met with her on May 2. This is consistent with Proctor's testimony that she assumed that she would not be recommended for an award because her evaluation had been lowered. In view of this finding, the General Counsel can prevail only if I find that Williams offered to change his recommendation at his second meeting with Proctor.

The question of whether Williams offered Proctor the choice of being recommended for an award instead of receiving higher grades is more difficult than the previous factual question inasmuch as it requires the weighing of diametrically opposite testimony by Proctor and Williams. Although Proctor seemed a bit flustered while testifying, there was nothing in the demeanor of either witness which would affect their credibility. There appears to be some inconsistency in the perception of various witnesses regarding Proctor's description of her conversations with Williams. Proctor herself testified that Williams had only said that the downgrading of her evaluation would not affect her award. Futrell testified that Proctor had told him that Williams had said that she would receive an award. Sherman testified that Proctor seemed to equivocate when he told her that Williams had denied offering her a trade-off of an award for the acceptance of lower marks on her evaluation.

None of the testimony of other witnesses seems to definitively support the contentions of either Proctor or Williams. However, it seems logical that Williams would not have made the alleged offer to Proctor for no other reason than to have done so would have exposed him to embarrassment and criticism from his superior. The original evaluation which Williams had submitted to Sherman (Resp. Ex. 3) had 8s and indicated that Proctor had not been recommended for an award. If Williams had made the alleged offer to Proctor, and if she had accepted it, it would have been extremely difficult for Williams to justify to Sherman the fact that

he had disobeyed orders by not changing the evaluation and that he had suddenly reconsidered his decision with regard to Proctor's award in spite of the fact that her evaluation had not been changed. While Williams was admittedly annoyed that he had been ordered to change the evaluation, it strains the imagination to assume that he would jeopardize his professional reputation in order to retaliate against Proctor. Taking that factor into consideration, along with the fact that the General Counsel bears the burden of proof pursuant to §2423.32 of the Rules and Regulations of the Authority, I find as a fact that it is more likely than not that Williams did not offer to recommend Proctor for an award if she would accept a lower performance evaluation.

In making this finding, I do not mean to imply that Proctor intentionally offered false testimony. Her recollection of pertinent events seemed somewhat unclear and she probably thought, not without a logical basis, that the restoration of the grades on her previous evaluation would entitle her to an award. Nevertheless, the evidence indicates that Proctor's assumption was incorrect and that the General Counsel has failed to carry her burden of proof.

Discussion and Analysis

The Legal Framework

Each of the parties have correctly cited the controlling Authority precedent. Under *Letterkenny Army Depot*, 35 FLRA 113, 118 (1990) (*Letterkenny*) the General Counsel, in order to establish a *prima facie* case, must establish by a preponderance of the evidence that the employee against whom the allegedly discriminatory action was taken had been engaged in protected activity and that consideration of the activity was a motivating factor in the action. Once the General Counsel presents a *prima facie* case, the Respondent may show by a preponderance of evidence that there was a legitimate nondiscriminatory justification for the adverse action and that the action would have occurred even in absence of the protected activity. Furthermore, the Administrative Law Judge is to consider the record as a whole in determining whether the General Counsel has made a *prima facie* case, *Department of the Air Force, Air Force Materiel Command Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 55 FLRA 1201, 1205 (2000). However, in order to meet her burden of proof of discrimination, the General Counsel need not show disparate treatment of a similarly situated employee, *305th Air Mobility Wing, McGuire Air Force Base, New Jersey*, 54 FLRA 1243, 1245, n.2 (1998).

The Application of the Controlling Law

The Authority has adopted a broad interpretation of activities which fall within the definition of rights protected under §7102 of the Statute. The protection of the Statute is not limited to union officers and representatives, but extends to rank and file employees as well, *United States Department of the Air Force, Aerospace Maintenance and Regeneration Center, Davis Monthan Air Force Base, Tucson, Arizona*, 58 FLRA 636, 645 (2003). Similarly, the protection of §7102 is not limited to activities which are prompted by pro- or anti-union sentiments, *United States Department of the Treasury, United States Customs Service, Miami, Florida*, 58 FLRA 712, 717 (2003). Protected activity includes the assertion of rights under a collective bargaining agreement, *U.S. Department of Labor, Employment and Training Administration, San Francisco, California*, 43 FLRA 1036, 1039 (1992) (*DOL*).

In consulting Futrell and Sherman about the reduction of the grades on her performance evaluation in the absence of feedback, Proctor was seeking to vindicate her rights under Article 29, Section 6 of the CBA (GC Ex. 7). Thus, she was clearly engaged in protected activity as defined in *DOL*.

As shown above, I have found as a fact that Williams had decided not to recommend Proctor for an award prior to their meeting on May 2. I have further found that Williams did not give Proctor the choice of accepting an evaluation with 8s and receiving an award or having her grades changed to all 9s, but without an award. Williams' decision to withhold a recommendation for an award could not have been motivated by Proctor's protected activity because the decision was made before the protected activity occurred and was not subsequently reconsidered. Accordingly, the General Counsel has not presented a *prima facie* case of discrimination according to the *Letterkenny* criteria.

I have not considered the intrinsic merits of Williams' decision or whether Proctor was, in fact, deserving of some 8s or all 9s on her performance evaluation. The sole issue before me, which is the basis of this Decision, is whether Williams' decision amounted to discrimination because of the exercise of a protected right under the Statute.

In view of the foregoing, I have concluded that the Respondent did not commit an unfair labor practice by withholding a performance award from Proctor. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

It is hereby ordered that the Complaint be, and hereby is, dismissed.

Issued, Washington, DC, October 13, 2006.

Paul B. Lang

Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. WA-CA-05-0608 were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT

CERTIFIED NOS:

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Dated: October 13, 2006
Washington, DC