UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

UNITED STATES DEPARTMENT OF LABOR, EMPLOYMENT AND TRAINING ADMINISTRATION, SAN FRANCISCO, CALIFORNIA Respondent	
and	Case No. 9-CA-90203
LOU ANN BASSAN, An Individual Charging Party	

Stefanie Arthur, Esquire
For the General Counsel

David Pena, Esquire
For the Respondent

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq., and the Rules and Regulations issued thereunder.

Pursuant to a charge filed on January 17, 1989, by Lou Ann Bassan, an Individual, a Complaint and Notice of Hearing was issued on June 23, 1989, by the Regional Director for Region IX, Federal Labor Relations Authority, San Francisco, California. The Complaint alleges the United States Department of Labor, Employment and Training Administration, San Francisco, California, (hereinafter called Respondent or ETA), violated Sections 7116(a)(1) and (2) of the Federal

Service Labor-Management Relations Statute, (hereinafter called the Statute), by virtue of its actions in terminating Ms. Lou Ann Bassan because she "joined or assisted" the National Council of Field Labor Locals, American Federation of Government Employees, AFL-CIO, (hereinafter called the AFGE), and "exercised rights enumerated in the collective bargaining agreement between Respondent and AFGE, and/or otherwise exercised rights protected by the Statute."

A hearing was held in the captioned matter on November 6, 1989, in San Francisco, California. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The General Counsel and the Respondent submitted post-hearing briefs on December 29, 1989, which have been duly considered.1/

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

1/ The General Counsel also submitted a "Motion to Correct Transcript" and a "Motion to Strike Portions of Respondent's Post-hearing Brief."

With respect to the Motion to Correct Transcript, in the absence of any objection, the General Counsel's Motion To Correct Transcript should be, and hereby is, granted.

With respect to the Motion To Strike Portions Of Respondent's Brief, it is General Counsel's position that certain arguments based upon a document not offered into evidence should be struck since such document was not included in the official record. Respondent's Opposition to the Motion acknowledges that the relied upon document is not a part of the official record but points out that the document is Respondent's Appraisal Plan mandated by the OPM and, as such, constitutes a part of Respondent's Rules and Regulations. Accordingly, inasmuch as the document constitutes a part of Respondent's Rules and Regulations, the accuracy of which may be easily verified, I find that it is an appropriate subject for Official Notice. Accordingly, the General Counsel's Motion To Strike is denied.

Findings of Fact

At all times material herein, the following named persons occupied the supervisory positions opposite their respective names in Respondent's Region IX office located in San Francisco, California:

Donald Balcer	-- Regional Administrator, Employment and Training Administration (ETA)
Felix Contreras	-- Deputy Regional Administrator, Employment and Training Administration (ETA)
Royce Hulsey	-- Director, U.S. Employment Service
Paul Nelson	-- Supervisor, Alien Certification Unit (ACU)

The Alien Certification Unit, hereinafter called the ACU, a component of the U.S. Employment Service, reviews alien applications for employment in the United States. The work is performed by employees holding the title or position of Alien Certification Specialist (ACS). The ACS is responsible for determining whether an alien's application for employment in the United States conforms to existing regulations. Once it is determined that an alien's application meets the regulatory standards the application is certified to the Immigration and Naturalization Service for final action. In the event the application is found to be deficient, a notice of such deficiency is issued and the alien is given an opportunity to correct the deficiency. In the event the deficiency is not corrected, the application may be denied. If a denial is issued the applicant may appeal the denial to the Department of Labor's Board of Alien Labor Certification Appeals (BALCA).

The National Council of Field Labor Locals, American Federation of Government Employees (AFGE), at all times material herein, has been the exclusive representative of a nationwide unit of the Department of Labor which includes, among others, the employees of ETA in Region IX, San Francisco. The Respondent and the AFGE are parties to a collective bargaining agreement which provides in Article 43, Performance Appraisal, Section 3, as follows:

Section 3 - Procedures for Developing Elements and Performance Standards

(A) Performance standards must be consistent with duties and responsibilities contained in an employee's position description.

(B) In the process of establishing and identifying critical and non-critical elements and related performance standards, the immediate supervisor and employee will discuss, face to face, if practicable, what is expected of the employee, methods and resources to achieve the performance standards, and any concerns the employee may have.

(C) When there are unresolved differences between the rating official and the employee regarding critical and non-critical elements and/or performance standards, the employee may add written comments for consideration and final determination by the reviewing official.

(D) In establishing standards, due consideration will be given to consistency with employee input, past performance of employees, standards for comparable positions and other relevant materials.

(E) Employees are entitled to an explanation of the rationale for their elements and standards.

(F) Due consideration will be given the employee as to the resources available and the authority delegated necessary to meet the identified standards and elements.

The Department of Labor's Performance Appraisal Plan For Employees, DLS Appendix B to FPM 430, page 12, states in paragraph B5-3(c) as follows:2/

> Where there are unresolved differences between the rating official and the employee regarding critical and non-critical elements and/or performance standards, the employee may add written comments for consideration and final determination by the reviewing official.

Lou Ann Bassan, the Charging Party herein, was hired by the ACU in March 1988 as a Grade GS-7 ACS under an excepted appointment. Ms. Bassan was the first of a number of new employees hired in Region IX between March and July 1988 in an attempt to reduce the 5000 case backlog in the San Francisco Regional Office. Her immediate supervisor was Mr. Paul Nelson, who in turn, was supervised by Mr. Royce Hulsey. In June of 1988 Ms. Bassan joined the AFGE and, beginning in August of 1988, regularly attended the monthly lunch meetings. On December 21, 1988, Mr. Don Balcer, the Regional Administrator, served written notice upon Ms. Bassan that she was being terminated from her position as an ACS effective December 31, 1988. The notice states in pertinent part as follows:

> I am taking this action because you are a disruptive influence within the Alien Certification Unit. You have been previously warned that your continued employment with this organization was in jeopardy if you continued to undermine the legitimate exercise of supervisory responsibility. For example, you continued to repeat your objections to the standards setting process even after

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2/ The collective bargaining contract states in the preamble to Article 43, Performance Appraisal, as follows:

> This Article represents the parties' implementation of FPM 430 in compliance with 5 U.S.C., Chapter 43. Additional guidance and requirements may be found in DLS Appendix B to FPM 430.

> you were informed about the proper procedures to use if you disagreed with the specific standards. This is only one example of a pattern of behavior that prevents the unit from operating efficiently.

According to the testimony of Ms. Bassan, the only activity which she participated in and that might have been upsetting to management concerned (1) her request for an upgrade to a GS-9, (2) her request for compensatory time in connection with a training program for new employees held in Washington, D.C., and (3) her submission of comments on newly established performance standards for GS-7 ACS's.

Ms. Bassan testified that she obtained her position with Respondent by answering a newspaper advertisement for a labor specialist. She was interviewed by Mr. Nelson and an individual named John Ramos who informed her that she could be hired on an excepted appointment basis because of her outstanding scholastic achievement, i.e. graduation from law school.3/ She was also informed both during the initial interview and at a later date when she received a telephone call from the personnel office offering her the job that there was a possibility she might well be upgraded to a GS-9.4/

Subsequently, after being hired, Ms. Bassan inquired about the rumored upgrade to a GS-9 and was given various reasons why she was not going to be upgraded. Thus, she was told that her graduate work was not equivalent to a master's degree, that she had not filled out the proper forms for the upgrade and her subsequent submission was untimely, and finally that the GS-9 position announcement had been canceled. Upon being informed that the position had been canceled, Ms. Bassan along with Mr. Clyde Jasper, a new employee with post graduate education who also had been led to believe at his employment interview that he might be eligible for a GS-9, approached Union Steward Jerry Weintraub

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3/ At this time Ms. Bassan had not passed the Bar examination.

4/ Although not entirely clear from the record, it appears that at the time that Ms. Bassan was interviewed for her position as an ACS, GS-7 there was also a GS-9 position being advertised.

in early April and asked him to seek an explanation. Mr. Weintraub arranged a meeting which was attended by himself, Mr. Nelson, Ms. Bassan and Mr. Jasper to discuss the matter of a promotion to a GS-9. At the meeting, which was also attended by a "Human Resource man," Mr. Nelson suggested that the only way out of the problem was to wait three months so as to allow Mr. Jasper to acquire some experience and then repost the position. Further, according to Ms. Bassan, Mr. Nelson told them that he already knew who he was going to select, it was going to be Ms. Bassan. The meeting then ended.

Mr. Nelson corroborates Ms. Bassan's testimony concerning a meeting to discuss her possible promotion to a GS-9. He also admits suggesting that the GS-9 position be reposted some three months later. However, his testimony is silent with respect to the allegation that he had made it clear that any reposting would result in Ms. Bassan's selection for the GS-9 position. Finally, according to Mr. Nelson, Personnel, at a later date, refused to repost the position since it feared that a veteran might block the selection of Ms. Bassan and/or Mr. Jasper. Personnel was also concerned that it would be a "sham recruitment." According to Mr. Nelson, following Ms. Bassan's failure to achieve a GS-9, she took every opportunity to raise the fact to Mr. Nelson that she was not a GS-9. Thus, Mr. Nelson, whose testimony is credited in this respect, testified that whenever he complimented Ms. Bassan on her work or asked her to help other people or share her work experience she would always ask for a GS-9 or state that she would do it, i.e. help others, if Mr. Nelson would give her a GS-9. Despite these latter statements, there is no record evidence that she did not help or share her work experience with the other newly hired ACS's. This action by Ms. Bassan was a constant irritant to Mr. Nelson.

In July 1988, the newly hired employees attended a training program in Washington, D.C. which began on Monday morning. Inasmuch as the employees were forced to travel on Sunday in order to arrive on time for the training program, Ms. Bassan, both before they departed and after they returned, raised with Mr. Nelson the question of compensatory time for travelling on Sunday. Upon being informed that the Regional Director had determined that the employees were not entitled to any compensatory or overtime for their travel to the training program, Ms. Bassan, along with several other employees, met with Union Steward Steve Connacher, who agreed to look into the matter. Thereafter, he checked with a co-worker in the Wage and Hour Division who informed him

that the employees were entitled to overtime. Following, a telephone call to the Respondent's Personnel Office in Washington, D.C. the employees were subsequently granted overtime for their Sunday travel. The record does not indicate the name of the person making the telephone call.

On August 12, 1988, Ms. Bassan was given an Interim Probationary Report which stated as follows:

> Lou Ann is quickly learning the tasks of processing labor certification applications. She is an excellent writer and has considerable awareness of detail. Her Notices of Findings are clearly written and readily understandable. Her production to date has been good given the fact that she is still learning the many intricacies of adjudicating labor certification applications and is still gaining experience with a wide variety of applications. In addition, she has shown initiative in suggesting improvements to the boilerplates, and has volunteered to tackle difficult cases where large number of U.S. workers have applied.

Mr. Nelson signed the report as Ms. Bassan's supervisor and Mr. Hulsey signed as the reviewing official.

Shortly after she received the Interim Probationary Report, according to Ms. Bassan, she was approached around August 17, by Mr. Hulsey who informed her at that time that she was getting the reputation as a trouble maker. When she asked why, he cited her activities in connection with overtime payment for the training program discussed above and the cubicle issue.5/ After explaining her role in the

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5/ Due to the hire of the new ACS's the Respondent was forced to reduce the size of a number of the cubicles assigned to a number of employees in order to have private cubicles available for all the new hires. The record indicates that Ms. Bassan never spoke to any management representatives about the reduction in the size of the cubicles. The record also reveals that Ms. Bassan's cubicle was not one of the cubicles being reduced in size. This conversation between Ms. Bassan and Mr. Hulsey occurred in August, several months prior to the time that the Union was contacted about the overtime matter.

overtime issue, she asked Mr. Hulsey whether he was telling her that her job was in jeopardy. According to Ms. Bassan, he said no and then laughed. Further, according to Ms. Bassan, up until December 21, 1989, when she received her notice of termination, no member of management ever indicated to her that there were any problems with either her work or conduct.6/

In the spring of 1988 when the new ACS employees were hired the Respondent had no performance standards in place for grades GS-7, 8 and 9. The Respondent did, however, have in place performance standards for the GS-11 ACS which, among other things, provided a minimum quantitative standard of 100 actions per month.

During the summer of 1988, Mr. Nelson informed the newly hired ACS employees that based upon the quantitative standard for a GS-11 ACS, i.e. 100 actions per month, he was considering establishing a quantitative standard of 50 actions per month for the GS-7 ACS. The newly hired ACS employees voiced no objection to such a standard.

On September 21, 1988, at a staff meeting attended by only the newly hired employees, Mr. Nelson announced the following new standards: GS-11, 150-200 actions per month; GS-9, 123-164 actions per month; GS-7, 100-134 actions per month; and GS-5, 81-108 actions per month. The new employees were shocked by the new standards and several of them, including Ms. Bassan, expressed their opinions on the validity of the standards. It appears that Ms. Bassan's statements may have stood out as she usually spoke in a loud voice. In response to the employees' comments, Mr. Nelson made it clear that he would consider the employee' concerns. On September 27, 1988, Mr. Nelson held another meeting with the newly hired employees and again discussed the new

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6/ Mr. Hulsey testified that in answer to Ms. Bassan's question, he informed her that her job was indeed in jeopardy since she had a tendency to attempt "to overturn organizational authority." According to Mr. Hulsey the meeting was precipitated by a memo to Ms. Bassan from him informing her that she did not seem to working toward the same goals as the organization and that she should reconsider her opposition. Mr. Hulsey could not produce a copy of the memorandum. Ms. Bassan denies ever receiving such a memorandum.

standards. However, it appears that at this time the parties concentrated on the narrative as opposed to the quantitative portion of the standard.

On November 23, 1988, at a meeting of the entire staff, Mr. Nelson proposed new quantitative standards for the various grades. The new standard for a GS-7, ACS was set at 84-117 actions per month. Inasmuch as the new employees were under the impression that Mr. Nelson was going to meet with them separately to discuss their standards, they were unprepared for the announcement and made no comments.

On November 30, 1988, Mr. Nelson informed the employees that he was implementing the standards which had been announced earlier at the November 23rd meeting. Ms. Bassan, along with a number of other employees, complained about the new standards. Thus, Ms. Bassan repeated the comments she had made at the earlier September 21, 1988 meeting, namely, that the standard was not fair, that the numbers were too high, that the range should be abolished, that the GS-7's were doing more work than the GS-11's and were not being compensated for it, that the GS-7's were still trainees and did not have all the skills required for the work. In response to the comments from the GS-7's the GS-11's told them to stop complaining and to shut up.

The discussion of the new standards ended when Mr. Nelson informed the employees that the standards were going into effect and if they did not like them they could write a dissent or quit.

The next day Mr. Nelson distributed the new performance standards to the employees and subsequently asked the employees for a signed copy indicating that they had been delivered to them. Ms. Bassan declined to sign a copy of the new standards until such time as she had prepared her comments to them in accordance with the provisions of the collective bargaining agreement.

On or about December 12, 1988, Ms. Bassan submitted a thirteen page commentary on the new standards. An identical commentary was also submitted by Ms. Evetta Dixon, a coworker of Ms. Bassan. The commentary was critical of both the standard and the manner in which Mr. Nelson handled the matter.

Shortly thereafter, Mr. Contreras, the Deputy Regional Administrator held a meeting with Mr. Nelson and Mr. Hulsey

for purposes of discussing Ms. Bassan's employment future with Respondent. Mr. Contreras, who admits seeing Ms. Bassan's commentary on the performance standards prior to the meeting, states that he called the meeting not because of the commentary submitted by Ms. Bassan but because he was concerned that her probationary period was nearing an end and that if management was of the opinion that she was going to continue to undermine supervisory authority then management should take appropriate steps to timely terminate her employment during the probationary period.

At the meeting the parties were in agreement that Ms. Bassan should be terminated because of her disruptive attitude. On December 21, 1988, Ms. Bassan received a letter of termination, the substance of which is set forth supra.

According to Mr. Contreras, since he was ultimately responsible for the personnel employed in the Regional Office, it was a routine practice for him to check out newly hired employees. In so doing, he heard from various sources within the Region that Ms. Bassan was "contentious" and "disruptive" in staff meetings. He spoke to Mr. Nelson about her rumored behavior and also mentioned the matter to Mr. Balcer, the Regional Administrator, who suggested that they have Royce Hulsey speak to her. This latter conversation between Mr. Hulsey and Ms. Bassan, according to Mr. Contreras' recollection, occurred around July or August 1988, after Mr. Contreras held the second of two meetings with Mr. Nelson. The earlier meeting with Mr. Nelson occurred, according to Mr. Contreras, in June of 1988. Mr. Contreras further testified that he had heard from Mr. Hulsey that he had indeed spoken to Ms. Bassan and during the conversation she had asked him if her job was in jeopardy and he had replied "yes." In this latter connection Mr. Balcer testified that it was his understanding that Mr. Hulsey had warned Ms. Bassan "regarding her employment."

According to Mr. Nelson,[7] who readily admits that Ms. Bassan was a highly qualified employee, he became disenchanted with Ms. Bassan when she continually asked for a promotion to a GS-9 as a quid pro quo for fulfilling his requests to share her expertise with other newly hired ACS employees. Although she appeared reluctant to follow his

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7/ The record indicates that Mr. Nelson is a low-keyed supervisor who rarely ever loses his temper.

wishes without such a promotion, he acknowledged that he had no evidence that she did not perform the requested assignments such as sharing the "boiler plate," which she had fashioned for various types of immigration cases. After he had unsuccessfully attempted to find a way to get her promoted to a GS-9 he resented her continued requests for such a promotion and found her frequent references to the fact that she was not a GS-9 irritating.

Mr. Nelson further testified that in September of 1988, as was his practice, he assigned a number of new employees to attend a meeting with the Immigration Lawyer's Association. When Ms. Bassan found out that she was not scheduled to attend the September meeting a violent argument erupted between Mr. Nelson and Ms. Bassan. Mr. Nelson, whose testimony in this respect stands uncontested, states that Ms. Bassan had a "temper tantrum" because she was denied the opportunity to attend the meeting. Her attitude stunned him and he was quite shook up because he had never had a shouting match with an employee. Inasmuch as the shouting match occurred in a cubicle with only five foot high walls, Mr. Nelson is sure it was overheard by other employees on the staff. Later that afternoon while he was contemplating writing Ms. Bassan up for the incident, Ms. Bassan entered his office and apologized for her earlier behavior.

Mr. Nelson also testified that he kept Mr. Contreras informed about Ms. Bassan's activities described above.

Further, according to Mr. Nelson when the subject of performance standards was discussed with the employees, Ms. Bassan was the most vocal of the critics and fought them every step of the way. Mr. Nelson viewed Ms. Bassan's actions and the manner in which she presented her position to be belittling, disrespectful and divisive. In this latter context she made a joke of the backlog and gave the employees the impression that management was being unfair in attempting to put some production standards in effect for them.

This latter described activity of Ms. Bassan in continually fighting the imposition of performance standards along with her actions in raising the fact that she was not a GS-9 in answer to requests from Mr. Nelson to share her expertise with other newly hired employees convinced Mr. Nelson that she would never be a team player and that she should be terminated before the end of her probationary period.

Although Mr. Nelson admits that he probably saw her written response to the performance standards prior to the meeting in which it was decided to terminate Ms. Bassan's employment, he denies that the submission was "a contributing factor to [his] decision to terminate her."

Mr. Nelson admits discussing with employee Evetta Dixon, one of the newly hired ACS's, the fact that her written comments on the performance standards were identical with those submitted by Ms. Bassan. During the conversation Ms. Dixon told Mr. Nelson that she was opposed to the standards and that it was her opinion that they would be difficult to meet. At some time during the meeting Mr. Nelson told Ms. Dixon that he was surprised that her comments were identical but that he hoped that she would attempt to meet the standards. Ms. Dixon acknowledged that Ms. Bassan spoke about the performance standards more than any other employee during the various staff meetings preceding the establishment of the standards.

Mr. Alan Thomas, a GS-11 Labor Certification Specialist, who is a dues paying member of the Union, testified that he was in attendance at many of the staff meetings wherein performance standards were discussed. According to him, Ms. Bassan shouted at Mr. Nelson, let it be know that she thought the standards proposed by Mr. Nelson were unfair and that she was not going to accept them and that she hoped that the other newly hired employees would feel the same. Mr. Thomas characterized Ms. Bassan's attitude in these meetings as being disrespectful and insubordinate to Mr. Nelson.

Discussion and Conclusions

The General Counsel takes the position that Ms. Bassan was terminated solely because of her actions in exercising a right set forth in the collective bargaining agreement, i.e. submitting written comments on the newly announced performance standards. Inasmuch as the General Counsel views the exercise of right stemming from the collective bargaining agreement to fall within activity protected by Section 7102 of the Statute, she would find that the Respondent's action constituted a violation of Sections 7116(a)(1) and (2) of the Statute.

To the extent that Respondent maintains that excepted probationary employees are not entitled to the protection of the Statute because they have no appeal rights from adverse actions, the General Counsel, citing a number of Authority

decisions, would find Respondent's position to be without merit.

Finally, the General Counsel would find that the Respondent has not established that it would have taken the same action with respect to Ms. Bassan, i.e. termination of employment, even if she had not participated in protected activity.

Respondent, on the other hand, takes the position that the exercise of a right set forth in the collective bargaining agreement is not protected activity within the meaning of the Statute. In this connection, while Respondent acknowledges that a contrary conclusion has been reached under the NLRA, it points out that the NLRA protects "concerted activity" while the Statute protects "union activity." According to Respondent the exercise of a right stemming from a collective bargaining agreement has been found by both the NLRB and the Courts to constitute concerted activity as opposed to union activity. However, even if a contrary conclusion is reached by the Authority, Respondent contends that the record establishes that Respondent would have discharged Ms. Bassan even in the absence of her participation in such protected activities.

Finally, as noted above, Respondent, relying on the Supreme Court's decision in U.S. v. Fausto, 484 U.S. 439, would find that the Authority has no jurisdiction over the discharge of excepted probationary employees since they have no statutory appeal rights.

Contrary to the contention of Respondent and in agreement with the General Counsel, I find that the Authority does have jurisdiction in this matter. Section 7116(a)(2) provides, among other things, that it shall be an unfair labor practice to discriminate against employees with regard to tenure or other conditions of employment based upon their participation in the activities set forth in Section 7102. Section 7103 of the Statute defines an "employee" as any individual (a) employed by an agency, or (b) whose employment has ceased because of any unfair labor practice. While Section 7103 specifically excludes certain categories of employees from the definition of an "employee," attorneys are not included in such categories.

Accordingly, I find that excepted service employees, particularly attorneys, are included within the definition of "employee" within the meaning of the Statute. Cf. Equal Employment Opportunity Commission, 24 FLRA 851, aff'd.

Martinez v. FLRA, 833 F.2d 1057, where the Authority and Court entertained a similar complaint alleging the discriminatory discharge of a General Attorney by the Equal Employment Opportunity Commission. To the extent Respondent relies on the Supreme Court's decision in United States v. Fausto, 484 U.S. 349, I find such case to be distinguishable. Fausto stands for the proposition that an excepted service employee has no right to appeal an adverse action of an agency. Here, as distinguished from Fausto, we have a prohibited personnel action. Thus, while the Authority would indeed be granting Ms. Bassan a review, it would be doing so only to the extent that it is carrying out the responsibility imposed upon it by the Statute, i.e. to protect the rights of federal employees to participate in union activities.

With respect to Respondent's position that the exercise of a right set forth in a collective bargaining contract by an individual employee is not protected activity within the meaning of the Statute, I find such position to be without merit.

A comparison of Section 7 of the National Labor Relations Act and Section 7102 of the Statute which define "employees rights" in the private and public sector, respectively, indicates that the main difference between the rights accorded employees in the private and public sector is that the public sector employees do not enjoy the right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection." Accordingly, the Authority has recognized that "concerted activity" which is unrelated to membership in, or activities on behalf of a labor organization, is not protected by the Statute. Veterans Administration, Washington, D.C., and Veterans Administration Medical Center, Cincinnati, Ohio, 26 FLRA 114, footnote 2; Department of the Treasury, Internal Revenue Service, Andover Service Center, Andover, Massachusetts, 13 FLRA 481; Veterans Administration Medical Center, Bath, New York, 4 FLRA 564.

For many years the NLRB has held that assertion of a right set forth in a collective bargaining agreement by an individual employee constitutes protected concerted activity within the meaning of Section 7 of the NLRA. Interboro Contractors, Inc., 157 NLRB 1295, enf'd. 388 F.2d 495; Bunny Bros. Construction Company, 139 NLRB 1516. In making such finding the NLRB pointed out in Bunny Bros., supra, that the affected employee's action in asserting a collective bargaining agreement right ". . . is but an extension of the

concerted activity giving rise to the [collective bargaining] agreement.

In NLRB v. City Disposal Systems, Inc., 465 U.S. 822 the Supreme Court affirmed the NLRB's "Interboro Doctrine" stating:

> . . . We cannot say that the Board's view of that relationship, as applied in the Interboro doctrine, is unreasonable. The invocation of a right rooted in a collective-bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement. That process--beginning with the organization of a union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement--is a single, collective activity. Obviously, an employee could not invoke a right grounded in a collective-bargaining agreement were it not for the prior negotiating activities of his fellow employees. Nor would it make sense for a union to negotiate a collective-bargaining agreement if individual employees could not invoke the rights thereby created against their employer.
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> . . . . .
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> A lone employee's invocation of a right grounded in his collective-bargaining agreement is, therefore, a concerted activity in a very real sense.
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> Furthermore, the acts of joining and assisting a labor organization, which § 7 explicitly recognizes as concerted, are related to collective action in essentially the same way that the invocation of a collectively bargained right is related to collective action. When an employee joins or assists a labor organization, his actions may be divorced in time, and in location as well, from the actions of fellow employees. Because

of the integral relationship among the employees' actions, however, Congress viewed each employee as engaged in concerted activity. The lone employee could not join or assist a labor organization were it not for the related organizing activities of his fellow employees. Conversely, there would be limited utility in forming a labor organization if other employees could not join or assist the organization once it is formed. Thus, the formation of a labor organization is integrally related to the activity of joining or assisting such an organization in the same sense that the negotiation of a collective-bargaining agreement is integrally related to the invocation of a right provided for in the agreement. In each case, neither the individual activity nor the group activity would be complete without the other.10/

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10. Of course, at some point an individual employee's actions may become so remotely related to the activities of fellow employees that it cannot reasonably be said that the employee is engaged in concerted activity. For instance, the Board has held that if an employer were to discharge an employee for purely personal "griping," the employee could not claim the protection of § 7. See, e.g., Capital Ornamental Concrete Specialists, Inc., 248 N.L.R.B. 851 (1980).

In addition, although the Board relies entirely on its interpretation of § 7 as support for the Interboro doctrine, it bears noting that under § 8(a)(1) an employer commits an unfair labor practice if he or she "interfere[s] with, [or] restrain[s]" concerted activity. It is possible, therefore, for an employer to commit an unfair labor practice by discharging an employee who is not

> himself involved in concerted activity, but whose actions are related to other employees' concerted activities in such a manner as to render his discharge an interference or restraint on those activities. In the context of the Interboro doctrine, for instance, even if an individual's invocation of rights provided for in a collective-bargaining agreement, for some reason, were not concerted activity, the discharge of that individual would still be an unfair labor practice if the result were to restrain or interfere with the concerted activity of negotiating or enforcing a collective-bargaining agreement.

Based upon the Supreme Court's decision in City Disposal Systems, supra, I find that an employee's action in asserting a right contained in a collective bargaining agreement constitutes protected activity within the meaning of Section 7102 of the Statute, since the Court makes it clear that such act is merely a continuation of the right explicitly recognized to form, join or assist a labor organization in collective bargaining.

To the extent that both the Court and the NLRB refer to the action of an employee in asserting a right contained in a collective bargaining agreement to be "concerted activity" it is obvious from a reading of their respective decisions, that they are relying on the explicit rights accorded by Section 7 of the NLRA and not, as contended by Respondent, the catch all phrase "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection."

Having concluded that the Authority has jurisdiction over this matter and that the assertion of a right contained in a collective bargaining agreement by an individual unit employee qualifies as protected activity within the meaning of Section 7102 of the Statute, it must now be determined whether Ms. Bassan's action in submitting written comments to the recently announced performance standards played any part in her subsequent discharge. If so, then a determination must be made as to whether Respondent would have taken the same action in any event absent Ms. Bassan's participation in protected activity.

In agreement with the General Counsel I find that Ms. Bassan's action in filing comments to the newly announced performance standards did play a part in her subsequent discharge. In reaching this conclusion I rely on the fact that Ms. Bassan's discharge occurred within days of the submission by her of highly critical comments concerning the newly announced performance standards, the fact that the meeting which led to the decision to discharge Ms. Bassan occurred after Mr. Nelson and Mr. Contreras read her comments and the absence of any evidence indicating that the meeting leading up to the decision to discharge her had been scheduled prior to receipt of her comments. Additionally, I find in agreement with the General Counsel, that Mr. Contreras' reasons for the timing of the discharge run contra to the record evidence. Thus, Mr. Contreras contends that they decided to discharge Ms. Bassan immediately because her probationary period was coming to an end and that they were concerned about the time it would take to complete the paper work ending her employment. However, the record indicates that inasmuch as Ms. Bassan was hired in March of 1988 she had almost three months remaining on her probationary year and that it only took Respondent nine days from the submission of her comments to present a letter to her on December 21, 1988 informing her that her employment was terminated effective December 31, 1988.

Moreover, the fact that Mr. Nelson subsequently saw fit to discuss the substance of the comments with Ms. Dixon, who had submitted the identical comments, and expressed to her his hope that she would attempt to meet the new standards, indicates that the comments, which were drawn up by Ms. Bassan, were a source of concern to him. The fact that Ms. Dixon was not also discharged does not alter the above conclusion concerning the reason for Ms. Bassan's discharge since it is acknowledged that Ms. Bassan was the most outspoken critic of the performance standards. In fact so much so that her oral comments infuriated some of the older rank and file employees.

Having concluded that Ms. Bassan's protected activity played a part in her discharge, it must now be determined, in accordance with the Authority's decision in Internal Revenue Service, Washington, D.C., 6 FLRA 96, whether Ms. Bassan would have been terminated in any event for reasons unrelated to her participation in activities protected by the Statute.

Contrary to the contention of Respondent, I find that the record evidence fails to establish that Ms. Bassan would

have been terminated in any event for reasons unrelated to her participation in activities protected by the Statute. Thus, while Respondent states in Ms. Bassan's notice of termination that she had been previously warned that her employment was in jeopardy if she continued to undermine supervisory authority and that despite such warning she continued to express her objections to the performance standards even after being informed of the proper procedures to be utilized if she disagreed with such standards, the record evidence failed to support such allegations. There is no probative evidence contained in the record which indicates that Ms. Bassan continued to voice her objections to the standards after being informed by Mr. Nelson that the discussions were at an end and that if she did not agree with the standards she was free to file written comments. As to the allegation that she was previously warned that her continued employment was in jeopardy, based particularly upon my observation of the witnesses and their respective demeanor, I credit Ms. Bassan's denial that she was ever informed that her continued employment with Respondent was in jeopardy.

Additionally, as noted earlier in this decision, the record is barren of any evidence indicating that Respondent's representatives had scheduled a meeting for purposes of discussing Ms. Bassan's continued employment prior to receiving her written comments concerning the newly instituted performance standards. Rather the record appears to indicate that the subject of her termination only arose after she submitted her written comments.

The fact that a Respondent might well have had grounds for the discharge of an employee, standing alone, is not a defense to a removal action. Rather it must be shown that such grounds would have been utilized by Respondent in the absence of the employee's participation in activities protected by the Statute. Respondent has failed to sustain this burden.

Having concluded that Ms. Bassan would not have been terminated but for her participation in activities protected by the Statute, I hereby recommend that the Federal Labor Relations Authority issue the following order designed to effectuate the purposes and policies of the Statute:

ORDER

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118

of the Statute, it is hereby ordered that the United States Department of Labor, Employment and Training Administration, San Francisco, California, shall:

1. Cease and desist from:

(a) Terminating, and otherwise discriminating against, employees because they have engaged in activities protected by the Federal Service Labor-Management Relations Statute, namely exercising rights set forth in the collective bargaining agreement between the U.S. Department of Labor and the National Council of Field Labor Locals, American Federation of Government Employees, AFL-CIO.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Offer Lou Ann Bassan immediate and full reinstatement to her former or substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole, consistent with applicable laws and regulations, for any loss of income she may have suffered by reason of her unlawful termination by paying to her a sum of money equal to the amount she would have earned or received from the date of her termination to the effective date of the offer of reinstatement, less any amount earned through other employment during the above-noted period.

(b) Post at its Region IX, San Francisco Office, copies of the attached notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Regional Administrator, Employment and Training Administration and shall be posted and maintained by him 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.

(c) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region IX, Federal Labor Relations Authority, 901 Market

Street, Suite 220, San Francisco, CA 94103, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., July 26, 1990

BURTON S. STERNBURG
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT terminate or otherwise discriminate against our employees because they have exercised rights set forth in the collective bargaining agreement between the U.S. Department of Labor and the National Council of Field Labor Locals, American Federation of Government Employees, AFL-CIO.

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

WE WILL offer Lou Ann Bassan immediate and full reinstatement to her former position or a substantially equivalent position, without prejudice to her seniority and other rights and privileges, and make her whole, consistent with applicable laws and regulations, for any loss of income she may have suffered by reason of her unlawful termination by paying her a sum of money equal to the amount she would have earned or received from the date of her termination to the date of the offer or reinstatement, less any amount earned through other employment during the above-noted period.

_____
(Agency or Activity)

Dated _____ By _____
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority whose address is: 901 Market Street, Suite 220, San Francisco, CA 94103 and whose telephone number is: 415-744-4000.