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

DEPARTMENT OF THE NAVY NAVAL FACILITIES ENGINEERING COMMAND, WESTERN DIVISION SAN BRUNO, CALIFORNIA Respondent and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 2096 Charging Party	Case Nos. 9-CA-00100 9-CA-00134

Mr. Gilbert J. Merrill, Jr.
Mr. Kyle D. Worley
For the Respondent

R. Timothy Shiels, Esquire
For the General Counsel

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 seg.1/, and the

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1/ For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, e.g., Section 7116(a)(5) will be referred to, simply, as "§ 16(a)(5)."

Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns principally, whether Respondent sought to "break" the Union by eliminating the Construction Representative (CR) classification in its Resident Officer In Charge of Construction (ROICC) offices; whether Respondent interfered with rights assured by the Statute by the reprimand of a Union official for a letter critical of management; and whether Respondent discriminated in the selection of employees based on engagement in protected activity.

This consolidated case was initiated by a charge in Case No. 9-CA-00100 filed on November 28, 1989 (G.C. Exh. 1(a)); and a First Amended charge was filed on February 6, 1990 (G.C. Exh. 1(c)). The charge in Case No. 9-CA-00134 was filed on December 18, 1989 (G.C. Exh. 1(e); the Consolidated Complaint and Notice of Hearing, in Case Nos. 9-CA-00100 and 9-CA-00134, issued on January 26, 1990 (G.C. Exh. 1(g) and an Amended Consolidated Complaint and Notice of Hearing (G.C. Exh. 1(h)) issued on February 26, 1990, each alleging violations, §§ 16(a)(1) and (2) of the Statute; and each set the case for pre-hearing conference and hearing on March 12, 1990. By Order dated February 23, 1990, the hearing was rescheduled for June 5, 1990 (G.C. Exh. 1(j); by Order dated March 6, 1990, the hearing was rescheduled for May 14, 1990; by Order dated April 26, 1990, Case Nos. 9-CA-00100 and 9-CA-00134 were consolidated with Case Nos. 9-CA-00177 and 9-CA-00187 (G.C. Exh. 1(k)); but, prior to the hearing, Case Nos. 9-CA-00177 and 9-CA-00187 were settled. Pursuant to the foregoing, a hearing was duly held on May 14, 15, and 16, 1990, in San Francisco, California, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which Respondent exercised. At the conclusion of the hearing, June 16, 1990, was fixed as the date for mailing post-hearing briefs which time was subsequently extended, on motion of General Counsel, with which Respondent joined, for good cause shown, to July 2, 1990. General Counsel and Respondent each timely mailed an excellent brief, received on July 5, 1990, which have been carefully considered.

General Counsel by motion dated June 25, 1990, and received June 26, 1990, moved to amend the Complaint and stated that,

> ". . . The Charging Party joins in the motion and Respondent does not oppose the motion."

The amendment sought would add to paragraph 10 of the Complaint the acts and conduct described in Paragraph 9, i.e., Paragraph 10 had referred only to ". . . paragraph 6, 7(b) and 8 . . ." and General Counsel would amend this to read "paragraph 6, 7(b), 8 and 9 . . . ." In the absence of objection, and good cause having been shown, General Counsel's motion is granted and Paragraph 10 of the Complaint is amended as requested.

Upon the basis of the entire record,2/ including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings

1. The National Federation of Federal Employees, Local 2096 (hereinafter referred to as the "Union"), was certified on June 7, 1988, as the exclusive representative of "All Resident Officer in Charge of Construction (ROICC) employees working for the Western Division, Naval Facilities Engineering Command, including all Construction Representatives, Engineering Technicians, Procurement Assistants, Stenographers, Clerks and Clerk Typists employed in the nine (9) western states, including Alaska, and all employees duty-stationed in San Francisco Bay", excluding management officials, professional employees, employees engaged in Federal personnel work, guards and supervisors, personnel in Seattle, Washington and San Diego, California and certain exclusions at San Bruno, California, more fully set forth in the Certification, General Counsel Exhibit 9 (see, also, Jt. Exh. 1, Art. I).

2. The Union had been preceded by AFGE Local 3723 which was in trusteeship from 1983-1986 (Tr. 165) and which did little to represent the employees in its bargaining unit, e.g., its collective bargaining agreement had been expired for more than two years and it took no action to secure negotiations on a new contract; it filed no grievances; no meetings were held; and, at least during the trusteeship, stewards were recommended for appointment by Respondent (Tr. 165-167).

2/ General Counsel filed with his Brief a Motion to Correct Transcript, to which no opposition was filed. The corrections sought, being clearly meritorious, are granted and the transcript is hereby corrected as more fully shown in the attached "Appendix."

3. Mr. Maurice Cone, currently employed at the United States Army Proving Grounds, Yuma, Arizona, had been employed by Respondent (generally referred to in the transcript as "West Div.") from March 1984, until October 23, 1989, when he began employment with the Army (Tr. 161, 162). Mr. Cone was appointed by the National Office as Acting President of Local 2096 upon its certification on June 7, 1988 (Tr. 163) and was elected President in June 1989 (Tr. 163). Mr. Cone testified that the bargaining unit was about 300 to 380 (Tr. 176, 211) and Mr. William Smith, now employed by the City of Sunnyvale, California (Tr. 72), a former CR in Respondent's San Francisco Bay ROICC Office (Tr. 74), and a former steward, Vice President and, for a short time, Acting President of the Union (Tr. 86-87), testified that there were about 1300 employees in the Western Division before the RIF and about 380 in the bargaining unit (Tr. 90); however the computer printout of bargaining unit employees showed 277[3/] as of October 4, 1989 (G.C. Exh. 18). Mr. Cone further testified that the Union had only about forty members (Tr. 212) of whom 30 to 35[4/] later received RIF notices (Tr. 212).

4. Initially, the Union encountered difficulty and delay in having its checkoff authorizations processed and the AFGE authorizations terminated (Tr. 167-168), no doubt affected by the desire of some employees, supported by the

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3/ At the time of certification, the appropriate unit included Camp Pendleton (near San Diego) and Bridgeport, [Ridge Crest (Tr. 173)] California (directly East of San Francisco near the Nevada line). Thereafter, in October 1988, (Tr. 175) in a reorganization, Pendleton and Bridgeport were made part of a new organization, ROICC Southwest, San Diego (G.C. Exh. 10; Tr. 173). Local 2096 was later certified as the representative of ROICC Southwest with about 175 bargaining unit employees (Tr. 176). San Diego was excluded from the Union's bargaining unit and the number of employees at Pendleton and Bridgeport was not shown separately. It is possible that this alternation of the bargaining unit is the reason for the disparity in the size of the unit.

4/ Although General Counsel stated that, ". . . the hand-written notations . . . are of no significance . . . ." (Tr. 243), there is strong suspicion that the check marks denote Union membership. If so, there were 33 Union members as of November 16, 1989 (G.C. Exh. 19, attachments).

Union, to maintain AFGE deductions in order to maintain AFGE health insurance (Tr. 168). In any event, in about 8 to 10 weeks after its certification the Union's checkoff authorizations were fully processed (Tr. 169). On December 30, 1988, the Parties reached agreement on a new Agreement (Jt. Exh. 1).

5. The Union not only negotiated a new Agreement but was active in filing unfair labor practice charges and filing and processing grievances (Tr. 82-85, 169-171, 177-179, 182-184, 223). In addition, the Union put up bulletin boards and raised employee complaints concerning training and smoking (Tr. 261, 263-264, 270).

6. For fiscal year 1990 (October 1989 - September 1990) the budget for the Naval Facilities Engineering Command was reduced by about 20 million dollars and reductions were necessary throughout the Western Division (Tr. 295-297). The Western Division was required to reduce the number of its employees by nearly 300. By letter dated July 28, 1989 (Res. Exh. 3), authorization for a RIF of an estimated 159 civilian employees was requested, it being further estimated that an additional 130 employees would voluntarily separate prior to the projected date of the RIF, for a total reduction of 289 employees; and early retirement authorization was requested. Mr. Cone had been brought to San Bruno on July 14, 1989, at which time he was informed of the anticipated RIF and was given Respondent's letter dated July 14, 1989 (G.C. Exh. 14).

7. Mr. Cone responded to Respondent's letter of July 14, 1989, by his letter dated July 24, 1989 (G.C. Exh. 15), in which he stated, inter alia, that the Union did not agree with Respondent as to competitive areas; requested information; and sought a meeting, ". . . after you receive your authority to in fact conduct a RIF within the Local's bargaining unit." (G.C. Exh. 15; Tr. 203-204).

8. Two days later, on July 26, 1989, upon receipt of a copy of an Agenda for a Senior Civilian ROICC Conference scheduled for July 28 and 29, 1989, Mr. Cone again wrote Respondent and stated, in part,

> "It is becoming clear . . . that your letter [14 July 1989] . . . was not giving the true picture of what you are really planning . . . you have failed to inform NFFE LOCAL 2096 you are also

> planning to (sic) Reorganization of Targeted Positions . . . The Construction Representatives and field Inspection of Military Construction which is where NFFE Local 2096's membership has come from since this Local was granted CERTIFICATION . . . This appears to be discrimination more than budget, since the ABOLISHING THE CORE OF THE UNION'S MEMBERSHIP IN A so called RIF which is in fact a RIF/Reorganization together . . . ." (G.C. Exh. 16).

Accordingly, Mr. Cone requested further information concerning the reorganization including: Organizational Chart before and after the realignment; numbers, types and grades of positions affected; position descriptions for affected positions; new positions and their position descriptions. Finally, Mr. Cone requested a meeting not later than August 15, 1989.

Mr. Cone testified that he never received an organizational chart (Tr. 206, 207); and did not succeed in meeting with Respondent until September.

8. By letter dated August 24, 1989 (Res. Exh. 13), Respondent supplied information requested by Mr. Core in his letters of July 24 and 26, 1989, including: numbers, types and grades of unit positions affected; position description of new position created; organizational listings for ROICC offices before and after RIF; position descriptions for affected positions; and various DOD and OPM pamphlets and forms. Respondent informed Mr. Cone that, ". . . We do not maintain official organizational charts for the ROICCs . . ." (Res. Exh. 13).

9. Respondent Exhibit 13 Enclosure (1) shows 161 positions to be abolished in the ROICC offices, including all 123 Construction Representatives [one each GS-7, 8 and 10; 120 GS-9] and seven Engineering Technicians [one GS-9; six GS-11]. The remaining 31 consisted of procurement clerks, clerk typists, administrative assistants, program assistants, support service specialists and contract specialists. Enclosure (1) does not show, nor purport to show, the full staffing of the ROICC offices. For example, Enclosure (1) shows no Engineers and no Supervisory Construction Representatives. Respondent Exhibit 14 is titled, "ROICC STAFFING", but it does not, notwithstanding its title, show the full staffing of the ROICC offices. To

the contrary, Respondent Exhibit 14 shows only: Engineers; Engineering Technicians; Supervisory Construction Representatives and Construction Representatives. Thus, Respondent Exhibit 14 shows none of the other classifications, such as clerk typists, procurement clerks, etc., known to have been present. If you took the number of employees in the bargaining unit as shown on the computer print-out-277 (G.C. Exh. 18) and added the number of Engineers (83) and Supervisory Construction Representatives (27), as shown on Respondent Exhibit 14, the resulting total of 387 would seem to be a reasonable estimate of the full staffing of the ROICC Offices prior to the RIF (cf. G.C. Exh. 32 which was not represented as accurate staffing figures).

Respondent Exhibit 13, Enclosure (9) does purport to show the full projected staffing of the ROICC offices after the RIF, including supervisory and professional employees. Enclosure 9 shows 282 positions. Accordingly, from the estimated pre-RIF employment of 387 the ROICC offices were projected to be reduced by 105 positions.

10. Respondent Exhibit 13 gave the Union the first official notice[5/] that the ROICC offices would, as part of the RIF, be reorganized; that all Construction Representatives would be eliminated; and that a new classification of Engineering Technician GS-10/11, referred to as Construction Management Technicians (CMTs), would be established.

Captain Charles M. Maskell, Assistant Chief of Civil Engineers and Deputy Commander for Manpower, Naval Facilities Engineering Command, Alexandria, Virginia (Tr. 293-294), testified that he became aware of the intended abolishment of the Construction Representative positions in August 1989 (Tr. 311) and because it was a major departure from the normal way of managing construction programs at the field activity level he was very concerned and inquired as to why it was being proposed and whether the innovative proposal, not previously tried elsewhere, made sense (Tr. 312, 373). Accordingly, he explored the matter with Captain Drennon, Commander of the Western Division, and with Captain Louis M. Smith, Vice Commander of the Western Division (Tr. 312, 424); that the Western Division believed that by

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5/ However, as noted above, from Mr. Cone's letter of June 26, 1989, it appears that the agenda for a Senior Civilian ROICC Conference scheduled for July 28-29, 1989, presaged such action.

requiring contractors to do more quality control and by using Engineering Technicians with broader technical experience they could do the same amount of construction quality assurance with fewer Engineering Technicians than the number of Construction Representatives that otherwise would be required (Tr. 373); and that his office was convinced of the soundness of the proposal and felt no reason to object (Tr. 375).

Captain Smith testified that, "The intent was to leave the office with the most capability with the fewest people" (Tr. 442); that, "In construction contracts over $3 million there's already what they call contractor quality control, which puts (sic) [makes] the contractor responsible for not just performing the work in accordance with the plans and specifications, but also inspecting it and certifying that it's done according to the plans and specifications." (Tr. 441).

Mr. Frank Ruccolo, Construction Director (Tr. 468) testified that, "The structure was looked at, how we can achieve the workload with less number of people and what was needed was not the inspector, the CONREP type of a position to do the daily inspection, because we could not afford to do that anymore, in view of the low number, and to provide periodic critical type of inspection at a higher level. And be more in line with the private industry, with the construction industry, with the counties, with the cities, or states where they do spot inspections or (sic) various points during construction. So we looked at that alternative as being the best risk for the government in view of the lowering resources." (Tr. 473)(see, also, G.C. Exh. 30).

As Captain Smith and Mr. Ruccolo stated, the decision to eliminate the Construction Representatives came after a series of meetings in July and August (Tr. 439, 451, 452, 488, 489) at which a number of the participants had recommended the elimination of the Construction Representatives[6/] (Tr. 487); but not all supervisors

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6/ General Counsel states, ". . . the only memorandum Ruccolo wrote following the July meetings contained 116 recommendations . . . and not one . . . recommended the elimination of the con rep positions (G.C. Exh. 28; Tr. 487-92). Ruccolo claimed that although this document referred to meetings about the RIF . . . it did not

(footnote continued)

agreed with the decision. Thus, Commanders J.E. Ealy, Sr. (Officer in Charge, Long Beach) and W.J. Morrison (OIC, Long Beach relieved by Ealy) stated, ". . . the area which will be affected is this office's ability to assure an acceptable level of quality in construction because of the loss of Construction Representatives." (G.C. Exh. 31); Messrs. Brian Stone, REICC, San Francisco Bay and Kim Abbott, another REICC, ". . . had brought up that the operation would not work well without construction representatives and that they were against laying all of them off." (Tr. 119-120); and Lt. Commander Mike Hill, ROICC, San Francisco, ". . . indicated . . . he felt strongly it was not a good way to operate." (Tr. 120). And, of course, the Construction Representatives universally disagreed with the decision. Mr. Martin Sexton, formerly a Supervisory Construction Representative and now a GS-11 Engineering Technician, disagreed with the decision (Tr. 591) because, ". . . The eyes and ears for quality assurance was with the

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6/ (footnote continued)

include a recommendation to eliminate the Con reps because the meetings referred to therein dealt only with 'streamlining' the ROICC Offices' paperwork and not with the organizational structure of the ROICC offices . . . ." (General Counsel's Brief, p. 8).

As noted above, paragraph 8, Mr. Cone indicated in his letter of July 26 (G.C. Exh. 16) that elimination of the Construction Representatives was an agenda topic, so there is no possible doubt that the matter was discussed at the July 28-29 meeting (see, Tr. 119-20). General Counsel's point that no participant had so recommended, is simply not established by General Counsel Exhibit 28. For example: (a) Mr. Ruccolo stated that the memorandum, dealt with recommendations, ". . . as to the process of our paperwork system and our flow in the construction business." (Tr. 489); ". . . the work flow recommendations, the process, . . . It did not deal with the structure of the field office." (Tr. 489-490). (b) recommendation No. 71, "Lower CQC threshold" [Contractor Quality Control], while not directly referring to Construction Representatives, reduction of ". . . the need for government inspection . . ." necessarily directly affected them; and recommendation No. 27, "Only inspect work at critical stages" also, implicitly recommends curtailment, if not elimination, of Construction Representatives. (c) the memorandum is titled, ". . . Recommendations . . . for Process Improvement" (G.C. Exh. 28).

construction representatives . . . The eyes and ears were protection that we were getting quality assurance and value for the dollar, Navy dollars spent . . . ." (Tr. 590). Mr. Sexton stated that after the Construction Representatives were removed, some of the Contract Administrators, ". . . had jobs that were two or three months old and couldn't find the jobs." (Tr. 590).

11. On August 25, 1989, Mr. John Teale, a Union Steward for the Northwest Area (G.C. Exh. 12, Tr. 223) reacted to Respondent's August 24, 1989, notification by writing and distributing the following letter,

"John Teale, Esq., Steward, NFFE
P.O. Box 2865
Silverdale, WA 98383
(206) 779-7867

"Date: 25 August 1989

"To: UNION MEMBERSHIP AND UNAFFILIATED LOWER ECHELON STAFF

"WAR HAS BEEN DECLARED!!! AUGUST THE 25th shall forever remain a day of infamy on my calendar. August 25th 1989 was the day when WESTDIV made it a personal WAR against ME!

"This afternoon we at Code 30 were informed as to who WESTDIV had decided had to go. . . . Naturally the DEATH LIST included ALL OF THE CON REPS plus THE ONE AND ONLY GS-9 ENGINEERING TECH. The bastards (for that is the most fitting adjective short of pure unadulterated profanity that sufficiently describes that bed of rattlesnakes in San Bruno) . . .

. . .

"Cone also informed me that Admiral Montoya who was intending leaving the Navy in December has decided to leave now in October so as it will give him plenty of time to commence to begin a new organization supplying Title II's to the Navy. (And I thought such intrigue went out of style fifty years ago. I've got news for you all. Intrigue, guile and graft is

still with us and I guess it will always be although I will interject that in Russia not too long ago, such antics would result in ten well aimed pieces of lead right between the ears.) Not so in America.

"Another gem is that WESTDIV have overstepped their authority. They are legal to RIF 50 bodies ONLY. (according to Cone). Over fifty must come from OPM -- NOT Captain Smith and certainly not from Sicilian Frank. (I do hope I don't get kneecapped for the latter remark . . . if I do you will know who is responsible.)

. . .

". . . Let everyone know what a bunch of bastards are running things for the Navy from San Bruno. It is time to pull out all the stops. Blackmail is a good way to start. If you have anything on any of these sons of bitches let us know (quietly). Anything we can hold over their heads like they are doing with us.

. . .

". . . Patriotism and efficiency and zeal are rewarded by pure treachery. I wouldn't be surprised if Ruccolo hasn't written this entire fiasco up as a &%$#ing Benny Sug for what he can get out of it, he is that kind a fellow.

. . ." (G.C. Exh. 21).

Mr. Teale testified that he delivered his letter, "To about four or five of my close acquaintances who were members of the union" (Tr. 224) and asserted that he gave it to no one else (Tr. 224); but a copy came in the normal office mail to Mr. Ruccolo (Tr. 484). Mr. Ruccolo testified that he found the letter offensive because, ". . . it was an attack on me, my character, my profession, and I was very upset by that." He further stated that he did not like to be referred to as "Sicilian Frank." (Tr. 482). Mr. Ruccolo stated that he did not do anything about the letter, although he believed action was taken by Western Division but he neither directed that action be taken nor did he participate in any action (Tr. 482).

Respondent by letter dated October 27, 1989 (G.C. Exh. 13), officially informed the President of the Union of management's discontent regarding Mr. Teale's letter and stated, in part, as follows: ". . . management recognizes that, inevitably, there will be differences between Labor and Management and certainly each party has the right to robustly express its view within the legitimate bounds of the Federal Labor-Management Relations arena. In the instant case, however, management strongly feels that the steward involved has exceeded these bounds at the detriment of our Labor-Management relationship." (G.C. Exh. 13).

12. On November 3, 1989, Lt. Commander Robert R. Pete, Northwest Area ROICC, issued Mr. Teale a letter of reprimand,

> ". . . for use of derogatory and insulting language about other personnel in your memo dated 25 August 1989 . . . ." (G.C. Exh. 22).

Commander Pete further stated, in part,

> "5. While I believe your memo was written out of sheer frustration associated with the anticipated reduction-in-force, the manner in which you refer to members of management and present your mistaken conclusions for actions taken, is a display of profound bad judgment warranting disciplinary action." (G.C. Exh. 22).

On November 13, 1989, Mr. Teale wrote a letter of apology to Mr. Ruccollo (G.C. Exh. 23). Mr. Teale stated, in part,

> "I might as well advise, Mr. Ruccollo (sic) that I sincerely regret (a) maligning you and (b) becoming involved with this or any other union. Although you are unaware, my family background does not ordinarily condone associating with such entities.
>
> "Needless to say, last week I provided the payroll department with the necessary documents to cease associating me with the union. I have also written to the new President informing him of my resignation as steward." (G.C. Exh. 23).

13. On September 13, 1989, the Union and Respondent, pursuant to the Union's impact bargaining on the planned RIF, entered into an Agreement (G.C. Exh. 2) which provided, in part, as follows:

> "1. Only WESTDIV ROICC area of consideration for CMR New job under merit promotion.
>
> . . .
>
> "3. New position is a promotion potential opportunity for Conreps.
>
> . . ."(G.C. Exh. 2)

Mr. Smith stated that the Union understood that the new CMR position was to be at the GS-10 and 11 level (Tr. 98), i.e., the Supervisory Construction Representatives would be "lateralled into the 11 positions, and only the 10's would be open to new vacancies" (Tr. 102-103).

14. On November 8, 1989, Respondent issued the vacancy announcement for the new CMT position (Engineering Technician, GS-802-10) (G.C. Exh. 4). In accordance with the agreement of September 13, 1989, the area of consideration was "WESTNAVFACENGCOM - ROICC Offices only" (G.C. Exh. 4) and listed the positions as GS-10 (Tr. 102). The announcement set forth the duties, and the Position Description is Respondent Exhibit 16, dated November 3, 1989.

15. On October 10, 1989, the Chief of Naval Operations granted Respondent authority to conduct a reduction-in-force of 159 employees (Res. Exh. 4(a)). Interested members of Congress were advised on October 25, 1989 (Res. Exh. 5); and the Office of the Chief of Naval Operation was advised on October 27, 1989, that Congressional notification had been made (Res. Exh. 6(a)).

16. By letter dated November 16, 1989 (G.C. Exh. 19), Respondent informed the Union that during the week of November 27, 1989, affected employees would be issued a 60 calendar day notice of RIF, the notice period to begin November 30, 1989, and the effective date of the RIF would be January 30, 1990 (G.C. Exh. 19). Enclosed were, inter alia, the names of the affected employees by location. There were 127 persons listed as affected employees,

consisting of 109 Construction Representatives,7/ one Engineering Technician, and 17 other employees.

17. As set forth in Paragraph 14 above, Respondent issued the vacancy announcement for the new CMT position on November 8, 1989. Respondent in its letter of August 24, 1989, had stated, in part, "It is the intention of this command to reassign current GS-11 level employees into this new position . . . ." (Res. Exh. 13, Par. 8) (Emphasis supplied) and Mr. Smith testified, as noted in Paragraph 13 above, that, ". . . the supervisory Con. Reps. would be planned to be lateralled into the 11 positions, and only the 10's would be open to new vacancies." (Tr. 102-103). Prior to the RIF, as of September 30, 1989, there had been 18 Engineering Technicians GS-11 (Res. Exh. 14, G.C. Exh. 18; Tr. 497-498) and 27 Supervisory Construction Representatives (Res. Exh. 14). Mr. Smith did not mention Engineering Technicians, although he knew there were GS-11 Engineering Technicians (Tr. 117) and was familiar with their duties (Tr. 118), indeed there were three at San Francisco where Mr. Smith worked (Res. Exh. 14; Tr. 74). It might reasonably be inferred that he included GS-11 Engineering Technicians since the new position encompassed them. Certainly, Mr. Ruccolo made it clear that, ". . . the engineering techs were included as part of this 1990 CMT positions." (Tr. 493). In any event, Respondent Exhibit 14 shows that 70 CMTs [Engineering Technicians] were "on board" as of February 1, 1990. A comparison of the number of CMTs shown less the number of GS-11 Engineering Technicians and Supervisory Construction Representatives leaves a total of only 25 CMT positions to which the 109 RIF'd Construction Representatives could aspire. The number of slots shown on General Counsel Exhibit 3 (thirty-three) plus the number of Engineering Technicians and Supervisory Construction Representatives shows an extremely close correlation to CMTs "on board" (Res Exh. 14),8/ indeed, it is exact except at five locations: Everett - 3 Eng Tech, 2 slots, 4 CMTs (one

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7/ The "CR" designations on the attachment to General Counsel Exhibit 19, are, indeed, Construction Representatives when checked against General Counsel Exhibit 18. In addition, two names not marked were found to be Construction Representatives as follows: Fallon-Patrick Callahan; Twenty-Nine Palms-Curtis Compton.

8/ e.g., Adak: 1 Eng. Tech., slots 4, CMTs 5; Barstow: 0 Eng. Tech., 0 Sup. CR, slots 2, CMTs 2; Castle: 0 Eng. Tech., 0 Sup. CR, slots 1, CMTs 1; China Lake: 2 Sup. CR, slots 3, CMTs 5.

additional slot).9/ Travis - 0 Eng. Tech., 0 Sup. CR, 0 slots, 1 CMT; San Francisco Bay - 3 Eng. Tech., 4 Sup. CR, 4 slots, 10 CMTs (one additional slot). Twenty-Nine Palms - 2 Sup. CR, 2 slots, 3 CMTs (one additional slot); and Whidbey - 1 Eng. Tech., 1 Sup. CR, 3 slots, 3 CMTs (two additional slots).

On the first page of General Counsel Exhibit 3 is an insert titled "ROICCS/NO VACANCY" and then nine locations: Fallon, Ketchikan, Lemoore, Long Beach, Moffett, North Bay, Pt. Mugu, Travis, and Yuma. General Counsel stated that this was on the document as supplied to the Union in January 1990, and meant that there were, ". . . no vacancies advertised or considered." (Tr. 101). The number of Engineering Technicians GS-11 and/or Supervisory Construction Representatives equaled or exceed the number of CMTs at each location except at Travis where there were no Engineering Technicians or Supervisory Construction Representatives but there was one CMT.10/ Again, this shows the lateral movement of GS-11 Engineering Technicians and Supervisory Construction Representatives to CMT positions and further emphasizes the paucity of CMT positions available.

18. The attachments to General Counsel Exhibit 19 show that 15 Construction Representatives were RIF'd at San Francisco Bay, including Mr. William Smith. General Counsel Exhibit 3 shows four slots for San Francisco. Mr. William Smith applied for a GS-10 Engineering Technician (CMT) vacancy (G.C. Exh. 4), was qualified and was in the final group from which the selection was made, but was not selected (G.C. Exh. 5). The applicants selected were: Mr. Charles Gardner, who had been a Construction Representative at Vallejo (G.C. Exhs. 3 and 18), and who declined the selection for another job (G.C. Exh. 3); Mr. James Engleman, a non-competitive eligible (Respondent Exhibit 35,

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9/ Although the record is silent, it is entirely possible that attrition reduced the number of Engineering Technicians and/or Supervisory Construction Representatives so that, in fact, there were no "additional" slots.

10/ Of course, an entirely possible, even probable, explanation is that a person from a location where the number of Sup. CRs exceeded the number of CMTs (Fallon), where the number of Eng. Tech. plus Sup. CRs exceeded the number of CMTs (North Bay, Pt. Mugu), or where the combined number of Eng. Tech., Sup. CR and slots exceeded the number of CMTs (Everett, 29 Palms, Whidbey) was moved to Travis. However, this was not explored on the record.

Attachment)[11], then a GS-9 Construction Representative at Oakland (G.C. Exh. 18); and Mr. Fredrick Niehoff, then a GS-9 Construction Representative at Travis Air Force Base (G.C. Exh. 18). There is no "Referral and Selecting Register" (Cf., Res. Exhs. 19 and 35) or "Promotion Board Evaluation" (Cf., G.C. Exh. 25; Res. Exh. 41) for San Francisco Bay. Mr. Niehoff, whether he applied for San Francisco Bay Area[12], wanted to decline the job offer at San Francisco but remain on the Stopper List and with severance pay but was told that if did not accept he would lose his standing on the Stopper List (Tr. 106). Accordingly, he filed a grievance (G.C. Exh. 6).

11/ Respondent Exhibit 35 shows that Messrs. Hartly, Moore and Weber, although then GS-9 CRs, had previously been GS-11 Eng. Tech. and, for this reason, were non-competitive eligibles. Presumably, the others shown on the same Attachment to Respondent Exhibit 35, including Mr. Engleman, had also been GS-11 Eng. Techs.; however, strictly speaking, the record shows only that Mr. Engleman was a non-competitive eligible.

12/ Mr. Smith made it clear that San Francisco Bay Area on his application did not mean merely the S.F. Bay Area ROICC office but included other ROICC offices in the area, specifically in his case Concord (Tr. 111-112). Travis AFB, where Mr. Niehoff worked, like Concord, is close to San Francisco even though it is not a satellite office of the S.F. Bay Area ROICC (Tr. 157), as neither is Concord. Mr. Niehoff's application was not made part of the record so that the areas he designated were not shown, beyond his evaluation for Everett (Res. Exh. 41); but if proximity to his home, presumably in the vicinity of Travis AFB, were a consideration, as Mr. Smith stated (Tr. 106), it must be assumed that he designated the S.F. Area in some manner and, even though he did not designate S.F. Bay Area ROICC, he, like Mr. Smith, may, in effect, have designated that office if he designated the S.F. Area. As the record shows evaluation and inclusion on "Referral and Selecting Register" at the area of designated interest, e.g., "ROICC Northwest" (Res. Exh. 19, G.C. Exh. 8) included Everett, Silverdale (Bangor), Whidbey and Adak (Tr. 236), and as Mr. Smith testified that S.F. Bay Area included various ROICC offices in the area, not just the S.F. Bay Area ROICC office, the record does not support by substantial evidence General Counsel's assertion that "Neihoff had not applied for the S.F. Bay vacancy" (General Counsel's Brief, p. 17), although, as noted, he did not apply for the S.F. Bay Area ROICC office.

Mr. Gardner having declined and Mr. Niehoff seeking to decline, only one of the four GS-10 CMT positions at San Francisco Bay was filled (by Mr. Engelman). Also, at Concord only one of two GS-10 CMT positions was filled (G.C. Exh. 3) pursuant to the Vacancy Announcement of November 8, 1989 (G.C. Exh. 4). The record does not show why these positions were not filled under the November 8, 1989, Vacancy Announcement (G.C. Exh. 4); but there was a second impact bargaining meeting, which Mr. Smith placed "in mid-January" (Tr. 111) but which, in view of the issuance date of General Counsel Exhibit 7, necessarily took place in mid-December, 1989. Mr. Smith merely indicated that a new Vacancy Announcement for Engineering Technician (CMT) at a lower grade was discussed and, ". . . it was decided that -- well I believe it says right on here [G.C. Exh. 7; Tr. 110] that anybody that applied during the first announcement was automatically considered for this . . . During our discussion in impact bargaining . . . the openings, by the way, for this were only, I believe in Concord and the San Francisco Bay Area . . . Those were the only places where they didn't fill their listings for their vacancies . . . ." (Tr. 111). The new Vacancy Announcement issued December 26, 1989 (G.C. Exh. 7), was for "Engineering Technicians, GS-802-9/10," and was limited to ROICC San Francisco and ROICC Concord. Mr. Smith, having previously applied for the San Francisco Bay Area was automatically considered for this new vacancy (Tr. 112). Also, Mr. Teale applied for the GS-9 position (G.C. Exh. 7). Again, there was no "Promotion Board Evaluation" or "Referral and Selection Register" for either San Francisco Bay ROICC or Concord ROICC. Consequently, the record does not show who applied or give any basis for comparison or evaluation except as to Messrs. John Teale, Stuart Eldridge and Andrew Uehisa whose qualifications are discussed hereinafter. Neither Mr. Smith nor Mr. Teale was selected. As to Mr. Smith, he was informed that he was rated eligible, was in the final group from which the selection was made, and that the following had been selected: Robert Ebert, Donald Wolfe, Stuart Eldridge, Allan Smith and Andrew Uehisa (G.C. Exh. 8). Each selectee had been a GS-9 CR at Oakland except Mr. Eldridge who had been a GS-9 CR at Silverdale (G.C. Exh. 18).

Vacancy Announcement (90) 05 (007) (G.C. Exh. 4) and Vacancy Announcement (90) 05 (026) (G.C. Exh. 7) each contained these requirements: "QUALIFICATION REQUIREMENT: One year specialized experience equivalent to the next lower grade level."; and "Eligibility is subject to time-in-grade requirements." Mr. Smith testified that an applicant under General Counsel Exhibit 4 had to have spent one year in

grade level 9, i.e., ". . . one year specialized experience equivalent to the next lower grade level . . . ." (Tr. 113), and that an applicant under General Counsel Exhibit 7 had to have spent one year in grade level 8 (Tr. 113).

General Counsel asserts that, "This meant that the eventual selectees no longer needed one year-in-grade at the GS-9 level." (General Counsel's Brief, p. 17). Clearly, he is saying that neither Mr. Ebert, who was employed by the West Div. in August 1989 (Tr. 146), nor Mr. Wolfe, who Mr. Smith stated had not been a GS-9 for one year (Tr. 114) was eligible under the GS-10 Vacancy Announcement (G.C. Exh. 4) because not "in-grade at the GS-9 level" for one year. It is entirely possible that the qualification, "Eligibility is subject to time-in-grade requirements", said time-in-grade requirements not being set forth in the Vacancy Announcement, would produce this result; but it certainly does not follow from the, "One year specialized experience" requirement. If one year in-grade were a requirement, then Mr. Ebert, certainly, who was not employed at any grade by Respondent until August 1989, would not have been eligible under either Announcement.[13/] Rather, this qualification requirement refers only to "One year specialized experience . . ." and in Mr. Ebert's case his ten years experience with Bechtel (Tr. 147-150) fully supplied the one year experience requirement.[14/]

13/ All that was shown about Mr. Wolfe was that he had not been a GS-9 for one year, his date of employment by Respondent not having been shown.

14/ Mr. Ebert testified but was not asked whether he had applied for the GS-10 vacancy (G.C. Exh. 4). Insofar as the one year experience requirement is concerned, Mr. Ebert was eligible under either the GS-10 (G.C. Exh. 4) on the GS-9 (G.C. Exh. 7) announcement; however, each Announcement was, as noted, subject to unstated "time-in-grade requirements." It is possible that General Counsel was right, but for the wrong reason, and because of time-in-grade requirements Mr. Ebert was eligible to bid for a job at his present grade level but not for a job at a higher grade level; but this is mere speculation since the record does not show Mr. Ebert's eligibility, or ineligibility, for the GS-10 vacancy.

Mr. Smith, pursuant to the settlement of an unfair labor practice charge was made whole and his RIF action was rescinded (Tr. 43, 121, 122, 561); however, he is not interested in returning to work for Respondent (Tr. 120). I express no opinion as to whether Respondent's initial failure to select Mr. Smith for either the GS-10, or the subsequent GS-9, job opening was because of his Union activity. As noted, in neither instance was the "Promotion Board Evaluation" or "Referral and Selecting Register" for San Francisco or Concord shown. Because 15 Construction Representatives had been RIF'd, it is unrealistic to believe that only Mr. Smith of the San Francisco Construction Representatives bid for the GS-10 position. Indeed, Mr. Sexton testified that he thought Mr. Hollingsworth, a Construction Representative at Oakland (G.C. Exh. 18), should have been selected. He also said Mr. Rasmus was not selected (Tr. 156). Of course, to be selected, a person must have applied. Moreover, General Counsel concedes that there was a list of qualified applicants from which Respondent could have filled the "remaining GS-10 ET vacancies . . . ." (General Counsel's Brief, p. 17). Of course, the record shows that Mr. Teale applied for the GS-9 position at San Francisco (Tr. 233) which presumably included Concord (Tr. 232). The record does not show any selection for the GS-9 position at Concord. Mr. Sexton's reference to the selection, or more correctly the non-selection, of Mr. Hollingsworth necessarily included the GS-9 position as he said that if he had been the selecting official he would not have selected Mr. Wolfe because, "His quality of workmanship was not as good as Mr. Smith's" (Tr. 158); but he was not the selecting official (Tr. 158).

In like manner, General Counsel contends that Commander Wilcox's instruction to Mr. Sexton to reduce the rating he, Sexton, had given Mr. Smith on his 1989 annual appraisal was because of Mr. Smith's Union activity (Tr. 154), an instruction Mr. Sexton did not comply with, and, at first blush, the contention seems to have merit; but it developed that Commander Wilcox had also instructed Mr. Sexton to reduce the rating of Mr. Hollingsworth, which Sexton also did not do (Tr. 159). Mr. Hollingsworth was not shown to have engaged in any Union activity, even membership.

19. Three "Promotion Board Evaluation" forms were introduced as exhibits: El Toro (G.C. Exh. 25); Everett (Res. Exh. 41); and Non-Competitive Eligibles (Attachment, Res. Exh. 35). The selecting official does not receive the Promotion Board Evaluation or any point scores (Tr. 546, 555); however, if an employee, or employees, were rated highly qualified (a score of 48, or more), the highly

qualified employee(s) would be shown before the listing of qualified employees on the Referral and Selecting Register (Tr. 546-547). The selecting official receives only an alphabetical listing of the candidates, i.e. an alphabetical listing of those "Highly Qualified," if any, followed by an alphabetical listing of those "Qualified." None of the applicants evaluated for ROICC Northwest was rated "Highly Qualified"15/ so only the alphabetical listing of the 24 "Qualified" Candidates (Res. Exh. 19) and three "Non-Competitive Eligibles" were submitted.

With full recognition that the selecting official did not have scores for the candidates, reference will be made herein to scores shown on General Counsel Exhibit 25 and Respondent Exhibit 41 to help evaluate General Counsel's allegation that Mr. Teale was not selected because of his Union activity; and further that such discrimination because of Union activity was shown by the non-selection of Messrs. Smith and Jessie Chavez. Nevertheless, it must be borne in mind that to the selecting official, who has only an alphabetical listing of the candidates and each candidate's application (Tr. 546), the record shows that each qualified candidate is precisely equal to every other qualified candidate.

20. Mr. Chavez was a Construction Representative at El Toro (G.C. Exh. 18, 19 Attachment) where, from mid-1988, he had been the Union steward (Tr. 260-261); his Union activity raised the ire of his supervisors (Tr. 261; 262; 265; 267; 268-269); and Mr. Chavez applied for the GS-10 opening at El Toro but was not selected. The selectees were: Joseph H. Talmanglo, David L. Crawley, James M. Thomas, Paul L. Maize, Larry C. Tan, and Garry C. Wolff (G.C. Exh. 3).

Mr. Chavez, like Mr. Smith, in settlement of an unfair labor practice charge, was rehired as a GS-10 Engineering Technician and was to begin work in that capacity on May 22, 1990 (Tr. 278-279, 280, 561). As with Mr. Smith, I express no opinion as to whether Respondent's initial failure to select Mr. Chavez for the GS-10 job opening at El Toro was because of his Union activity.

15/ Three "Non-Competitive Eligibles" were rated Highly Qualified: Mr. Petronilo Cendana (Attachment, Res. Exh. 35); and two names at the top of the same document (Attachment, Res. Exh. 35) which I can not read.

The Promotion Board's Evaluation of Candidates for El Toro was introduced as an exhibit (G.C. Exh. 25). There were at least 19 applicants for six openings although the "Referral and Selection Registers" for El Toro were not introduced as exhibits. Mr. James M. Thomas, a "Non-Competitive Eligible" (Attachment, Res. Exh. 35), then a GS-10 Construction Representative at Long Beach (G.C. Exh. 18), was one of six selected (G.C. Exh. 3). Of the 18 evaluated on General Counsel Exhibit 25, none was rated Highly Qualified; but Mr. Chavez received the highest rating of "40" (G.C. Exh. 25). Of those selected from among the candidates rated by the Promotion Board, Mr. Wolff had 38 points; Messrs. Crawley and Maize 27 points each; Mr. Tan 26 points; Mr. Talmanglo, who had been a GS-9 Construction Representative at Oakland, 19 points; and each of the other four had been GS-9 Construction Representatives at El Toro (G.C. Exhs. 3, 18). The non-selection of Mr. Chavez at first blush might suggest that his Union activity had been a factor; however, Messrs. Adams (CR 9-El Toro) and Williams (CR 9-Pt. Mugu) each received 37 points and were not selected; Messrs. Klump (CR 9-El Toro) and Russell (CR 9-El Toro) each received 36 points and were not selected; Mr. Franklin (CR 9-Monterey); received 34 points and was not selected; Mr. Cajigal (CR 9-El Toro) received 32 points and was not selected; and none was shown to have had any Union activity.16/ The non-selection of seven candidates, including Mr. Chavez, each of whom had higher scores than any selectee except Mr. Garry C. Wolff dispells the threshold inference that Union activity influenced the non-selection of Mr. Chavez; Mr. Cone testified that in August or September 1988, he had met with Mr. Dan Haynosch, Director of Construction Management, at El Toro at which time "they come to the terms that he [Chavez] could be a steward" and the "reprimand" of Mr. Chavez was removed and his record was "cleared up" (Tr. 192-194); Mr. Chavez's Performance Appraisals for 1986, 1987 and 1988 (G.C. Exhs. 24(a), (b) and (c)) reflect no adverse rating after he became Union steward - indeed his over-all rating for 1988 was slightly higher (HS+, G.C. Exh. 24(a)) than for 1987 (HS, G.C. Exh. 24(b)); and his evaluation by the Promotion Board obviously reflected no adverse rating. Had the selecting official divined the evaluation of each candidate

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16/ Mr. Kimble (CR 9-El Toro had 30 points; and Mr. Teale (E.T. 9-Silverdale) had 31 points. I have "put aside" Mr. Kimble as he received one point less than Mr. Teale who is considered separately hereinafter.

precisely as the Promotion Board, rather than as eighteen equally qualified candidates, his actual selections discriminated against all candidates, except Mr. Wolff, who had the highest evaluations; but the selection of four (excluding Mr. Thomas, a non-competitive eligible) lower rated candidates rather than four from among the seven highest rated candidates, other than Mr. Wolff, demonstrates no discrimination because of protected activity since only Mr. Chavez, in the non-selected highest rated category, was shown to have been even a Union member, much less to have engaged in other protected activity.

21. Mr. Teale, since April 2, 1990, an employee of the U.S. Army Corps of Engineers (Tr. 219) had been a Construction Representative with Respondent from 1978 until June 1987, when he became a GS-9 Engineering Technician (Tr. 220-221), a one of a kind position for a specific project, a large power plant at the Puget Sound Shipyard (Tr. 479, 484). In 1989, Mr. Teale had been a vice president and steward of the Union, however, he renounced the vice presidency (Tr. 223) but remained a steward (TR. 223). He filed two grievances on his own behalf (Tr. 223, 224). As noted earlier, Mr. Teale, in his letter dated November 13, 1989, stated that, ". . . last week I provided the payroll department with the necessary documents to cease associating me with the union. I have also written to the new President informing him of my resignation as steward." (G.C. Exh. 23).

On November 30, 1989, Mr. Teale received his notice of RIF effective January 30, 1990 (G.C. Exh. 20). Mr. Teale applied for the GS-10 Engineering Technician position at all locations except Alaska (Tr. 231), San Francisco Bay, Concord, Stockton, or Long Beach (Tr. 232); however, he was not selected. Mr. Teale appears on the Promotion Board Evaluation for Everett (Res., Exh. 41) and, as noted his total score was 31. There is no Referral and Selecting Register for Everett but General Counsel Exhibit 3 shows that the following were selected: Mr. Chad Hicks (G.C. Exh. 3), who had been a GS-9 Construction Representative at Ferndale (G.C. Exh. 18) and whose score was 30, (Res. Exh. 41), and Mr. Robert Hodson, (G.C. Exh. 3) who had been a GS-9 Construction Representative at Point Mugu (G.C. Exh. 18) and whose score was 35 (Res. Exh. 41). Mr. Teale's score, it is true, was one point higher than Mr. Hick's score; but Messrs. Pate (33), Wood (36) [selected, as noted hereinafter, for the single position at Northwest], Eldridge (36), Klump (36), Villanueva (31.5), Russell (36), Sklors (36), Hill (32), Reiman (32) and Niehoff (32), each of whom had scores higher than Mr. Teale, and none of whom was shown to have engaged in protected activity, were not selected.

The Evaluations of December 5, 1989 (Res. Exh. 41) and, necessarily the selections [the date for Everett was not shown, but presumably would have been on, or about, the same date as for Northwest which was December 12, 1989] were about a month after Mr. Teale had indicated he had resigned his position as steward. Nor does his Evaluation (Res. Exh. 41) or his Performance Ratings used for the RIF (G.C. Exh. 20) reflect any impairment because of protected activity.

Mr. Teale was one of the qualified candidates for ROICC Northwest[17/] (Res. Exhs. 19 [Competitive], 35 [Non-Competitive]); but was not selected. Rather, Jackie Wood was selected on December 15, 1989 and accepted on December 19, 1989 (Res. Exh. 19). Mr. Roger Sklors, who, like Wood, had 36 points (Res. Exh. 41), had been selected as an alternate. Mr. Sklors accepted a position at Adak on January 8, 1990 (G.C. 3).

As noted above in connection with Mr. Chavez, Mr. Teale was not selected for El Toro even though the Promotion Board's Evaluations (G.C. Exh. 25) showed that his point total (31) exceeded the point total of every selectee except Mr. Wolff (38); however, there were seven other candidates, including Mr. Chavez, who had higher scores than Mr. Teale and, of course, higher scores than any selectee except Mr. Wolff (Mr. Chavez' score of 40 was higher than Mr. Wolff's (38)). Further, Mr. Kimble's score of 30 (Res. Exh. 41) was higher than any selectee except Mr. Wolff although lower than Messrs. Chavez' and Teale's scores. The comments with respect to Mr. Chavez also apply with equal force to Mr. Teale. In addition, as noted, at the time of the evaluation and selection for El Toro, Mr. Teale had resigned as Union steward.

No other Promotion Board Evaluations or Referral and Selection Registers were offered; however, Mr. Richard L. Tusing, who had been a GS-9 Construction Representative

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17/ There was no Promotion Board Evaluation for Northwest but, except for two persons, the same employees evaluated for Everett were Competitive Qualified Candidates for Northwest. Messrs. James Bowron, GS-9 CR Silverdale, and James Watson, GS-9 CR Long Beach, appear on Respondent Exhibit 19 (Referral and Selecting Register for Northwest) but not on Respondent Exhibit 41 (Promotion Board Evaluation for Everett); and Messrs. Robert A. McLeod (GS-9 CR Everett) and William F. Young (GS-9 CR El Toro) appear on Respondent Exhibit 41 but not on Respondent Exhibit 19.

at Barstow and had a score of 28 points on the Everett Evaluation (Res. Exh. 41), was selected for Barstow (G.C. Exh. 3); and Mr. Calvin Tozel,[18/] who had a score of 27 points on the Everett Evaluation (Res. Exh. 41) was selected for China Lake (G.C. Exh. 3), locations for which Mr. Teale also applied (Tr. 231-232).

22. Mr. Teale applied for the GS-9 Engineering Technician Position at ROICC - San Francisco Bay and ROICC Concord. Although General Counsel Exhibit 3 showed only four slots at San Francisco, one of which had been filled by Mr. Engelman under the GS-10 announcement (Mr. Niehoff was also selected but did not want to accept the job), five were selected as GS-9 Engineering Technicians as follows: Robert Ebert, Donald Wolfe, Stuart Eldridge, Allan Smith and Andrew Uehisa. There was no Promotion Board Evaluation or Referral and Selecting Register for San Francisco entered into evidence, so it was not shown how many applied for the GS-9 position. Only Messrs. Eldridge and Uehisa appear on the evaluation for Everett or El Toro and Mr. Eldridge had 36 points (Res. Exh. 41) and Mr. Uehisa 24 points (Res. Exh. 41). Ebert, Wolfe, Smith and Uehisa had been located at Oakland and Mr. Eldridge, like Mr. Teale, had been located at Silverdale.

The record shows nothing concerning the apparent filling of one GS-9 position at Concord.

CONCLUSIONS

A. This proceeding is not barred by § 16(d)

The Union filed a grievance on December 15, 1989, concerning the RIF; however, the issues raised by the grievance (Res. Exh. 1(a)) are not the same issues as raised by the Union's charge (G.C. Exh. 1(e)) or as alleged in the Complaint (G.C. Exh. 1, Paragraph 9). Therefore, this proceeding is not barred by § 16(d) of the Statute.

As General Counsel stated,

> "In his reply to the grievance [Res. Exh. 1(b)] Captain Drennon noted that on 'Point No. 4' [RIF approval was obtained based on inaccurate

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18/ Mr. Tozel had been a GS-9 Construction Representative but his GSA Location does not appear on G.C. Exh. 18, although from the position of his name he may have been located at China Lake.

> and misleading information] Bill Smith [who, as Acting President of Local 2096, signed the grievance] had mentioned that he feels that the RIF has in fact been targeted at construction representatives. (Res. Exh. 1(b)). On cross-examination, Smith confirmed that Point No. 4 raised only the theory that approval of the RIF was obtained on inaccurate and misleading information. (Tr. 129). Moreover, Drennon's reply proves that Point No. 4 was only challenging Respondent's inaccurate and misleading information and that Smith's reference to the targeting of Con reps was merely an example of Respondent's misleading information. Smith unequivocally stated that the grievance did not raise the theory raised in the ULP, i.e. that the RIF had been used as an opportunity to bust the union. (Tr. 89-90)." (General Counsel's Brief, p. 25).

I fully agree with General Counsel that the grievance did not raise either the interference (16(a)(1)) or discrimination (16(a)(2)) issue which are the issues raised by the charge and the Complaint.

B. Elimination of Construction Representatives

General Counsel asserts that Respondent's conduct violated the Statute for the reasons that:

> "First, the Respondent's conduct in selecting the employees who would suffer the effects of the RIF [footnote omitted] was discriminatory under Section 7116(a)(2) of the Statute. Second, that same conduct is an independent violation of section 7116(a)(1) of the Statute because, regardless of Respondent's motive, the overwhelmingly biased selection of unionists to suffer the effects of the RIF had a 'chilling effect' on the remaining employees' pursuit of rights protected by the Statute." (General Counsel's Brief, pp. 25-26).

I fully understand that the Union felt that Respondent had used the RIF to "bust" the Union; however, the record is

to the contrary. There is no dispute, and the record shows, that budget reduction for fiscal year 1990 required that Western Division reduce the number of its employees. To achieve the required reduction, Respondent changed its method of contract quality control by eliminating daily on-site inspection, which meant abolishment of the Contractor Representatives whose function was to provide daily on-site inspections, and moving to Contractor Quality Control whereby the contractor is made responsible, not only for performing the work in accordance with the plans and specifications, but also inspecting the work and certifying that it has been done in accordance with the plans and specifications. The record shows without contradiction that Contractor Quality Control had become an accepted method of contract quality control in private industry, in the construction industry, in state, county and city construction, and in their own construction contracts in excess of three million dollars, so that the decision to eliminate daily on-site inspection was, as Respondent stated, a sound, legitimate and rational response to the reduction in force required. To be sure, this was an innovative technique in the Naval Facilities Engineering Command and, because it had not previously been tried in the Command, Captain Maskell investigated the matter and was convinced of the soundness of the proposal.

There is resistance to change which becomes all the greater when one's well being or livelihood is threatened. Certainly, there was resistance to adoption of Contractor Quality Control by some supervisors, such as Commanders Ealy and Morrison, REICCs Stone and Abbott, Lt. Commander Hill and, of course, by former Supervisory Construction Representative Sexton who sincerely believed, and stated, that, ". . . The eyes and ears for quality assurance was the construction representatives . . . The eyes and ears were protection that we were getting quality assurance and value for the dollar, Navy dollars spent . . . ." (Tr. 590).

By abolishing all existing Engineering Technician positions (19 - Res Exh. 14), Supervisory Construction Representatives (27 - Res. Exh. 14), and Construction Representatives (109 - G.C. Exh. 19) and replacing them with 70 CMTs (Tr. 493; Res. Exh. 14) Respondent reduced its workforce by 85; but it also changed its "method of doing business" from daily on-site inspection to Contractor Quality Control. The decision to adopt Contractor Quality Control dictated the abolishment of Construction Representatives, whose function was to provide on-site inspection, together with the Supervisory Construction Representatives. Because it created a new job

classification, CMT, to administer Contractor Quality Control, Respondent also abolished all existing Engineering Technician positions. The GS-11 Engineering Technicians (18) and Supervisory Construction Representatives (27) were, as Respondent had informed the Union in its August 24, 1989, letter (Res. Exh. 13, Par. 8) and had discussed with the Union on September 13, 1989, specifically, with regard to Supervisory Construction Representatives (Tr. 102-103), upon abolition of their positions, to be reassigned to CMT positions (Res. Exh. 17). This left only about 25 to 33 CMT positions available for the 109 Construction Representatives and one GS-9 Engineering Technician (Mr. Teale), the GS-11 Engineering Technicians having been reassigned, as noted, to CMT positions. Of the 110, the great bulk, not less than 71,[19/] were not members of the Union.

There is nothing in the record that indicates, or even suggests, that Union activity was a consideration in Respondent's decision to adopt Contractor Quality Control (Tr. 470-473, 487, 488; G.C. Exh. 30). General Counsel sought to show Union animus; but the only Union animus shown concerned Mr. Chavez. While certainly not condoned, this is not an allegation of the Complaint and Mr. Chavez stated that Mr. Haynosch met with him, his supervisor, John Estill, and President Cone in September 1988, (Tr. 194) and that, "It was resolved. They agreed to not -- well first of all, to accept me as a steward at El Toro, to stop the harassment . . . ." (Tr. 278; see, also, Mr. Cone's testimony, Tr. 192-193). Although Estill made a threatening statement to Mr. Chavez in March 1990 (Tr. 273), Mr. Estill is no longer a supervisor (Tr. 279).

Other indicia relied upon by General Counsel I do not find constitute Union amimus. For example, while it is true that after the certification of the Union on June 7, 1988, Respondent on, or about, August 31, 1988, informed the Union that effective October 1, 1988, it was reorganizing its OICC

19/ Mr. Cone testified that the Union had only about 40 members, of whom 30 to 35 later received RIF notices. Respondent Exhibit 41 shows that Ms. Visitacion Romine, Secretary of the Union, was a clerk typist. Except as shown on Respondent Exhibit 41, the record does not show how many of the Union's members were Construction Representatives. From Mr. Cone's testimony and Respondent Exhibit 41, it would appear that not more than 30 to 34 were CRs or Engineering Technicians.

Southwest Division which would, ". . . include ROICC Camp Pendleton and ROICC Bridgeport" (G.C. Exh. 10); however, Respondent specifically stated, ". . . the Department of the Navy will be filing a petition to the Federal Labor Relations Authority (FLRA) advising them of this realignment . . . Until the FLRA rules, the employees at ROICC Camp Pendleton and ROICC Bridgeport will continue to be part of your bargaining unit . . . ." (G.C. Exh. 10). Indeed, the Agreement of the parties, (Jt. Exh. 1), covers both Pendleton and Bridgeport, although the Union subsequently was certified as the bargaining representative of the Southwest Division, i.e., it "picked-up" San Diego, excluded in its June 7, 1988, certification, and the rest of the Southwest Division including, of course, Pendelton and Bridgeport.

Further, the initial delay in having the Union's checkoff authorizations processed and AFGE's authorizations terminated undoubtedly was due in part to administrative time lag. Moreover, the desire of some employees, with the support of the Union, to continue their AFGE deductions in order to maintain AFGE health insurance further contributed to the problem. Again, while not condoned, this is not an allegation of the Complaint and the Union's checkoff authorizations were fully processed.

While the desire of the Union to have its stewards lists posted immediately after its certification (G.C. Exh. 12) is understandable, Respondent's insistence that, ". . . the determination of numbers, locations, official time and procedural aspects for union stewards has not been negotiated . . . ." (G.C. Exh. 12(a)), was equally understandable. The Union having "jumped the gun" in posting its steward lists, Mr. Haynosch's (Respondent's Director of Construction Management) having them put back up (Tr. 190) does not demonstrate union animus, nor does Captain Drennon's failure to enter into a personal "dialogue" with Mr. Cone.

Respondent and the Union completed negotiations of a new Agreement (Jt. Exh. 1) on December 30, 1988; Respondent met with the Union on July 14, 1989, before submitting the RIF request to explain the reasons for the request; the parties negotiated on the impact of the RIF in September 1989, and again in December 1989, with regard to the Engineering Technician GS-9 positions. In sum, while the record shows some hostility to the Union by a few supervisors at two ROICC offices, such isolated conduct certainly would not justify an inference that the decision to adopt Contractor Quality Control was motivated by Union animus. Indeed, the

action of Respondent to resolve and put a stop to isolated aberrations together with its relations with the Union, dispel General Counsel's assertion of union animus. But, more important, there is no basis whatever for General Counsel's assertion that Union activity, and/or Union animus, played any part in Respondent's decision to adopt Contractor Quality Control. To the contrary, the record shows that Contract Quality Control was an established method of quality control; that Respondent's decision to adopt Contractor Quality Control was wholly to achieve the greatest efficiency with its reduced manpower; that Respondent's decision was a sound, legitimate and appropriate response to the reduction in force required; and that Union activity was not a consideration.

I have considered General Counsel's other allegations asserted to show that, ". . . Respondent's RIF selections were in retaliation for the Union's protected activity . . . ." (General Counsel's Brief, p. 28), and find them without merit. For example, alleging "Cover up and false records," General Counsel states, ". . . in the October letter to Congressman Dannemeyer, Vice Commander Smith said that the RIF had been 'designed . . . [to lessen] the adverse impact of [the] RIF on any one . . . group of employees.'20/ This is patently false - two months earlier Respondent had 'finalized' its decision to eliminate all Con rep positions . . . "and, ". . . Respondent's correspondence consistently suggested that the RIF would be distributed 'West-Div wide'." (General Counsel's Brief, p. 34). General Counsel would read "group" as meaning "classification" and, no doubt, the Construction Representatives wanted to read that meaning into the word; but the word "group" conveys no such meaning to me, nor, certainly, does the more precise dictionary definition, which, in part, as applicable, is: "2a: a relatively small number of individuals assembled or standing together . . . 3: a number of individuals bound together by a community of interest, purpose, or function . . . ." Webster's Third New International Dictionary (1971). Obviously, Captain Smith used the word "group" to mean those at one place, location, or area for he further stated in

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20/ The complete sentence actually read,

> "The proposed RIF is designed to reasonably accommodate anticipated budget and workload cuts while lessening the adverse impact of RIF on any one location or group of employees." (G.C. Exh. 17(e)).

the same letter, ". . . This included the abolishment of the Construction Representative position and the establishment of a new position . . ." (G.C. Exh. 17(e)). Because the Construction Representative position was abolished, the RIF action in this regard was, indeed, West-Div. wide.

As a further example, General Counsel states that, ". . . in July the Union obtained the memorandum indicating that the elimination of the Con rep positions was likely, but when Cone inquired as to the import of the memorandum, Ruccolo told him that it meant nothing even though less than one month later Respondent 'finalized' its Con rep RIF selections exactly as set out in that memorandum." (General Counsel's Brief, p. 34). The "memorandum" was not a memorandum at all but was dated July 12, 1989, and entitled, "Westdiv FY 90 Proposal ROICC Office Reductions" and set forth in chart form two scenarios: one, reduction of Con Reps, Sup. CRs, Eng. Tech., etc., for a total reduction of 131; the second, elimination of Con Reps, reduction, essentially as before of Sup CRs, Eng. Tech., etc., for a total reduction of 175 (G.C. Exh. 32). Mr. Cone testified that Mr. Ruccolo, ". . . said this document didn't mean anything. That they just had to put down some numbers and it wasn't -- it wasn't significant at all . . . ." (Tr. 575-576). From the whole record, Mr. Ruccolo was absolutely correct. At this point, many options, ". . . were thrown on the table from various sources including myself", such as, "consolidating of field offices in various areas; coming up with some regional offices . . . combining some smaller offices or making smaller offices satellites . . . consolidating some of the functions, contracting functions . . . all types of alternatives . . . ." (Tr. 471). Consequently, even though the eventual decision resulted in the elimination of the Construction Representative positions, the mid-August decision was markedly different. Thus, Respondent decided to adopt Contractor Quality control and, while eliminating the Construction Representative positions, established a new position, CMT, to carry out Contractor Quality Control.

When Respondent adopted Contractor Quality Control, it abolished all existing Engineering Technician positions and established new CMT positions. Although still an "802 Engineering Technician" the new Construction Management Technician position, GS-11, (Res. Exh. 17) was different from the previous Engineering Technician position (Res. Exh. 13(a)-1, Enclosure [third Position Description from end - GS-802-11]. All supervisory Construction Representative positions were also abolished. The GS-11 Engineering

Technicians and Supervisory Construction Representatives were laterally reassigned to the new GS-11, CMT positions. As all prior Engineering Technician positions were abolished, including the one GS-9 position, Mr. Teale was not singled out and he was not laterally reassigned because he was not eligible for lateral reassignment.

The General Counsel bears the burden to establish by a preponderance of the evidence that an unfair labor practice has been committed. Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah, 35 FLRA No. 94 35 FLRA 891, 899 (1990); Letterkenny Army Depot, 35 FLRA No. 15, 35 FLRA 113, 118 (1990). About one fourth of the employees affected by Respondent's adoption of Contractor Quality Control were members of the Union and about half of the members were shown to have engaged in protected activity on behalf of the Union; but General Counsel has not established that protected activity was a motivating factor in Respondent's decision to adopt Contractor Quality Control, which, in turn, meant abolition of the Contract Representative, et al., positions. If it were found, contrary to my determination, that General Counsel had made the required prima facie showing, nevertheless, Respondent did not violate § 16(a)(2) because the record shows without contradiction that there was a legitimate justification for its action and, for reasons fully set forth above, Respondent would have taken the same action even in the absence of protected activity.21/ Letterkenny Army Depot, supra, 35 FLRA at 118. Accordingly, paragraphs 9 and 11 of the Amended Consolidated Complaint (G.C. Exh. 1(h)) are hereby dismissed.

C. Reprimand of John Teale

Mr. Teale's letter of August 25, 1989 (G.C. Exh. 21) was written in his capacity as a Union steward; was to, inter alia, "Union Membership and Unaffiliated Lower Echelon Staff"; and was distributed. By letter dated October 27, 1989, Respondent wrote the President of the Union to ". . . officially inform you of management's discontent" concerning Mr. Teale's letter (G.C. Exh. 13); and on November 3, 1989, issued a Letter of Reprimand to Mr. Teale (G.C. Exh. 22). Respondent's Letter of Reprimand stated, in part,

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21/ Indeed, the overwhelming majority of the employees affected were neither members of the Union nor shown to have engaged in any protected activity.

"5. While I believe your memo was written out of sheer frustration associated with the anticipated reduction-in-force, the manner in which you refer to members of management and present your mistaken conclusions for actions taken, is a display of profound bad judgment warranting disciplinary action." (G.C. Exh. 22).

The Complaint alleges that the Letter of Reprimand violated both § 16(a)(1) and 16(a)(2). No basis for a 16(a)(2) violation was shown and General Counsel does not assert a 16(a)(2) violation for the issuance of the Letter of Reprimand. Accordingly, the allegation that issuance of the Letter of Reprimand violated § 16(a)(2) of the Statute is dismissed.

Union freedom of speech under the Statute is primarily protected by two provisions. First, by § 2 of the Statute which guarantees the employees' right, "to form, join, or assist any labor organization." Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264 (1974) (hereinafter referred to as "Letter Carriers").22/ Second, by the provisions of § 16(e)

22/ Letter Carriers involved E.O. 11491; but, for all practical purposes, is tantamount to a determination under the Statute inasmuch as Section 2 of the Statute perpetuates, in statutory form, the same rights accorded by Section 1 of E.O. 11491. The Court stated, in part, as follows:

"The primary source of protection for union freedom of speech under the NLRA, however, particularly in an organizational context, is the guarantee in § 7 of the Act of the employees' rights 'to form, join, or assist labor organizations. . . . (418 U.S. at 277)

. . .

". . . The Court in Linn [383 U.S. 53 (1966)] recognized the importance of this § 7 protection, in words quite pertinent to this case:

(Footnote continued)

of the Statute. Oklahoma Air Logistics Center (AFLC), Tinker Air Force Base, Oklahoma, 6 FLRA 159 (1981); Department of Transportation, Federal Aviation

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22/ (Footnote continued)

> 'Likewise, in a number of cases, the Board has concluded that epithets such as "scab," "unfair," and "liar" are commonplace in these struggles and not so indefensible as to remove them from the protection of § 7, even though the statements are erroneous and defame one of the parties to the dispute.' 383 U.S. at 60-61.
>
> "These considerations are equally applicable under the Executive Order. Section 1 of the Order guarantees federal employees these same rights. . . ." (418 U.S. at 278).

The Court further stated, in part, as follows:

> "In this case, of course, the relevant federal law is Executive Order No. 11491 rather than the NLRA. Nevertheless, we think that the same federal policies favoring uninhibited, robust, and wide-open debate in labor disputes are applicable here. . . . (418 U.S. at 273)
>
> . . .
>
> ". . . we see nothing in the Executive Order which indicates that it intended to restrict in any way the robust debate which has been protected under the NLRA. Such evidence as is available, rather, demonstrates that the same tolerance for Union speech which has long characterized our labor relations in the private sector has been carried over under the Executive Order. . . ." (418 U.S. at 275).

Administration, Oakland Air Route Traffic Control Center, Fremont, California, 14 FLRA 201 (1984).[23/]

Although the protection afforded, whether under §§ 7 or 8(c)[24/] of the NLRA or under §§ 2 or 16(e) of the Statute, is not absolute, see, e.g., National Labor Relations Board v. Local Union No. 1229, International Brotherhood of Electrical Workers, 346 U.S. 464 (1953); Golden Nugett, Inc., 215 NLRB 50 (1974); Timpte, Inc., 233 NLRB 1218 (1977), enf'd denied sub nom. Timpte, Inc. v. NLRB, 590 F.2d 871 (1979); Department of Defense, Defense Mapping Agency Aerospace Center, St. Louis, Missouri, 17 FLRA 71 (1985); United States Forces Korea, Eighth United States Army, 17 FLRA 718 (1985). The Board has stated that,

> ". . . the use of strong language in the course of protected activities supplies no legal justification for disciplining or threatening to discipline an employee acting in a representative capacity, except in the most flagrant or egregious of cases." (American Telephone and Telegraph Co., 211 NLRB 782, 783 (1974), enf'd, 521 F.2d 1159 (2d Cir. 1975)

Of course, disloyalty, even though devoid of strong language in the sense of epithets, profanity, etc., may deprive statements of protection. National Labor Relations Board v. Local Union No. 1229, International Brotherhood of Electrical Workers, supra.

23/ "As we have previously held, outside of the context of representation elections (where management's neutrality is required), section 7116(e) protects the expression of personal views, arguments, or opinions by management, employees, or union representatives as long as such expression contains no threat of reprisal or force or promise of benefit or is not made under coercive conditions. See, e.g., Oklahoma City Air Logistics Center (AFLC), Tinker Air Force Base, Oklahoma, 6 FLRA No. 32 [6 FLRA 159] (1981)." (14 FLRA at 203).

24/ "(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

The Authority has stated:

> ". . . the right to publicize matters affecting unit employees' terms and conditions of employment, while not unfettered, is a right protected under section 7102 of the Statute." Department of the Air Force, 3rd Combat Support Group, Clark Air Base, Republic of the Philippines, 29 FLRA 1044, 1048; see, also, Bureau of Prisons, Federal Correctional Institution (Danbury, Connecticut), 17 FLRA 696, 697 (1985).
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> "When an employee who is also a Union official is acting in an official capacity as a union official, he is entitled to greater latitude in speech and action." Veterans Administration Medical Center, Bath, New York and Veterans Administration, Washington, D.C. 12 FLRA 552, 576 (1983); see, also, Overseas Federation of Teachers, 21 FLRA 757, 759 (1986); Veterans Administration Regional office, Denver, Colorado, 2 FLRA 667, 675-676 (1980); Department of Housing and Urban Development, San Francisco Area Office, San Francisco, California, 4 FLRA 460 (1980).

The Authority upheld distribution of a union leaflet which had criticized a supervisor's behavior and referred to the supervisor as, "this season's holiday turkey." Such reference was found not to be "scurrilous" or "defamatory" within the meaning of Maryland Drydock Co. v. NLRB, 183 F.2d 538 (4th Cir. 1950). Internal Revenue Service, North Atlantic Service Center (Andover, Massachusetts), 7 FLRA 596 (1982); and in United States Department of Housing and Urban Development, Region VI, and United States Department of Housing and Urban Development, Region VI, San Antonio Area Office, Case No. 6-CA-20311, 26 Adm. Law Judge Dec. Rep., April 12, 1984, the Judge held that Respondent violated §§ 16(a)(1) and (2) of the Statute by disciplining, or threatening to discipline, the Union's president for posting letters in which management officials, not only were criticized but were accused of perjury because, as the Judge

held, ". . . the posted statements represented the legitimate concern of a union representative regarding labor relations matters and were posted in accordance with the practice of posting all Union correspondence so as to keep employees informed of the Union's activities. This does not represent the kind of flagrant conduct which is beyond the ambit of protected activity." In Department of Treasury, Internal Revenue Service, Memphis Service Center, 16 FLRA 687 (1984), the admonishment of a union steward for calling her supervisor a "fool" was held to violate 16(a)(1) because it was ". . . not sufficiently flagrant to remove it from the ambit of protected activity. . . ." (26 FLRA at 697).

On the other hand, in Department of Defense, Defense Mapping Agency Aerospace Center, St. Louis, supra, (hereinafter referred to as "Defense Mapping") it was held that reprimand of an employee for using the phrase "Get screwed" during the course of a grievance meeting did not violate § 16(a)(1) of the Statute because her remarks, ". . . were indefensible under the circumstances and constituted flagrant misconduct, thus justifying discipline as outside the protection of the Statute." (17 FLRA at 83); in United States Forces Korea, Eighth United States Army, supra, (hereinafter referred to as "Eighth Army"), the reprimand of the President of Local 1363 for a letter to the editor of The Korea Herald was held not to violate 16(a)(1) or (2) of the Statute because, ". . . the statements or allegations contained therein while not disruptive of discipline were disloyal to the Respondent" (17 FLRA at 728) and "To the extent that a union officer includes in his statements or publications about existing labor relations problems derogatory and/or defamatory remarks which undermine the credibility and the confidence of U.S. government officials in a foreign country and which have no reasonable nexus to his union's legitimate labor relations problems, such union agent loses the protection of the Statute." (17 FLRA at 729); and in Veterans Administration, Washington, D.C. and Veterans Administration Medical Center, Cincinnati, Ohio, 26 FLRA 114 (1987), aff'd sub nom., American Federation of Government Employees, AFL-CIO, Local 2031 v. FLRA, 878 F.2d 460 (D.C. Cir. 1989) (hereinafter referred to as "Veterans Administration") the reprimand of the editor of the union's newsletter for an article which attacked the Chief of Building Management Services was held not to violate 16(a)(1) or (2) of the Statute because, ". . . There is a clearly expressed public policy against racial discrimination . . ." and "Racial stereotyping tends to undermine that policy and is not protected." (26 FLRA at 116).

Mr. Teale's letter (G.C. Exh. 21) referred to management as "The bastards (for that is the most fitting adjective short of pure unadulterated profanity that sufficiently describes that bed of rattlesnakes in San Bruno)"; referred to management as "sons of bitches"; referred to Mr. Ruccolo as "Sicilian Frank" and added a further remark, "(I do hope I don't get kneecapped for the latter remark [i.e. "Sicilian Frank] . . . if I do you will know who is responsible."; inferred that Admiral Montoya was guilty of "guile and graft"; asserted that the Navy was "screwing you and me out of our jobs"; made a further derogatory statement about Mr. Ruccolo, "I wouldn't be surprised if Ruccolo hasn't written this entire fiasco up as a &%$#ing Benny Sug for what he can get out of it, he is that kind of a fellow"; and urged blackmail, "Blackmail is a good way to start. If you have anything on any of these sons of bitches let us know (quietly)."

While quite different from the racial discrimination involved in Veterans Administration, supra, Mr. Teale resorted to racial stereotyping and it could be concluded that, for that reason alone, his conduct was not protected. Mr. Teale's statements were disloyal to Respondent, although, unlike Eighth Army, supra, there was no foreign country involved. Mr. Teale used profanity and even "screwing" which was found indefensible in Defense Mapping, supra. Nevertheless, while I do not approve or condone such conduct, I conclude that, as the Supreme Court stated in Letter Carriers, supra, Mr. Teale's letter was protected as ". . . uninhibited, robust, and wide-open debate. . ." (418 U.S. at 273). Accordingly, Respondent's letter of reprimand violated § 16(a)(1) of the Statute.

D. Failure to select John Teale

1. For a GS-10 position

Mr. Teale obviously was qualified for either the GS-10 or the GS-9 Engineering Technician position as he had been a GS-9 Construction Representative from 1978 until 1987 and was a GS-9 Engineering Technician from 1987 until RIF'd on January 30, 1990.25/ Mr. Teale applied for the GS-10

25/ General Counsel raised no issue concerning the lateral movement of the only GS-9 Engineering Technician to the new GS-9 CMT (Engineering Technician) position. Although Mr. Smith met with Respondent for impact bargaining on this new position in December 1989, the record is silent as to lateral movement of GS-9 ET to the new GS-9 ET (CMT) position.

Engineering Technician position at all locations except: Alaska, San Francisco Bay, Concord, Stockton, or Long Beach; but he was not selected.

Respondent asserts, in part, that,

> "The General Counsel has failed to meet its burden of proof regarding its allegation that Mr. Teale's non-selection for the GS-10 Engineering Technician position at Silverdale, Washington (ROICC Northwest) was in any way a result of prohibited discrimination under Section 7116(a)(2) of the Statute. . . ." (Respondent's Brief, pages not numbered, but 12th page excluding the cover sheet)

I agree that General Counsel failed to establish by a preponderance of the evidence that Mr. Teale's non-selection for the GS-10 position at ROICC Northwest, ROICC Whidbey, ROICC Everett, or ROICC El Toro was the result of prohibited discrimination. Thus, at ROICC Northwest, Jackie Wood was selected for the single slot and Mr. Roger Sklors was selected as an alternate. Each had 36 points as compared to Mr. Teale's 31 points. At ROICC Everett, Mr. Chad Hicks, who had 30 points, and Mr. Robert Hodson, who had 35 points, were selected. While Mr. Teale's score was one point higher than Mr. Hicks,[26/] any inference that Mr. Teale was not selected because of his having engaged in protected activity was dispelled by the fact that ten applicants, each of whom had scores higher than Mr. Teale, and none of whom was shown to have engaged in any union activity, also were not selected. At ROICC Whidbey no Promotion Board Evaluation or Referral and Selecting Register was offered in evidence; of the three selected: Ron (Ronald E.) Martin, Bob (Robert C.) Hoover and Lloyd W. Reiman (G.C. Exhs. 3; 18), Messrs. Martin

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26/ Again, I must emphasize that the selecting official did not receive the Promotion Board Evaluation and, accordingly, did not have the benefit of the scores accorded each applicant by the Promotion Board. I have referred to them to help evaluate the selections made on the assumption that examination of each applicant's application would permit an evaluation by the selecting official approximating that of the Promotion Board's evaluation.

and Hoover had been employed at Whidbey as GS-9 Construction Representatives; and only Mr. Reiman appears on a Promotion Board Evaluation introduced as an exhibit (ROICC Everett, Res. Exh. 41) and his score of 32 was higher than Mr. Teale's score of 31. At El Toro six were selected from at least nineteen applicants. One of those selected was Mr. James Thomas, a non-competitive eligible. Although Mr. Teale's score of 31 exceed the score of every selectee evaluated by the Promotion Board (G.C. Exh. 25) except Mr. Wolff, whose score was 38 [Crawley and Maize 27; Tan 26; and Talmanglo 19], seven other applicants, including Mr. Chavez, had scores higher than Mr. Teale and were not selected; and, in addition, Mr. Kimble, whose score of 30 and Mr. Kim, whose score of 29, were lower than Mr. Teale's but higher than any of the five selectees evaluated by the Promotion Board except Mr. Wolff, were also not selected. Messrs. Crawley, Maize, Tan and Wolff had been employed as GS-9 Construction Representatives at El Toro [Mr. Talmanglo had been a GS-9 Construction Representative at Oakland; and Mr. Thomas had been a GS-10 Construction Representative at Long Beach].

Mr. Teale bid for the GS-10 Engineering Technician position at Barstow and at China Lake. General Counsel Exhibit 3 shows that Mr. Richard L. Tusing, who had been a GS-9 Construction Representative at Barstow, and who had a score of 28 points on the Everett Evaluation (Res. Exh. 41), was selected for Barstow and Mr. Calvin Tozel, who had been a GS-9 Construction Representative, probably at China Lake (see, n. 14, supra), and who had a score of 27 points on the Everett Evaluation (Res. Exh. 41), was selected for China Lake. Also selected for Barstow was Mr. Leonard Valentine, who had been a GS-9 Construction Representative at Barstow; and also selected for China Lake were: Joe Hernandez and William Hurt, both of whom had been GS-9 Construction Representatives at China Lake (G.C. Exhs. 3, 18). There was no evaluation for Valentine, Hernandez or Hurt, no Promotion Board Evaluation or Referral and Selecting Register for Barstow or for China Lake. The fact that Mr. Teale was not selected, even though his score on the Everett Evaluation (31) was higher that Mr. Tusing's (28) who was selected at Barstow and higher than Mr. Tozel's (27) who was selected at China Lake, is not sufficient, accepting Mr. Teale's protected activity, including that for which he was given a reprimand which reprimand I have found violated § 16(a)(1) of the Statute, to establish a prima facie case of discrimination for the reasons: (a) the same documents, i.e., G.C. Exhs. 3 and 18, show that employees at Barstow were selected for the Barstow positions and that employees at China Lake were selected for the China Lake positions.

Of course, selections based on a "homer" preference is not a violation of § 16(a)(2) of the Statute; (b) General Counsel does not assert that the selection of Tusing and Tozel was discriminatory because their scores were lower than Mr. Teale's score. Inasmuch as General Counsel did not establish a prima facie case, Respondent had no obligation to call the selecting official or officials.

There was no evidence presented that permits the evaluation of selections made at any other location for which Mr. Teale applied. I have considered General Counsel's assertions and find then unpersuasive. Most have already been addressed. For reasons fully set forth above, I disagree with General Counsel's position on the disproportionate numbers selected for RIF (General Counsel's Brief, p. 33). Respondent adopted Contractor Quality Control to cope with the mandated reduction in staff. With respect to "rehiring pattern," statistics have little meaning.27/ With 109 Construction Representatives and one GS-9 Engineering Technician vying for just 33 CMT positions, 70 per cent could not be accommodated as CMTs. Accordingly, I have examined the positions for which Mr. Teale bid and the selections made and find no evidence that Mr. Teale's non-selection was because of his protected activity.

2. For a GS-9 position

Mr. Teale also bid for the GS-9 position at San Francisco and Concord. Presumably, one GS-9 CMT (Engineering Technician) position was filled at Concord but no evidence was introduced concerning the number of persons, or their identity, who bid, or who was selected.

The only evidence concerning the GS-9 vacancy at San Francisco was the Position Vacancy Application sent to Mr. Smith (G.C. Exh. 8) which shows that the following were selected: Robert Ebert, Donald Wolfe, Stuart Eldridge, Allan Smith and Andrew Uehisa. The only selectees who

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27/ For example: With 13 officials and stewards in a unit of 277, the number expected in 33 CMT slots would be 1.548. Actually, there were two (Hodson and Walker, Res. Exh. 32). Or, with a 70 per cent loss of positions, of the 12 officers and stewards (Cone left before the RIF and MacDonald was not part of the bargaining unit), 3.6 might have expected to be retained. Actually, there were three: Hodson, Romine and Walker (Res. Exh. 32).

appear on a Promotion Board Evaluation are: Stuart N. Eldridge who received a score of 36 on the Everett Evaluation (Res. Exh. 41) and Andrew K. Uehisa who received a score of 24 on the same Evaluation (Res. Exh. 41). Mr. Eldridge, like Mr. Teale, had been employed at Silverdale while Messrs. Ebert, Wolfe, Smith and Uehisa had been employed at Oakland. Except for Mr. Eldridge, whose score of 36 was higher than Mr. Teale's score of 31, every other selectee for San Francisco had been located at San Francisco (Oakland) (G.C. Exh. 18). Under the circumstances, the mere fact that Mr. Uehisa's score of 24 was lower than Mr. Teale's score is not sufficient to make a prima facie case of discrimination since the same documents (G.C. Exhs. 8 and 18) show that every selectee except Mr. Eldridge had been employed at San Francisco (Oakland).

Having found that Respondent violated § 16(a)(1) of the Statute by its reprimand of Mr. Teale it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 18(a)(7) of the Statute, 5 U.S.C. § 7118(a)(7), and § 2423.29 of the Regulations, 5 C.F.R. § 2423.29, it is hereby ordered that Department of the Navy, Naval Facilities Engineering Command, Western Division, San Bruno, California (hereinafter referred to as "Respondent"), shall:

1. Cease and desist from:

(a) Interfering with, restraining or coercing Mr. John Teale, or any other employee, in the exercise of rights guaranteed by Section 7102 of the Statute, including the right, freely and without fear of penalty or reprisal, to act for a labor organization and in that capacity to present the views of the labor organization and, further, in the exercise of rights guaranteed by Section 7116(e) of the Statute, including the expression of any personal view, argument or opinion.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights guaranteed 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) Remove from the Official Personnel Folder of Mr. John Teale the Letter of Reprimand dated November 3, 1989, and expunge from all records any reference to said Letter of Reprimand.

(b) Post at each ROICC location in the Western Division 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 Commanding Officer of Respondent and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous 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 5 C.F.R. § 2423.30, notify the Regional Director, Federal Labor Relations Authority, Region IX, 901 Market Street, Suite 220, San Francisco, California 94103, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that all other allegations of the Complaint be, and the same and hereby, dismissed.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: November 14, 1990
Washington, D.C.

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 HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain or coerce Mr. John Teale, or any other employee, in the exercise of rights guaranteed by Section 7102 of the Statute, including the right, freely and without fear of penalty or reprisal, to act for a labor organization and in that capacity to present the views of the labor organization and, further, in the exercise of rights guaranteed by Section 7116(e) of the Statute, including the expression of any personal view, argument or opinion.

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

WE WILL forthwith remove from the Official Personnel folder of Mr. John Teale the Letter of Reprimand dated November 3, 1989, and WE WILL expunge from all records any reference to said Letter of Reprimand.

_____

(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 any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region IX, whose address is: 901 Market Street, Suite 220, San Francisco, CA 94103, and whose telephone number is: (415) 744-4000.