

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

. . . . .  
DEPARTMENT OF AGRICULTURE .  
U.S. FOREST SERVICE, .  
FRENCHBURG JOB CORPS .  
MARIBA, KENTUCKY .

Respondent .

and .

Case No. 4-CA-10146

NATIONAL FEDERATION OF .  
FEDERAL EMPLOYEES, LOCAL 466 .

Charging Party .

. . . . .  
Heyward Washington, Esq. and  
Daryle A. Parks, Esq.  
For the Respondent

Sherrod G. Patterson, Esq.  
For the General Counsel

Larry King, President and  
Joyce Roach, Vice President  
For the Charging Party

Before: JOHN H. FENTON  
Administrative Law Judge

DECISION

Statement of the Case

At issue here is whether Respondent lowered the performance appraisal of Union Vice President Joyce Roach from "Superior" to "Fully Successful" because of her office and/or her use of official time.

Respondent runs a job training center for young adults in Mariba, Kentucky, within its Daniel Boone National Forest. Some 30 to 50 of the approximately 240 bargaining unit employees in the Forest are assigned to the Center where, at material times, they worked for its Director,

John Henry Young, Jr. Ms. Emma Caswell was his Administrative Officer until September of 1990. A Support Services Supervisor worked directly under Caswell and over Roach, who has functioned as a GS-5 Purchasing Agent for the Center for 11 or 12 years. From sometime in 1987 until January of 1990 that supervisor was Deana Lesch, who was transferred elsewhere in the Forest. Roach then worked under the immediate supervision of second-line supervisor Caswell until March of 1990, when GS-5 Personnel Clerk Linda Henry was promoted to Support Services Supervisor.

Roach received, for the first and only time in her career, a "Superior" performance rating from Lesch for the period running from October 1, 1988 through September 30, 1989. Roach was at that time the Local's steward for the Center. It is not known when she assumed such duties, but it appears that she took over such position from Deana Lesch, presumably when Lesch became a supervisor. Lesch did not testify. It further appears that Lesch and Roach enjoyed a very close personal relationship. Roach named one of her children after Lesch.

Union membership and activity seem to have been on the rise during this period. Roach said she was not an active steward until just before she was elected vice-president of the Local in January of 1990. Not only did she then occupy a higher position, but her representational responsibilities embraced the entire Forest-wide segment of the national consolidated bargaining unit. Perhaps ten times as many employees worked in the Forest as in the Center. As noted, supervisor Lesch left the Center in January, the fourth month of her fiscal year '91 supervision of Roach. She did not leave an interim assessment of Roach's performance, although the regulations required one, and she was not contacted, though she worked elsewhere in the Forest, for her evaluation of Roach during the first quarter and more of the appraisal year here at issue.

Emma Caswell, Lesch's supervisor at the Center, took over supervision of Lesch's former subordinates from January until a new Support Services Supervisor was appointed on March 25, 1990. GS-5 personnel clerk Linda Henry was selected for that position, winning out over, among others, Roach.<sup>1/</sup> It appears clear that Roach continued to deal

---

<sup>1/</sup> Roach applied for a detail to the vacated personnel clerk position in the apparent belief it carried more weight than did her own position for promotion purposes. On April 10 she grieved the refusal to provide her such a detail.

directly with Caswell concerning any problems she encountered as a purchasing agent. She perceived Henry, who apparently had no purchasing experience, as one who was not knowledgeable about procurement matters.

Caswell did conduct some sort of six month progress review with Roach before turning her over to Henry's supervision. At Roach's request, she deleted the former's "tearsheet" responsibilities, which had to do with vehicle records, and consumed several days a month. This was done, in part, according to Caswell, in order to afford Roach more time for procurement activity. There is no indication that Caswell found any substantial fault with Roach's work, although she did discuss with Roach the fact that Roach was getting behind in her filing.

In the meantime, Union activity at the Center had blossomed. Roach asserted, very imprecisely, that her use of official time increased from 2% of her time in the '88-'89 appraisal year to 28% of her time in the 89-90 year.<sup>2/</sup> The number of grievances (or ULP charges) grew from five to about 30, most of which were apparently filed against Center management. Some involved denials of official time, which Henry admits having denied a few times, because of work pressure.

General Counsel seeks to show opposition to the Union through an incident involving President Larry King, statements attributed to Caswell and Henry, several denials of official time requests, and the fact that Respondent entered several settlements.<sup>3/</sup> The latter, of course, may not be

---

<sup>2/</sup> It was otherwise put as a use of from 20 to 50 hours in the first period to "500 to 600, about 580, something like that" in the latter period. While she forgot her records, and the resulting math is troublesome, it is clear that representational activity increased greatly, although the pattern or distribution of that use over time is unknown.

<sup>3/</sup> The collective bargaining agreement provides for the grant of "reasonable amounts" of official time, for the representative to inform the supervisor of the approximate amount of time needed, and for delay in release only "due to work-related reasons pertaining to mandatory short-term coverage and/or the critical mission of the functional area". I cannot infer hostility to use of official time based simply on several instances of denials or reductions of time requested.

used, and were not introduced, to show that violations occurred. The incident involving King occurred around Thanksgiving of 1989 and involved the Center Director's instructions to Roach that she detain King, during a representational visit to the Center, until Director Young was able to get law enforcement officers to arrest him. Roach warned King, who left, and, he testified, saw officers on their way to the Center as he was driving away. No more is known about the incident. It certainly provides no basis for a conclusion that Young wished thereby to dissuade King from engaging in Union or representational activity.

The statements are a more difficult matter. It is worth noting the precise language of the pleadings both for purposes of considering any statements and for divining the nature of the alleged 8(a)(2) violation. The Complaint alleged an unfair labor practice as follows:

11. Roach is Vice President of Local 466.
12. During the rating period from January 1989 through September 1990, Respondent, by Henry, stated, in essence, to Roach that she was using a lot of official time and it had to affect her performance.
13. On October 15, 1990, Roach received her annual performance rating. The rating was lower than the prior year despite Roach's having accomplished basically the same amount of work.
14. The Respondent, by Henry, lowered Roach's overall rating because Roach engaged in the activities described in paragraphs 11 and 12.
15. By the conduct described in paragraph 13, the Respondent committed an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1) and (2). (Emphasis mine)

It seems to me that the Complaint alleges a violation of subsection (2) and a derivative violation of (1). This reading is fortified by the absence of any claim that a threat was made in Counsel for the General Counsel's opening statement, and by the failure of Respondent's representatives to cover that matter in their examination of Henry. Roach testified that Henry in August or September, said "something to the effect that I was using an awful lot of official time

and it was affecting my timeliness on getting procurement out and that kind of thing." Roach said she received it "as a threat to my performance". On cross-examination Henry denied ever saying that Roach's use of official time was affecting her performance. Roach otherwise (and somewhat conflictingly) testified that Henry made no comments about her work during the appraisal year. When asked whether Henry had ever commented about the time it took Roach to get things purchased, Roach said she had not and then added "(t)he only time we discussed it, they had asked me if I got behind to come in and let them know. . . . Ms. Caswell and Ms. Henry said . . . if you get behind, let us know, we will help out." However, Roach did attribute to Caswell three or four statements to the affect that Roach was spending an awful lot of time on official time and it was affecting her procurement. While such conduct was not alleged in the original or amended Complaint, Counsel for the General Counsel at the close of the hearing moved to amend the Complaint to embrace the statements made by Caswell notwithstanding that such evidence was elicited from the very first witness. Respondent objected on the ground it was not fair to add things after you have had the hearing. As was the case with Henry, Respondent did not ask Caswell whether she had made to Roach the kind of statements the Complaint attributed to Henry.

In answer to the undersigned's question whether she was concerned about Roach's ability, in the face of increased use of official time, to carry out her normal duties without additional assistance, Caswell said that she was concerned and on two or three occasions asked whether there was anything she could do to help. She said that Roach acknowledged the need for help, and that she provided assistance in both filing and typing. Caswell also testified that on several occasions she, concerned with Roach's apparent stress from doing both union and government "work", asked whether Roach needed help, and that she replied she was okay, that she would work it out. She also testified that Roach hesitated about accepting filing assistance, on the ground it might do more harm than good, although it enabled her to catch up with the filing. Caswell on cross acknowledged that she twice asked Roach how many cases she had and how much time they were going to take, and said that Roach replied that she did not know. She denied that she had ever stated that Roach's "official time usage would affect her performance". The strength of the denial suggests that the statement implied an impact on the performance rating, for clearly any discussion about the need for help necessarily implied that official time was having a negative impact on

performance, as such, absent a finding that Roach's normal day was quite enough to handle both her official duties and her representational work.<sup>4/</sup> In late June and early July Roach encountered serious problems in procurement. Budget funds were lost because of the failure to obligate them by processing the requisitions before expiration of the Program Year on June 30. According to Caswell and Henry, a number of program managers called to complain about the loss of funds. As a result, on July 6, Caswell sent Roach a memorandum stating that procurement activity had been questioned, that Caswell and others had prioritized the 31 pending requisitions, and that Roach was to expedite procurement actions with typing assistance if needed. Under the new system requisitions would no longer go directly to Roach, but were to go to Henry or Caswell where they would be logged in and assigned one of three priorities, each with a different turn-around time. After that things improved. Roach acknowledged she was having difficulty with her requisitions, though she blamed such matters as mandatory attendance at the Center picnic for interfering with her

---

<sup>4/</sup> Roach, Henry and Caswell all dealt with the matter of the effect of official time on "performance" as if the latter word encompassed the word "rating", as does Respondent's brief. Thus Roach found remarks about affect on rating as intimidating, and both Henry and Caswell denied such remarks as if accused of having thereby threatened to lower her rating. Yet clearly, from the testimony of all three, there were discussions involving offers of assistance, which would make sense only in the context of Roach's involvement in representational duties impacting on her capacity to keep up with her job. Her own computations indicate, for what it may be worth as a measure, that her work dropped off 17% from the prior year. At the same time, assuming as we must that her use of official time increased by at least that much, it follows that she had the same or less time within which to discharge her duties than she did the year before. Some accommodation was therefore necessary if that work was to be done. How one precisely measures the degree of accommodation needed in the circumstances, and how one can have open and useful discussions without a necessary observation about the impact of official time on job performance being found to be unlawfully threatening is, of course, the rub. And it is complicated by the use of arithmetic comparisons and computations by one clearly not skilled in such matters. See her testimony that an increase in official time usage from 2% to 28% of her duty time constituted a 26% increase.

effort. While it is claimed that she had to accomplish more work per hour left after use of official time, there is no evidence that Roach ever affirmatively sought assistance, and there is, in Caswell's testimony, some evidence that she resisted proffered filing assistance as likely to be counterproductive.

In August or early September Henry pencilled in a rough draft of her evaluation of Roach. She wrote, as to critical element no. 1 (Small Purchasing), that co-workers in the Supervisor's office indicated a constant need to give information to Roach regarding purchasing; that she used that office as a reference rather than researching; and that the Center staff frequently complained they were not getting items as quickly as they needed them, even when they were priority. She further wrote that Roach's frequent answer was that she knew she was behind but she had a lot to do. In conclusion, Henry noted that Roach did get the job done and suggested a successful rating. Critical item no. 2 was Imprest Fund Cashier. Henry noted that Roach "never" had adequate money on hand - "always out" and "had no cash" for routine business. She nevertheless suggested a fully successful (the alternative being "does not meet"), and on cross-examination conceded her strong language was hyperbole. Critical element no. 3 - Purchases other than Purchase Orders - was also rated a successful performance, although it was noted that Roach sometimes took a week to obtain signatures and did not always get them out on a weekly basis. Nevertheless it was noted that the work was timely enough to show effort. Item no. 4 - Order and Payment Follow-up was one, she said, of very little activity, with nothing indicating outstanding work and nothing indicating Roach was not performing. She was rated successful. Procurement Reports and Files was the final critical element. Here Henry's remarks were all favorable and the rating was "exceeds". Thus Roach received one "exceeds" and four "fully successfuls" as opposed to three of the former and two of the latter the year before.

Caswell and Henry conferred about and agreed upon the rating. In September Caswell was transferred so the actual, finalized rating was taken to Caswell's superior, Center Director Young, for his signature as the reviewing official. Before he signed however, Henry conferred with Roach about her assessment of the latter's performance on October 1. Henry testified that she showed the appraisal to Roach and they talked about the job elements and the ratings given - why Henry found her to be successful or, in the one instance,

to exceed that standard<sup>5/</sup>. Roach said that she did not agree with the rating, contending that she had accomplished the same amount of work in less time. Henry responded that she did not compare the amount of work for the two years, that her rating was based on "timeliness, accuracy, deadlines". Roach refused to sign the rating and the two agreed to have another discussion in a week or ten days. When they met again Henry reaffirmed her original decision, calling it a fair and accurate assessment. According to Roach, she brought up the matter of official time, saying to Henry "as I told you before, you realize that the time I spent on official time should not be figured in my performance. You should rate me only on the time that I spent in procurement or purchasing." Again according to Roach, Henry replied that she "realized that".

Roach attached a memo dated October 15 to her appraisal, setting forth her reasons for refusing to sign. Essentially it argues that she did the same job as the year before in 2/3 to 1/2 the time, that she was rated by someone with "absolutely no knowledge of purchasing . . . (and) . . . no idea as to the process which must be used to purchase items" and that she must therefore assume that the lower rating was the product of some personal dislike or discrimination based on union involvement. She concluded it was the latter because of comments that "I was spending so much time on union work that it might affect my performance".

That is the story, but it omits what may be a very important factor: the testimony of Henry and Caswell under cross-examination concerning the accommodation, if any, they made to Roach's extensive use of official time. And any examination of that issue should begin with the question whether it was embraced by the Complaint and, if not, whether it was in fact at some point understood to be at issue and "fully litigated".

The Complaint alleged that Roach's performance rating was lowered because she engaged in the activities described in paragraphs 11 and 12, i.e. that she was the Local's Vice President and that her supervisor "stated, in essence, . . .

---

<sup>5/</sup> According to Roach the only real explanation offered was that she had a different supervisor this year. I sense both accounts are largely true, i.e. that explanations were offered and not accepted and that the bottom line explanation was that the two supervisors saw things differently in the different years.

that she was using a lot of official time and it had to affect her performance." Clearly, such language contends that Roach was downgraded in retaliation for holding union office and for using a lot of official time. Perhaps it is sufficiently ambiguous, in its reference to the effect upon performance, to sustain a claim that Respondent, having observed a negative effect, was charged affirmatively with a duty to accommodate to it. To the extent any such ambiguity may have been resolved by the prosecutor's opening statement, that statement spoke to retaliation for protected activity, and application of the Letterkenny standard to such motivation. And, as was the case with the claimed unlawful statements, Respondent's representatives did not join issue and defend against any claimed violation based on failure of accommodation. They neither objected nor did they "fully litigate" the matter. It would appear that they did not appreciate what was at issue until after the fact.<sup>6/</sup> Nevertheless, having failed to object, they then attempted to join issue on brief, arguing that Respondent in fact attempted to accommodate to Roach's predicament by offering a number of forms of assistance.

More than a private litigant, government has a special obligation to litigate in such a way as to see that justice is done, not simply to win. When it accuses persons or institutions of violating public laws, it should be clear about its claims of violations so that defendants know what it is they are to defend against. As noted, neither the

---

<sup>6/</sup> Nor have Respondent's representatives, who are not lawyers, sought to restrict this case, on the grounds adverted to, to the question of unlawful retaliation. I nevertheless think it appropriate to deal with the issue precisely because of the absence of counsel, the questionable fairness of litigation by surprise or stealth, and the inadequacy of records developed in the absence of mutual understanding concerning what is at issue. I should note that it is not even clear to me that General Counsel is asserting that there was a failure of accommodation which constitutes a discrete violation, or is, rather, simply attempting to show that Respondent's purpose of retaliation was accomplished by setting up Roach for a failure of superior performance by refusing to recognize the scope of the demands on her time for representational duties, thus shortchanging her in the allocation of time to do her job. As I see it, a violation based solely on failure of accommodation requires no finding of animus or hostility, whereas it inheres in the very notion of retaliation.

pleadings, the prosecutor's opening statement, nor any statement or amendment thereafter voluntarily offered served to put Respondent on notice that it was charged with a failure to accommodate. And lastly, good records will seldom result from litigating while blindfolded, with the ultimate consequence that the record mirrors the reality as does a curved mirror and the law is applied to what is in fact an appearance which distorts the reality. For these reasons I would recommend that the Authority not consider the issue of accommodation, on the ground it is not ready or ripe for the careful adjudication it requires.

As it is hardly clear that the Authority will accept the procedural recommendation, it remains necessary to deal with the testimony elicited by Counsel for the General Counsel respecting any accommodation made or attempted by Roach's superiors to the demands of her representational duties, as well as the contention that a failure of accommodation is evidence of retaliatory purpose.<sup>7/</sup> Counsel for the General Counsel relies on the following colloquy involving Caswell to establish that Respondent made no accommodation:

Q. - Did you take into account that almost 30% of her compensated hours were spent on Union business?

A. - No, I did not. We rated her on procurement activities only.

---

<sup>7/</sup> Of course, an agency has every right to inquire about, or refer to, official time usage and its impact on job performance, provided its purpose is to seek an accommodation between the needs of the job and the exercise of representational rights. Section 7131 recognizes that the amount of such time is a matter of agreement between an agency and a union, depending upon what is "reasonable, necessary and in the public interest." An official such as Roach is not entitled simply to take what she thinks she needs, to be unresponsive about the time she requires, and simultaneously to take any statement about the impact of official time usage on her work as threatening. The Authority has held that even reassignment of a busy union representative will in some circumstances be privileged. See Norfolk Naval Shipyard, 15 FLRA 867; Scott Air Force Base, 20 FLRA 761, 765. Thus, a remark about official time usage is not easily equated with one about other forms of "pure" union activity that do not take place on the clock.

Q. - [Did you take into account] the fact that a lot of her time was spent on her Union work . . . when you rated her as far as her quality and quantity of work went?

A. No.

This seemingly clear statement was to become more confused as the examination proceeded. Finally she was asked:

Q. - So, yes or no, did you rate Ms. Roach on the basis as if she was not spending 30 percent of her time on her union business?

A. - Frankly, I'll have to say no. Because when I rated her, I rated her on those elements, standards that are there. I didn't rate her on union time.

Q. - I want to make sure you understand my question. Did you rate her as if she was spending 40 hours a week, eight hours a day, taking into consideration leave and being sick, on her purchasing agent's duties?

A. When you say it that way, I'd have to say yes. It was considered.

Q. - What was considered, her union?

A. - Her union.

Q. - What?

A. Her union activity was considered but no, it did not have any bearing on the rating that was given her.

### Conclusions

#### The Statements

The standard for determining whether a statement violates the law is an objective one - would a reasonable employee be coerced in all the circumstances. No context of other violations is required, nor need animus or hostility toward the union be established. Ogden Air Logistics Center, Hill Air Force Base, Utah, 35 FLRA 891, 895.

To recap briefly, Roach testified that in September or October Henry said something to the affect that she was "using an awful lot of official time and it was affecting my timeliness on getting procurement out. . . ." She also testified that Caswell, on three or four undated occasions, said that her use of an "awful lot of official time was affecting my job as procurement agent". Both accused women, when asked whether they had said that Roach's use of so much official time had to affect her performance, stoutly denied it, as if it were taken as a threat to lower the performance rating because of declining performance tied to protected activities. All three struck me as being truthful in recounting their recollections. Oddly, Roach on direct examination as to whether Henry had ever commented about the time it took her to get things purchased, replied in the negative, contradicting her earlier statement. She elaborated by saying that the only time they discussed it, Henry and Caswell asked her to let them know if she got behind and they would help out. It is uncontradicted that typing and filing assistance were provided to Roach, and that on several occasions Roach was unreceptive to suggestions of help. On the other hand, there is the further contradiction, also undenied testimony, that on some occasion when Roach indicated she was behind, she was told to do the best she could. Such a record permits no easy conclusions. Yet it is obvious, as Caswell claimed, that she sought to help. It is worth noting here that official time was normally cleared with Henry, and that Roach often bypassed her for guidance on the ground she knew nothing about purchasing problems. Thus the person providing much of the real supervision would not necessarily know about conflicting representational duties. Caswell testified that she was not aware that Roach was on official time as much as she claimed, and, further, that Roach was unresponsive when asked about the duration of such work, despite the obligation to provide an estimate.

Thus the record indisputably shows that Roach was asked to inform her supervisors if she got behind, and that they in fact made assistance available to her. It indicates also that she was to work rather independently, seeking guidance only concerning new or difficult assignments and further, that on some occasions at least, she was unenthusiastic about acknowledging the need for help as well as accepting it, and about disclosing how much official time she would require. Observations about the impact of official time usage on one's job performance, in such circumstances, ought not be taken by a reasonable person as threatening. They are in fact a necessary ingredient of accommodation. No

appropriate accommodation can be understood, never mind reached, in the absence of full and frank discussion of the conflict between management's right (obligation) to see that the governments work is effectively done, and the Union's right to discharge its representational duties. The conclusion that an inference of coercion ought not be drawn by a reasonable person from such remarks is fortified by the absence of any evidence that Respondent was hostile to Roach because she held Union office or because it believed she spent excessive time on representational matters. It follows that the General Counsel has not established, by a preponderance of the evidence, that the statements at issue, if ever made in such form, were violative of Section 7116(a)(1). I therefore recommend dismissal of that allegation and, in any event dismissal of that part of it attributed to Caswell on the ground it was not alleged in the Complaint and not promptly amended in at the hearing, but rather at the close of it. Cf. Scott AFB, 20 FLRA 761, and VAMC, Leavenworth, 31 FLRA 1161. Ogden Air Logistics Center, Hill AFB, 35 FLRA 891, relied upon by the General Counsel, is highly similar in that it involved a statement comparable to those here at issue, and a reduction in the performance appraisal of a union officer whose use of official time had grown from 15% of his duty time when rated excellent to 45% when rated fully successful. In my judgment that case is inapposite because the statement was uttered during discussion of the appraisal, too late ever to fit the mold of an effort to work out the conflict between obligations owed the union and obligations owed the agency.

#### The Allegedly Retaliatory Performance Appraisal

As noted above, there is here no persuasive evidence of Union animus. The record is incontestably devoid of any unambiguous expression of hostility to Roach based on Union office or activity. Worse yet for the prosecutor's thesis, we have solid evidence that at least some assistance was made available to Roach, though there is no way to measure its adequacy in terms of her needs if a fair accommodation was to be found. In such a context a finding that the lowered rating was the product of discriminatory purpose or intent would necessarily have to rest on a conclusion that the rating was so devoid of legitimate justification as to be otherwise inexplicable or indefensible.

We start with a backdrop: Roach received only one superior rating in 11 or 12 years and it was arguably suspect as tainted by friendship. At a minimum the challenged appraisal did not depart from a consistent

superior level of performance. In addition, one cannot ignore the fact that her status as a steward was no obstacle to elevation of her appraisal to superior.

From this inauspicious start we advance to a year in which she encountered increasing difficulty in getting her filing and typing done in timely fashion as well as her other procurement activity. In consequence funds were lost because of failure to obligate them before the Program Year ended. And her own testimony shows that she was offered assistance to help her meet her job goals. In such circumstances I cannot conclude that her appraisal was so transparently off base as to warrant the conclusion that Roach's protected activity was a "motivating factor" in the decision that her performance was not so good as to call for a superior performance rating. Accordingly I find that General Counsel has not made out a prima facie case under Letterkenny (35 FLRA 113).

#### The Alleged Failure to Accommodate

As has been indicated, I am not entirely sure that a discrete violation of this kind is before me, and I have recommended that it should not be met on its merits because it was neither clearly pleaded nor fully litigated. Nevertheless, evidence concerning accommodation was elicited, in part for the obvious reason that it is relevant to the question whether the supervisors made remarks that were coercive. And it is used in argument, perhaps as an element of the allegation of retaliation in the appraisal process. Being unsure whether General Counsel would press forward with an argument that the appraisal was tainted by an unlawful failure to make an appropriate accommodation to Roach's right to represent others, caution dictates that I deal with it.

For reasons discussed in connection with the allegedly violative statements and retaliatory appraisal, I find that the General Counsel has not made out a prima facie case. Roach was offered assistance, as she testified. Whether it was adequate we do not know, but it has not been shown that she was given less help than she needed and then was judged as if she had all that an appropriate accommodation would require. On the contrary, according to Roach, Henry told her that she realized that she was to rate Roach only on the time spent in procurement and purchasing and that the time spent on official time "should not be figured in in (her) performance." And Caswell testified that official time was considered in the sense that it cut into duty time, but that

such "union activity" had no bearing upon the rating. Her colloquy with the prosecutor was inherently ambiguous, because questions about the impact of "Union business" on her rating almost unavoidably implied discrimination, i.e. an answer denying that Union business was taken into account in arriving at an appraisal would constitute an admission that the required accommodation had not been made. I take what she had to say at transcript pages quoted as indicating that the time spent on representational duties was considered in the sense that allowance was made for it, but that such activity, as such, was not put to illegitimate use. To put it more precisely, I conclude that such language does not satisfy the burden placed on General Counsel.

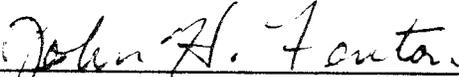
It is required to establish, by a preponderance of the evidence, that Respondent's rating of Roach ignored, or failed to factor in, her privileged downtime, thereby penalizing her for exercising her statutory rights.

Accordingly, I recommend that the Authority enter the following:

ORDER

It is hereby ordered that the Complaint in Case No. 4-CA-10146 be, and hereby is, dismissed in its entirety.

Issued, Washington, DC, June 26, 1992

  
\_\_\_\_\_  
JOHN H. FENTON  
Chief Administrative Law Judge