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

RANDOLPH AIR FORCE BASE SAN ANTONIO, TEXAS Respondent	
and	Case No. 6-CA-10306
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1840, AFL-CIO Charging Party	

Major Robert L. Woods
For the Respondent

Joseph T. Merli, Esquire
Kerry K. Simpson, Esquire
For the General Counsel

Mr. Gilbert Berryhill
For Charging Party

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.[1/], and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1

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)(1) will be referred to, simply, as "§ 16(a)(1)".

et seq., concerns threatened disciplinary action against the Union's Vice President because of a complaint by him to the Commanding Officer of Respondent concerning possible nepotism. For reasons fully set forth hereinafter, I find that Respondent violated § 16(a)(1) of the Statute by threatening disciplinary action against a Union officer for protected activity.

This case was initiated by a charge filed on January 1, 1991, alleging violations of §§ 16(a)(1) and (4) of the Statute (G.C. Exh. 1(a)). The Complaint and Notice of Hearing issued on August 30, 1991 (G.C. Exh. 1(c)); alleged violation of § 16(a)(1) only; and set the hearing for October 1, 1991. By Order dated September 18, 1991, the date of the hearing was rescheduled, on Motion of Respondent, to which the other parties did not object, for good cause shown, for December 10, 1991, pursuant to which a hearing was duly held on December 10, 1991, in San Antonio, Texas, 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 each party waived. At the conclusion of the hearing, January 10, 1992, was fixed as the date for mailing post-hearing briefs, which time was subsequently extended, on motion of Respondent, to which no opposition was filed, for good cause shown, by Order dated January 6, 1992, to February 10, 1992. Respondent and General Counsel each timely mailed a brief, received on, or before, February 11, 1992, which have been carefully considered. 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 American Federation of Government Employees, Local 1840, AFL-CIO (herein also referred to as the "Union") is the exclusive representative of certain of Respondent's employees, including employees who work at the golf course (Tr. 16).

2/ On my motion, I hereby correct an obvious error in the transcript. On page 1, page 6 and thereafter throughout the transcript where ever it appears, the name: "Joseph T. Marley" or Mr. "Marley" is hereby corrected to read "JOSEPH T. MERLI" or Mr. "MERLI".

2. At a meeting during the week of November 26, 1990, scheduled to discuss unfair labor practice charges and the removal of a golf course employee, at which the Union was represented by Mr. Gilbert Berryhill, President, and by Mr. Joe R. Gutierrez, Vice President, and Respondent was represented by Mr. Roger Cullen, Human Resources Officer for NAF employees, and by Mr. Herbert O. Kessler, Labor Relations Specialist, the Union raised a possible nepotism problem concerning Mr. Tony Osborn, Assistant Golf Course Superintendent, and requested an investigation (Tr. 19, 20, 29, 34, 50, 52-53, 69, 71).

3. There is sharp disagreement as to whether, as Mr. Berryhill asserted, the subject of nepotism had been scheduled for this meeting, i.e., that it was to be a specific agenda matter (Tr. 29), or whether, as Messrs. Cullen and Kessler asserted, the issue had not been mentioned until it was interjected at the meeting as a defense to the proposed removal as an assertion that Mr. Osborn, who was proposing the removal of the golf course employee, was "ill equipped to perform supervisory duties . . . because he had help getting his job." (Tr. 51, 52; 69-70); however, since it is unnecessary to resolve this conflict, I have not done so. The significant fact, which is conceded by all parties, is that the question of nepotism was brought up and was discussed at the meeting. Mr. Berryhill testified that when Mr. Gutierrez brought up his concerns about Mr. Osborn being promoted several times in just a few years and his mother, Mrs. Gulsby, being employed in the Human Resources Office, "At that time, Mr. Cullen just acted like it was a big joke. He said that yea (sic) she worked there, but she was just a typist, she had nothing to do with promotion or anything else. And, it was just blown off. Like, you know, so what." (Tr. 20). Mr. Cullen conceded that, "Well, I, I may have chuckled. I may have thought it was funny in terms of it was so ridiculous, so absurd that somebody would allege that there was nepotism in connection with Tony's appointment or his subsequent promotions. It just seemed ridiculous to me." (Tr. 52).

From the record, I conclude that Respondent treated the Union's complaint of nepotism lightly at the meeting and, that, while it is clear that Mr. Cullen did tell the Union, as Mr. Berryhill admitted, that ". . . this [Osborn's promotion several times in the past five years and that his mother was the personnel assistant in the Human Resources Offices] was an allegation that had surfaced several years

before and had been investigated and it was determined that there was no basis for the charge of nepotism . . ." (Tr. 35), Respondent did not show the Union the report of the prior investigation. Rather, as Mr. Berryhill further testified,

> "Q . . . Did you ask to see a copy of this investigation?
>
> "A We asked, but we never saw one.3/
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> . . .
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> "A . . . All we were told was that these allegations were made several years before and investigated and nothing was found and that was it. They indicated they weren't going to investigate it again." (Tr. 35).

Mr. Cullen testified that Mr. Osborn had been hired as a custodial worker, NA-2, on September 25, 1984; that on November 9, 1984, he was appointed as an electro-motor equipment mechanic (working on golf carts), NA-6; and that he was appointed Golf Course Assistant Superintendent, UA-7, on May 13, 1990 [UA-7 being equivalent in pay to a GS-7] (Tr. 61, 63). It is obvious, and I so conclude, that an investigation some years before (Mr. Cullen stated that he had worked with Mrs. Gulsby since he had been the Human Resources Officer (Tr. 59); that she had worked for him for three years (Tr. 53); and that the IG investigation had occurred before his, Cullen's, arrival (Tr. 54)) could not have covered Mr. Osborn's 1990 promotion. Indeed, Mr. Cullen stated that he had never seen the report (Tr. 54) and from his testimony, " . . . according to what I had heard, there had been an IG investigation when Tony Osborn was assigned. . . ." (Tr. 54) (emphasis supplied), it is far from clear whether the investigation concerned only Mr. Osborn's initial employment (appointment) or whether it also explored his November 9, 1984, "promotion" to NA-6 (from NA-2). Mrs. Reba Gulsby's testimony further suggests that the IG investigation concerned only her son's initial employment. Thus, she testified,

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3/ I do not credit Mr. Cullen's testimony that the Union did not ask to see a copy of the investigation (Tr. 54); however, I do credit Mr. Cullen's testimony that he made an offer that the Union could review the records, ". . . to find out what kind of a job she (Mrs. Gulsby) does or where she is assigned . . ." (Tr. 53, 54).

"A. I never saw the report, but I was told that there was nothing wrong found . . . Nothing was found that I had got him hired into a job. That I had nothing to do with it." (Tr. 88)

4. Mr. Cullen quite credibly and forthrightly testified that when Mr. Gutierrez made the accusation of nepotism he responded,

> ". . . I know the person you are accusing of nepotism, she's worked for me for a period of three years. Our books are open to you if you care to find out what kind of a job she does or where she is assigned, you are free to do that. And they kind of dropped it there." (Tr. 52-53).

I have no doubt whatever that, as Mr. Cullen testified, he did not deny that Mrs. Gulsby was related to Mr. Osborn (Tr. 53); however, despite the facts that: (a) he believed, "It was common knowledge and . . . they knew it . . .". (Tr. 53); (b) the conceded reference by Mr. Berryhill to a prior investigation of Osborn's promotions and his mother's employment in the Human Resources Office (Tr. 35); and (c) the Union's obvious knowledge, as Mr. Cullen asserted, that Mrs. Gulsby was Mr. Osborn's mother, as shown by Mr. Berryhill's statement noted above (Tr. 35) as well as by Mr. Berryhill's testimony that Mr. Gutierrez stated to Mr. Cullen that Mrs. Gulsby was Mr. Osborn's mother (Tr. 20, 46) and by Mr. Berryhill's further testimony that the informants told the Union that Mrs. Gulsby was Mr. Osborn's mother (Tr. 45) and, from Mr. Cullen's testimony which I credit, it, nevertheless, is plain that he simply did not refer to their relationship.

5. Their Complaint having been rebuffed at the meeting with Messrs. Cullen and Kessler (Tr. 35), Mr. Gutierrez wrote a letter, dated November 30, 1990 (G.C. Exh. 2)[4/], to the Commanding Officer of Randolph AFB, then Col. Thomas O'Bierne, in which he stated his concerns about the possible nepotism problem concerning Mr. Osborn; stated that he had already brought this matter to the attention of Messrs. Cullen and Kessler; set forth the grounds alleged in support of the possible nepotism problem; and requested that the

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4/ The letter states: "FROM: Joe R. Gutierrez, Vice President, AFGE Local 1840, P.O. Box 305, Universal City, Texas 78148-1321." (G.C. Exh. 2).

Commanding Officer make an investigation, ". . . give you a chance to investigate this and correct this situation." (G.C. Exh. 2).

6. Mr. Berryhill testified that he and Mr. Gutierrez discussed writing the letter to the Commanding Officer; that Mr. Gutierrez said he would write it; and after it was written he, Berryhill, read it and approved it as factually correct (Tr. 36). Mr. Berryhill further testified that he had received the information on which the allegation of nepotism was based several weeks before the meeting with Messrs. Cullen and Kessler (Tr. 32) and that the Union made no effort to verify the information because, ". . . we felt that should by Civilian Personnel's job to do that, to investigate this thing." (Tr. 39). Although Mr. Berryhill stoutly maintained that the Union's information came from two reliable sources (G.C. Exh. 2; Tr. 26, 27, 38), one was the employee whose proposed removal was in issue (Tr. 38) and the other was the Chief Steward, Mr. Hicks (Tr. 47, 48), who has brought information to the Union many times and it has been reliable (Tr. 26), much of the information apparently was incorrect. For example, the letter asserted that Mr. Osborn received "4 promotions within the last 2 years." But, as Mr. Cullen stated without contradiction, he received a promotion on May 13, 1990, and the only prior promotion had been nearly six years earlier on November 9, 1984 (Tr. 61, 63); the letter asserts Mr. Osborn's promotion to "mechanic and plumber", whereas the record shows a single promotion, on November 9, 1984, to an electro-motor equipment mechanic; the letter stated that, "Mrs. Gulsby has been in charge of the merit promotion board for the last three years", but, as Mr. Cullen testified wholly without contradiction, there is not, and never has been, a "merit promotion board" (Tr. 57, 58, 59).

From the credited testimony[5/], Mr. Cullen did not deny that Mrs. Gulsby was Mr. Osborn's mother. Accordingly,

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5/ I do not credit the testimony of Mr. Berryhill, if he so testified, that Mr. Cullen denied any knowledge of kinship between Mrs. Gulsby and Mr. Osborn. First, his testimony in this regard is contradictory. Thus, his testimony, on re-direct examination, first was, when the subject was brought up of Mrs. Gulsby being the mother of Mr. Tony Osborn, "Well, he acted like he did know it and he thought it was quite funny that Mr. Gutierrez had made the statement that she was his blood mother." (Tr. 46). Then,
(Footnote continued on next page.)

Mr. Gutierrez' statements is his letter of November 30, 1990, to Col. O'Bierne (G.C. Exh. 2), that "Mr. cullen (sic) denied any knowledge of kinship between the parties involved"; that, ". . . my position as to Mr. Cullen lying to us on not knowing that Mrs. Gulsby was Mr. Osborn's blood relative. . . ."; and that, "If Mr. cullen (sic) hasn't found out they are related by now they have kept their little secret pretty good or he lied to us" (G.C. Exh. 2), were knowingly false. Other representations in the letter may also have been incorrect, such as the allegations about Mr. Cullen's bowling in view of Mr. Cullen's denial that he had bowled with anyone, "let alone these people", for 20 years (Tr. 59), etc., but the errors noted herein were not, unlike Mr. Gutierrez' statements regarding "kinship" which

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(Footnote continued from previous page.)
Mr. Berryhill continued, "He acted like he wasn't aware that she was the mother of anybody that worked at NAF or anywhere." (Tr. 46). Earlier, on cross-examination, Mr. Berryhill had testified, ". . . we told 'em that Mr. Osborn had been promoted several times in the last five years and that his mother was the personnel assistant in the Human Resources Office. . . . 'Q . . . Now you indicated that Mr. Cullen had told you . . . that this was an allegation that . . . had been investigated and it was determined that there was no basis for the charge of nepotism, is that correct? 'A. That's correct.'" (Tr. 35) And, on direct, Mr. Berryhill had testified, ". . . Mr. Gutierrez offered his concerns about a person at the golf course being promoted several times in just a few years and brought it to Mr. Cullen's attention that his mother worked in the Human Resource Office. . . . He said that yea (sic) she worked there, but . . . she had nothing to do with promotion. . . ." (Tr. 20). Second, I found Mr. Cullen to be an entirely credible witness and, as stated earlier, fully credit his testimony that he did not deny that Mrs. Gulsby was related to Mr. Osborn and find that he simply did not refer to their relationship for the reason, as he stated, "It was common knowledge and . . . they knew it. . . ." Third, Mr. Gutierrez, a prime actor in this dispute was not called as a witness and no explanation was given for his absence. Accordingly, I draw the adverse inference that had he testified he would have admitted that he knowingly made misrepresentations in his letter of November 30, 1990, to Col. O'Bierne, including his representation that Mr. Cullen had denied any knowledge of kinship between Mrs. Gulsby and Mr. Osborn and that he knowingly stated, which he knew to be false, that Mr. Cullen had lied about their relationship.

were knowingly false, shown to have been knowingly false when made, notwithstanding Mr. Cullen's refutation at the hearing.

The record shows that Mr. Osborn was hired on September 25, 1984, as a custodial worker, NA-2; that he was promoted on November 9, 1984, to NA-6, electro-motor equipment mechanic; and that on May 13, 1990, he was promoted to Golf Course Assistant Superintendent, UA-7 (Tr. 62, 63). The record also shows that his mother, Mrs. Gulsby, who began as a personnel clerk in the NAF Civilian Personnel Office (Tr. 86), was, during the period in queston, Personnel Assistant (UA-6) (Tr. 53, 86) until she left the Personnel Office in November, 1990 (Tr. 86).

7. Respondent's reply to the Union's November 30, 1990, letter to Col. O'Bierne was a memorandum, dated December 7, 1990, from Mr. Herbert O. Kessler, Labor Relations Officer (G.C. Exh. 3), which stated as follows:

> "1. I have been provided a copy of your 30 Nov 90 letter to Col O'Bierne[6/] in which you made numerous false statements, obviously with malicious intent, against Ms Reba Gulsby, Mr Roger Cullen, Mr Tony Osborn and Mr Edward Schieber. While your letter was submitted under the guise of bringing possible nepotism regulation violations to the Base Commander's attention in the interest of justice, it is very clear that your intent was to inflict damage on the careers of the employee mentioned.
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> "2. For your information, there was a complaint concerning possible nepotism regulation violations involving Ms Gulsby and Mr Osborn several years ago. It was thoroughly investigated and no evidence of wrongdoing was discovered.
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> "3. I am providing copies of your 30 Nov 90 letter to all of the employees named in it, management officials in your organization . . . so they can take whatever action is deemed appropriate. Clearly, you have placed yourself in a position in which you may be subject to disciplinary action for making false and unfounded statements with malicious intent. AFR 40-750, Discipline and

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6/ Apparently, Mr. Gutierrez misspelled the Colonel's name by failing to add a final "e".

Adverse Actions, recommends a penalty of reprimand to removal for the first offense of that nature.

"4. I now consider your complaint to Col O'Bierne a closed matter. . . . " (G.C. Exh. 3)

CONCLUSIONS

To state a claim for defamation, the statement, whether oral [slander] or written [libel], must be communicated to someone other than the person defamed. Pinkney v. District of Columbia, 439 F.2d 519, 527 (D.C. 1977); Ostrowe v. Lee, 256 N.Y. 36, 38, 175 N.E. 505 (1931). In this sense, the letter of November 30, 1990, to Col. O'Bierne may have constituted "publication"; but in presenting its concerns to the Commanding Officer, the Union utilized an established mechanism for the resolution of complaints functionally equivalent to a grievance procedure; at the hearing Mr. Kessler, Respondent's Labor Relations Specialist, conceded that the Union has right to submit its concerns to the Commanding Officer (Tr. 75)7/; and, as Respondent states, ". . . a union official, when acting in his official capacity must be given very broad latitude in speech and action. . ." (Respondent's Brief, p. 4), citing: Veterans Administration Regional Office, Denver, Colorado, 2 FLRA 668, 675-676 (1979); Internal Revenue Service, North Atlantic Service Center (Andover, Massachusetts), 7 FLRA 596 (1982).

Mr. Gutierrez in his letter of November 30, 1990, made it clear that he was writing in his capacity as Union Vice President; Respondent in its Brief does not assert to the contrary, but, rather, implicitly conceded that he acted in his official capacity; and I find that he acted in his official capacity in writing the letter of November 30, 1990. Indeed, Respondent does not question or deny that Mr. Gutierrez acted in his official capacity in writing the letter of November 30, 1990, but that,

"The content of Mr. Gutierrez' letter contained such erroneous statements which were published with knowledge of their falsity or with reckless disregard of whether they were true or false. Therefore, they lose their protection under the Statute. . . ." (Respondent's Brief, p. 5).

7/ Historically, in the military the three traditional avenues for the redress of complaints have been: to the Inspector General; to the Commanding Officer; or, sometimes facetiously, to the Chaplain.

At the outset, with respect to the Statute, I do not agree that Mr. Gutierrez "published" any statement by his letter of November 30. Rather, he was exercising a protected right under the Statute to bring to the attention of the Commanding Officer the Union's concern about possible nepotism, i.e., to present a grievance pursuant to an authorized mechanism.8/ In fact, the only "publication" or distribution of the letter, or of its content, outside the grievance procedure was by Respondent (G.C. Exh. 3).

The Authority has held that, ". . . flagrant misconduct by an employee, even though occurring during the course of protected activity, may justify disciplinary action by the employer." Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington, 2 FLRA 54, 55 (1979). In Veterans Administration Regional Office, Denver, Colorado, supra, Judge Chaitovitz, whose decision was adopted by the Authority, stated,

> ". . . A labor organization must be free to write and express itself in a grievance in terms which it feels, correctly or incorrectly, will most successfully accomplish its ends. To subject a union representative to discipline because he records a grievance in a way that displeases management, or

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8/ Filing a grievance is a protected right under the Statute, Department of Treasury, Internal Revenue Service, Louisville District, 20 FLRA 660 (1985); and § 3(a)(9) of the Statute defines "grievance" broadly, e.g.,

> "(9) 'grievance' means any complaint -
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> . . .
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> "(B) by any labor organization concerning any matter relating to the employment of any employee; or
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> "(C) by any employee, labor organization, or agency concerning -
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> . . .
>
> "(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." (5 U.S.C. § 7103(a)(9)).

because management believes the wording is incorrect or untruthful, would be to unreasonably limit and interfere with a labor organization's effectiveness . . . ." (2 FLRA at 674-675).

Judge Chaitovitz further stated,

". . . When acting officially in his capacity as an official of a labor organization, a union official must have very broad latitude in speech and action. However even then there are some actions or statements that would be so extreme as to be unprotected. . . ." (2 FLRA at 675-676).

See also: Internal Revenue Service, North Atlantic Service Center, 7 FLRA 596, 603-604 (1982) ("holiday turkey" leaflet protected), but cf., Maryland Drydock Co. v. NLRB, 183 F.2d 538 (4th Cir. 1950); Defense Logistics Agency, Defense Depot Tracy, Tracy, California, 16 FLRA 703, 712-713, 716 (expulsion of steward from a formal discussion for refusal to accept reasonable rules for conduct of the meeting); Veterans Administration, Washington, D.C. and Veterans Administration Medical Center, Cincinnati, Ohio, 26 FLRA 114 (1987), aff'd 878 F.2d 460 (D.C. Cir. 1989) (racial stereotyping in newsletter unprotected). Of course, the Supreme Court, in Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264 (1974) (hereinafter "Letter Carriers"), held that under Executive Order 11491, the substantive provisions of which were substantially like the provisions of the Statute,

". . . the same federal policies favoring uninhibited, robust, and wide-open debate in labor disputes are applicable . . ." (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. . . ." (id. at 275).

The same federal policy is applicable under the Statute, see, for example, Veterans Administration, Washington,

D.C. and Veterans Administration Medical Center, Cincinnati, Ohio, supra. However, the Court cautioned in Letter Carriers, supra, ". . . Linn [383 U.S. 657 (1966)] is still applicable here, and state libel remedies are pre-empted unless appellees can show that the publication was knowingly false or made with reckless disregard for the truth." (418 U.S. n.14, p. 281). The Court further explained,

> ". . . The Linn Court explicitly adopted the standards of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and the heart of the New York Times test is the requirement that recovery can be permitted only if the defamatory publication was made 'with knowledge that it was false or with reckless disregard of whether it was false or not.' . . . the Court also said that recovery would be permitted if the defamatory statements were shown to have been made with malice. But the Court was obviously using 'malice' in the special sense it was used in New York Times - as a shorthand expression of the 'knowledge of falsity or reckless disregard of the truth' standard. . . ." (id at 281).

Just as engagement in protected activity is shielded from actions for libel or slander, so too is protected activity shielded from disciplinary action by an agency and, as stated in United States Force Korea, Eighth United States Army, 17 FLRA 718, 728 (1985),

> "It is only those statements which are knowingly false and uttered with reckless abandon which lose the protection of the Statute."

Respondent asserts that, "The content of Mr. Gutierrez' letter contained such erroneous statements which were published with knowledge of their falsity or with reckless disregard of whether they were true or false. Therefore, they lose their protection under the Statute. . . ." (Respondent's Brief, p.5). For reasons set forth hereinafter, I do not agree that Mr. Gutierrez' letter lost its protection under the Statute.

I have found, it is true, that Mr. Cullen, in the meeting with Messrs. Berryhill and Gutierrez, did not deny that Mrs. Gulsby was Mr. Osborn's mother; but, to the contrary, as I have further found, when Mr. Gutierrez made the assertion, Mr. Cullen simply did not refer to their relationship. Necessarily, it follows that Mr. Gutierrez knowingly made the false statements that Mr. Cullen denied any

knowledge of kinship and "lying to us on not knowing that Mrs. Gulsby was Mr. Osborn's blood relative", all of which translates to calling Mr. Cullen a liar. I do not condone such conduct; nevertheless, for various reasons, his statements were not removed from the protection of the Statute. First, as the Supreme Court noted in Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53 (1966),

> ". . . in a number of cases, the Board [NLRB] has concluded that epithets such as . . . 'liar' are commonplace in these struggles and not so indefensible as to remove them from the protection of § 7,[9/] even though the statements are erroneous and defame one of the parties to the dispute. . .". (id. at 60).

See: 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, 36 ALJ Dec. Rep. April 12, 1984; related case on Attorney Fees, 24 FLRA 885 (1986). Mr. Gutierrez' statements about Mr. Cullen do not represent such flagrant conduct as to remove it from the ambit of protected activity.

Second, except for his statements concerning Mr. Cullen, other statements, such as that, "Ms. Gulsby has been in charge of the merit promotion board for the past 3 years", when it would appear from Mr. Cullen's testimony that there was no such board; that Mr. Osborn "has received 4 promotions within the last 2 years", when it would appear from Mr. Cullen's testimony that he received only one promotion in the last two years; that Mr. Osborn "lacked experience for his promotion to mechanic and plumber", whereas, apart from his qualification, it appears from Mr. Cullen's testimony that he had been promoted once, on

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9/ "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all of such activities except to the extent that said right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

November 9, 1984, to the position of electro-motor equipment mechanic to work on golf carts and never to a job as plumber, were not knowingly false when made. It is true that at their meeting, prior to Mr. Gutierrez' letter of November 30, 1990, Mr. Cullen told Messrs. Berryhill and Gutierrez that Mrs. Gulsby was not in charge of the merit promotion board and had nothing to do with promotions (Tr. 37); told them that he, Cullen, hadn't bowled in years and was not associated with any bowling league (Tr. 43). Nevertheless, Mr. Berryhill stated that they, he and Mr. Gutierrez, did not believe Mr. Cullen because their sources had indicated that Mrs. Gulsby did more in the office than type (Tr. 37) and he believed the letter was factually accurate when it was written.

Mr. Berryhill, as noted, stated that Mr. Cullen told them that Mrs. Gulsby was not in charge of the merit promotion board and stated that he had not bowled for years; but in view of Mr. Cullen's testimony, that when Mr. Gutierrez made the accusation of nepotism he, Cullen, had responded,

> ". . . I know the person you are accusing of nepotism, she's worked for me for a period of three years. Our books are open to you if you care to find out what kind of a job she does or where she is assigned . . . And they kind of dropped it there." (Tr. 52-53),

I do not believe that Mr. Cullen went into any further detail, as he did at the hearing, e.g., that there was and never had been a promotion board; the dates of Mr. Osborn's promotions, etc. Accordingly, while there were known disagreements, the record does not show that any of the statements were knowingly false. Nor, under the circumstances, of submitting a "grievance" to the Commanding Officer and requesting an investigation, was the Union obligated to do more by way of investigation to substantiate their claims, as they might, had they made a public charge.

Third, the statement of a grievance must be accorded absolute immunity, under the Statute for,

> ". . . To subject a union representative to discipline because he records a grievance in a way that displeases management, or because management believes the wording is incorrect or untruthful, would be to unreasonably limit and interfere with a labor organization's effectiveness. . . ." Veterans

Administration Regional Office, Denver, Colorado, supra, 2 FLRA at 675.

Clearly, not all action under the Statute retains its status as protected activity as, ". . . some actions or statements that would be so extreme as to be unprotected." (id. at 676); see also cases set forth above. I am aware that Judge Chaitovitz, in Veteran Administration Regional Office, Denver, Colorado, supra, did not accord absolute immunity to the statement of the grievance even though he found nothing in its language to remove it from its status as protected activity. Nevertheless, I believe, union representatives must be free to state grievances without the threat of discipline or of other action. Otherwise, their effectiveness would be severly limited. Not infrequently grievances must challenge the veracity of individuals; grievances may involve charges of malfeasance or of nonfeasance; etc., and unless unfettered in the statement of its grievances unions could not effectively carry out their responsibilities as representatives under the Statute. Nor does the presentation of a grievance to the responsible person in a recognized procedure constitute "publication" or "distribution" at large.

From the point of presentation of the grievance, I fully agree that actions may become so disruptive or statements may so exceed "robust debate" as to lose protection under the Statute. Of course, other activity normally enjoying protected status, such as leaflets (Linn v. United Plant Guard Workers of America, Local 114, supra) newsletters (Letter Carriers, supra), letter to newspaper (United States Forces Korea, Eighth United States Army, supra), newsletter (Veterans Administration, Washington, D.C. and Veterans Administration Medical Center, Cincinnati, Ohio, supra) may also lose their status as protected activity.

After the statement of the grievance, statements in the course of processing the grievance broaden the spectrum of persons hearing the statements, nevertheless, it could be argued that all statements in the grievance procedure are entitled to protection as part of the give and take of the collective bargaining process, e.g., The Bettcher Manufacturing Corporation, 76 NLRB 526, 529 (Member Gray, dissenting in part)(1948). But statements outside the grievance procedure, such as in leaflets, newsletters, etc., should be held to a higher standard for the reason that public dissemination of statements contrary to the standards adopted by the Supreme Court in New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Linn v. United Plant Guard

Workers of America, Local 114, supra; Letter Carrier, supra, can inflict great harm on the person defamed.

Here, Mr. Gutierrez addressed his letter to the Commanding Officer, he stated the Union's concern concerning possible nepotism asking for an investigation; and he used an established procedure for addressing Union concerns. Mr. Gutierrez' letter was a grievance within the meaning of § 3(a)(9) of the Statute, he made no publication or distribution of his grievance outside the grievance procedure, and his written statement of the grievance was entitled to unqualified protection under the Statute.

Respondent's reply to Mr. Gutierrez' letter was its memorandum, dated December 7, 1990 (G.C. Exh. 3), signed by Mr. Kessler. In an all too frequent manner, the response to a charge of possible management misconduct was an attack on the "whistleblower". For reasons set forth above, I have found that Mr. Gutierrez engaged in protected activity. Mr. Kessler repeated the assertion Mr. Cullen had made at the meeting with Messrs. Berryhill and Gutierrez that a complaint concerning nepotism involving Mrs. Gulsby and Mr. Osborn had been made several years ago and after investigation no wrongdoing was discovered. Accepting that the prior investigation, conducted some years ago, had found no wrongdoing does not answer the Union's concerns of continuing actions indicating possible nepotism. I have no reason to believe that there was any nepotism and, certainly, many of the Union's allegations were shown to have been false; nevertheless, the "facts" as viewed by the Union and set forth in Mr. Gutierrez in his letter of November 30, 1990, showed a plausible cause for concern: four promotions within the last two years; at least two are questionable as to his experience and qualification; and that he received all of his promotions while his mother was in charge of the merit promotion board. Moreover, at the hearing: (a) Mr. Cullen stated that he had never seen the I.G. Report which had taken place more than three years previously; (b) the record strongly implied that the prior investigation may have concerned only Mr. Osborne's initial employment; and (c) the record shows that at the meeting with Messrs. Berryhill and Gutierrez, Mr. Cullen did not, as he later did at the hearing, give any details as to dates of Mr. Osborn's promotions; did not show that there was no merit promotion board; did not show what positions Mr. Osborn had held, etc. Whether the "facts" asserted were correct or incorrect, Mr. Gutierrez stated the basis for the Union's concern and he directed his concern of possible nepotism only to the Commanding Officer. Rather than assailing

Mr. Gutierrez for stating the Union's concern about possible nepotism, his expressed concerns deserved a point by point rebuttal.

Mr. Kessler stated, in part,

". . . Clearly, you have placed yourself in a position in which you may be subject to disciplinary action for making false and unfounded statements with malicious intent. AFR 40-750 . . . recommends a penalty of reprimand to removal for the first offense of that nature." (G.C. Exh. 3).

Mr. Kessler further stated that,

". . . I am providing copies of your 30 Nov 90 letter to all of the employees named in it, management officials in your organization . . . so they can take whatever action is deemed appropriate. . . ." (G.C. Exh. 3).

The Authority has stated,

"Under section 7102 of the Statute, an employee has the right to form, join, or assist any labor organization freely and without fear of penalty or reprisal. An agency's interference with this right violates section 7116(a)(1) of the Statute. Marine Corps Logistics Base, Barstow, California, 33 FLRA 626, 637 (1988) (Marine Corps Logistics Base), petition for review dismissed sub nom. Boyce v. FLRA, No. 88-7524 (9th Cir. order Mar. 23, 1989). The standard for determining whether a management statement violates section 7116(a)(1) is an objective one. The question is whether, under the circumstances, the statement could reasonably tend to coerce or intimidate the employee or whether the employee could reasonably have drawn a coercive inference from the statement. Id. Although the circumstances surrounding the making of the statement are taken into consideration, the standard is not based on the subjective perceptions of the employee or on the employer's intent. Rather, objective standards must be used. Department of the Army Headquarters, Washington, D.C., and U.S. Army Field Artillery Center and Fort Sill, Fort Sill, Oklahoma, 29 FLRA 1110, 1124-25 (1987); Bureau of Engraving and Printing, 28 FLRA 796, 803 (1987)." Ogden Air Logistics Center, Hill Air Force Base, Utah, 34 FLRA 834, 837-838 (1990).

Viewing Mr. Kessler's letter objectively, there can be no doubt that any employee receiving a letter from the Labor Relations Officer telling him he was subject to disciplinary action for making false and malicious statements, and pointing out that Air Force Regulations provided a penalty of reprimand to removal for a first offense, would feel coerced and intimidated from bringing future concerns to the attention of the Commanding Officer. Any Union representative would have a reasonable fear of disciplinary action in voicing concerns about possible managment misconduct. Moreover, Mr. Kessler issued an open invitation to each management official in Mr. Gutierrez' organization, as well as each individual named in the November 30, 1990, letter, to take action against Mr. Gutierrez. Such action on the part of Mr. Kessler necessarily tended to coerce and intimidate Mr. Gutierrez, and any other Union representative, from voicing concern about possible management misconduct on pain, not only of disciplinary action under Air Force Regulations, but, also by retaliation by supervisors and any person who might be named as being involved in any such possible misconduct. Respondent's letter to Mr. Gutierrez violated § 16(a)(1) of the Statute by threatening him with discipline for engaging in protected activity.

Having found that Respondent violated § 16(a)(1) of the Statute, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 2423.29 of the Rules and Regulations, 5 C.F.R. § 2423.29, and § 18 of the Statute, 5 U.S.C. § 7118, the Authority hereby orders that Randolph Air Force Base, San Antonio, Texas, shall:

1. Cease and desist from:

(a) Threatening to discipline Mr. Joe R. Gutierrez, any other official of American Federation of Government Employees, Local 1840, AFL-CIO, the exclusive representative of certain of our employees (hereinafter "Local 1840"), or any other member of the bargaining unit, for expressing concerns of Local 1840 to the Commanding Officer of Randolph Air Force Base.

(b) Failing to treat as confidential all information submitted by, or on behalf of, Local 1840 to the Commanding Officer relating to concerns of Local 1840 about possible management misconduct.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under the Statute.

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

(a) The Commanding Officer shall personally, inasmuch as his culpability in failing to respond properly to Mr. Gutierrez's letter of November 30, 1990, caused Mr. Kessler's unlawful response, notify each person to whom Mr. Kessler, in paragraph 3 of his letter of December 7, 1990, provided copies of Mr. Gutierrez' November 30, 1990, letter as follows:

> Mr. Gutierrez by his letter of November 30, 1990, lawfully communicated the Union's concerns about possible nepotism. Mr. Hebert O. Kessler's memorandum dated December 7, 1990, was in error, is hereby disavowed and is hereby rescinded.

(b) Post at Randolph Air Force Base, San Antonio, Texas, 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 Randolph Air Force Base and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or cocered by any other material.

(c) Pursuant to § 2423.30 of the Rules and Regulations, 5 C.F.R. § 2423.30, notify the Regional Director, Dallas Region, Federal Labor Relations Authority, 525 Griffin Street, Suite 926, Dallas, Texas 75202, in writing, within 30 days from the date of the Order as to what steps have been taken to comply herewith.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: September 11, 1992
Washington, DC

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 threaten to discipline Mr. Joe R. Gutierrez, any other official of American Federation of Government Employees, Local 1840, AFL-CIO, the exclusive representative of certain of our employees (hereinafter "Local 1840"), or any other member of the bargaining unit, for expressing concerns of Local 1840 to the Commanding Officer of Randolph Air Force Base.

WE WILL treat as confidential all information submitted by, or on behalf of, Local 1840 to the Commanding Officer relating to concerns of Local 1840 about possible management misconduct.

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

WE WILL forthwith disavow, rescind and withdraw Mr. Herbert O. Kessler's unlawful memorandum dated December 7, 1990.

_____
(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, Dallas Region, Federal Labor Relations Authority, whose address is: 525 Griffin, Suite 926, Dallas, TX 75202 and whose and whose telephone number is: (214) 767-4996.