

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

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SACRAMENTO AIR LOGISTICS CENTER,
MCCLELLAN AIR FORCE BASE, .
CALIFORNIA .

.
Respondent .

and . Case No. SF-CA-20260

.
AMERICAN FEDERATION OF .
GOVERNMENT EMPLOYEES, .
LOCAL 1857, AFL-CIO .

.
Charging Party .

.....

Telin W. Ozier, Major, USAF

Counsel for the Respondent

Yolanda Shepherd Eckford

Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER

Administrative Law Judge

DECISION

Statement of Case

The unfair labor practice complaint alleges that Respondent violated section 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116(a)(1) and (2), by reassigning two employees, Linda Cox and Ronnie Difuntorum, because they had filed grievances and engaged in other protected activity. The complaint also alleges that Respondent violated section 7116(a)(1) and (5) of the Statute when it failed to notify the Union and give the Union the opportunity to bargain concerning the impact and implementation of the reassignments.

Respondent's answer admitted the allegations as to Respondent, the Union, and the charge, but denied any violation of the Statute.

A hearing was held in Sacramento, California. The Respondent and the General Counsel were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The American Federation of Government Employees, Local 1857, AFL-CIO is the agent of the exclusive representative of a nationwide unit of employees, including employees of the Respondent.

In 1991, the Respondent had a division within its installation known by the designation TINCA. This division is responsible for a critical element of aircraft maintenance, namely the non-destructive inspection (NDI) of military aircraft and their components to ensure structural integrity.

Twelve bargaining unit employees, including the two employees at issue, Ronnie Difuntorum and Linda Cox, worked in the Mag Penetration Section of NDI as NDI testers. NDI testers use highly technical equipment and are trained and certified to conduct inspection in three different processes--magnetic particle inspection, magnetic rubber inspection, and dipenetrant inspection.

In late 1990 Difuntorum and Cox were decertified in the magnetic rubber process because five items were found to require rework in a job performed jointly by both employees.⁽¹⁾ On December 6, 1990, both

Difuntorum and Cox filed grievances under the negotiated grievance procedure alleging that the decertifications had been unjust.⁽²⁾ The grievances were processed through all steps of the parties' negotiated grievance procedure, between December 1990 and March 1991, at which time both grievances were denied at the final step.

On the same date that the Union filed grievances on behalf of Difuntorum and Cox, December 6, 1990, Union directorate steward Matthew Lee wrote the Labor Relations representative for the shop, Archie Gandy, concerning certain complaints against the shop supervisor, Robert Gates. Lee's letter specifically named Cox and Difuntorum as having furnished the information which formed the basis of the complaints being lodged against Gates. The complaints included allegations of smoking and parking violations by Gates, improper use of personal clocks for monitoring attendance, and the letter also questioned the employees' decertifications. Lee's letter stated that Cox and Difuntorum had "expressed fear of reprisal from management in TIN for bringing these issues to the Union." Branch Chief Billie Shaw responded by letter dated December 11, 1990 stating, in some instances, that corrective action had been taken and denying other allegations.

Cox' and Difuntorum's decertifications brought about several tangential issues which were also grieved by Cox and Difuntorum. Both Cox and Difuntorum were denied overtime in connection with the decertifications and filed grievances based on the denial of overtime. Difuntorum was denied a within-step grade increase, which he grieved. Cox was counseled in connection with the decertification and filed a grievance raising the counseling. These grievances were all filed in January 1991 and were processed through all steps of the negotiated grievance procedure until March or April of 1991. In August 1991, Cox and Difuntorum grieved their performance appraisals in which they had been rated unacceptable and minimally acceptable in connection with their decertifications. Both grievances were denied at the third and final step of the negotiated grievance procedure on November 17, 1991.

The decertification grievances, as well as all grievances that followed, were heard by individuals who would ultimately have a part in the reassignments, as discussed later, which took place in early December 1991. Cox' and Difuntorum's grievances were all submitted to Robert Gates, the first step deciding official. Ed Riojas, Director of the NDI Division, was the deciding official for the 2nd step of Cox' and Difuntorum's grievances.

After Cox and Difuntorum began filing grievances, Gates' attitude toward them changed. Where before the supervisor had engaged them in friendly conversation, after the exercise of protected activity he would rarely speak to them. (Tr. 35, 63, 70). During first-level grievance meetings between Union steward Leo Wanner and Mr. Gates, Gates appeared unwilling to discuss the grievances. (Tr. 35). When Warner spoke to Gates in March or April 1991 about filing a grievance concerning the rotation of work duties, Gates responded, "Fine. Anytime you're one minute late, I'm going to write you AWOL." (Tr. 36).

Sometime in 1991, Division Director Riojas held a meeting with the employees in the unit in which he "proceeded to ream [the employees] out because [the shop] only had one-half a percent of the base population and . . . had half of the grievances that were filed on the base." (Tr. 294, 319).

Shortly after Mr. Riojas' meeting, some of the employees requested a meeting with Riojas. (Tr. 121). They had previously spoken with Rod Wagner, deputy branch chief, Archie Gandy, labor relations liaison, and Sherian Long, employee relations specialist. All together six of the 12 employees, Charles Brooks, Daniel

Matthews, Harold Ishoy, Vance Hall, Mark Anselman, and William Novelli, and a former employee, James Pena, made complaints to these management officials about Cox or Difuntorum.

Cox and Difuntorum's grievances about their decertifications created tension and discord among the employees and "got the ball rolling." (Tr. 223, 237, 241, 251-52, 327, 342-43). Ishoy gave Supervisor Gates a statement in June 1992 in which he stated, "What started as one silly grievance snowballed into scores of meaningless grievances raising issues that were pointless and caused stress on all the employees in the shop, to the point that production and skills suffered." (Respondent's Ex. 7). Brooks termed the grievances "trivial" and their numbers "comical" or "ludicrous." (Tr. 217, 221). Ishoy called them "silly." (Tr. 327). Brooks, Ishoy, Anselman, and Novelli acknowledged that the grievances were one form of disruption in the shop. (Tr. 221, 327, 342-43, 353). The employees wanted it known that the grievances by Cox and Difuntorum did not represent the views of the entire shop. (Tr. 244, 319, 341, 354).

Deputy branch chief Wagner understood from the employee's complaints that the employees were reacting in defense of their supervisor, Robert Gates. The employees told him that Gates was "getting railroaded" and "abused by their subordinates." (Tr. 128-29). According to Wagner, the employees felt that Gates was being harassed by the volume of grievances for anything trivial (Tr. 158), and that Cox and Difuntorum were "trying to get the supervisor." (Tr. 129). Wagner testified that the "employees that felt that Mr. Gates was doing a good job, that . . . he was treating people fairly [,] that he was a reasonable man, also felt that the grievances were BS, for lack of a better term (Tr. 159)", and that their voices were not being heard. (Tr. 144).

Union steward Leo Warner had received similar comments from employees William Novelli, Mark Anselman, Harold Ishoy, Danniell Matthew, and Chuck Brooks. They advised him that they were tired and upset over Cox and Difuntorum filing grievances, because they were "out to get Bob [Gates]." (Tr. 360).

The employees who complained about the Cox and Difuntorum grievances also voiced other complaints about Cox and Difuntorum to management at the same time. These complaints included allegations that (1) the two employees were speeding through their work and not doing a good job (Tr. 91, 93, 113, 190); (2) that Cox had pinched the buttocks of some employees and was continuously talking of her sexual exploits (Tr. 113, 187); (3) that Difuntorum intimidated people and used derogatory, discriminatory terms regarding other workers (Tr. 187); and (4) that both were general complainers and the source of animosity and bickering in the shop (Tr. 98, 112, 137, 174, 190).

Employee Complaints About Poor Work of Cox and Difuntorum.

The complaint to management that Cox and Difuntorum were not doing a good job on their inspections was repeated at the hearing by the testimony of Chuck Brooks (Tr. 213-214, 231), Mark Anselman (Tr. 346), and William Novelli (Tr. 331-32). Brooks claimed that he had mentioned this to his supervisor a few times (Tr. 232), while Novelli and Anselman said they had not (Tr. 337-38, 351). Rodney Wagner, Deputy branch chief, testified that Cox and Difuntorum were productive employees and that their reassignments did not take place because of productivity problems. (Tr. 132).

Cox: Pinching - Speaking of Sexual Matters.⁽³⁾

The complaint to management by some employees that Cox had pinched their buttocks and had spoken of her sexual exploits was repeated at the hearing by Chuck Brooks (Tr. 217), James Pena (Tr. 261, 263), Vance Hall (Tr. 289), Harold Ishoy (Tr. 321), and William Novelli (Tr. 332). Brooks claimed he was pinched once by Cox, and heard her give descriptions of sexual matters once or twice, years ago, but that "it didn't bother me much," and he did not report the matter. (Tr. 216-17, 228-29). James Pena said he was pinched three times by Cox and heard her describe sexual encounters sometime in 1989 or 1990. He found this conduct disruptive, but did not mention the pinching to supervisor Gates until the summer of 1991. (Tr. 261-63, 265). Vance Hall testified that he had been pinched five times by Cox, but did not register an official complaint at the time and just walked away. (Tr. 288). Harold Ishoy testified that he "vaguely" remembered Cox speaking about her sexual escapades and joking about men's genitalia. He found this disruptive, but did not tell supervisor Gates about it until June 18, 1992 when Gates asked him to write a memorandum as to what he had observed. (Tr. 320-27). William Novelli testified that during lunch Cox talked about her sexual exploits. He also found this to be disruptive. He reported the matter to his supervisor and the EEO office. The dates of his reports were not elicited. (Tr. 332-33, 338).

Rodney Wagner, deputy branch chief, testified that Vance Hall had once casually commented that Linda Cox had pinched his buttocks, but he did not think it was a serious problem. He did not question Cox or other employees about the accusation. (Tr. 113, 130-31).

Cox was never counseled or questioned by management about the alleged activity. (Tr. 377-78).

Difuntorum: Intimidation - Derogatory Comments

The complaint to management that Difuntorum intimidated people and used derogatory, discriminatory terms regarding other workers was repeated at the hearing by employees Brooks (Tr. 213, 228, 241-242), Ishoy (Tr. 321), Hall (Tr. 282), Anselman (Tr. 348, 353), and Novelli (Tr. 330). Brooks testified that Difuntorum repeatedly called him a "chicken-bone white boy" (Tr. 213-14).⁽⁴⁾ Brooks made his supervisor aware of it and advised the EEO office, but he did not desire to pursue the matter as it was not his biggest problem with Difuntorum. (Tr. 227-29). Ishoy testified that he had heard Difuntorum use derogatory and degrading language toward white employees in the shop in 1991, but this had not been directed toward him personally. (Tr. 321-23). While Ishoy found this conduct to be disruptive, he did not complain or report it to Supervisor Gates at the time. (Tr. 323, 326). Hall spoke of an event in 1991 when Difuntorum "hassled" an employee named Curtis and "gave him a hard time." Hall provided no specific details and acknowledged that he had probably not told Supervisor Gates about it at the time. (Tr. 284, 318). Anselman testified that he was also the subject of the "chicken-bone white boy" comment by Difuntorum, but also never reported it at the time, not wanting to cause trouble. (Tr. 349, 352). Novelli testified that Difuntorum harassed new employees and made comments about "chicken-bone white boys" to the group without singling anyone out. Novelli did not find this disruptive, but believed others did. (Tr. 338).

Rod Wagner, deputy branch chief, testified that Difuntorum always had the reputation of being a "rough and tough guy, playing hard guy and trying to intimidate people." (Tr. 114, 136-37). Employees Chuck Brooks and Mark Anselman confirmed that Difuntorum has always been prone to disruptive behavior in the

shop (Tr. 215-16, 224-25, 242, 350), from being disruptive in his initial training class (Tr. 224-25), and other classes (Tr. 350), to putting a dent in a locker (Tr. 241-42), or injuring a bicycle (Tr. 237). Matthew testified that Difuntorum once bounced a ball off the wall (Tr. 245).

Difuntorum was never counseled or disciplined for making racial slurs or causing disruptions or morale problems in the shop. (Tr. 146, 367, 370-71).

Complainers

The complaint to management that Cox and Difuntorum were complainers and the source of animosity and bickering in the shop was repeated at the hearing by the testimony of employees Chuck Brooks (Tr. 212-16, 231, 240-41) Danny Matthews (Tr. 247-48), Vance Hall (Tr. 270 274, 281, 285, 287, 317, Harold Ishoy (Tr. 327), Mark Anselman (Tr. 348, 353), and William Novelli (Tr. 330, 337, 342). Chuck Brooks testified that the most disruptive thing Difuntorum and Cox did in the shop was to take shortcuts to increase their own production and then constantly berate other employees for not doing as much (Tr. 212-16, 231). According to Brooks, they have always been disruptive in the shop. (Tr. 224). Brooks stated that Difuntorum was loud and childish. (Tr. 237).

Mr. Brooks testified that the numbers of grievances became "comical is a good description, ludicrous." (Tr. 217). He was not familiar with the details, but knew "there were a lot of them, some of them seemed real trivial." (Tr. 218, 222). He acknowledged that the grievances were one way the employees were disrupting the shop. (Tr. 219, 221). He said the grievance they filed on their decertifications "was what I think kind of got the ball rolling. They filed a grievance for being decertified for 30 days or 60 days, like it was earth shattering or something." (Tr. 223). They argued with people over small things, like parking spots, "and it just started snowballing, and as soon as that decertification took place with the bad rubber, it just started going full speed . . . 30, 60 days the letters out of your file and everybody's happy with it. It couldn't be left at that with them, they had to just take it and run with it for all that it was worth. Poor me, poor me, poor me. They're picking on me." (Tr. 214).

Employee Danny Matthew testified that the shop was in a state of disarray because of name calling or "some situation would happen where a grievance or something . . . would be going on and all of a sudden people would get tied into it that didn't want to get tied into it." (Tr. 244). He said that once Linda Cox took offense at someone leaving early because of the clocks and went to the second or third level supervisor. He said she "got all of those people in trouble," and it was felt that the whole shop was responsible, which created hard feelings. (Tr. 246-48).

Vance Hall testified that Ron Difuntorum and Linda Cox were not happy with their lives and, therefore, caused havoc and chaos for others. (Tr. 270-71). It made him sick to his stomach to learn that Difuntorum and Cox had gained access to one of his co-worker's production records through the Union. He tried to stop his own records from being given to the Union. Hall was of the opinion that they could have broken the law in having such documents (Tr. (274-77, 305).⁽⁵⁾ He claimed that Difuntorum had once lied about his wallet being stolen (Tr. 278) and his garage broken into in order to be released from work "without a hassle." (Tr. 281). Hall claimed that he did not report Difuntorum's falsehoods to his supervisor and kept a lot of things between them until "the line was crossed." This occurred when the Union started "running down Bob [Gates] as a boss

and everything else." (Tr. 317). Hall claimed that Cox committed a malicious act in 1991 when she falsely told him that one of his coworkers was going to shoot him with a gun (Tr. 285-86), and "went ballistic" and called the police when he and Ron Difuntorum were engaging in self-help by moving some cement parking barriers. (Tr. 286-87).

After the meeting in which Mr. Riojas referred to the high number of grievances compared to the number of employees, Hall felt that Riojas had the distorted picture that the grievances represented the thinking of everyone in the unit. Hall then arranged a meeting of some employees with Mr. Riojas to correct this impression (Tr. 319).

Employee Harold Ishoy, in addition to testifying about Difuntorum's use of derogatory and degrading language and Linda Cox' talk of sexual matters, as reflected above, testified that Cox found fault with everyone in the shop. Ishoy also did not report this matter to Supervisor Gates at the time. He acknowledged that there was disagreement and discord in the shop and that the problem started when Difuntorum and Cox started filing grievances. As noted above, in a statement given to his supervisor on June 18, 1992, Ishoy stated, "What started as one silly grievance snowballed into scores of meaningless grievances raising issues that were pointless and caused stress on all the employees in the shop, to the point that production and skills suffered." (Respondent's Ex. 7).

Employee William Novelli testified, in addition to the above matters, that Cox and Difuntorum also created turmoil by bragging about the work they had done compared to that of other employees, with no regard for the quality of the work. (Tr. 331-32, 337). He said employees suspected that they were cutting corners. According to Novelli, Cox and Difuntorum publicly criticize Gates, whom Novelli considered to be very fair, and they had no respect for supervisors that didn't agree with them. (Tr. 333). Novelli testified that people in the shop felt the grievances of Cox and Difuntorum were being represented as reflecting the views of the entire shop, which they were not, and, for that reason, meetings were set up to set the record straight. (Tr. 341). Novelli stated, "[I]t became obvious to me that if you have two people, the same people that are constantly going to the Union, they have a problem with the rest of the shop or the manager or whatever the problem is, I don't know." (Tr. 343).

Employee Mark Anselman, in addition to the above matters, testified that Cox and Difuntorum did not like working in the shop and created poor morale. He stated that Cox had criticized him to Supervisor Gates in front of the whole group for not correctly marking a defect found in his inspection. He said that everybody forgets to do this now and then. He felt she brought it up to make him look bad and Cox to look good. (Tr. 247-48). Anselman testified that, since 1989, Difuntorum and Cox had pretty much done the same thing: "Ron was always teasing you or laughing at you. Linda was always trying to make herself look good." Anselman said that their grievances were part of the disruption, and other employees who were "real content with the way things were going" wanted it known that they were not speaking for the entire shop. (Tr. 353-54).

Deputy Branch Chief Wagner, in addition to receiving complaints from some of the employees about Cox and Difuntorum, also testified as to his personal knowledge of their being complainers and the source of conflict in the shop. Wagner said he had met with Cox when an offensive written sexual comment had been directed to her, when she had complained about Supervisor Gates, and when she had once requested a transfer. Wagner acknowledged, however, that Cox was not reassigned at her request or because she had a personality conflict with her supervisor. (Tr. 140). Wagner said Cox and Difuntorum were unhappy and made everyone aware of their unhappiness which created poor morale and poor communications in the shop. He

said there were "cheap shots thrown around" and they "kept the pot stirred" and "stimulated a lot of the problems." (Tr. 155). When asked to describe the complaints that the employees had made which were not grievances, Wagner referred to two complaints concerning moving the wall clocks and their decertifications, which were grievances. The only specific complaints cited by Wagner which were apparently not specific grievances were Difuntorum's complaint, registered with him since 1989, about wearing safety-toed shoes, and their general complaints about Supervisor Gates. Wagner said that the grievance about moving the wall clocks four feet was an example of their being unreasonable about management's efforts to try to make the work place better. (Tr. 138-39). Wagner testified that their numerous grievances were just a reflection, a response, to their being unhappy with their jobs. (Tr. 127). He said Supervisor Gates had expressed to view that he preferred Cox and Difuntorum out of his shop because of their complaining. (Tr. 163-64). He said that the grievances had been "a pain in the butt, to be honest with you. Especially in the volume which he had been given by these two individuals. But the [biggest] issues [were] . . . the impact of the back-biting, the back-stabbing, that kind of thing." (Tr. 164-65).

The record establishes that there were 12 employees in the shop. Six employees complained about Cox and Difuntorum and six, namely Cox, Difuntorum, Brennan, Simmons, Warner, and Guice, did not. There is no evidence that Riojas or Wagner investigated the complaints or interviewed employees in the shop who had not complained.

Action By Division Director Riojas

After receiving the complaints from several employees in late November or early December 1991, and conferring with supervisors in the chain of command, Mr. Riojas advised Sherian Long, employee relations specialist, that he had received complaints about Cox and Difuntorum. Riojas told Ms. Long that he "just [couldn't] allow it to continue, to go on. I have employees up here all the time, complaining about the tension, [and] the conflicts between them is disrupting the work force." Riojas asked Ms. Long for advice. She told him that he could move the supervisor, which was discussed, or the employees, as it was his right to determine how to organize his area. Long mentioned that there was a need for employees in the sheetmetal area. Riojas asked her to determine if Cox and Difuntorum were qualified for such an assignment.⁽⁶⁾ (Tr. 172-75, 183-84, 191).

The Reassignments

Cox and Difuntorum were found to be fully qualified for sheetmetal work. (Tr. 191). They were reassigned to the Manufacturing and Services Division, Sheetmetal Section, effective December 15, 1991. Their positions in NDI were abolished and the slots were given to the Sheetmetal Section. (Tr. 119, 149, General Counsel's Ex. 16-19).

Difuntorum and Cox were notified of their reassignments in early December 1991. Gates notified Difuntorum on December 5, 1991 that he was being reassigned because of his secondary sheetmetal skill. (Tr. 57). Cox was informed by Gates on December 6, 1991 that it was a management reassignment and "management's choice to pick who they wanted." (Tr. 67). Subsequently, this reason was basically reiterated to Difuntorum and Cox by Gloria Padilla, staffing specialist. (Tr. 57, 67).

Request to Bargain

On December 12, 1991 the Union submitted, among other things, a request for briefing and bargaining on the reassignments. (G.C. Exh. 11). The Union had received no prior notice of the reassignments. (Tr. 20).

A meeting was held in February 1992 between Respondent and the Union regarding the request to bargain. Mr. Riojas told the Union that he had selected Cox and Difuntorum because they were unhappy in the shop and were creating a morale problem.⁽⁷⁾ He said it was better for them to be moved and better for the employees that remained. (Tr. 126). The Union was advised that the employees had the skills to do the job and that it was management's right to assign employees. Respondent refused to enter into impact and implementation bargaining with the Union. (Tr. 24).

Effect of Reassignments

The reassignments of Cox and Difuntorum did not result in any loss of base pay. (Tr. 198). However, they lost over- time. The NDI shop worked overtime hours subsequent to their departure. There is no evidence that such overtime was made available to them, or that comparable overtime was made available to them in the sheetmetal shop. (Tr. 26, 133, 202-03, General Counsel's Ex. 13(a)-(e)).

The record reflects that there is a significance difference in the training and working conditions between NDI testers and sheetmetal workers. NDI testers are trained to perform a highly technical inspection function utilizing sophisticated equipment. By contrast, the sheetmetal position requires employees to perform more rudimentary shop tasks such as riveting and drilling. (Tr. 59-60, 68,80, 109-111).

Cox and Difuntorum also suffered a loss of promotion potential. NDI testers may be promoted up to the Wage Grade (WG) 12 level whereas the top nonsupervisory Wage Grade sheetmetal position is WG-9. While Cox and Difuntorum could still be considered for wage grade promotions in NDI based on their past experience, they could be handicapped in seeking such positions as time passes. They may not be as familiar with emerging technology as the employees already assigned there. (Tr. 197). Although supervisory positions up to WS-12 are available in sheetmetal, different factors are utilized to determine promotions to the supervisory level. (Tr. 62, 70, 180).

Shortly after Cox and Difuntorum were assigned to the Sheetmetal Shop, their new supervisor, Steve Thatcher, advised them that their ex-supervisor, Bob Gates, had called and advised Thatcher not to let them work together as they were troublemakers. (Tr. 59, 68).

Discussion and Conclusions

Alleged Section 7116(a)(1) and (2) Violations

Section 7116(a)(2) of the Statute provides that it is an unfair labor practice for an agency "to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment[.]" Under the analytical framework set forth in Letterkenny Army Depot, 35 FLRA 113 (1990), in determining whether the Respondent violated Section 7116(a)(2) of the Statute, the General Counsel must establish that the employee against whom the alleged discriminatory action was taken was engaged in protected activity and that consideration of such activity was a motivating factor in connection with hiring, tenure, promotion, or other conditions of employment. Id. at 118. If the General Counsel makes this required prima facie showing, the respondent may seek to establish, by a preponderance of the evidence, that there was a legitimate justification for its action and the same action would have been taken even in the absence of the consideration of protected activity. Id.

There is no dispute that Cox and Difuntorum were engaged in activities protected by the Statute and that Respondent was aware of those activities. That consideration of such activity was a motivating factor in connection with the reassignment of these two employees is strongly suggested by (1) the closeness in time between the agency's decision and the protected activity, and (2) the animus indicated by (a) Supervisor Gate's threats to retaliate if Steward Wanner filed a grievance, (b) Supervisor Gate's change in attitude toward Cox and Difuntorum after they filed grievances, (c) Director Riojas "reaming out" employees in the shop because so many grievances had been filed. See United States Department of Transportation, Federal Aviation Administration, El Paso, Texas, 39 FLRA 1542, 1551-53 (1991).

Respondent sought to establish that there was a legitimate justification for its action. Respondent claims that Cox and Difuntorum would have been reassigned even in the absence of protected activity because they caused discord and disruption among their fellow employees separate from their protected activity. Respondent claims that it was not acting as a result of the grievances, but rather was responding to a valid request for help from a majority of shop employees affected by the negative and disruptive behavior of the two employees.

I conclude that Respondent has not established its affirmative defense by a preponderance of the evidence. The evidence shows that the complaints of half of the employees (not a majority as Respondent contends) regarding Cox' and Difuntorum's disruption of the shop were triggered by the Cox and Difuntorum's grievances. The primary purpose of these employees was to make known to higher management, in light of Director Riojas' criticism concerning the number of grievances filed, that they supported their supervisor and did not approve of the grievances or the disruption they had caused. As Respondent acknowledges that it was responding to employee complaints, and as this was the employees' primary purpose, it is evident that Respondent took complaints about Cox' and Difuntorum's protected activity into consideration in reassigning them for their "discord and disruption." Respondent was not entitled to take complaints about protected activity into consideration in making a decision on an employee's conditions of employment. United States Army Support Command, Fort Shafter, Hawaii, 3 FLRA 796, 806 (1980).

The employees' additional complaints about Cox' and Difuntorum's fell generally into the categories (1) that they took shortcuts in their work and did not do a good job, (2) that Cox had pinched the buttocks of some employees and talked of her sexual exploits, (3) that Difuntorum used derogatory, discriminatory terms regarding other workers, and (4) that both were general complainers and the source of animosity and bickering in the shop apart from their grievances. The complaint that Cox and Difuntorum were cutting corners and not doing a good job wasn't seriously considered by Respondent. Deputy Branch Chief Wagner acknowledged that Cox and Difuntorum were productive employees and the reassignment did not take place

because of their productivity problems. The other three matters were also generally of long-standing duration and did not produce serious complaints by the employees to higher management, or any action by management, until Cox and Difuntorum had filed grievances and involved the Union in the shop's activities. There is no evidence that Respondent interviewed other employees who had not complained, conducted any investigation concerning the unprotected activity, or even raised the matter of the unprotected disruptive conduct with Cox and Difuntorum as a reason for their reassignments or to prevent its repetition in their new shop.

I conclude that a preponderance of the evidence establishes that Respondent violated section 7116(a)(1) and (2) of the Statute by reassigning Cox and Difuntorum because they had filed grievances and engaged in other protected activity.

Failure To Bargain

Respondent contends that it had no obligation to notify the Union and afford it an opportunity to bargain on the impact and implementation of the reassignments as they had no bargainable adverse effects.

The reassignments constituted a change in conditions of employment. The facts set out above reflect that, as a result of the change, Cox and Difuntorum lost the opportunity to work the overtime that became available in their former shop. There are also significant differences between the training and working conditions in the jobs they formerly held and their reassigned positions. They also suffered a possible loss of promotion potential. Wage grade promotions could go up to the WG-12 level in their NDI tester positions while the wage grade level in the sheetmetal shop is WG-9. Only supervisory positions, which are governed by separate promotion criteria, go to WS-12 in the sheetmetal shop. While Cox and Difuntorum could still be considered for wage grade promotions in NDI based on their past experience, they could be at a disadvantage in seeking such positions as time passes. They may not be as familiar with emerging technology as employees already assigned to NDI.

Accordingly, it is concluded that the change had an effect or a reasonably foreseeable effect on the conditions of employment of unit employees that was more than de minimis so as to trigger an obligation on the part of Respondent to notify the Union and bargain over the impact and implementation of the decision to make the reassignments. United States Immigration and Naturalization Service, United States Border Patrol, Del Rio, Texas, 47 FLRA No. 15 (1993). As Respondent did not fulfill its bargaining obligation, Respondent violated section 7116(a)(1) and (5) of the Statute, as alleged.

The General Counsel requests a status quo ante remedy. The evidence shows that Respondent acted willfully, provided no notice to the Union in advance of the changes which had a more than de minimis impact on the unit employee involved, and rebuffed the Union's request for post-implementation bargaining. There is no evidence that a status quo ante remedy would disrupt or impair the efficiency and effectiveness of the agency's operations.⁽⁸⁾ Accordingly, after balancing these factors pursuant to Federal Correctional Institution, 8 FLRA 604, 606 (1982), I conclude that a status quo ante remedy is appropriate and warranted to best effectuate the purpose and policies of the Statute. Backpay is appropriate where, as here, the Agency's unlawful implementation resulted in a reduction of pay. The amount of backpay owed will be a matter for compliance. United States Customs Service, Southwest Region, El Paso, Texas, 44 FLRA 1128, 1129-30 (1992); United States Immigration and Naturalization Service, Honolulu District Office, Honolulu, Hawaii, 43

FLRA 608 (1991); Department of the Air Force, Scott Air Force Base, Illinois, 42 FLRA 266, 274-75 (1991).

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, it is hereby ordered that the Sacramento Air Logistics Center, McClellan Air Force Base, California shall:

1. Cease and desist from:

(a) Discriminating against Linda Cox and Ronnie Difuntorum, or any other employee, by permanently reassigning the employee(s) because they filed grievances and engaged in other activities protected by the Statute.

(b) Changing the conditions of employment of employees in the bargaining unit represented by the American Federation of Government Employees, Local 1857, AFL-CIO (the Union), such as by permanently reassigning employees from positions as nondestructive testers to sheetmetal mechanics, without providing the Union notice and an opportunity to bargain concerning the impact and implementation of the change.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights assured 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 Relations Statute:

(a) Rescind the reassignments of Linda Cox and Ronnie Difuntorum to sheetmetal mechanics and return them to their former positions as nondestructive testers and, consistent with law and regulation, make them whole for any loss of pay or benefits suffered as a result of the reassignments, including backpay with interest for any withdrawal or reduction in pay, allowances, or differentials.

(b) Upon request, bargain with the American Federation of Government Employees, Local 1857, AFL-CIO, the agent of the exclusive representative of its employees, over the impact and implementation of the December 15, 1991 reassignments of Linda Cox and Ronnie Difuntorum.

(c) Notify the American Federation of Government Employees, Local 1857, AFL-CIO, the agent of the exclusive representative of its employees, of any proposed change with respect to the permanent reassignment of employees and, upon request, bargain with the Union over the impact and implementation of

the change.

(d) Post at its facilities 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 Commander, 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 insure that such Notices are not altered, defaced, or covered by any other material.

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, San Francisco Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

GARVIN LEE OLIVER

Administrative Law Judge

Dated: Washington, DC, May 12, 1993

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 EMPLOYEES THAT:

WE WILL NOT discriminate against Linda Cox and Ronnie Difuntorum, or any other employee, by permanently reassigning the employee(s), because the employee(s) filed grievances and engaged in other activities protected by the Statute.

WE WILL NOT change the conditions of employment of employees in the bargaining unit represented by American Federation of Government Employees, Local 1857, AFL-CIO (the Union), such as by permanently reassigning employees from positions as nondestructive testers to sheet/metal mechanics, without providing the Union notice and an opportunity to bargain over the impact and implementation of the change.

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

WE WILL forthwith rescind the reassignments of Linda Cox and Ronnie Difuntorum to sheetmetal mechanic positions and return them to their former positions as nondestructive testers in the Nondestructive Inspection Division and, consistent with law and regulation, we will make them whole for any loss of pay or benefits suffered as a result of the reassignments, including backpay with interest for any withdrawal or reduction in pay, allowances, or differentials.

WE WILL notify the American Federation of Government Employees, Local 1857, AFL-CIO, the agent of the exclusive representative of our employees, of any proposed change with respect to the permanent reassignment of employees and, upon request, bargain with the Union over the impact and implementation of the change.

WE WILL, upon request, bargain with the Union over the impact and implementation of the December 15, 1991 reassignments of Linda Cox and Ronnie Difuntorum.

(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, San Francisco Regional Office, whose address is 901 Market Street, Suite 220, San Francisco, California 94103 and whose telephone number is (415) 744-4000.

1. Cox and Difuntorum took supplemental training and were subsequently recertified.
2. Prior to the recertification grievance, Cox had filed a grievance in July 1990 concerning an AWOL charge. Cox subsequently abandoned the grievance.
3. Cox denied that she had ever pinched a shop employee or engaged in conversations of a sexual nature. (Tr. 78, 378). I credit the employees' account that such conduct occurred as well as Cox' testimony that it was not unusual for the men in the shop to engage in conversations about sex.
4. Difuntorum claimed that he had made such a remark to a former employee in jest, but not to any other employee. I credit the employees' that such comments were made. Their significance will be discussed later.
5. Cox testified that she had only received her own production records through the Union, but that Hall had alleged she had broken into the office to obtain the records. Although Supervisor Gates acknowledged to Cox that she had not broken into the office, he declined to have a meeting with all of the employees to straighten the matter out. (Tr. 77, 82-3).
6. According to Long, there were also discussions about "the conflict" caused by another employee, Leo Wanner, a Union steward, "but Leo would not be working with [Gates] in there, so they were hoping that the conflict was not going to be present." (Tr. 207).
7. Rodney Wagner, deputy branch chief, was present at the meeting and also expressed the opinion that the employees were reassigned because of "their unhappiness, their dissatisfaction with the job, their dissatisfaction with management. . . . It just wasn't working. . . . The shop suffered for it, production suffered for it." (Tr. 127). As noted above, Wagner claimed that the employee's numerous grievances did not have anything to do with their reassignment "per se. I think the numerous grievances is just a reflection of them being unhappy. You know how do you gauge an employee's satisfaction with their job, if they file grievances or complaints, you know, its just a response, I believe, to being unhappy, a reaction." (Tr. 127).
8. Respondent has not addressed this matter separately from its general defense that it was necessary to reassign the two employees because conflicts between them and the other employees disrupted the work force

and affected morale and production. However, Respondent has not demonstrated that it would have reassigned Cox and Difuntorum in the absence of protected activity. Respondent may, of course, take appropriate steps to promote the efficiency and the effectiveness of the agency's operations by counseling and/or disciplining employees who engage in unprotected activity.