

Office of Administrative Law Judges

WASHINGTON, D.C.

NAVAL AVIATION DEPOT NORTH ISLAND

CORONADO, CALIFORNIA

Respondent

and

Case No.  
SF-CA-90140

INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL  
ENGINEERS, LOCAL 16, AFL-CIO

Charging Party

Yolanda Shepherd Eckford, Esquire

For the General Counsel

W. Don Wilson

John Townsend

For the Respondent

Gary Hilbers

For the Charging Party

Before: JESSE ETELSON

Administrative Law Judge

**DECISION**

## *Statement of the Case*

The unfair labor practice complaint in this case alleges that the Respondent, Naval Aviation Depot, North Island, Coronado, California (NAD) violated sections 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (the Statute). NAD failed to select employee Carol[yn] Harper, then the vice president of the Charging Party (the Union), for a position for which she applied. The complaint alleges that Harper was not selected because she engaged in protected activity. NAD's answer denies that its failure to select Harper was based on her protected activity and that it committed the alleged unfair labor practice.

A hearing on the complaint was held in San Diego, California, on August 17, 1999. Counsel for the General Counsel and for NAD filed post-hearing briefs.

### **Findings of Fact**

(1)

#### A. Setting and Chronology of Events

Carolyn Harper is one of six employees in the travel section of NAD's administrative services and processes area. Susanna Anguiano is the supervisor of 19 employees in the three sections comprising the administrative services and processes area. Under Anguiano, the travel section employs a lead clerk, four GS-5 "management assistants," and a GS-4 "office automation assistant" or "office automation clerk." Harper occupies, and had for approximately three years when she applied for one of the management assistant positions, the office automation position.

Harper was a steward for the Union, the exclusive representative of a unit of NAD's employees, from 1995 to 1997. During this period approximately 20 percent of her working hours were devoted to Union responsibilities on "official time." Harper received a performance rating of "exceeds fully successful" for the fiscal year ending July 31, 1996, and a rating of "outstanding" for the fiscal year ending July 31, 1997. She also received a "Special Act" cash award for achievement over the period of January-July 1997.<sup>(2)</sup>

In December 1997 Enith Bruce, an employee in the mail section, was detailed to the travel section. She remained on detail until August 1998, when she was selected for the management assistant position at issue here. Debra Huntingford (presumably another travel section employee) and Carolyn Harper, with the assistance of other employees when neither was available, trained Bruce to perform the work-- customer service--that she had been assigned. In March 1998 Anguiano nominated Bruce for a "Special Act" cash award.<sup>(3)</sup> Bruce had also received an award, of the same type that Harper had received, in 1997 (Tr. 153).

In April 1998 Harper mentioned to Anguiano that she was thinking of running for Union vice-president. Anguiano responded that this (presumably referring to occupying the position, not to running for it) would require a lot of union time, to which Harper replied that she did not think so, because "[t]hat's why we have a president." (Tr. 41). Nevertheless, when Harper became vice-president, her official time increased to 40 percent. Then, during a period in which the president was absent or in travel a good deal of the time, Harper's official time increased to 80 percent (Tr. 38, 70).

Anguiano became concerned about what she regarded as excessive official time for Harper. She consulted a Mr. Ramirez, the union liaison representative of the human resources office (HRO), who advised her to monitor Harper's use of official time and to contact, Charlie Critchlaw, another HRO official, if it escalated. In or around June 1998 Critchlaw spoke to Union President Mike Bell about the amount of leave Harper was using, which, together with her official time, was, in management's eyes, making her unavailable for her work in a critical position. Bell testified credibly that he understood that Anguiano had provided Critchlaw with the figures that gave rise to the conversation. Critchlaw asked Bell if they could work something out to reduce the amount of official time Harper used. Bell explained Harper's need for official time but promised Critchlaw to do whatever the Union could to accommodate management's request.

Also in June 1998, Anguiano became aware that one of her management assistants had been selected for promotion to another position and that the assistant's position would become vacant. Anguiano had, in the past, filled vacancies by advertising and recruitment through the HRO. A fellow supervisor informed her that there was a much quicker method, called the Management Identification of Candidates (MIOC) system, that she could use to fill this vacancy. Under MIOC, eligibility could be limited to employees in the same or related occupations at the next lower grade level, if all of them were known by the selecting official and could easily be evaluated and considered, without the necessity for an application form. Under MIOC, it was contemplated that in most cases the selecting official would be the first-line supervisor of the eligible candidates. (GC Exh. 7.)

Anguiano verified that this option was available for purposes of filling this vacancy. She informed each of her eligible employees, including Harper, of her intention to consider them for promotion to this position. She asked that, if they were interested, they address certain "elements" of the position in writing. A memorandum to that effect went to Harper on August 4, 1998.

Around this time, Anguiano and Harper had one or more conversations in which Harper told Anguiano that, although she might, or would, apply for the position, she knew that Anguiano would not select her. According to Harper, she stated further to Anguiano that the reason Anguiano would not select her was because she was already complaining about the time Harper spent on union matters. Anguiano's version of such a conversation at that time did not include Harper's statement about the reason Anguiano would not select her. However, mail section supervisor Anita Smith, a witness for NAD, testified credibly that she was present in Anguiano's office when Harper, before she made her written submission, entered the office and stated that Anguiano would not select Harper because of her union activities.

I find that Harper stated to Anguiano something to the effect that Anguiano would not select her because of their differences over her use of official time--hence because of her union activities. Notwithstanding that, Harper submitted the required paperwork on August 5. According to Harper, she told Anguiano again, when she submitted it, that she knew she would not be selected because of Anguiano's complaints about her union time. Anguiano responded, according to Harper, by stating that Harper knew the impact of the office, that it has a lot of work to get out, and that she needed "somebody that's going to be here." (Tr. 42) Anguiano did not testify about any such conversation that occurred at the time Harper delivered her submission. In the absence of any such testimony, including any denial that such a conversation occurred, I credit the substance of Harper's version.

Sometime in August, but after Harper made her written submission, Harper, together with Union President Bell, met with Anguiano, and perhaps Critchlaw, to discuss Harper's official time. Harper and Bell agreed to

limit her official time to two hours in the morning and two hours in the afternoon. (Tr. 42-43, 63.)<sup>(4)</sup>

Anguiano evaluated the candidates and selected Enith Bruce in late August. Shortly after the selection, Harper again entered Anguiano's office and told her that she knew Anguiano had not selected her because of her union activities. According to lead clerk Frederick Swingle, who was present at the time, Anguiano responded, saying, "No, that's not true." Then Harper said she would have to "file a grievance against it." Anguiano replied that Harper should "do what [she had] to do." I credit the substance of Swingle's testimony.<sup>(5)</sup>

Enith Bruce had to be trained before she could perform all the duties of the management assistant position. According to management assistant Janet Andrews, it took Bruce 3-5 months to be fully trained in all the details of the position. I credit this uncontroverted testimony.

## B. The Selection Process

The instructions to selecting officials for using the MIOC system (GC Exh. 7) provide for the preparation of a list of "Best Qualified (BQ)" candidates. This list is to include "those candidate who have a majority of BQ assessments for experience, training, education, awards and performance." Candidates may earn a BQ assessment in one of a number of ways. One is to have met the "ideal examples" of "best qualified . . . work experience" and "training/education" for a "Knowledge, Skill[,] and Ability" (KSA) that had been identified in the selecting official's "task analysis" of the position to be filled. In addition, candidates who have received a "major award," including a "special act" award related to the position within the last five years, are to be rated BQ. Further, the instructions state that "[c]andidates who receive Outstanding or Exceeds Fully Successful/Superior (Demonstration Project positions) ratings during the last three years are rated as BQ." Once the list of "BQ eligibles" has been compiled, the selecting official is to make the final selection in the following manner:

Apply your selection criteria to each BQ eligible. Selection criteria must be business-related; however, it may include personal characteristics that would differentiate between candidates. Do not assign "points" or "rank/score" the applicants again when applying selection criteria. You may interview the BQ candidates.

Anguiano prepared a task analysis that is reflected in the memorandum she gave to each of the eligible employees, asking them to address the listed "elements" [or KSA's] of the management assistant position (GC Exh. 5). These were:

1. Knowledge of travel operations within Naval Aviation Depot per Joint Regulations I & II.
2. Knowledge of functional responsibilities and operating procedures in the Administrative Services and Operations Office.
3. Ability to meet and deal with all levels of personnel within and outside the command on a daily basis.

4. Ability to work under pressure and meet tight deadlines.

Four employees responded with written submissions. All except Harper were officially employed in the mail section, although Enith Bruce was then on detail to the travel section. After reviewing the submissions of each of the candidates, Anguiano made an assessment of each, which she committed to writing in a memorandum for her own file (Mgmt Exh. 2), a practice she had followed in the past when making selections. Anguiano's notes on two of the four candidates are relatively brief. Apparently neither had much, if any, experience working in the travel section. Anguiano's notes on Harper, who then had three years' experience in the travel section, nevertheless indicated that, in Anguiano's view, she had "not demonstrated that she's gained or attempted to gain any knowledge of the overall travel system, Travel Regulations or the Administrative Office." The notes contain examples of the kinds of situations in which Anguiano believed that Harper had not been as helpful as she might have been in dealing with matters for which the travel section is responsible. Finally, Anguiano noted that "[h]er attendance is poor due to family matters (ie: emergency situations that arise with her family and causes an unplanned leave situation), thus causing her fellow employees to constantly pick up her workload."

Anguiano's written assessment of Enith Bruce warrants my quoting it at length:

Ms. Bruce was moved from the Mail Section to the Travel Section in December 97. She has performed all duties assigned to her in an outstanding manner. Any task or assignment was accepted readily and met before due dates. Since the position of the runner was frequently vacant, she took the responsibility of ensuring all tickets were returned for issuance.<sup>(6)</sup> She did this on her own without asking and never complained about the added workload. She works overtime in the morning and evening ensuring all customers[] needs are met. She is a fast learner and has good rapport with . . . our internal . . . and external customers. I've assigned special assignments throughout her time in Travel and she always meets my requirements within the given timeframe. Her attendance is commendable. I recommended her for a SA in March of 98 for her excellent performance. She continues to be a team player and has maintained her excellent work ethics. She constantly asks for clarification of regulations and I have worked with her in teaching her JTR rules and regulations and claim settlements. She understands the importance of meeting tight deadlines, and goes out of her way to meet my and customers[] needs.

On August 24, 1998, three days after making her assessment notes, Anguiano completed the "selection certification" stating that Bruce was the selectee. The top of the form contains her ratings of each of the candidates, with respect to their being "BQ" or merely "Qualified" ("Q"). Anguiano rated both Bruce and another candidate, "X," "BQ" in two KSA's and "Q" in the two other KSA's. Bruce and "X" received overall ratings of "BQ." Bruce was rated as "BQ" with respect to KSA 3 (ability to meet and deal with personnel) and KSA 4 (ability to work under pressure and meet tight deadlines). "X" was rated as "BQ" in KSA 2 (knowledge of responsibilities and procedures in Administrative Services) and KSA 3. Harper and the fourth candidate, "Y," were rated as "Q" in all four KSA's. Anguiano made no rating assessments of any of the candidates in the columns on the form headed "EDUC/TRNG" or "PA," the latter presumably referring to awards.

## **Analysis and Conclusions**

Section 7116(a)(2) of the Statute makes it 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[.]" In *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*), the Authority set forth a framework for determining whether an unfair labor practice under section 7116(a)(2) has been established. After setting forth the elements of the threshold burden that the General Counsel must carry in order to establish a *prima facie* case and thus defeat a motion to dismiss, *Letterkenny* provides that an agency will not be found to have violated section 7116(a)(2) if it shows, by a preponderance of the evidence, that: (1) there was a legitimate justification for its action; and (2) the same action would have been taken even in the absence of protected activity. *Id.* at 118.

The Authority has adopted the practice of declining to decide in *Letterkenny* cases "whether the General Counsel satisfied its threshold burden" if it finds that the agency has established its two-pronged affirmative defense. *Headquarters Forces Command, Fort McPherson, Georgia*, 53 FLRA 1715, 1716, 1737-38 (1998); *United States Air Force Academy, Colorado Springs, Colorado*, 52 FLRA 874, 879 (1997). Because I conclude that NAD has established such an affirmative defense here, I follow that practice and make no determination concerning the establishment of a *prima facie* case.

In determining whether the *Letterkenny* defense has been established in the case of an allegedly discriminatory failure to select, one does not review the merits of the agency's judgment in making the selection that it did. The crucial issue is, rather, its motivation. Here, Anguiano's testimony, amplified by the notes she made during the selection process, persuade me that she considered Bruce to be the most qualified candidate, that she considered Bruce's selection to be in the best interest of the organization, and that she would have selected Bruce even in the absence of Harper's protected activity.

Anguiano credited candidate "X," as well as Bruce, with the ability to maintain a "good rapport with all of our customers and internal staff" (Mgmt Exh. 2). She also rated "X" higher than Bruce with respect to KSA 2. However, her perception that, among other things, Bruce was able to learn quickly, was willing to make an extra effort to do so, and that she consistently met deadlines, evidently carried more weight.

Anguiano's description of Bruce makes her out to be a superlative employee in every respect that Anguiano found to be ultimately significant. Thus, being a "fast learner" and possession of the other qualities that Anguiano saw in Bruce outweighed her inferior rating, as compared to "X," with respect to the state of her knowledge of responsibilities and procedures in Administrative Services (KSA 2) at the time of the selection. Nor, whatever may have motivated Anguiano in arguably giving Carolyn Harper less than her due on any of the individual KSA ratings, do I see any basis on which to discredit the evidence that Anguiano had more confidence in Bruce than in any of the other candidates.<sup>(7)</sup>

Anguiano may have made a technical error in giving Harper a "BQ" rating based on the special act award she received in 1997.<sup>(8)</sup> Anguiano disregarded that award, and Harper's "outstanding" rating in that year, which, she asserted, was a depot-wide group rating and award dictated from above. The General Counsel disputes this and presented an employee witness who testified that he did not receive such an award. While I credit Anguiano in believing that the award was a result of a group effort and thus did not entitle Harper to a "BQ" rating (a belief that Anguiano applied to her rating of all of the candidates), I will assume for the purpose of this analysis that she was in error.

This error, in applying an instruction that in any event has not been shown to have the force or effect of law, did not contribute to Harper's non-selection. Close reading of the MIOC instructions persuades me that a single "BQ" rating, for receiving a qualifying award or otherwise, would not have been sufficient to make any candidate a "BQ eligible." "BQ eligible" status was available only to candidates who had "a majority of BQ assessments for experience, training, education, awards[,] and performance." Were this standard applied literally, *none* of the candidates qualified for "BQ eligible" status. Anguiano did not apply the instructions literally, but gave "BQ eligible" status to the two candidates who had, in her view, the highest number of BQ ratings.

I find no basis for concluding that what appears to be Anguiano's second technical error (on which none of the party's have commented) was motivated by a desire to disadvantage Harper. Rather, she appears to have applied the instructions, with which she had no previous experience and which hardly present themselves as a model of clarity, in the manner that made the most sense to her. As Anguiano applied the instructions, candidate "X" qualified for BQ eligibility in the same way that Bruce did--by virtue of her ratings on two of the KSA's. Yet she was not selected either. It is not seriously disputed that both Bruce and "X" received special act awards when Harper did in 1997. If Anguiano had given each of the candidates a BQ rating for receiving those awards, Bruce and "X" would each have had three BQ ratings (still not a "majority of BQ assessments)." Bruce and "X," however, received "BQ eligible" status independent of their awards.

The MIOC instructions advise the selecting official to apply their "selection criteria," which "must be business-related" but may include "personal characteristics that would differentiate between candidates[,] " to "each BQ eligible" (GC Exh. 7). It seems highly unlikely that a candidate who became a BQ eligible on the basis of an award alone would have edged out candidates who were found to be BQ eligible by virtue of their awards and, in addition, by virtue of their KSA ratings.

Counsel for the General Counsel attributes a sinister motive to each instance in which Anguiano arguably deviated from the MIOC instructions. Counsel even suggests that Anguiano viewed the MIOC system itself as a method to avoid selecting Harper. If anything, it would seem that the MIOC system was more to Harper's advantage, as it limited eligibility to a small group of which she was a member. Moreover, Anguiano had reason to believe that Harper would decline to apply for the position, as she had in the past, at least if Anguiano used the same selection procedures she had used on those occasions. With respect to any deviations from the instructions, it appears that Anguiano had broad discretion and that she would hardly have had to resort to procedural chicanery in order to make the selection that she did.

Would Anguiano have viewed Harper's qualifications as equal to or superior to Bruce's, and have selected her, in the absence of her protected activity? NAD has not eliminated, and cannot be expected to eliminate, that possibility. The *Letterkenny* framework recognizes the futility of attempting to prognosticate to any degree of certainty the course of events proceeding from an alternative and hypothetical set of preconditions. Instead, the affirmative defense to an allegation of discrimination under the Statute requires only sufficient credible evidence to persuade the Authority of the probability, on balance, that the allegedly unlawful action had a legitimate justification and would have been taken even in the absence of protected activity. I conclude that NAD has met that burden. I therefore recommend that the Authority issue the following order:

**ORDER**

The complaint in Case No. SF-CA-90140, is dismissed.

Issued, Washington, DC, November 12, 1999.

JESSE ETELSON

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Administrative Law Judge

1. Among the factual matters in dispute, I have found only the testimony of Supervisor Susanna Anguiano concerning her decision to select an employee other than Harper for the position in question to be dispositive. I found Anguiano, from her demeanor, to be a highly credible witness in general, and to be credible, for the reasons set forth below, with respect to the matters I deem to be dispositive.
2. Anguiano's explanation for the "outstanding" rating and the award is a matter of dispute and will be discussed below. Harper testified that she believed that Anguiano had nominated her for another special act award in 1996 (Tr. 36).
3. Counsel for the General Counsel contends that, because NAD failed to produce a copy of Bruce's reputed award, although copies of all such awards were subpoenaed, an adverse inference against the existence of such an award is warranted. It is not clear whether Anguiano's testimony is to be taken as stating that Bruce actually received the award. In any event, the significance of the award is that Anguiano believed that she nominated Bruce for it (*see* Mgmt Exh. 2), and I credit her belief that she did.
4. Although Anguiano did not recall such a meeting, I find that Harper and Bell did not make it up and that it occurred. Bell testified that he believed it took place in July. However, he admitted to being confused about dates, and Harper appeared to have a clearer recollection of the time frame.
5. Harper testified about a conversation she had at the very time Anguiano told her that she had selected Bruce, in which Harper told Anguiano that she knew Harper was more qualified and Anguiano responded that Harper knew she needed "somebody who's going to be here." (Tr. 42) Harper did not mention Swingle's presence, and I conclude that she had confused this conversation with the August 5 conversation, when Harper delivered her submission and Anguiano used the same language.
6. "Runner" is an informal name for Harper's position. The reference to that position being "frequently vacant," and to Bruce's performing duties of that position, unquestionably has its counterpart in Anguiano's note about Harper's "unplanned leave" and the necessity for fellow employees to "pick up her workload." However, in her testimony, Anguiano downplayed the significance of this observation, stating that it "wasn't a big factor in my selection. It was more based on work habits of being able to perform that . . . job." (Tr. 152.)
7. Anguiano's contemporaneous notes (Mgmt Exh. 2) are part of the substantive evidence presented by NAD. Counsel for the General Counsel had, and took, the opportunity to cross-examine Anguiano about the notes. They are subject to scrutiny to the same extent (except for demeanor) as Anguiano's testimony. While recognizing that these notes could have been constructed to mask a discriminatory action, I find in them every appearance that they reflect Anguiano's normal practice and her candid assessment of each candidate, and that



they thus support her testimony.

8. There is insufficient evidence about the award Harper believed she was nominated for in 1996 to determine whether it, also, should have been considered for the purpose of BQ status, nor was Anguiano questioned about it. Much the same can be said about Anguiano's failure to consider Harper's "exceeds fully successful" and "outstanding" ratings for 1995-96 and 1996-97, respectively. The instruction to rate candidates BQ if they have received such "ratings during the last three years" is ambiguous as to whether or not the employee must have received such a rating in *each of* the last three years, and this issue was not explored at the hearing. Moreover, if Anguiano erred in not rating Harper BQ on this basis, I would find such error to be nondispositive for the same reasons discussed below with respect to the 1997 special act award.