

Office of Administrative Law Judges

WASHINGTON, D.C.

U.S. PENITENTIARY,
ADMINISTRATIVE MAXIMUM,
FLORENCE, COLORADO

Respondent
and

Case No. DE-CA-90530

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 1302

Charging Party

Jennifer A. Schmitt

Counsel for the Respondent

Steven B. Thoren

Ayodele Labode

Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER

Administrative Law Judge

DECISION

Statement of the Case

The amended unfair labor practice complaint alleges that Respondent, through Warden Michael Pugh, violated section 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7116(a)(1), by making statements, or otherwise communicating, to employees concerning the Charging Party and its web site which interfered with, restrained, or coerced employees in the exercise of their rights granted under the Statute.

The General Counsel contends that the Respondent's conduct, through Warden Michael Pugh, violated § 7116(a)(1) when Pugh (1) questioned bargaining unit employee Sean Riggins about the comment that Riggins left on the Union's web site; (2) told Riggins that he did not receive the Quality Step Increase (QSI) initially because of his comment on the Union's web site; (3) said to Riggins that there were dirty staff within the Union; (4) told bargaining unit employee Eric Nicholls that he was not loyal because of his comments on the Union's web site; (5) said to Nicholls that the Union was the most corrupt that he had ever seen; (6) told Nicholls that he had not received his QSI initially because of his comments on the Union's web site, and (7) communicated to Riggins and Nicholls that the Respondent was monitoring the Union's web site, maintaining copies of what employees posted there, and that these matters would be considered with regard to employees' conditions of employment. Each of the statements and conduct allegedly constitutes independent acts of interference, restraint and coercion of employees engaging in activity protected under § 7102, in violation of Statute.

The Respondent's answer admitted the jurisdictional allegations as to the Respondent, the Union, and the charge, but denied any violation of the Statute. Respondent defends the action on the basis that its actions in viewing the Union's web site do not constitute unlawful surveillance or monitoring because the web site is accessible for any person who has access to the Internet. Respondent contends that Warden Pugh did not make the statements attributed to him; that each discussion of the Union's web site was initiated by Riggins and Nicholls, and the Warden's comments about the web site were an appropriate response to offensive statements which had been made on the Union's web site impugning his reputation.

For the reasons explained below, I conclude that a preponderance of the evidence supports the alleged violations.

A hearing was held in Denver, Colorado. 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⁽¹⁾, 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 Union and the Respondent

The National Council of Prison Locals, American Federation of Government Employees (AFGE) is the exclusive representative of a nationwide consolidated bargaining unit of Bureau of Prison (BOP) employees

appropriate for collective bargaining. The Charging Party (Local 1302, or Union) is an agent of the National Council of Prison Locals, AFGE and represents bargaining unit employees at the Respondent (Administrative Maximum or ADX). ADX houses from 350 to 500 of the BOP's most violent inmates. They are serving average prison sentences of about 40 years.

The Union's Web Site and Guest Book

Local 1302 started its own world wide web site in the late summer of 1998. The purpose of the web site was for the Union's officers to communicate with unit employees on pending labor relations issues, provide links to other local unions and the national union, and provide employees a means to communicate with the Union. Anyone with access to the Internet can view the web site. Most employees do not have Internet access from their duty stations at the ADX.

The Union maintains a guest book on its web site, which allows those accessing the web site to leave comments for others to see and comment upon, if they choose. The Union, in consultation with its attorneys, established a policy with regard to postings on the guest book, which requires that the person record who is making the posting, and prohibits posting threats, criminal activity, and issues that would affect the security at the ADX.

Respondent's Reaction to Offensive Comments

In early 1999, following comments on the Union web site that were viewed by the Respondent as particularly offensive, Warden Michael Pugh asked the ADX Investigations Branch to copy all comments on the web site dating back to August 1998. The comments were maintained in two large three-ring binders in the Warden's office.⁽²⁾ The contents of the binders were arranged alphabetically by the name of each writer, about 55 individuals, and contain hundreds of comments posted on the Union web site through October 1999.

The Respondent identifies twelve comments reportedly made by three individuals during this period as particularly offensive and impugning the reputation of the warden. (See Appendix A). A single individual reportedly posted eight of these comments. (*Ibid.*, Numbers 3-10). Two other individuals reportedly made two such comments each. (*Id.*, Numbers 1-2, 11-12). Warden Pugh testified that these false and inflammatory statements affected his ability to operate the ADX in a safe and efficient manner as it impacted on how the staff and the inmates viewed and might respond to him as a leader and a warden. The three individuals reportedly making these comments are not involved in this case, and the Respondent does not contend that the comments of Sean Riggins and Eric Nicholls on the web site are of the same nature or constituted flagrant misconduct.

On at least two occasions, Pugh informed officers of Local 1302 that he was offended by the guest book on the web site and asked that the guest book be removed. The Union refused to do so based on the advice of its attorneys.

Warden Pugh's Meeting With Sean Riggins

On about July 7, 1999, Correctional Officer Sean Riggins visited the Warden's office and asked Warden Pugh why he had not received a QSI based upon his April 1999 performance appraisal and the recommendations of his supervisors. Pugh asked Riggins if he really did not know why he had not received the QSI. Riggins told Pugh that he really did not know, and asked if he was under some sort of investigation or was the problem in his attitude. Pugh responded that it was sort of Riggins' attitude and explained that employees who receive QSIs should be role models to other staff. Pugh then said he would reconsider Riggins' QSI if Pugh decided that Riggins did not know what he was talking about, but if he decided that Riggins did know what he was talking about, he would not even bother. Riggins asked if Pugh would at least speak to his supervisors, and Pugh agreed to do.

On July 8, 1999, Riggins was called to his supervisors' office. Lieutenants Beaudin and Benavides told Riggins that they had met with the Warden that morning, the Warden had asked them about Riggins, and they had told the Warden that Riggins was a good officer, did his job well, and did not argue or challenge their authority. Riggins thanked them and was told to go to the Warden's office where Warden Pugh was waiting to see him.

In Riggins' private meeting with the Warden, the Warden told Riggins that he would go ahead and sign for Riggins' QSI. Pugh said the lieutenants had put in a good word for Riggins and decided to sponsor him. The Warden said that Riggins now had a clean slate with him, indicating with his hands the baseball safe sign to confirm what he was saying.

As the conversation continued, Pugh asked if Riggins still did not know why Pugh did not want to give Riggins the QSI. Riggins replied that he honestly did not know and asked if it had anything to do with the comment that he had left on the Union's web site. The Warden responded that what upset him the most was that Riggins had jumped on the bandwagon right away. Riggins replied that he had not, that he had kept his peace for a long time, but was responding to the comments of others and had been very careful how he worded his comments.

Warden Pugh then pulled a black binder off the shelf, thumbed through it, and read to Riggins the comment Riggins had made on the Union's web site. As of this time, Riggins had posted only one comment on the Union's web site, which was made on February 25, 1999. In that comment, Riggins wrote that while all employees respected the Regional Director (the former Warden), they could not expect management to discipline its own. Riggins also wrote that the Union had strong, competent leadership, and it was ironic that the Warden had done much to strengthen the Local that was giving him such a headache. Riggins went on to write that he agreed with comments made by two other individuals, one of whom had stated that "maybe Congress would like to know about this fiasco." {G.C. Exhibit 3(b), Riggins, February 25, 1999}.

While reading Riggins' web site comment, Pugh accused Riggins of agreeing with two other employees who had posted comments critical of Pugh. Riggins replied that he had agreed with the specific comments they had made, but had never said he agreed with the individuals overall. When Pugh remarked that Riggins was saying in his comment that all management was bad, Riggins also disagreed, pointing out that he had noted how much respect the employees had for the Regional Director, the former warden at ADX.

As this meeting continued, Pugh circled his hands over the binder, and said, "What we have here is some

dirty staff within the Union trying to get things stirred up on the web site to take the heat off of themselves." Pugh said he knew that some staff members were transferring information between prison gang members. Riggins replied that he had heard rumors about the persons Pugh thought were "dirty," but did not want to hear about it until Pugh had proven the allegations and taken action against those people. Pugh responded that he had access to more information than Riggins, to which Riggins agreed.

After some inquiries by Riggins concerning the handling of inmate complaints and attacks on officers, and discussion of these matters, Riggins thanked Pugh for the QSI and the meeting ended.⁽³⁾

Riggins' QSI was effective July 18, 1999. Riggins continued to place entries on the Union's web site after his meetings with Warden Pugh (G.C. Exhibits 3a & 3b; Respondent's Brief, Tabs 13-16.

Warden Pugh's Meeting with Eric Nicholls

Correctional Officer Eric Nicholls met with Warden Pugh on August 2, 1999. Nicholls requested the meeting to discuss the QSI for which he had been recommended, but had not received. Following the "get acquainted" portion of the meeting, during which the Warden inquired about Nicholl's career aspirations and family, as the Warden tried to do with all of his staff, Nicholls brought up his own concerns. Pugh said he did not believe that Nicholls was a loyal person because of things that Nicholls had said and done. When Nicholls asked Pugh why he felt that way, Pugh said that he thought that Nicholls knew why. Nicholls said that he had made entries on the Union's guest book web site, but would stand by them and he had not said anything he might regret.

The Warden responded by saying that he could tell Nicholls exactly what he said and grasped the black binder marked "N-Z." The Warden started thumbing through it while scanning the pages and reading them to himself. At the time of the meeting, Nicholls had made about ten comments on the guest book of the Union's web site. In his various messages, Nicholls had inquired about a possible source of illness at the prison, commented that all correctional officers were "indeed loyal," and the remainder of his comments was along the lines of merely expressing support and thanks for the Union's executive board and "the active members of our union for their time, energy and dedication." (General Counsel Exhibit 3B, Nicholls).

While thumbing through the binder, Pugh asked Nicholls if he would be surprised if told that a few of the staff members were bringing in things for white supremacist leaders incarcerated at ADX. Nicholls replied that he would be surprised. Pugh said that two key players in the Union were bringing things in, that the Union was the most corrupt union he had ever seen, and that he would not even speak to some of the members of the Union's executive board because they did not deserve his time. Pugh also said that one of the Union's national officers was the sickest one of them all. He told Nicholls that the Union leaders or members of the executive board were lying to employees about what Pugh had said or done in an effort to discredit him because of his knowledge of their illegal activities.

With regard to the QSI issue, Pugh told Nicholls that by leaving comments on the guest book, Nicholls was not supporting him, and therefore was not being loyal and did not deserve a QSI.⁽⁴⁾ Nicholls replied that he felt he had supported the Warden and had been loyal to him.

The Warden closed the binder without having mentioned any of Nicholls' entries specifically. Pugh told Nicholls that his slate was clean. Pugh would go ahead and process the QSI.

A week or two later Nicholls was called to the Warden's office where Warden Pugh gave him a QSI certificate. The effective date of his pay increase was August 1, 1999.

Discussion and Conclusions

Section 7102 of the Statute protects each employee in the exercise of the right to form, join, or assist a labor organization, or to refrain from any such activity, without fear of penalty or reprisal. Section 7116(a)(1) provides that it is an unfair labor practice for an agency to interfere with, restrain, or coerce any employee in the exercise by the employee of such right.

It is a fundamental right under the Statute for unions and employees to communicate with one another without the fear of reprisal from management, including "[t]he right of Federal employees under section 7102 of the Statute to publicize matters affecting unit employees' terms and conditions of employment." *Scott Air Force Base, Illinois and National Association of Government Employees, Local R7-23, SEIU,*

AFL-CIO, 34 FLRA 1129, 1135 (1990) (collecting cases regarding contacts with the press, public officials, or use of agency facilities). Although the present case does not involve communication between the union and employees using the *agency's* facilities, cases concerning such communication are instructive in this area. In *Department of Labor, Office of Workers' Compensation Programs, Branch of Special Claims and Stephanie E. Garland*, 11 FLRA 77 (1983) the Authority held that the agency violated the Statute by removing and prohibiting the posting of notices on an employee bulletin board, thereby interfering with the right of union officials to communicate directly with employees and for employees to seek assistance from union representatives.

The ability for the Union and employees to communicate with each other was a primary purpose of the Union's establishing the web site and the guest book in this case. Of course, the right to communicate is not an unfettered one. As the Union recognized in establishing its public web site and guest book, the release of information to outside parties which would jeopardize the Respondent's mission as a penal institution would not be protected.⁽⁵⁾ *Bureau of Prisons, Federal Correctional Institution, Danbury, Connecticut*, 17 FLRA 696-97 (1985).

The Authority has held that the standard for determining whether management's statement or conduct violates section 7116(a)(1) of the Statute is an objective one. The question is whether, under the circumstances, the statement or conduct would tend to coerce or intimidate the employee in the exercise of rights protected by the Statute, or whether the employee could reasonably have drawn a coercive inference from the statement. 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 the intent of the employer. *U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky,*

49 FLRA 1020, 1034 (1994); *U.S. Penitentiary, Florence, Colorado*, 53 FLRA 1393, 1403-05 (1998).

Statements to Riggins and Nicholls about Their Comments on the Web Site

The record reflects that Warden Pugh told bargaining unit employees Riggins and Nicholls words to the effect that they did not initially receive recommended QSIs because of their comments on the Union's web site. By such conduct, and by questioning Riggins and Nicholls about their comments on the web site in the context of discussions about their qualifications for QSIs, the obvious inference to be drawn from Pugh's statements was that the employees' communications with the Union would be considered in determining their conditions of employment. The employees could reasonably have drawn a coercive inference from the statements, thus interfering with their rights to assist and communicate with the Union. Such conduct violated section 7116(a)(1) of the Statute, as alleged.

The record also reflects that, during the meetings with Riggins and Nicholls, Warden Pugh clearly communicated the message that the Respondent was monitoring the Union's web site, maintaining copies of what employees posted there, and that these postings may be considered with regard to employees' conditions of employment.

I agree with the General Counsel that, in this respect, Respondent, through Warden Pugh, separately violated section 7116(a)(1) of the Statute. Warden Pugh clearly sent the message that he would consider the postings when deciding whether employees received awards, such as QSIs. As acknowledged by the General Counsel, it is not the Respondent's monitoring of the Union's web site that is the alleged violation. The Union's web site is a public forum, open for reading by the public, and the Respondent's monitoring of the guest book on the web site is no different than would be the Respondent's reading of an employee's letter to the editor in a union's newspaper. Rather, the violation here is the combination of circumstances: the Respondent, through Warden Pugh, communicating to employees that it is monitoring the web site, maintaining copies of the comments that employees post there, *and* will consider the protected comments of employees in determining their conditions of employment. An employee would "think twice" about using this means to communicate with the Union in such circumstances. If an employee has to think twice before exercising a statutory right, the employee's right has been interfered with. *Department of the Treasury, Internal Revenue Service, Louisville District*, 11 FLRA 290, 298 (1983). The Respondent's action would chill the "uninhibited, robust, and wide-open debate" favored in both private and public sector labor relations. *Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 273 (1974).⁽⁶⁾

Statements to Riggins and Nicholls about the Union

As set forth in more detail above, the record reflects that Warden Pugh told Riggins during their conversation that there were "some dirty staff" within the Union transferring information between prison gang members and "trying to get things stirred up on the web site to take the heat off themselves." Pugh told Riggins that he had access to more information than Riggins. Pugh also told Nicholls during their

conversation that the Union was the most corrupt union he had ever seen, that two key players in the Union were illegally bringing things in the prison, and that the Union leaders or members of the executive board were lying to employees about what Pugh had said or done in an effort to discredit him because of his knowledge of their illegal activities.

The General Counsel contends that these statements to Riggins and Nicholls were made in a context that was coercive and violated section 7116(a)(1) of the Statute. According to the General Counsel, given how this discussion occurred, the obvious interpretation of a reasonable employee would be that the Warden was saying that those involved in the Union and posting comments on the web site are or may be dirty or corrupt, and this interpretation would tend to chill any participation in the Union that an employee may engage in, even though such participation is clearly protected by section 7102 of the Statute.

"[O]utside of a representational context, section 7116(e) protects the expression of personal views, arguments or opinions by management, employees, or union representatives as long as such expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions." *Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma*, 6 FLRA 159, 161 (1981).

The statements contained no explicit threat of reprisal or force or promise of benefit. The determination of whether the statements were otherwise "made under coercive conditions" must, as noted above, be an objective one, based upon whether the action would tend to coerce a reasonable employee.

These statements were made in the context of a discussion by Warden Pugh of whether Riggins and Nicholls initially deserved QSIs in light of their postings on the Union web site. In their comments on the web site, both Riggins and Nicholls had expressed support for the leadership of the Union. Warden Pugh's comments to the effect that key leaders in the Union were engaged in illegal activity and that the Union was corrupt would discourage a reasonable employee from continuing to express such support and, in this way, assisting the Union. Made in the context of a discussion of their QSIs and protected communication with the Union, I conclude that the statements were made under coercive conditions and violated section 7116(a)(1), as alleged. As Judge Learned Hand stated in *NLRB v. Federbush Co.*, 121 F. 2d 954, 957 (2nd Cir., 1941):

Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of

which the relation between the speaker and the hearer is perhaps the most important part. What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart.

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

ORDER

Pursuant to section 2423.41(c) of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the U.S. Penitentiary, Administrative Maximum, Florence, Colorado shall:

1. Cease and desist from:

(a) Making statements, comments, or in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute to form, join, or assist the American Federation of Government Employees, Council of Prison Locals, Local 1302 (the Union), the agent of the exclusive representative of its employees, freely and without fear of penalty or reprisal, including the right of employees to communicate with the Union through its guest book on its web site.

(b) In any like or related manner interfering with, restraining or coercing its 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) 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 Warden 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.

(b) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director of the Denver Region, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, April 26, 2000

GARVIN LEE OLIVER

Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Penitentiary, Administrative Maximum, Florence, Colorado violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

We hereby notify our employees that:

WE WILL NOT make statements, comments, or in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute to form, join, or assist the American Federation of Government Employees, Council of Prison Locals, Local 1302 (the Union), the agent of the exclusive representative of our employees, freely and without fear of penalty or reprisal, including the right of employees to communicate with the Union through its guest book on its web site.

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

(Activity)

Date: _____ By: _____

(Signature)

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Denver Region, 1244 Speer Boulevard, Suite 100, Denver, CO 80204-3581, and whose telephone number is: (303) 844-5224.

APPENDIX A

1. "Through his binos he did adora-little bikinis poolside in Mora-the local law came- and witnessed the shame- in that town he voyeured no mora. Someone was there who did see-such an act of infamy-Washington did say you're leaving today-just stay away from the pools in D.C." (2/9/99)

2. "Give us a Warden that cares about staff and get rid of the rebounding self-esteem refugee. Considering the amount of time he's been here, he has caused more discontent and controversy than the average Anti-Christ." (2/5/99)

3. "Last Message from Berlin. The Fuhrer has gone insane. The evil Nazi dictator is preparing to flee with his plunder and has begun his scorched earth policy. (8/13/99)

4. "Funny how our Warden made sure they skipped my unit. From the look on his face yesterday, he seemed on verge of "going postal." I hope it was nothing I wrote. Anyone know where I can pick up a lightweight kevlar vest? By the way, I think I found his dirty staff member. It can only be the Warden himself." (8/12/99)

5. "Make no mistake this Warden is behaving like a Nazi." (8/7/99)

6. "It seems like the harder our little dictator struggles to remove it, the farther his cranium seems to plunge into his rectal orifice." (5/3/99)

7. "As I think about which news agency would best handle reporting our warden's incompetence, lack of tact, Nazi-like investigations and discrimination, I can't help but wonder if it wouldn't be best to wait until this summer when the public swimming pools are open. They will obviously follow him around. Who knows what they might discover about him. Maybe they will catch him in some clandestine meeting with a house mouse or just wearing a trenchcoat with candy in the pockets. One never knows what one will find in a Nazi's closet." (5/1/99)

8. "Like his 1950's predecessor of paranoia, Senator Joseph McCarthy, he tells anyone who will listen that there are communists in the government or in the case of our warden, "dirty staff" in the ADX . Just as Joseph McCarthy did, our warden announces unusually high percentages with absolutely no truth. If the warden has proof of dirty staff then he should walk them out. I won't tolerate dirty staff myself. If he has no proof he should shut his mouth . Personally, I think he is just trying to break up the unity of our union by creating paranoia. Then again he could just be delusional. Anyone can make unfounded allegations. For example, I could say that one percent of all the Bureau wardens are pedophiles with binoculars that like to watch children at public swimming pools." (4/29/99)

9. "Is the Warden really an inept alien in disguise or the illegitimate child of Adolph Hitler and Eva Braun, raised by fugitive Nazis?" (2/14/99)

10. " I hope our famous CEO is talented at bending over & grabbing his ankles as he is at eating cheese. His highly questionable management techniques are only surpassed by those of Adolph Hitler. One would think that he would of understood by now that Nazi tactics will not be tolerated by us!" (2/12/99)

11. "Soon Giovanni, we will be able to say "stick a fork in that pissclam he's done." (7/16/99)

12. "I have to comment on the latest actions of our deranged, power-crazed piece of shit warden. This lunatic does not have the authority to transfer bargaining unit staff to another institution against thier will. This employee has done nothing wrong and is being moved because this mentally ill CEO feels that he is disruptive. Who is next? I am disruptive. I dare him to try it with me. He does not have the onions. The real disruptive force in OUR ADX is Punk Pugh. He needs to be forced out. We will stop this violation of rights by means necessary. We all need to realize that if this coward is hiding behind his "authority is not stopped, we are next. This Local is with our Brother in this struggle and will not let this harassment, retaliation, racism, union busting, and abuse of power continue." (4/28/99)

1. The General Counsel's unopposed motion to correct the transcript is granted; the transcript is corrected as set forth therein.
2. Copies of the binders, each 2½ to 3 inches thick, were admitted as G.C. Exhibits 3(a) and 3(b). Warden Pugh acknowledged that they contained copies of the comments made on the guest book in the Union's web site.
3. Warden Pugh recalled meeting with Riggins about the QSI, but did not recall the date. Pugh denied questioning Riggins about his comments on the Union's web site, but recalled discussing the web site with Riggins based on questions that Riggins raised. Pugh acknowledged giving Riggins his opinion that certain staff members had engaged in misconduct and were using the Union web site as a shield. The Warden specifically denied telling Riggins that he did not receive a QSI because of his comments on the web site. In making the above findings, I have credited the detailed and specific testimony of Riggins. I found his testimony inherently probable in light of all the testimony and the surrounding circumstances.
4. Pugh testified that he and Nicholls had a general discussion about the web site based on questions that Nicholls brought up, but he specifically denied questioning Nicholls about his comments on the web site and stating that Nicholls was not loyal because of his comments. The Warden acknowledged that he was familiar with Nicholls' comments on the web site, may even have reviewed them at the meeting, but did not find the comments particularly offensive, although "[t]here were some people, and I can't tell you if Eric or Mr. Nicholls falls into this category . . . who did not make offensive comments, but they certainly showed support for other folks who did." Pugh also specifically denied telling Nicholls that Local 1302 was the most corrupt union he had ever seen. (Tr. 74-78). In making the above findings, I found Nicholls' account of what occurred at the meeting to be inherently probable in light of all the surrounding circumstances.
5. An employee can be disciplined for remarks or actions that exceed the boundaries of protected activity and constitute flagrant misconduct. See footnote 6, *infra*.
6. The Authority noted in *Department of the Air Force, Grissom Air Force Base, Indiana*, 51 FLRA 7, 11-12 (1995):

A union representative has the right to use "'intemperate, abusive, or insulting language without fear of restraint or penalty'" if he or she

believes such rhetoric to be an effective means to make the union's point. *Naval Facilities Engineering Command*, 45 FLRA at 155 (quoting *Old Dominion Branch No. 46, National Association of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 283 (1984)). Consistent with section 7102, however, an agency has the right to discipline an employee who is engaged in otherwise protected activity for remarks or actions that "exceed the boundaries of protected activity such as flagrant misconduct.'" *U.S. Air Force Logistics Command, Tinker Air Force Base, Oklahoma City, Oklahoma and American Federation of Government Employees, Local 916*,

AFL-CIO, 34 FLRA 385, 389 (1990) (citation omitted).

As noted, Respondent does not contend that the statements by Riggins and Nicholls on the web site exceeded the boundaries of protected activity and constituted flagrant misconduct.