UNITED STATES OF AMERICA

**FEDERAL LABOR RELATIONS AUTHORITY**

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: November 17, 1998

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE AIR FORCE
AIR FORCE MATERIEL COMMAND
WARNER ROBINS AIR LOGISTICS
CENTER ROBINS AIR FORCE BASE, GEORGIA

Respondent

and Case No. AT-CA-80078

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 987

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA

**FEDERAL LABOR RELATIONS AUTHORITY**

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

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| DEPARTMENT OF THE AIR FORCE<br>AIR FORCE MATERIEL COMMAND<br>WARNER ROBINS AIR LOGISTICS CENTER<br>ROBINS AIR FORCE BASE, GEORGIA<br><br>Respondent | |
| and<br><br>AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 987<br><br>Charging Party | Case No. AT-CA-80078 |

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **DECEMBER 21, 1998**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

JESSE ETELSON
Administrative Law Judge

Dated: November 17, 1998
Washington, DC

OALJ 99-05

# FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C.

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| DEPARTMENT OF THE AIR FORCE<br>AIR FORCE MATERIEL COMMAND<br>WARNER ROBINS AIR LOGISTICS CENTER<br>ROBINS AIR FORCE BASE, GEORGIA<br><br>Respondent | |
| and<br><br>AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 987<br><br>Charging Party | Case No. AT-CA-80078 |

Sherrod G. Patterson, Esquire
For the General Counsel

C.R. Swint, Jr., Esquire
For the Respondent

Harvy Burnette, Union Steward
For the Charging Party

Before: JESSE ETELSON
Administrative Law Judge

## DECISION

The unfair labor practice complaint in this case alleges that Respondent Air Logistics Center (the ALC) violated sections 7116(a)(1), (2), and (4) of the Federal Service Labor-Management Relations Statute (the Statute). The alleged violations concern appraisal ratings given to two employees in April 1997. According to the complaint, as amended, these ratings were given to these employees because of certain protected activities they engaged in, including their being associated with unfair labor practice charges

filed against the ALC by the Charging Party (the Union).[1] The ALC's answer admits, in part, the alleged protected activity, but denies that the appraisal ratings were given because the employees engaged in protected activity and denies that the ALC committed the alleged unfair labor practices.

A hearing on the complaint was held in Macon, Georgia.[2] Counsel for the General Counsel and for the ALC filed post-hearing briefs.

## Findings of Fact[3]

### *A. Background*

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[1] The complaint alleges that the ratings were given, in part, because the employees were "the key witnesses" with respect to alleged illegal conduct described in three charges filed in January 1997 and a further charge filed in May 1997. Counsel for the General Counsel appears to have abandoned the position that the May 1997 charge forms any part of the basis for the ALC's alleged discriminatory actions. In any event, the evidence establishes that the appraisals in question were made in April 1997, a time when no one responsible for the appraisals had knowledge of the May 1997 charge.

[2] Counsel for the ALC moved to dismiss the complaint at the close of the General Counsel's case on the ground that a *prima facie* case had not been established. I reserved ruling on the motion at that stage, in part because it was administratively expedient to receive the ALC's evidence in order to minimize the likelihood of having to reopen the record in the event that a reviewing authority disagreed with a ruling of dismissal. In retrospect, find the motion to have been premature because the General Counsel had rested only conditionally, reserving the right to call Deena Wallace, the ALC's principal witness, as his witness if the ALC did not call her.

[3] Although, at the parties' request, I ordered that the witnesses be sequestered for the purpose of minimizing problems in the resolution of credibility, there were very few conflicts in the witnesses' testimony and none that I regard as dispositive. This observation applies only to evidentiary facts. There is a dispute, of course, over the ultimate fact--the motivation for the April 1997 ratings.

Geraldine Polite and Mildred Nobles[4] are procurement technicians, working in a small section with two other procurement technicians, Martha Umberger and Betty Bruno. For the purpose of making certain purchases from outside contractors, the ALC has organized itself into "product directorates," or areas requiring purchases. The procurement technician are responsible for ordering spare parts for these directorates. Each technician is assigned to meet the purchasing needs of two product directorates.[5]

In performing their jobs, the technicians prepared the documents required for making purchases and submitted a "package" containing the necessary documents to their supervisor, the contracting officer holding the "warrant" for making the purchases. The supervisor thus was aware of the quantity and quality of each technician's work. Each technician's output was also recorded in a monthly work report, which indicated whether any of the required submissions were delinquent or "fixing to be delinquent" (Tr. 128).

All four procurement technicians receive annual performance appraisals from their immediate supervisor. Judy Hunter was their supervisor during the appraisal year beginning on July 1, 1993 and ending on June 30, 1994. For the 1993-94 appraisal year Hunter had awarded to all four procurement technicians overall performance ratings of "excellent," resulting in all of them receiving cash awards of 1.3 percent of their salaries. The total of the ratings on Polite's various "appraisal factors" was 70. Nobles' total score was 71.

*B. Change of Supervisors and the August 1996 Appraisals*

Hunter left her position during the following appraisal year (July '94 - June '95) and was replaced temporarily by an interim supervisor. In March 1995, this supervisory position was filled by Deena Wallace. The procurement technicians' performance ratings for the July '94 - June '95 appraisal year were not based on their actual performance

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[4] At the time of the hearing, Ms. Nobles had married and become Mildred Nobles Sanders. As all the record evidence refers to her as Nobles, I will continue to refer to her under that name.

[5] Umberger "basically handled one large major program" (Tr. 130). It is not clear whether that meant that she was responsible for only one directorate, making her an exception to the two-directorate pattern, or whether her work also involved a second directorate to some extent.

during that year. Instead, the appropriate ALC official decided to rate all of them exactly as they had been rated the previous year. The apparent reason for this decision was that Deena Wallace had become the technicians' supervisor too late in the appraisal year to rate them, Hunter was not available to rate them, and no one else was deemed to be in a position to do so. As a result, Polite again received a total score of 70 and Nobles received a total score of 71. All four procurement technicians received overall ratings of "excellent" and cash awards.

According to both Polite and Nobles, soon after Wallace took over she began to criticize Polite's work performance. In a "performance discussion" documented by a memorandum dated January 26, 1996, and covering the last six months in 1995, Wallace pointed out to Polite certain "areas for improvement" among the official appraisal factors. These areas were "work effort," "adaptability to work," "working relationships," and "work management." Wallace also marked "self-sufficiency" as an area for improvement, although she also wrote "satisfactory" in the comment column for that factor. (R Exh. 7, Tr. 145-46.) On the corresponding performance discussion memorandum for Nobles, Wallace wrote "satisfactory" next to each of the appraisal factors but noted five factors as "areas for improvement or extra attention" (R Exh. 8, Tr. 192-93).

In August 1996 Wallace gave Polite and Nobles their written performance appraisals for the July '95 - June '96 appraisal year. The totals of their appraisal factor ratings were 60 and 62, respectively, and their overall performance ratings were both in the "fully successful" range. These overall ratings did not qualify either employee for a cash award.

*C. Protected Activities and Subsequent Appraisals*

Both Polite and Nobles filed grievances claiming that their appraisals were unfair and in violation of the applicable collective bargaining agreement. Both Polite and Nobles requested that Wallace, to whom the first step of their grievances would be presented, arrange to have Union Steward Ronald Jack Williams released to represent them. (Williams was employed in a different part of the ALC's operation.) Wallace made the necessary arrangements.

Williams presented Polite's and Nobles' grievances to Wallace at separate meetings, the affected grievant being present at each. Wallace denied both grievances, reaffirming her appraisals. The grievances proceeded to the next step, where both were settled. Under the terms of both

settlements, the August 1996 appraisals were cancelled. New appraisals for the applicable year were to be based on these employees' 90-day performance under new performance plans to be written with input from the employees. The new appraisals would serve as the employees' "appraisal[s] of record" for the year originally covered by the August 1996 appraisals.

Nobles testified that the occasions on which Wallace spoke to Polite critically about Polite's work increased after the grievances over the August 1996 appraisals. According to Nobles, the criticism got worse--that Wallace was "all the time picking on her." There was no corresponding evidence of Wallace criticizing Nobles, either before or after these grievances, except to the extent evidenced by the "areas for improvement or extra attention" noted on the memorandum of their January 1996 performance discussion. Nor did Polite testify that Wallace treated either of them differently after the grievances.[6]

In early January 1997, Wallace sent a message by e-mail to Polite and Nobles requesting work reports by mid-January so that she could reevaluate them at the end of January. On or around January 7, 1997, Union Steward Williams came into their work area to deliver a copy of Polite's settlement agreement to her. When he arrived there, however, he discovered that he had brought a copy of Nobles' settlement agreement instead. Nobles was not there, so Williams left the copy for her.

Wallace testified credibly that she observed Williams in the area, talking with an employee, and called the ALC's Labor Relations Section to determine what if anything she should do. Labor Relations Specialist Janet Spivey told Wallace that Williams should not have gone to Wallace's area without (1) first obtaining leave to do so and (2) announcing his presence to Wallace. Spivey advised Wallace

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At the hearing, Polite complained that Wallace did not talk to her but would would communicate by leaving her notes. Polite did not fix the time this started. Wallace testified that she always tried to talk to Polite about work that had to be returned to her for corrections. She denied that she was reluctant to talk to Polite in person. Wallace explained that she left notes and e-mail messages for Polite and other employees when they were not there, and that Polite was absent frequently, to the extent that she had to request advanced sick leave and to use leave without pay. Polite, notwithstanding her testimony that Wallace would not talk to her, testified about some conversations they had. I credit Wallace.

that she should ask Williams to leave. Wallace did so, explaining to him what Spivey had told her.[7] Nobles testified that, sometime after Williams' visit, Wallace told her that Williams was going to get into trouble for being there. Wallace had no recollection of such a conversation.

Having learned of these early January events, Williams reported them to the Union's attorneys, who prepared three separate unfair labor practice (ULP) charges on January 14 and filed them with the Authority's Atlanta Region on January 21. The ULP charges alleged that Wallace (1) told an employee that a Union representative (Williams) got in trouble for engaging in protected activity; (2) implemented a work report require-ment without notice to or bargaining with the Union; and (3) began a practice of using unsecured e-mail for grievance processing without notice to or bargaining with the Union, such use of e-mail also interfering with and restraining grievants/employees from engaging in protected activity.

In January 1997 Wallace made the reappraisals mandated by the grievance settlements. Nobles' reappraisal is dated January 27 and Polite's is dated January 28. Each of their total scores was lower than the scores on the August 1996 appraisals, although both overall ratings were still in the "fully successful" range. Polite's total January 1997 score was 54 and Nobles' was 58.

On February 12, 1997, the ALC's Labor Relations Section forwarded copies of the three January ULP charges to the management officials responsible for Wallace's section.

Along with these copies was a standard covering memorandum requesting that the management officials review the charges and provide certain information about the allegations by March 12. Within that period, Wallace was informed of the nature of the charges and provided her input regarding the circumstances surrounding the charges. Wallace had then become aware that the charges involved Polite and Nobles. These were the first ULP charges that Labor Relations Specialist Spivey was aware of concerning alleged conduct by Wallace. Wallace was not aware of any grievances or ULP charges filed by either Bruno or Umberger.

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[7] Williams testified about his visit to the area but neither confirmed nor denied that Wallace spoke to him. I credit Wallace, who had no apparent reason to fabricate this testimony.

On two or more occasions in March, Wallace released Polite and Nobles to go to the Union hall to provide information about the charges to an Authority investigator.

On April 18, 1997, Wallace signed performance appraisals for Polite and Nobles for the period of July 1, 1996 to March 31, 1997. This period ended on March 31 because Respondent had changed the appraisal year so that a new appraisal year began on April 1, 1997. Wallace testified credibly that, in evaluating Polite's and Nobles' performance, she excluded from her consideration a 3-month period, slightly different for each of these employees, but both beginning around mid-October 1996 and ending around mid-January 1997 (Tr. 194).

According to Wallace, she excluded this period for Polite and Nobles because she had previously evaluated their performances for that period in her January 1997 reappraisal and they had not done well. Those months included holiday breaks that resulted in a relatively small sample of work product to evaluate. Wallace testified that she thought it would be better for these employees if she excluded that 3-month period. Consequently, she based the April 1997 appraisals on Polite's and Nobles' performance for the previous three months (approximately the third quarter of calendar 1996) and approximately three months in early 1997.

Polite's total score on the April 1997 appraisal was 58; Nobles' was 60. Their overall ratings remained in the "fully successful" range. Their co-workers, Umberger and Bruno, received scores that were significantly higher. These coworkers' scores had remained in the "excellent" range for several years. Under Wallace, however, the totals for one had declined slightly, while the other, whose job, in Wallace's view, involved the most complex work, rose, by the year in question, into the "superior" range (GC Exh. 19, 20).

Wallace testified that the differences between the scores she awarded to Umberger and Bruno and those awarded to Polite and Nobles were based on her assessment of their respective performances during the appraisal period, including such aspects as the timeliness and the accuracy of their submissions. As reflected in their respective appraisals, Wallace found Nobles' and Polite's work less commendable than Umberger's and Bruno's in general but found

Nobles to be somewhat more adaptable to her work and better at working relationships than Polite.[8]

## Discussion and Conclusions

### I. Isolation of Issues and Relevant Evidence

The evidence outlined above reviews a series of appraisals leading to those covered by the complaint being litigated in this proceeding. The appraisals that Polite and Nobles received from Wallace in August 1996 for the July '95 - June '96 appraisal year were the subject of their separate grievances. These grievances were settled and the settlements resulted in new appraisals for the appraisal year July '95 - June '96, issued by Wallace in January 1997. The January 1997 reappraisals were the subject of ULP charges filed in May 1997 (after Wallace made the appraisals of her technicians for the abbreviated July '96 - March '97 appraisal year) and later settled by an agreement that reinstated the August 1996 appraisals retroactively.

Neither the August 1996 appraisals nor the January 1997 reappraisals are before the Authority in this proceeding. The only appraisals at issue here are the April 1997 appraisals of Polite's and Nobles' performance for the abbreviated appraisal year of July '96 - March '97. At the time Wallace made these appraisals, Polite's and Nobles' "appraisal[s] of record" for the previous year (July '95 - June '96) were those given by Wallace in January 1997.

For the purposes of this case, the only protected activities by Polite and Nobles that are relevant to the issue of the motivation behind their April 1997 appraisals are their activities in connection with their grievances over the August 1996 appraisals and with the three ULP charges filed in January 1997 over other matters. Polite filed two grievances in 1996, complaining of actions by Wallace, before Wallace issued the August 1996 appraisals. Although Counsel for the General Counsel established that these were the first grievances filed against Wallace as a supervisor, these grievances are not part of the alleged discriminatory basis for either of the April 1997 appraisals.

### II. Applicable Analytical Framework

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[8] This testimony goes to an ultimate fact rather than an evidentiary fact, and I make no "credibility" finding on it, *per se*. Instead, my decision as to the impact of such testimony on the disposition of the case will be based on my analysis of all the evidence presented.

Section 7116(a)(2) of the Statute makes it an unfair labor practice to encourage or discourage membership in any labor organization by "discrimination in connection with hiring, tenure, promotion, or other conditions of employment." Section 7116(a)(4) makes it an unfair labor practice to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under the Statute. Once it is determined that the act that is alleged as discriminatory falls conceptually within either section 7116(a)(2) or (4), the question of whether such an act has occurred must be resolved by employing the analytical framework set forth in *Letterkenny Army Depot*, 35 FLRA 113, 118 (1990) (*Letterkenny*). *See Department of Veterans Affairs Medical Center, Brockton and West Roxbury, Massachusetts*, 43 FLRA 780 (1991).

Under *Letterkenny*, a *prima facie* case of discrimination will be found if the General Counsel establishes two things. The first is that the employee against whom the alleged discriminatory act was taken engaged in protected activity.[9] In order to find a violation of section 7116(a)(4), however, it is not sufficient that the employee engaged in protected activity. The employee must have engaged in an activity within the narrower scope of activities described in section 7116(a)(4). The second essential element for a *prima facie* case under either section 7116(a)(2) or (a)(4) is that it be established that "such activity was a motivating factor" in

[9] I have questioned the requirement that the alleged discriminatee have actually engaged in protected activity. Such a narrow reading of the basis of the discrimination would exempt retaliations against employees for their *suspected* activities or the activities or suspected activities of others, as well as actions taken against employees other than the actual targets of the discrimination, for the purpose of masking the discriminatory motivation for the action taken against the targeted employees. *Wright Line*, 251 NLRB 1083 (1980), employing what the Authority described in *Letterkenny*, 35 FLRA at 122, as "the same test" as the Authority's, does not so limit the scope of proscribed discrimination. *See F&E Erection Co.*, 292 NLRB 587 (1989). In a very recent decision, Chief Judge Chaitovitz concluded that, at least under certain circumstances, discrimination against an employee who had not engaged in protected activity falls within the prohibition of section 7116(a)(2) of the Statute. *Small Business Administration, Newark, New Jersey*, Case No. BN-CA-80113, at 20 (Oct. 21, 1998) OALJ 99-02.

the action taken against the employee. If the General Counsel fails to make this showing, the case ends without further inquiry. *Letterkenny*, 35 FLRA at 118.

In *Letterkenny*, the Authority adopted the dictionary definition of *prima facie* case, with the accompanying explanation that focuses on the sufficiency of "plaintiff's evidence." *Id.* at 119. This, taken alone, might suggest that the Authority intended to consider the General Counsel's evidence alone in determining whether a *prima facie* case had been established. However, *in U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 37 FLRA 161, 172 (1990) (*SSA*) the Authority concluded that an agency's actions "were based on considera-tion of [the alleged discriminatee's] protected activity and, accordingly, the General Counsel has established a *prima facie* case that the Respondent violated section 7116(a)(2) of the Statute." In so concluding, the Authority relied on "the absence of any other explanation for the Respondent's disparate treatment" of the alleged discriminatee. Further, in *Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 49 FLRA 1522, 1532 (1994), the Authority concluded "[o]n the basis of the entire record . . . that the General Counsel failed to establish a *prima facie* case . . . ."[10]

The Authority also noted, in *Letterkenny*, 35 FLRA at 121-22, that a finding that an agency's asserted reasons for taking the allegedly discriminatory action are pretextual is based on consideration of all the evidence presented in a case. Establishing that the reasons are pretextual, the Authority had stated previously, might be part of the *prima facie* case. *Id.* at 120.

Thus, the Authority apparently has recognized that, once a complete record has been made, it is unrealistic to expect the trier of fact to determinine the employer's motivation by viewing the evidence piecemeal. Here, for example, the issue is whether the ALC gave Polite and Nobles, because of their protected activities, lower appraisal ratings than it otherwise would have. I find it virtually impossible to assess the ALC's motivation without

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[10] *Cf. Golden Flake Snack Foods*, 297 NLRB 594 n.2 (1990) ("[I]t is the evidence as presented at the hearing, drawn from whatever source, [not the General Counsel's evidence viewed in isolation] which precisely determines whether or not there is a prima facie case of unlawful conduct.").

considering its explanation for the rating and the evidence supporting that explanation.[11]

Without more, an employee's protected activity, known to management, followed by his or her being placed in a less favorable position, or failing to receive a hoped-for advancement, does not warrant an inference of a causal relationship. While such a relationship may be established by circumstantial evidence, there must be *some* credible evidence to augment the mere contemporaneity of the protected activity and the employee's treatment. *See U.S. Department of Justice, Federal Prison System, Federal Correctional Institution, Milan, Michigan*, 17 FLRA 1023, 1037 (1985).

Counsel for the General Counsel cites a statement from the judge's decision in *United States Department of Interior, Office of the Secretary, U.S. Government Comptroller for the Virgin Islands*, 11 FLRA 521, 532 (1983), to the effect that "in any case where action affecting the conditions of employment of an employee involves an employee known to be active in protected union activity there is a suspicion, or presumption, that the action was motivated by the employee's protected activity." A careful reading of that decision, however, reveals that the judge, affirmed by the Authority, decided the case in accordance with the principles I have adduced above. Moreover, in *U.S. Department of the Air Force, Seymour Johnson Air Force Base, Goldsboro, North Carolina*, 50 FLRA 175 (1995), the Authority adopted the findings and conclusions of Judge Arrigo, who stated, "While a suspicion may exist, I disagree that a presumption of discriminatory motivation is established on those facts alone. Suspicion is not evidence and speculation is not proof." *Id.* at 182 n.9.

**III. A Prima Facie Case Has Not Been Established**

In the absence of any direct evidence of animus against Polite's and Nobles' exercise of their statutory rights, Counsel for the General Counsel seeks to elicit an inference that there was disparate treatment. However,

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[11] Motivation, as the NLRB has recognized in applying *Wright Line* (the progenitor of *Letterkenny*), is an issue that is primarily associated with the *prima facie* case. Thus, the "*Wright Line* defense" is not a rebuttal of the showing that the protected activity was a motivating factor, but an independent showing that, even assuming the "motivating factor" element, the same action would have been taken even in the absence of protected activity. *NKC of America, Inc.*, 291 NLRB 683 (1988).

there is no basis for such an inference. Merely giving different ratings to different employees, or to the same employees in different years, does not constitute disparate treatment. Awarding lower ratings to these employees than those they had received before they grieved their August 1996 appraisals does not amount to disparate treatment unless there is reason to assume that their ratings are otherwise expected to remain consistent from year to year. No such assumption is warranted with respect to any of the employees Wallace supervised.

The total numerical ratings for each of Wallace's employees changed by at least three points between 1995 and 1997. All but one of the changes were, cumulatively, downward. Moreover, a more radical change occurred for three of the four employees in that their overall ratings changed. The change was upward for one employee and downward for two. And although the two employees whose overall ratings declined during this period were Polite and Nobles, those declines occurred in 1996, before any of their relevant protected activity. It was then that Wallace differentiated their performances substantially from the performances of Bruno and Umberger. After that, and through April 1997, Polite's and Nobles' overall ratings remained in the "fully successful" range.

More generally, Wallace's pattern of appraisal ratings indicates that she gave little if any weight to the ratings each employee received in prior years. This pattern is consistent with her testimony and, with respect to the weight given to the ratings her employees had received for the '94 - '95 appraisal year, is supported by common sense. That year's ratings were based on evaluations, by a different supervisor, of the performance of these employees in the '93 - '94 appraisal year, the '94 - '95 appraisals being bogus.

Even if Wallace looked at employees' performance in exactly the same way that her predecessor did, and even assuming that her predecessor's appraisal ratings were justified (which we have no way of determining), Wallace had little reason to rely on these not-so-recent evaluations for guidance as to how to rate them in the years after she took over. Moreover, it would not have been necessary for Polite's and Nobles' job performance to have deteriorated for Wallace to have justifiably given them lower ratings than they had received in the past. In fact, Wallace showed dissatisfaction with Polite's performance even before the '94 - '95 appraisal year ended.

Wallace's early criticisms of Polite constitute persuasive evidence that her less favorable view of Polite's job performance preceded Polite's protected activity. The situation with respect to Nobles is not as clear, although some signs of dissatisfaction may be found in Wallace's January 1996 performance discussion memorandum. Ultimately, however, the record provides inadequate basis for the inference that Wallace's April 1997 appraisal of her performance was motivated by any of the protected activities. That is, while there might be insufficient evidence to *preclude* such an inference in Nobles' case, the record lacks any of the *indicia* that would justify a finding that the General Counsel has carried the burden of establishing this element of a *prima facie* showing regarding either employee.

Counsel for the General Counsel argues that the timing of the April 1997 appraisals, in relation to the other relevant events, evidences a discriminatory motivation. However, Wallace did not choose the time for making these appraisals, nor is there any basis to conclude that any other ALC officials tailored the date of these appraisals to respond to Polite's and Nobles' protected activities. Moreover, to the extent that one might relate the April 1997 appraisals to these employees' most recent protected activities (those connected with the filing and investigation of the January 1997 ULP charges), counsel for the ALC makes the cogent point that Wallace rated both Polite and Nobles higher after these protected activities than she had in January 1997, shortly before she learned of them.

Finally, since the establishment or not of a *prima facie* case is based on the entire record, I note that Wallace's testimony in support of her ratings was plausible, internally consistent, and sufficient to explain why, at least in her own mind, Polite's and Nobles' recent performance was neither equal to that of the other two procurement technicians nor compatible with Polite's and Nobles' pre-1966 ratings. In evaluating this testimony, solely for the purpose of completing my analysis of whether a *prima facie* showing has been made, I need not decide whether it would be sufficiently persuasive to rebut a *prima facie* showing, under *Letterkenny* standards, had such a showing been made.[12] This is not to say that Wallace's testimony would not have been sufficiently persuasive but only that it need not have been in order to avoid finding "an absence of any other [than discriminatory] explanation" (*SSA*, 37 FLRA at 172) for the action taken. I

[12] See n. 8, above.

do, however, find her explanation to be sufficiently persuasive so that, considering it as part of the record as a whole, I conclude that it is not pretextual.

For all of these reasons, I recommend that the Authority issue the following order.

**ORDER**

The complaint is dismissed.

Issued, Washington, D.C., November 17, 1998

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JESSE ETELSON
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by JESSE ETELSON, Administrative Law Judge, in Case No. AT-CA-80078, were sent to the following parties in the manner indicated:

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Dated: November 17, 1998
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