UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

U.S. PENITENTIARY LEAVENWORTH, KANSAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 919 Charging Party	Case Nos. DE-CA-60026 DE-CA-60027 DE-CA-60028 DE-CA-60049 DE-CA-60050 DE-CA-60051 DE-CA-60349 DE-CA-60362 DE-CA-60365 DE-CA-60385 DE-CA-60405 DE-CA-60569

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. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **MARCH 31, 1997**, 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: February 28, 1997
Washington, DC

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: February 28, 1997

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

SUBJECT: U.S. PENITENTIARY
LEAVENWORTH, KANSAS

Respondent

and Case Nos. DE-CA-60026
DE-CA-60027
AMERICAN FEDERATION OF GOVERNMENT DE-CA-60028
EMPLOYEES, LOCAL 919 DE-CA-60049
DE-CA-60050
Charging Party DE-CA-60051
DE-CA-60349
DE-CA-60362
DE-CA-60365
DE-CA-60385
DE-CA-60405
DE-CA-60569

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(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

U.S. PENITENTIARY LEAVENWORTH, KANSAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 919 Charging Party	Case Nos. DE-CA-60026 DE-CA-60027 DE-CA-60028 DE-CA-60049 DE-CA-60050 DE-CA-60051 DE-CA-60349 DE-CA-60362 DE-CA-60365 DE-CA-60385 DE-CA-60405 DE-CA-60569

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For Respondent

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For the Charging Party

Before: JESSE ETELSON
Administrative Law Judge

DECISION

Introductory Overview

These 12 consolidated cases present questions of interference with employee rights, discrimination to discourage membership in the Charging Party (the Union), refusal to negotiate in good faith, and failure to provide the Union with the opportunity to be represented at a "formal discussion." They also present the question of the appro-priateness of certain "nontraditional" remedies that the General Counsel has requested in the event that Respondent is found to have committed unfair labor practices.

The first group of consolidated cases, Case Nos. DE-CA-60026, 60027, 60028, 60049, 60050, and 60051, concerns events occurring in September and October of 1995. The consolidated complaint covering these cases alleges that Warden (William) Page True, Associate Warden Carl (or R.C.) Greenfield, and Executive Assistant Robert Bennett made coercive statements to employees and Union officials James Evans (paragraphs 27, 29, 30, 31, and 35) Larry Raney (paragraphs 28 and 31), Roger Michaud (paragraph 32) and to a group of employees attending a meeting on October 4 (paragraph 39), in violation of section 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute). The same consolidated complaint also alleges that Respondent violated section 7116(a)(1) and (2) of the Statute by removing Evans from its strategic planning committee (SPC) based on Evans' protected activities and that the removal of Evans from the SPC also constituted a failure to honor the Union's designation of Evans as a member of SPC, in violation of its duty to negotiate in good faith, thereby committing an unfair labor practice under sections 7116(a)(1) and (5) of the Statute. Finally, this complaint alleges that the October 4 meeting with employees was a formal discussion within the meaning of section 7114 (a)(2)(A) of the Statute and that Respondent failed to afford the Union with notice and an opportunity to be represented at that meeting, in violation of section 7116(a) (1) and (8).

The answer to this consolidated complaint denies all of the substantive allegations, except for jurisdictional and preliminary matters, but admits that the October 4, 1995 meeting was formal in nature.

A separate complaint covers Case No. DE-CA-60349 and alleges that Respondent violated section 7116(a)(1) and (5) of the Statute by refusing to allow Union President Larry Raney access to the Union's office at Respondent's facility, refusing to recognize Raney as the Union's appointed representative to serve on Respondent's housing committee,

and by refusing to recognize Raney as the Union's designated representative for purposes of presenting a class during Respondent's annual refresher training. Respondent's answer explains that Respondent, acting in accordance with statutory and contractual rights and its "historic practice," placed Raney on "home duty" status pending the outcome of an official investigation, and that this necessarily precluded his entering the facility.

The complaint in another group of these consolidated cases, Case Nos. DE-CA-60362, 60365, 60405, and 60569, alleges that Respondent, through Food Service Administrator Randy Madan, directed employee Terrell Hill, who was not designated by the Union for the purpose, to sign a work schedule roster in the space designated for the signature of a Union repre-sentative, and that this conduct violated section 7116(a)(1) and (5) of the Statute. This complaint also alleges that Respondent, through Madan, Greenfield, and True, made coercive statements to employees Jim Healey (paragraph 22), Evans (paragraph 23), Lynn Looney (paragraph 26), and other unit employees at a staff meeting (paragraph 24 and 25).

The answer to this complaint asserts that Madan "allowed" employee Hill to sign the roster as a Union representative, having been informed that Hill was a Union steward. The answer denies the alleged coercive statements, including those in paragraph 25 of the complaint "as written," and represents that Warden True's comments at the staff "recall" meeting "will be fully explained at hearing."

A separate complaint in Case No. DE-CA-60385 alleges that Respondent changed a local supplemental collective bargaining agreement, after an untimely disapproval of the agreement, that Respondent reproduced the changed agreement for distribu-tion to employees, and that it ordered the Union to relocate its office within Respondent's facility without providing the Union with notice or any opportunity to negotiate, all in violation of section 7116(a)(1) and (5). An amendment of this complaint at the hearing alleges that, by relocating the Union office, Respondent repudiated a provision of the local supplemental agreement.

Respondent denied that the disapproval of the agreement was untimely, that it changed the agreement, that it failed to provide the Union with notice and opportunity to negotiate concerning the relocation of the Union office, and that it committed any unfair labor practices. I also construe Respondent's opposition to the motion to amend the complaint as a denial of the substance of the "repudiation" amendment.

A hearing on all of these consolidated cases was held in Kansas City, Missouri. Counsel for the General Counsel and for Respondent filed post-hearing briefs. After presenting the general background facts, I shall take up each of the cases in the chronological order in which the incidents they involve began. I shall identify each by the case number corresponding to the unfair labor practice charge underlying each allegation litigated here.[1]

Most of the witnesses presented by each side appeared to be highly credible. Most also had some motivation for telling either more or less than the whole truth. In general, my credibility resolutions are based to no great extent on their demeanor. Rather, they are largely the product of an effort to reconstruct these events in a manner that is as consistent as possible with the record as a whole, and with how experience teaches that people might be expected to have acted in similar circumstances, with due regard for their capacity to behave inexplicably. What I consider to be knowledge gained from "experience," of course, is inevitably what has passed through the filter of my own biases.

Voltaire is attributed with words to the effect that history (as written) is so many tricks played upon the dead. The reconstructed narratives appearing below are potentially more invidious, for while they carry no greater assurance of fidelity to actual events than does such "history," they "play" on the living. Nonetheless, my responsibility is not to hold out for certainty but to reach for the more modest objective of closure.

Findings on General Background Facts

Respondent is part of the Federal Bureau of Prisons (FBP), a primary national subdivision of the Department of Justice, an agency under the Statute. The National Council of Prison Locals, American Federation of Government Employees (the Council), represents a nationwide consolidated bargaining unit of FBP employees appropriate for collective bargaining. The Union is the Council's agent for representing employees at Respondent.

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[1] Respondent's motion to correct two minor errors in the hearing transcript is granted. I note also that GC Exhibits 26, 27, and 30, erroneously bound with the admitted exhibits, were rejected, and that the first name of Laddie Tabor is misspelled.

During the period with which these cases are concerned, the warden of Respondent's facility was Page True. R.C. Greenfield was an associate warden. Warden True arrived in June 1995 and Greenfield arrived in August 1995, shortly before the incidents in dispute here began. Employees Larry Raney and James Evans were, respectively, President and First Vice-President of the Union. Between June and September 1995 Raney served as Acting President of the Council. His duties in that capacity required time away from Respondent's facility, and Evans then served as Acting President of the (local) Union. Raney resumed his duties as Union President in the latter part of September.

CASES NOS. DE-CA-60027 AND 60050

In these cases it is alleged that True and Greenfield made coercive statements to Evans and Raney concerning Evans' representation of employee Melody Beyer in connection with her proposed eviction from "reservation" housing provided to employees. "Reservation" housing is housing provided within prison grounds to employees approved by the warden.

Evidence Presented

a. By the General Counsel in Cases DE-CA-60027 and 60050

As a result of an incident involving a visitor to the "reservation" residence of employee Melody Beyer, she was served with a notice dated September 6, 1995, signed by Greenfield, that her assignment to this housing would be terminated in 14 days. In other words, she would be evicted. Greenfield's duties at that time included supervision of the reservation housing committee. While the functions of that committee were not described fully in the record, one of its functions was to make recommendations, normally followed by the warden, in selecting among employee applicants for such housing assignments (Tr. 102, 155). The Union had a represen-tative as a member of the committee, pursuant to the Master Agreement between FBP and the Council.

Evans testified that, on September 7, a Union steward informed him of the Beyer eviction notice. Evans went to Beyer and obtained a copy. He then proceeded to the warden's office and presented himself for the purpose of representing Beyer. Warden True, according to Evans, told him that the Union had no business representing Beyer in this matter, that it was not a disciplinary matter, and that

Evans should "turn [his] head and look the other way and help [True] out on this one." Then Evans told True that True had misinterpreted Evans' character, that he was insulted, and that he would in fact represent Beyer.

Still according to Evans, Warden True called Beyer a whore and a slut and said that "drunks had a path worn to her back door." Evans challenged these statements. He suggested that the facts be obtained from Beyer and that "we could sit down and this thing wasn't as serious as [True] was trying to perceive it." True allegedly told Evans that he "had ways of getting tough with [him]." Evans answered that True would not "threaten me off." True responded, "Jimmy, Jimmy, Jimmy. The neighbors, Jimmy. They all told me. I can get affidavits." (Jimmy) Evans then asked for the affidavits.

They discussed the facts of the incident further. Then Evans questioned the appropriateness of giving Beyer only 14 days to move. In response, True took the eviction notice (GC Exh. 18), scratched through "14 days," and handwrote, in the margin, "30 dys" [sic].

Immediately after this meeting, Evans drafted a request for any information "the agency is relying upon to terminate housing on the reservation," referring specifically to Ms. Beyer and requesting that her eviction be reconsidered. The following day, according to Evans, he returned to the warden's office with Beyer, where True told Beyer that "[t]he Union should not be involved here, and I won't allow it." Evans insisted on remaining as her representative. Beyer stated that she wanted him as her representative, and the warden told Evans that "I will let you stay because I like you."

Evans and Beyer attempted to make a case against eviction, but, according to Evans, True was hostile toward Beyer. True used the word, "slut," and, in response to Beyer's representation that her last evaluation had been "outstanding," commented to the effect that, "Yes, and I know how you got your evaluation, too." At a certain point True dismissed Beyer from the meeting and "ordered" Evans to stay. The meeting ended, however, without any resolution of the problem. Still according to Evans, True told him "again . . . that he had ways to back me off the . . . case.

On September 15, Warden True sent Beyer a letter notifying her that her assignment to reservation housing would be terminated **90** days from her receipt of the letter.

Evans continued to press the Beyer matter at a meeting with the warden on September 20. Evans testified that the warden told him again, at that meeting, that he had ways of backing Evans off, and, further, that he would no longer discuss the case with Evans, as it had then become an EEO complaint. Union Sergeant-at-arms Joe Corriston, who accompanied Evans to this meeting, also testified that True told Evans he had to "back off this one," that it was not a Union matter, and that True "had ways of backing him off."

Union President Raney had resumed his local duties around this time. He testified that on September 27, at a private meeting with Warden True on other matters, True told him that he did not think Evans should be representing Beyer. True said that Beyer "had a path worn to her back door," that True was in control of his reservation and did not believe Beyer should have called people to his reservation without his knowledge, and that Raney, as Union President, "needed to back Evans off this case." Raney told True that he refused to back off cases in which the Union represents employees. Then True told Raney, "I have ways to back you off cases."

Also on September 27, Beyer filed a "Grievance and EEO Complaint." Evans signed the document as the grievant's representative and presented it to Warden True. Evans also assisted Beyer in completing a housing discrimination complaint that was filed with the U.S. Department of Housing and Urban Development on September 28.

During September 28, Warden True and Associate Warden Greenfield, making what Greenfield called their "daily rounds," entered Evans' work area, the "ISM area." Evans was wearing a Union hat. After a discussion about the hat, Evans removed it. According to Evans, True and Greenfield then walked on but returned a few seconds later. True opened the door to a mail truck room and ordered Evans inside, where he told Evans that he did not like his "paperwork on this Beyer case." True reminded Evans that he had told him to back off and that he had ways of backing him off. He would put Evans "on the street." Then, as Evans further testified, True asked him if he liked his job and whether he would "like to get a few days off." Evans said that he would not.

Evans testified that True then "ordered" Greenfield to take Evans to Greenfield's office. There, Greenfield told him, "This warden wants a pound of your flesh. I have worked around him before. You had better do what he says."

Later that day True summoned Evans to his office. Evans brought Union Second Vice-President Lynn Looney with him as his Union representative. During this meeting, the following occurred according to Evans:

> [T]he warden then said, I am sorry, Jimmy, for this morning. Don't be around me when I am angry; I do stupid things. But almost in the same breath, [True] said to me, I guess I haven't got your attention. I do have ways of backing you off this Melody Beyer thing. (Tr. 182.)

Looney described this part of the meeting as follows:

> [The warden] turned to Jimmy, and he told Jim -- he says, ["]First of all, I would like to apologize to you about what happened down in the ISM area today.["] He said, ["]You know, when I get mad, people need not to be around me, because I do dumb things.["] He went on to say, ["T]he hat really wasn't the issue down there.["] He says, ["]But what I think you are doing is not paying any attention to me, Jimmy. When I tell you things, you just [act] like you don't pay any attention to what I am saying.["]
>
> [True] said, ["]It was just like in the Melody Beyer case.["] He said, ["]I told you to back off this case, and you won't back off.["]

After further discussion in which Evans reiterated his intention to represent Beyer, the meeting reached a point where, according to Looney, "Basically, [the warden] said, I have ways to back you off, Jimmy." (Tr. 279-80.)

On October 16, 1995, Warden True sent Beyer a letter stating that: "We have reviewed your case and have elected not to terminate your reservation housing at this time."

b. By Respondent in Cases DE-CA-60027 and 60050

Warden True testified about a conversation with Evans concerning the Melody Beyer matter at which Joe Corriston was present. He did not testify specifically about any other conversation with Evans about this matter, but he denied telling Evans or anyone else to back off the Beyer case. True could not recall talking about the Beyer case with Raney. He believed that he had called another Union official, Chief Steward Roger Michaud, to his office to

discuss with him and Respondent's chief psychologist the possibility that evicting Beyer would cause a suicide attempt by the visitor whose difficulties had resulted in the eviction notice. True intimated that his own decision to rescind the eviction notice was based in part on that discussion.

Concerning the conversation with Evans and Corriston, True testified that he told them that he was embarrassed that the police had to come to the reservation and told them that he had learned from Beyer's neighbors that "she was noted to invite male guests to her residence quite often." Evans told True he was wrong to evict her. In response, True told Evans that "he was all right to express his feelings on that, but I didn't think it was a union matter, and that it didn't impact the working conditions of the institution." (Tr. 429.)

Greenfield testified, in connection with the September 28 "daily rounds" encounter with Evans, that True called Evans into a side room and talked to him about his Union hat. According to Greenfield, True said to Evans that he had spoken to him about wearing that hat in the institution, and "you're fucking with me," and that True later told Evans, "If you keep disobeying my orders, I'm going to take disciplinary action against you." True left the room and Greenfield asked Evans to accompany him to Greenfield's office, where Greenfield told him that, "If the warden gives you an order, I think you need to comply." Greenfield then talked with Evans about the policies regarding hats. Greenfield denied telling Evans that the warden wanted a pound of his flesh. He denied hearing the warden tell Evans to back off the Beyer issue.

Findings and Conclusions: Nos. Cases DE-CA-60027 and 60050

Warden True's denials regarding the conversations in which he was alleged to have told Evans to back off the Beyer case were incomplete. He was asked nothing about the first meeting with Evans, on September 7, which, although not alleged as one of the violations in the complaint, set the stage for the subsequent meetings. As this was the meeting at which True changed the eviction notice from 14 to 30 days, I have little doubt that such meeting occurred. As True did not testify about this meeting, and as Evans' testimony about what occurred was essentially believable, I credit Evans' testimony that True told him that he had no business representing Beyer, that he should look the other way and help True out on this one, and that Beyer was a whore and a slut with a "path worn to her back door." Finally, I credit Evans that True used words to the effect

that he "had ways of getting tough" with him, either at this meeting or at their next, if not both.

True did not testify about a meeting with Evans and Beyer on September 8, at which, according to Evans, True spoke of having "ways to back me off." This incident was not alleged in the complaint, and I make no credibility finding with regard to this specific statement at this meeting. I do not expect a party to controvert every testimonial assertion made at a hearing, and True did make a generic denial about telling anyone to back off the Beyer case. Further, Evans was not entirely consistent. He testified that True said this "again," but his testimony about what True had said previously had to do with "getting tough," not with "backing off." However, Evans' testimony presents a credible description of the warden's style in dealing with Evans. Therefore, as stated above, I credit that at one or more of these two meetings True spoke of having "ways," either of getting tough with Evans or, to the same effect, of getting him to do what True wanted.

Thus, I am more inclined to believe Evans and Corriston that when True met with them on September 20, he said he had ways of backing Evans off, than to believe True's generic denial. True's testimony (presumably given to bolster his denial) that "I would never make such a statement," rings slightly off key when heard in conjunction with other statements credibly attributed to him throughout the hearing and reflecting a certain intensity of expression that is perfectly consistent with "such a statement."

More difficult is a determination of whether True, even if inclined to make such a statement, made it repeatedly as alleged. Raney testified about a meeting concerning other matters on September 27 at which True brought up the Beyer case and eventually made a "ways to back you off" statement. True could not recall a conversation with Raney about this matter, but Raney credibly recounted True's statement that Beyer "had a path worn to her back door," an expression that Evans credibly attributed to True at the September 7 meeting. I find that True did discuss the Beyer case with Raney. Further, given Raney's specific testimony about the "ways to back you off" statement and True's inability to remember discussing the Beyer case with Raney at all, I credit Raney.

Resolution of the credibility of Evans' account of the September 28 conversations with True and Greenfield is equally difficult. However, in this instance, I am persuaded in large part by the testimony of Greenfield, a particularly credible witness. Greenfield heard no

reference to the Beyer case and probably would have, if True had spoken of it, after the discussion in the ISN area about the Union hat. That True had spoken of the hat, and not the Beyer case, is also more consistent with Looney's testimony regarding the later September 28 meeting in True's office. Thus, Looney credibly reported that True told Evans that "the hat really wasn't the issue down there . . . but . . . I think you are . . . not paying attention to . . . what I am saying, . . . like in the Melody Beyer case." This suggests that, at least as True remembered the incident in the ISM area, he had been upset about the hat because it reminded him of Evans' stand in the Beyer case. He apologized for "what happened down [there]," referring what he now acknowledged to be an overreaction to the wearing of a Union hat. Then he explained what was behind his behavior but had not been mentioned at that time. Thus, although, as Greenfield credibly testified, True did threaten to take disciplinary action against Evans, the General Counsel has not established to my satisfaction that the threat was connected to the Beyer case.

There is no evidence that, when Greenfield spoke privately with Evans, he mentioned the Beyer case. However, paragraph 30 of the consolidated complaint alleges that Greenfield's warning, that Evans had better do what True had said to do, referred to that case. One could readily infer such a connection if True had said something about the Beyer case in the just concluded conversation. I have found that the General Counsel has failed to establish that True had done so. I therefore reject the inference that Greenfield's comments referred to that case.

The final incident during which it is alleged that a coercive statement about the Beyer case was made is the September 28 meeting in Warden True's office to which Evans brought Looney as his Union representative. I credit Evans and Looney, whose testimony is mutually corroborative with respect both to True's apology and to his further statements about backing off the Beyer case. True did not testify about this meeting, so there is no explanation in the record for his purpose in summoning Evans to his office other than to say the things Evans and Looney testified that he said.

As Respondent has noted, eventually it was True who "backed off" the Beyer eviction. However, that does not persuade me that he lacked the motivation to make the kind of statements he is alleged to have made, in order to induce the Union to leave the matter to him.

Section 7116(a)(1) of the Statute makes it an unfair labor practice to interfere with, restrain, or coerce any

employee in the exercise of any right under the Statute. Section 7102 of the Statute establishes an employee's right to form, join, or assist any labor organization, including the right to act for a labor organization as a representative and to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees. Section 7102 further provides that "each employee shall be protected in the exercise of such right." I find that Evans' attempt to represent Beyer, on behalf of the Union and at her request, through various means including the filing of a grievance, was a protected activity under section 7102.

> 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, or whether the employee could reasonably have drawn a coercive inference from the statement.

U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky, 49 FLRA 1020, 1034 (1994). Having found that Warden True told Evans and Raney that he had ways of making Evans back off the Beyer case, I conclude that these statements carried the necessary coercive or intimidating tendency with respect to the exercise of employee rights. I therefore find that Respondent violated section 7116(a)(1) as alleged in paragraph 44 of the consolidated complaint in Case Nos. DE-CA-60026, 60027, 60028, 60049, 60050, and 60051, to the extent that paragraph 44 refers to conduct described in paragraphs 27 and 28 but, consistent with my earlier findings, not to the extent that it refers to conduct described in paragraphs 29 or 30.

CASE NO. DE-CA-60026

The complaint allegation (paragraph 31) arising from the charge in this case is that Warden True told Evans and Raney that he was going to control a labor-management meeting they were attending, and that if they did not shut up he would put them out on the street (meaning that they would be fired or suspended, Tr. 17). Paragraph 44 of the consolidated complaint alleges that these statements violated section 7116(a)(1).

Evidence Presented

a. By the General Counsel in Case 60026

Raney testified that during his September 27 meeting with True, Raney complained that management had been excessively inquisitive about Union officials' use of official time. True responded that there would be a labor-management relations (LMR) meeting on September 29 and that he would attend it personally and inform both his executive staff and the Union how he wanted them to deal with each other.

The LMR meeting was called for 3:00 pm, an unusual time, according to Evans, whose work shift ended by then. According to Raney, the Union representatives and some of the executive staff were sitting at the table when the warden entered. Evans was wearing his Union hat and True told him to take it off, "or I am going to put you on the street." Evans told True that True had said he could wear the hat if he was not on duty. According to Raney, the warden responded, "You hear what I said. Get that hat off your head, or I am going to put you on the street."

Raney testified that he then told the warden that Evans would take the hat off if Evans was paid an hour overtime for attending the meeting. True insisted on removal of the hat, but would not agree to pay overtime. Raney got up with the other Union officials and "proceeded out of the room." True told them not to "play these childish games with me," but the Union officials kept walking. Then Raney heard True say he would pay an hour overtime, and everybody turned around and started walking back into the room. (Tr. 68-69.)

As Raney went back in, he saw the warden get up and walk around the table toward him. Words concerning Raney's toughness and "manhood" were exchanged, according to Raney, and the warden became "real red," but went back to his seat. The meeting proceeded. When Chief Steward Michaud spoke, True was "real polite," according to Raney, but when Evans said something, the warden said, "You lower your voice. I will put you on the street." Raney protested, and "[w]e proceeded" and "got through that meeting." (Tr. 69-70.)

Evans testified essentially as Raney did concerning this meeting. He added that, once the meeting began, the warden focused on an incident at the recent national convention of the Union's parent organization, American Federation of Government Employees (AFGE). The voice level at the LMR meeting became very loud. When Raney and Evans became as loud as the warden, according to Evans, True said to both of them, "if you don't shut up, I am going to put you on the street." Evans also testified that, at the end

of the meeting, Raney said something to the effect that he was glad they ended up having a normal LMR meeting, and that Raney went over to shake the warden's hand, but that True made no response.

b. By Respondent in Case 60026

Warden True testified that he attended the LMR meeting in an attempt to strengthen the labor-management relationship. He wanted specifically to suggest changing the practice of hiring an outside stenographer to take minutes, at a cost of $100 a meeting, and to substitute either his or the associate warden's secretary. The record is unclear as to whether he actually raised that issue at the meeting, but he affirmed that he brought up the incident at the AFGE convention.

True recalled being sensitive to Evans' wearing of the Union hat and that, as True entered the room, a Union representative was asking Associate Warden Greenfield whether Evans could have overtime for the meeting. However, True did not, in his testimony, connect the issue of the hat with that of the overtime. True testified that he heard Greenfield respond that Evans could not have overtime. He testified that the issue "then got around to me, and I said, No[.]"

The warden corroborated that the Union representatives left the meeting and then returned, but he testified that they had a caucus before returning and that he reversed his decision about paying Evans overtime "[w]hen they c[a]me back in." He confirmed telling Raney, when he reentered the room, "You are not tough." He denied eliciting any physical confrontation with Raney. Respondent's counsel asked True:

Now, in that meeting, did you say anything like, I am going to control this meeting, and Mr. Evans and Mr. Raney, shut up, or I am going to put you on the street?

True answered:

> I would never make such an unprofessional statement. No, I did not.

According to True, the meeting "was not loud for an LMR meeting." True also volunteered the following:

> What was interesting about that meeting and this whole scenario was, after the fact -- I have always been quite appalled that this situation has surfaced -- because after that

> meeting, Mr. Raney came and shook my hand, and said, ["]Thanks for getting control of it.["]

Laddie Tabor, Respondent's Human Resource Manager, attended that LMR meeting. Tabor denied that True threatened the jobs of Raney or Evans and that he said he was going to control the meeting and put Evans and Raney on the street. According to Tabor, True's only cautioned them about leaving the meeting again. Maxwell Brown, an associate warden, similarly denied that True "made any threatening statements other than . . . that they should not walk out."

Greenfield, who, in addition to being an associate warden was Respondent's "chief" of LMR, testified that, before True arrived, Raney asked him whether Evans was going to be paid overtime for attending the meeting. Greenfield first responded doubtfully. Raney informed him that True had said they would be paid overtime for a meeting if it was held outside of normal duty hours. Greenfield replied that then they would have to ask True, who was just arriving. They asked True about overtime, and he said it would not be paid. The Union representatives got up and one of them, probably Raney, said, "This meeting is over; I told you we can't trust these SOBs." Greenfield's testimony continued:

> And they turned to exit the area. And the warden said, ["]Larry, don't leave, don't make a mistake, don't walk out on the warden.["] And it just turned into almost like a shouting match, you know. That's the way the meeting began. Greenfield later indicated that he was referring only to the "chaotic" nature of the first "five minutes or so.

He was asked whether, to the best of his recollection, the warden even threatened either Raney's or Evans' job. Greenfield answered that the warden did not. Greenfield also had no recollection of any discussion about a hat.

Findings and Conclusion: Case No. DE-CA-60026

As is often the case in such situations, no single witness was able to demonstrate a clear recollection of **all** of the statements and actions that might shed light on the allegation in question. However, some examples of incomplete recollection are more significant than others. For example, since the complaint allegation includes in the statement attributed to True words to the effect that he was going to control the meeting, I infer that at some point a witness came forward with that information. However,

neither Raney nor Evans so testified. I detect some degree of confusion in the collective recollection of the Union attendees at that meeting by the time of the hearing.

Nor can one determine from the unfair labor practice charge that Evans filed in this case on October 10, 1995, what Union activities Evans claimed, at that time, that True had targeted in threatening Evans' and Raney's jobs. I note that on October 10 Evans also filed two other charges, including the one in Case 60027 in which there was also alleged a threat of discipline that became, in the complaint, a threat to put Evans "on the street" if he did not back off the Beyer case.

Chief Steward Michaud attended the September 29 LMR meeting. According to Raney, so did Union Sergeant-at-Arms Corriston. Both testified at the hearing but neither testified about that meeting, although Michaud referred to it as the subject of an October 1 phone call from Warden True, which phone call became, in turn, the subject of Case No.
DE-CA-60049, discussed below. While Michaud's and Corriston's testimony about the LMR meeting might have been regarded as merely cumulative, there is reason to find their silence on this matter significant. While both have some interest in the outcome of these cases by virtue of their status as Union officials, they have a less distinct interest in portraying True as a "bad guy" than either Raney or Evans, who are central figures in this and other of these cases and against whom True has been alleged to have taken unlawful action. In these circumstances, Michaud's and Corriston's failure to testify about True's alleged statement at the LMR meeting tends to diminish at least the probability that either of them heard the alleged statement.

Associate Warden Greenfield has at least as great an interest in the outcome as Michaud and Corriston. However, his denial that he heard such a statement is significant because his specific responsibilities for LMR matters should have heightened his attentiveness to such matters and reduced the possibility that it was said without his knowledge. Thus, his testimony as an observer, if truthful, is persuasive, and if inaccurate is more likely to be the product of perjury than that of any of the other observers who testified. On my overall impression of Greenfield, I am reluctant to conclude that he perjured himself. To some extent, these observations also apply to Human Resources Manager Tabor, to whom I impute a professional interest in the manner in which such meetings are conducted, which interest should have enhanced his reliability as an observer to the extent that he was truthful.

Finally, I find at least some significance in the fact that, as both Evans and True testified, Raney approached True at the end of the meeting to shake his hand, and gave some indication that the meeting had turned out satisfactorily. While it is conceivable that Raney would make such a gesture in the wake of the alleged threat, either as an attempt to change the dynamics of the relationship or otherwise, it does not appear to be the most likely course of events. Thus, some doubt is thrown on whether, at that time, Raney believed that True had made such a threat. Possibly, a later discussion with Evans caused Raney to assent in good faith to what Evans believed he had heard at the meeting. As might be suggested by some of my earlier observations, I find it to be more than a remote possibility that, over some period of time following the September 29 LMR meeting, Raney and Evans had conflated certain of the rapidly developing events of September. In any event, I conclude that the General Counsel has not met the burden of establishing what is alleged in paragraph 31 of this consolidated complaint.

CASE NO. DE-CA-60049

Paragraph 32 of the consolidated complaint in the series of cases including Case Nos. DE-CA-60026, 60027, 60028, 60049, 60050, and 60051 alleges that during a telephone conversation on or about October 1, 1995, Warden True told Chief Steward Michaud that he was going after Evans and Raney because of their union activities. Paragraph 44 of the consolidated complaint alleges that this statement was an unfair labor practice in violation of section 7116(a)(1) of the Statute.

Evidence Presented

a. By the General Counsel in Case 60049

Michaud testified that True phoned him at home on the morning of October 1 and told Michaud he was calling because of the September 29 LMR meeting. True said that he wanted Michaud to know that Michaud was right about certain issues that had been discussed, and that one of them was that True had been unprofessional in connection with the big argument that took place during the meeting.

Then True turned the subject of the conversation to Evans and Raney. He said, in what Michaud testified were his exact words, "I am tired of them two fucking with me all the time." Then True said that he was going to get their attention. Michaud asked if True meant that he was going

after them. True answered, "Yes." True told Michaud that he was going to remove Evans from the Inmate Systems Management Department (ISM) and place him in the Custody Department. True also told Michaud that Raney, who was a cook-foreman (nonsupervisory), "had better be the best goddamn food service person in Leavenworth." Michaud asked him why. True answered, "Because he keeps fucking with me all the time."

b. By Respondent in Case 60049

True testified that he phoned Michaud to tell him that he was not going to attend any more LMR meetings, where he would be "disrespected," and that "all future endeavors would be going through Mr. Greenfield." True called Michaud to tell him this because Michaud had always been "the one always to have an open discussion in good faith, and I enjoyed those." True denied that he said he was going to get Evans and Raney "because of their union activity" or said anything like that.

Sometime after this conversation Michaud showed True notes he had made of the conversation. True told Michaud that the notes were "not even close to my conversation." Michaud admitted to him that it was a mistake for him to have documented the conversation, and he apologized to True.

Timeliness Issue, Findings, and Conclusion: Case No. DE-CA-60049

Respondent contends that paragraph 32 of the consolidated complaint is barred by section 7118(a)(4) of the Statute because the original charge in Case 60049 alleged only matters relating to True's conversation with Michaud about how Evans had obtained his job in the ISM department, and because the amended charge in that case, alleging the substance of what became paragraph 32 of the consolidated complaint, was filed more than six months after the date of the conversation.

> [A] complaint need bear only "a relationship" to a charge and closely relate to the events cited in the charge. [Citation omitted.] Further, a charge is sufficient if it informs the alleged violator of the general nature of the violation charged; only defects in a charge that prejudice a respondent will result in dismissal of a complaint.

U.S. Department of Justice, Office of Justice Programs, 50 FLRA 472, 476-77 (1995). The original charge in this

case concerns True's October 1 phone call to Michaud, his discussion of Evans' ISM position, and his statement that he would get Evans' attention by assigning him to Custody. Although that charge did not mention Raney, it put Respondent on notice that his statements concerning what he intended to do to a Union official was being alleged as a violation. I conclude that such a relationship between the charge and the complaint is sufficient to insulate the complaint from a section 7118(a)(4) attack.

I credit Michaud. I believe that he was asked at some point, and in some manner, whether he could support Raney's and Evans' recollection about what True said at the September 29 meeting, and that he declined to do because he did not remember hearing what they alleged. Thus I find him to be a person who would be reluctant to make up a story in the interest of solidarity. Further, the reliability of his recollection of the conversation is enhanced by the fact that he made contemporaneous notes, notwithstanding True's doubts about their accuracy. That Michaud seems to have omitted True's statements about Raney from one or more of his earlier accounts of the conversation is understandable, as True's specific announcement of the action he was going to take against Evans is likely to have riveted Michaud's attention. Although True testified that Michaud apologized for making notes of the conversation, the reported apology contained no confirmation of True's doubts about their accuracy.

True's sworn denial may have come a little too easy. He was asked, closely paraphrasing the words of the complaint, whether he had said he was going after Evans and Raney "because of their union activity." Michaud did not testify that True used words like "because of their union activity," and True's further denial that he said "anything like or similar to that at all" still left him with some wiggle room. Michaud's testimony was that True expressed displeasure with Evans and Raney because they were doing something that True described with the *ef* word.

Given the credited testimony that True said he was going after them because they were *effing* with him "all the time," the context suggests that he was referring to Evans' and Raney's union activities. Absent a different explanation, Michaud could reasonably have drawn a coercive inference from the statement, namely, that True would deal harshly with these two top Union officers because of the way they dealt with him
in their capacities as Union officers. I therefore conclude that the statement was an unfair labor practice in violation of section 7116(a)(1) of the Statute.

CASE NO. DE-CA-60028

This case concerns Evans' removal from Respondent's strategic planning committee (SPC). Paragraph 34 of this consolidated complaint alleges that Warden True removed Evans, the Union's designated representative, from the SPC. Paragraph 35 alleges that True's executive assistant, Bob (Robert) Bennett, told Evans that Evans had been removed because True did not like the way he represented certain employees. Paragraph 36 alleges that Evans' removal was based on his protected activities; paragraph 37 alleges that his removal constituted a failure to honor his designation by the Union as its SPC member. Paragraph 44 alleges that Bennett's statement to True violated section 7116(a)(1) of the Statute. Paragraph 45 alleges that Evans' removal violated sections 7116(a)(1) and (2); paragraph 46 alleges that Evans' removal and failure to honor his designation by the Union violated sections 7116(a)(1) and (5).

Evidence Presented

a. By the General Counsel in Case 60028

Around July 1995 Warden True formed the SPC. He explained to Evans, then Acting President of the Union, that its purpose was to provide a forum for bringing forward ideas concerning the employee working environment. Evans testified that the warden "invited me to be on this committee, or invited the Union to have a representative on this committee." Evans designated himself and so notified True. He also "had run it across Mr. Raney," who approved his appointment.

As Evans remembered it, the committee initially had six to eight members. About half were bargaining unit employees. The group operated as a single committee and discussed issues like smoking, safety, overtime, and man-hours. Evans attended approximately four SPC meetings between July and October. He spoke out when he deemed it necessary to insure that the rights of the bargaining unit employees were recognized.

Evans testified that on October 2, Executive Assistant Bennett came to his work area and pulled him aside. Bennett told Evans that the warden was removing him from the SPC. Evans asked him why, and Bennett told him that "the warden did not like the way that I represented people that he wanted to fire or kick off the reservation." At that time Evans was still representing Melody Beyer in connection with her announced eviction, and was representing two employees

whose removals had been proposed. Although Evans was not the designated Union representative for those two employees, he had discussed them with the warden.

Also on October 2, True issued a memorandum to Evans, with a courtesy copy to "Larry Raney, Union President," notifying Evans of his removal from the SPC and stating:

> You were selected to participate as a staff member, not as a union representative, and I find that your participation is detrimental to this important committee's progress.

On October 7, Raney responded to this notification with a memorandum advising Warden True and Human Resources Manager Tabor that Evans had been assigned to the SPC "by the union president, and that he is to act as the union representative, and not as an employee." Raney asserted the Union's right to be on the committee and concluded that the Union "will continue to be represented by Mr. Evans on this committee."

In December, Respondent restored Evans to the SPC, which had been reorganized into several subcommittees. The subcommittees' activities were overseen by a strategic planning steering committee. Evans was assigned to a subcommittee dealing with community relations but which, according to Evans, did not give him the "overview" that he had on the old SPC because "anything that developed in these subcommittees was then put to the steering committee," on which neither he nor any other Union representative served.

b. By Respondent in Case 60028

Warden True was asked by Respondent's counsel whether he set up a "strategic planning steering committee" after reporting for duty at Leavenworth. True affirmed that he had, and that he formed such committee because each institution "is supposed to have strategic plans developed and formulated[,]" and he wanted "a group of individuals . . . to explain what strategic planning is all about, to communicate strategic planning, and these were going to be the people that [were] going to pass the communications upward and downward".

Asked what the strategic planning *steering* committee was, True stated:

> The strategic planning steering committee are those staff members who actually work the strategic plans. They actually are committees

> headed up by the chairman of each committee [sic], and they actually work the plan, to get the initiatives completed.

True testified that he appointed Evans to the steering committee, not as a Union official but as a staff member. True acknowledged the Union's right to representation on the SPC but not on the steering committee. In the memorandum revoking that appointment, he erroneously stated that he was removing him from the SPC, having intended to remove him from the steering committee. When it came to True's attention that the Union "nominated Evans to be a part of the [SPC]," True permitted him to serve in that capacity. True further testified that he did not tell Bennett that he did not like the way Evans represented employees, nor did he tell Bennett anything like that. (Tr. 439-42.) True did not testify as to why he removed Evans from the steering committee.

Bennett, True's executive assistant and Respondent's strategic planning coordinator for 1995, confirmed and provided some clarification to the formation of the committees. He testified that True had explained to the approximately 12 members of the steering committee that, in order "to give others a sense of ownership in the process, a bigger committee would be developed in order to deal with specific objectives that the warden wanted to focus . . . our attention on, and those members would meet with the steering committee, the catalysts, in a retreat" (Tr. 471).

The warden had selected Evans for the steering committee, and Evans participated in its meetings until True asked Bennett to tell him he was being removed from the steering committee. Bennett did not remember the exact words he used when he so informed Evans, but he believed that he simply told Evans that True had asked him to tell Evans he was being removed from the steering committee. Asked to respond to the allegation that he told Evans that the warden "didn't like the way he, Mr. Evans, wanted to fire or kick off the reservation" [sic], Bennett testified, "It is a bald-face lie."2

Bennett also testified that, although he did not remember whether he wrote the October 2 memorandum removing Evans, the word "steering" was "absentmindedly left out," that the apparent removal from the SPC was a "matter of

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2 Although the question asked Bennett at that point appears to have been truncated in the official transcript, I take it that Bennett understood that he was being asked whether he said what the complaint alleged that he said.

semantics, actually, because we did not have a committee" (Tr. 472).

According to Bennett, he called Chief Steward Michaud some time before October 19 to inform him that Respondent was proceeding with the full SPC and that the Union should decide "who they wanted to be on that representative body." Bennett was apparently informed that the Union had selected Evans. In a memorandum dated October 19, notifying "All Concerned" of an upcoming Strategic Planning Retreat, Evans is listed among the named SPC members (but not among the separately listed members of the steering committee), as the Union representative. He attended the retreat, which was held on December 12 and 13.

On cross-examination, Bennett testified that he attended steering committee meetings and that he could not recall anything about Evans' behavior or participation at these meetings.

Factual Analysis and Resolutions: Case No. DE-CA-60028

In the absence of any specific explanation for Evans' removal from the steering committee, and in view of the warden's demonstrated antipathy to Evans' union activities, it is difficult to avoid the inference that the removal was motivated by these activities. In fact, I become concerned when a conclusion presents itself as such a "no-brainer."

Warden True provided a general explanation of sorts in his October 2 memorandum. He stated there that Evans was "selected to participate as a staff member, not as a union representative, and I find that your participation is detrimental to this important committee's progress." This suggests, possibly, that True was reacting to Evans' assuming the role of a Union representative (which Evans thought he was), and thus acting more aggressively in what he regarded as the protection of employee rights than True would have hoped.

However, Bennett's testimony establishes that he -- True's eyes and ears on the steering committee -- saw or heard nothing untoward in Evan's behavior at committee meetings. Given the then recent history of True's relations with Evans, and his October 1 phone conversation with Michaud about Evans, it appears that what was more prominently on True's mind was Evans' conduct outside the steering committee. This, in turn, lends some credence to Evans' testimony that Bennett told him that True was removing him because he did not like the way Evans was representing people.

In order to believe that Bennett said something like this, it is not necessary to find that True told him it was so. It is sufficient that Bennett so interpreted True's action. That Bennett would share this knowledge or impression with Evans appears so imprudent as to make one skeptical that he did, but it seems more than likely that, as Evans testified, he would have asked Bennett why he was being removed. Bennett did not deny that he was asked. However, his silence on whether he was asked leaves no alternative, except Bennett's flat denial, to Evans' version of Bennett's answer. What, then, did he answer? I find the probabilities to be with Evans' version, and credit it, almost by default.

Bennett's statement and the other circumstances surrounding True's action are, therefore, mutually reinforcing. Bennett's statement probably reflects his belief, based either on True's direct statement to him or on his opportunity to observe events with an insider's perspective, that True was motivated by Evans' union activities outside the steering committee. If, on the other hand, as suggested obliquely in the October 2 memorandum, True's action had been based, even in part, on Evans' conduct on the committee (and without getting into whether that conduct constituted "protected activity"), I would have expected to hear some testimony to that effect. I therefore find that the General Counsel has established the substance of the allegations in paragraphs 34, 35, and 36 of the consolidated complaint. However, I credit Bennett that the SPC, as such, had not been formed yet and that Evans was, in effect, removed instead from the steering committee.

With respect to paragraph 37 of the consolidated complaint, I credit Evans that he was the Union's designee as a member of the committee that we now understand to have been the steering committee. Evans testified that True had invited him to be on the committee or for the Union to have a representative. While this testimony, standing alone, is somewhat ambiguous, I take it to mean that True gave Evans, then the Union's acting president, the option of serving on the committee himself or having the Union designate someone else. This understanding is consistent with Evans' having responded by designating himself and checking with Raney.

True's testimony that he appointed Evans as a staff member and not as a Union official does not squarely refute what I have credited. Given True's description of the committee's function, its work was part of the institution's mission. Every committee member was a staff member and was acting in the capacity of an employee. This does not

foreclose a role for an employee designated by the Union, whether a Union official or not, to voice the collective concerns of bargaining unit employees with respect to the matters being discussed.[3] It is difficult to believe that when True approached the acting president of the Union about serving on the committee, either of them walked away from their conversation with the impression that Evans was selected as a rank-and-file employee and would be expected to serve only in a purely nonrepresentative capacity. Surely, True was not that innocent of the pressures the acting president would incur, with respect to Union's interests, while serving on such a committee. Finally, sending a courtesy copy of the removal memorandum to Union President Raney represents at least some sort of acknowledgment that, despite the disavowal in the body of that memorandum, the Union had a certain expectation with respect to Evans' status on the committee.

Conclusions: Case No. DE-CA-60028

Having resolved these disputed issues of fact, I conclude that Bennett's statement to Evans that he was being removed from the committee because the warden did not like the way he represented people violates section 7116(a)(1) of the Statute, as alleged in paragraph 44 of the consolidated complaint. The statement draws a direct link between Evans' protected repre-sentational activities and this action, thereby delivering the message that his protected activity will result in adverse consequences. The allegation in paragraph 45 that the actual removal violated section 7116 (a)(1) and (2), however, brings us up against a serious problem.

The factual findings I have made with respect to True's motivation and its basis in Evans' protected representational activities clearly show that the General Counsel has satisfied the benchmark causation factors set forth in *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*), and that Respondent has failed to establish a *Letterkenny* rebuttal. I also conclude that Evans' service on the steering committee had become a condition of his employment, irrespective of whether that service was as a "staff member" or as a representative of the Union, so that his removal satisfied the final *Letterkenny* requirement that the alleged discriminatory treatment be connected with "hiring, tenure,

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[3] I do not speak here of the issue of whether the work of the committee involved "conditions of employment" so as to require the Union's participation, on request. That is a separate matter to be discussed below.

promotion, or other conditions of employment." *Id.* at 118. However, as Counsel for the General have recognized in their brief, the Authority recently described an additional requirement for establishing section 7116(a)(2) violations:

> We acknowledge the view of the NLRB . . . that the failure by an employer to honor a valid dues revocation request amounts to discrimination that encourages union membership in violation of the Labor Management Relations Act . . . . Under the Statute, however, we require a showing of disparate treatment of similarly situated employees in order to find a violation of section 7116(a)(2) or (b)(2).

American Federation of Government Employees, AFL-CIO, 51 FLRA 1427, 1439 n.11 (1996) (*AFGE*). Previously, the Authority had stated that "discriminatory **or** disparate treatment is **relevant** in determining whether there has been a violation of section 7116(a)(2) . . . . *U.S. Department of the Treasury, Office of the Chief Counsel, Internal Revenue Service, National Office*, 41 FLRA 402, 418 (1991) (emphasis added).

Illustrating that broader focus, the Authority, in *United States Air Force Academy, Colorado Springs, Colorado*, 50 FLRA 498, 501 (1995), (*Air Force Academy*), remanded a case to the Chief Administrative Law Judge for a determination, among other things, as to whether an alleged 7116(a)(2) restriction placed on an employee's use of telephones "differed, in scope or timing, from restrictions placed on other employees or whether, **on any other basis**, the restrictions constituted unlawful discrimination." (Emphasis added.) Then, at the most recent stage of the *Air Force Academy* case, the Authority, notwithstanding its intervening decision in *AFGE*, seemingly reopened the door to a finding of discrimination without disparate treatment. Thus, in reviewing exceptions to the administrative law judge's decision on remand, the Authority declined to decide whether, as the judge had found, the General Counsel had failed to establish a *prima facie* case of a separate instance of section 7116(a)(2) discrimination, notwithstanding the absence of any claim or indication of disparate treatment. 52 FLRA 874 (1997).

In the instant case, Evans was the only Union representa-tive on the steering committee and the only member of that committee shown to have been removed. However, the record is silent as to whether any other member was ever removed. It follows that it is also silent about

the circumstances surrounding any such removal. Since I assume that a "showing of disparate treatment" is an affirmative showing, I am unable to find that such a showing has been made here. The General Counsel does not argue to the contrary. The General Counsel argues, however, that the overwhelming evidence of unlawful motivation makes a showing of disparate treatment unnecessary. But how does one deal with *AFGE*?

In a recent decision, for purposes of an alternative basis on which I concluded the complaint had to be dismissed, I accepted at face value the Authority's *AFGE* requirement of a showing of disparate treatment. *305th Air Mobility Wing, McGuire Air Force Base, New Jersey*, Case No. BN-CA-60070, OALJ 97-01 (Oct. 23, 1996), currently under review. However, I have reexamined *AFGE* and find it to be inapplicable here. The requirement set forth in *AFGE* is to show disparate treatment "of similarly situated employees." Thus, in the *AFGE* case, the Authority appears to have assumed the existence of "similarly situated employees who may have sought to revoke their dues withholding authorizations in the past." *AFGE* at 1438-39. If, however, there is no basis for finding that there are any similarly situated employees, I conclude that, consistent with *AFGE* and *Air Force Academy*, it is permissible to evaluate the motivation for the agency's treatment of the employee without relying on "disparate treatment." Thus, "disparate treatment" is only a meaningful concept among "similarly situated employees." When there are no similarly situated employees, disparate treatment cannot be shown, yet discriminatory treatment may have occurred because such treatment would not have been administered *but for* the protected activity. Such discriminatory treatment contains all the section 7116(a)(2) elements explicated in *Letterkenny*.

In order to apply this analysis to the instant case, however, it is necessary to resolve whether there are any employees who are "similarly situated," in the sense in which the Authority uses that term, to Evans. The question then is: similarly situated as to what? Evans may or may not have been the only employee who was removed from the steering committee. He certainly was not the only employee on the committee, and it apparently occurred to no one at the hearing, myself included, to develop a record as to any other respects in which, aside from his status as Union representative, Evans was similarly or differently situated from other employee committee members. I conclude, unable to muster any logical imperative but purely out of considerations of practicality, that in order to invoke the requirement of showing disparate treatment, a respondent

must shoulder the burden in the first instance of establishing that there *were* "similarly situated employees." That has not been established here. I therefore further conclude that Evans' removal from the steering committee violated section 7116(a)(1) and (2), substantially as alleged in paragraph 45 of the consolidated complaint, and notwithstanding paragraph 45's reference to earlier allegations that Evans was removed from the SPC.

On the other hand, I conclude that the General Council has not made out a case that Evans' removal violated section 7116(a)(5) of the Statute. The Union's right, on behalf of the bargaining unit employees, to be represented on the steering committee depends on a showing that the committee's functions involve "conditions of employment." within the meaning of section 7103(a)(14) of the Statute. *Department of the Air Force, 915th Tactical Fighter Group, Homestead Air Force Base, Florida*, 13 FLRA 135, 148-51 (1983). *See also Department of the Treasury, U.S. Customs Service, Miami, Florida*, 19 FLRA 1123, 1123-24, 1132-33 (1985), *reconsidered as to other matters*, 29 FLRA 610 (1987).1983)[4] While Evans testified that the subjects of overtime and man-hours were discussed, the mere mention of these subjects provides an insufficient basis on which to conclude that the committee dealt with matters that required including the Union.[5]

CASE NO. DE-CA-60051

This case arises from what is admitted to have been a "formal" meeting Warden True held on October 4, 1995, with bargaining unit employees. Paragraph 39 of the consolidated complaint alleges that, during this meeting, True discussed grievances within the meaning of section 7103(a)(9) of the Statute by reading aloud the narratives of unfair labor practice charges previously filed by the Union and stating that the charges were not true and that he had an institution to run. Paragraph 40 alleges that True refused

[4] It has not been alleged that anything about the committee, or Evans' removal from it, violated either section 7114(a)(2)(A) (formal discussions) or 7116(a)(3) ("sponsor, control, or otherwise assist any labor organization").

[5] In this respect, the analysis of the issue of a bargaining obligation under section 7116(a)(5) is analogous to the methodology of the National Labor Relations Board in considering whether an employer-formed committee involving employees in discussions constitutes a labor organization. *See Electromation, Inc.*, 309 NLRB 990 (1992).

to allow Raney, the Union's representative, to participate in this meeting. Paragraph 42 alleges that the meeting was held without affording the Union notice and an opportunity to be represented.

Paragraph 43 of the consolidated complaint alleges that by the conduct previously alleged in connection with this meeting, Respondent failed to comply with section 7114(a)(2)(A) of the Statute, which subsection refers to an exclusive representative's right to be represented at certain "formal discussions." Paragraph 44 alleges that the conduct alleged in paragraph 39 was an unfair labor practice in violation of section 7116(a)(1) of the Statute. Paragraph 47 alleges that all of the conduct alleged with respect to this meeting violated section 7116(a)(1) and (8), the latter making it an unfair labor practice for an agency to "otherwise fail or refuse to comply with any provision of this chapter." The brief of Counsel for the General Counsel focuses on the (uncontested) "formal" nature of the meeting and True's alleged failure to permit Raney to participate, thereby failing to comply with the duty to give the Union the opportunity to be represented and thus violating sections 7116(a)(1) and (8). The General Counsel presents no argument concerning the alleged independent violation of section 7116(a)(1) arising from True's statements about the previous unfair labor practice charges. I shall limit my treatment of the issues in Case 60051 accordingly. *Cf. Delaware National Guard*, 10 FLRA 135, 143 n.6 (1982) (contention "originally argued" but not mentioned in brief was deemed abandoned).

Evidence Presented

a. Undisputed Background Facts

Respondent holds monthly employee "recall" meetings and occasional "special recalls." All available employees (those whose posts do not require 24-hour coverage) are relieved from their duties to attend. Attendance is mandatory for available employees, including supervisors and managers, at least for those who are on duty status at the time of the meeting. On October 4, Warden True instructed his secretary to send a notice to all departments in the institution, by electronic mail, of a "staff early recall" that day at 3:30 p.m. in the inmate auditorium. (Employee witnesses called this a "special recall.") The notice stated that "All staff are encouraged to attend this meeting." It was attended by an estimated 200 or more staff members and lasted between 10 and 20 minutes.

b. By the General Counsel in Case 60051

Union President Raney testified that after he finished work at noon and had gone home, he received a phone call from an employee who told him that there was going to be a "recall" that day. Raney tried to locate someone then on site whom he could designate as the Union's representative for the meeting. He could not find anyone who was available, so he returned and attended the meeting himself. He seated himself in the first row of the auditorium.

Raney testified that Warden True began the meeting by announcing that he was the godparent of the "Sharon and Lacy" family. (Steve and Sharon Lacy were later identified as a couple, one or both of whom were employees.) Then True read aloud some four to six unfair labor practice charges that the Union had filed. Raney testified (Tr. 83):

> [True] said, ["T]hese are some unfair labor practices that have been filed on the union, that is a lie,["] and then he went into reading the unfair labor practice.
> * * * * *
> . . . I raised my hand, and the warden was just like about two feet from me; he could see me, with my hand up.
>
> I raised my hand to try to get the opportunity to address the employees . . . .
> * * * * *
> The warden wouldn't acknowledge me. He slammed his hand down on the podium. He says, ["]I have got an institution to run,["] and he walked out.

Union Secretary-Treasurer John Johnson testified that Warden True began the meeting by stating that he wanted to dispel some rumors. True mentioned his being a godfather. He talked about spreading rumors, and announced that he would fire anyone who did so. Then he read the Union's charges, but did not identify them. Those charges that Johnson remembered being read dealt with "retaliation against Union officials, trying to back Union officials off of a case." After reading the charges, True said words to the effect that he was busy and had an institution to run. He told those assembled to make up their own minds, but neither admitted nor denied the substance of the charges. (Tr. 394.)

Johnson remembered seeing Raney in the front row. Raney raised his hand at the end of the meeting but True did not acknowledge him. They were less than ten feet apart. Raney "stood up to talk to the warden as it ended." There

was a pause. The meeting was over, but nobody seemed to be sure it was. Finally, there was a "mad rush for the door." (Tr. 395.)

Employee John Trott learned about the meeting in the early afternoon. Trott testified that True read a statement that sounded like a complaint and contained allegations about threats being made by True and Greenfield to what "sounded like a Union member or leader." True read these allegations in a way that made it sound as though the writer "was not very literate" and had very poor grammar. True "kind of stumbled through the words." Raney was sitting in the front row, between six and eight feet from True, and raised his hand "like he wanted to comment on . . . what the warden was reading." True did not "recognize" him. The meeting ended abruptly. The warden said he had an institution to run, and left the room without further comment. (Tr. 411-14.)

c. By Respondent in Case 60051

True testified that his electronic mail notice of the October 4 staff recall accorded with the manner in which he had sent notices of staff recalls since he had been a warden, and that he had never heard or seen any complaints from the Union regarding this method of notification.

Asked what he did at the October 4 staff recall, True testified that he read "some complaints that were being said about me." He could not recall what they were, but knew that he did not mention any name or from whom the allegations came.

> I just said, ["]These are some areas that people -- what people are saying about me,["] and I read them to the staff.
>
> I said, ["]You all choose, you know, what is right and what is wrong here.["]

Then, True testified, he dismissed the staff. He did not see Raney raise his hand. (Tr. 443-44.)

Human Resource Manager Tabor testified that, after brief introductory remarks about dispelling rumors and about being a godfather, True read three "ULPs." That was all there was to the meeting. When Tabor got up to leave, he saw Raney with his hand up. (Tr. 494-95.) Associate Warden Maxwell Brown testified essentially as Tabor did. However, he denied seeing Raney raise his hand "while the warden was

standing at the podium" or hearing Raney make any statements. (Tr. 511.)

Captain Tracy Johns described the meeting as the other witnesses presented by Respondent did. He added that True did not mention the Union in any way. He did not see Raney raise his hand or speak while True was at the podium. After the meeting was dismissed and everyone was leaving, however, Raney stood up and attempted to speak to the staff. (Tr. 518.)

Bruce Blackmon, an assistant food administrator, summarized the meeting as follows:

> Mr. True said he was concerned with rumors that were going around the penitentiary; he read a list of I assume they were ULPs that had been filed against him. He said, ["]You make a determination if these are fact or if it's fabrication.["] He said, ["]I've got a penitentiary to run, thank you for your time["] -- and that was the end of it.

Blackmon saw Raney, who had been sitting in the first row, stand up and turn around to face everyone after True had left the podium and was heading up the aisle. Raney said, "These are charges, these aren't rumors." (Tr. 525-26.)

Findings and Conclusion: Case No. DE-CA-60051

I find Blackmon's summary of the meeting to be the best available statement incorporating the relevant and credible testimony of all the witnesses with respect to how the meeting was conducted. However, I also credit the General Counsel's witnesses, corroborated by Tabor, that Raney raised his hand. Although Raney apparently stood up later, it stands to reason that he raised his hand first in an attempt to get True's attention before True actually left the podium. Whether True saw him is next to impossible to ascertain on this record.

It is not disputed that this meeting had the requisite "formality" to render it subject to the provisions of section 7114(a)(2)(A) of the Statute. Nor is there much doubt that at this meeting there occurred a "discussion between one or more representatives of the agency and one or more employees in the unit . . . concerning any grievance or any personnel policy or practices or other general condition

of employment[.]"[6] I conclude that Respondent discussed "grievances" when True read and commented on the charges alleging that Respondent had violated the Statute. *Cf. Department of Veterans Affairs Medical Center v. FLRA*, 16 F.3d 1526, 1533 (9th Cir. 1994), *enforcing Veterans Administration Medical Center, Long Beach, California*, 41 FLRA 1370 (1991) (formal discussion concerned a "grievance" when its subject was a proceeding under "statute that Congress enacted to implement its finding that 'labor organizations and collective bargaining in the civil service are in the public interest'").

Since this meeting was a "formal discussion" covered by section 7114(a)(2)(A), the requirement that the Union, the exclusive representative, "be given the opportunity to be represented" means that its representative had "a right to comment, speak, and make statements." *U.S. Nuclear Regulatory Commission*, 21 FLRA 765, 767-68 (1986). Here, absent specific notice of the meeting to the Union, Raney designated himself as the Union's representative for whatever purposes the then unknown nature of the meeting might require.[7] In these circumstances, Raney was not obliged to announce formally that he was the Union's representative for section 7114(a)(2)(A) purposes. Rather, it was Respondent's affirmative duty to ensure that the Union had the opportunity, through its designee, to participate in an appropriate manner.

Raney raised his hand, attempting to be recognized to respond to the warden's remarks. That was all he reasonably could have been expected to do to indicate that he sought to exercise the Union's right to participate. I find it to be irrelevant whether or not the warden actually saw him raise his hand. By causing the meeting to end without giving the

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[6] It is not clear from Respondent's answer whether it denies that part of paragraph 39 of the consolidated complaint that alleges that Respondent, by True, "discussed grievances within the meaning of 5 U.S.C. §7103(a)(9)[.]" That provision of the Statute defines "grievance" as including any complaint by any employee, labor organization, or agency concerning "any claimed violation . . . of any law, rule, or regulation affecting conditions of employment." Respondent's brief does not address the section 7103(a)(9) issue.

[7] The General Counsel's brief does not advance the theory that Respondent's failure to notify the Union of the meeting, apart from the notice to employees, provides an independent basis for finding a failure to comply with section 7114(a)(2)(A).

Union the opportunity to have its representative participate, Respondent failed to comply with section 7114 (a)(2)(A). Thus, as alleged in paragraph 47 of the consolidated complaint, Respondent committed an unfair labor practice in violation of section 7116(a)(1) and (8).

As noted above, the General Counsel has not pressed the portions of paragraphs 39 and 44 to the extent that they allege that True's comments about the unfair labor practice charges independently violated section 7116(a)(1). I credit Blackmon to the extent that True said words to the effect that he left it to the audience to decide whether the allegations in the charge were true. I find no independent 7116(a)(1) violation. This completes my findings and conclusions with respect to the issues raised in the consolidated complaint in Case Nos. DE-CA-60026, 60027, 60028, 60049, 60050, and 60051.

CASE NO. DE-CA-60349

The complaint in this case alleges that, through a series of actions beginning on October 25, 1995, Respondent has refused to allow Union President Raney access to the Union's office located in Respondent's facility, has refused to recognize Raney as the Union's representative on Respondent's housing committee, and has refused to recognize him as the Union's representative for purposes of presenting a class during Respondent's annual refresher training.

Evidence Presented

a. Undisputed background facts

A series of inmate riots at several FBP facilities began around October 19, 1995, although not at Leavenworth. Reputedly these riots were part of the reaction of African-American inmates to political events concerning sentencing guidelines that are particularly stringent as applied to offenses involving "crack" cocaine . Approximately 62 percent of the inmates at Leavenworth are African-American. Some of them had told Warden True that they thought the guidelines were unfair to inmates who were sentenced under the "crack" guidelines, most of whom are African-American.

All of the FBP prisons were ordered to go into immediate lock-down status. In this status, all inmates are "confined to their cells only" (Tr. 448), presumably meaning that they remain in their cells 24 hours a day.

Respondent conducts 40 hours of annual refresher training of employees on various topics. The Union had negotiated the right to participate in this training by providing a one-hour class on Union related matters.

Until February 6, 1996, the Union's office was located in the basement of Respondent's administration building, adjacent to the employees' assembly room and near a lunch area. On February 6, Respondent required the Union to move its office to a location inside the "third grill" the most secure area in the institution. The prior location had been inside the second grill but outside the third, in an area having a lower "security" status.

b. By the General Counsel in Case 60349

According to Raney, he went to the warden's office on the morning of October 27 to pass on some information regarding prison security. This included documents concerning statements by inmates to the effect that once the inmates were let out of their cells, there would be a disturbance. Raney also offered some of his own observations about the security arrangements. The warden told Raney, "My intelligence is not telling me what your intelligence is telling you." Raney responded that "new guys" assigned to receive such information "hadn't formulated their information from . . . their snitches, basically." Raney also had some suggestions for the warden in dealing with a disturbance, and told him that the inmates had discovered where a riot team was stationed. True told Raney that he did not believe a word he was saying, and ordered Raney out of his office. (Tr. 90-94.)

Later that afternoon, Associate Wardens Greenfield and Rob Mundt approached Raney. One of them asked Raney to step into an adjoining office, where Greenfield told him he had heard that Raney was "going around telling employees that we need to open it up and kick it off." Raney understood the statement Greenfield had attributed to him to mean that "we" needed to let the inmates out and then fight them. Raney told Greenfield that this was not true. What he had said, Raney told Greenfield, was that, "when we let them out, if they go off and we have to fight them, to do what we got to do [sic]." Greenfield responded that if he heard "one more word coming out of your mouth about stuff that is going on," he would have two of the biggest lieutenants "drag [Raney's] ass down the hall and out of this facility." (Tr. 94-96.)

The next day, October 28, two lieutenants met Raney as he arrived at work. They told him to step into an office. Raney said he would not go in without a Union

representative. One of the lieutenants called Chief Steward Michaud on his radio. Michaud arrived and they went in. Greenfield, Mundt, Human Resource Manager Tabor, Camp Administrator Campbell, and the two lieutenants were in the office with them.

Raney had prepared some requests for investigation of the threats Greenfield had made to him the previous day. He gave them to Michaud and asked him to have "them" sign for a copy and give Raney a copy back. Greenfield "reads it, throws it down on the table, [and] says, I ain't signing that shit[.]" Then Greenfield gave Raney a letter signed by Warden True, beginning as follows:

> This is to notify you that effective this date and until further notice, your duty station is being changed to your home address, 21455 Dye Store Road, Weston, Missouri.

The letter designates Raney's "tour of duty" hours, including his half-hour lunch period. It informs Raney that he is to remain in his home during duty hours, except for lunch or approved leave. The letter advises him to be available for changes in assignment and to report to the institution if instructed to do so. He is informed how to request leave and advised that leaving his home during duty hours will make him subject to being placed on AWOL status. The letter continues:

> This is not a disciplinary or adverse action. You will receive full pay and benefits. You must perform work that is properly assigned to you during this period.
>
> Should you have any questions or need assistance in this matter, contact Laddie Tabor, Human Resource Manager, extension 419.

When the meeting ended, Greenfield said, "Escort his ass out of here now." Whoever Greenfield had so addressed walked Raney to his car. (Tr. 97-99, GC Exh. 3.) The following day, October 29, Raney received a copy of a memorandum from Greenfield to "Control Center." Its subject is "Bar from Admission to Institution," and its message is:

> This is to notify you that Mr. Larry Raney, Cook Supervisor, should not be permitted to enter the institution, effective immediately.

Russ Perdue, then the Union's secretary-treasurer, informed Raney that the housing committee was going to meet.

Raney authorized Perdue to sign and submit a memorandum for him, appointing himself (Raney) as the Union's member of that committee. Such a memorandum, addressed to Warden True, was submitted on November 15 and received on that date by an otherwise unidentified K. Dorsett. By contract (according to Raney), the housing committee meets monthly or whenever there is a housing vacancy. Raney received no notification, after the November 15 memorandum, of any housing committee meetings.

Raney sent Greenfield a notice designating himself and Lynn Looney as the Union's representatives to teach the one-hour Union class at the 1966 refresher training program. That program was to be held at the Officer's Training Center "up on the hill, outside the facility." (Tr. 105-08.) Greenfield's response, dated January 11, 1996, states:

> As you are aware, Mr. Lynn Looney and you are currently on "home duty" status pending the results of current investigations. Therefore, neither you nor Mr. Looney are authorized to be on institution grounds without prior approval from the Warden. Until such time as there is a change in your duty status, Mr. Looney and you will not be permitted to instruct the AFGE class. Please provide a list of alternate instructors.

In March 1996, Warden True issued a memorandum that Raney interpreted as providing some encouragement to renew his request to participate in the refresher training. He addressed such a request to the warden on March 14. On March 15, Warden True denied the request in a letter (GC Exh. 16) indicating that had Raney misinterpreted True's earlier memorandum. The letter goes on to state that:

> At the present time you are in Home Duty status due to an ongoing investigation. As such, you do not have the authority to leave your duty station (your home) without proper approval. Approval has not been granted for you to leave your duty station at the present time. Clearly no approval has been granted for you to instruct Annual Training as you suggest in your March 14, 1996, memorandum.

As of the date of Raney's testimony (August 21, 1996), he was still on home duty status. Deterred by the instructions barring him from the institution, he had not attempted to enter the Union office. He had received no duty assignments from management. (Tr. 107, 133-34.)

c. By Respondent in Case 60349

Greenfield testified that he had been informed that Raney "had been holding meetings with staff and inmates, meetings that were categorized in my mind as inciteful and contrary to good custodial practices." The day before Raney was placed on home duty status, Greenfield confronted Raney about this. He told Raney that if Greenfield "heard or found information and I ascertained that he was perceived to be making inflammatory statements, that I would recommend to the warden that he would be put out of the institution until the October disturbances were quelled." Greenfield also testified that Raney could have had access to the institution only with special permission or with an escort. (Tr. 575-79.)

Warden True testified that "staff" brought to his attention that Raney had told a group of Black inmates that "we should fight you all now." True cited the following as Raney's reported next remarks to the inmates (Tr. 449):

> It is inevitable. We are going to have to fight you, and what are other inmates around the nation going to say when you didn't support their cause[?] They are going to call you a bunch of pussies . . . .

According to True, it was also reported to him that Raney was making statements to staff members to the effect that he wished the warden would "open [the institution] up and fight them and get it over with" (Tr. 451).

True regarded these alleged comments as exacerbating an already volatile situation -- that "this only added fuel to the fire." He was concerned about the possibility of a riot when the institution "open[ed] up." He testified that "one of the things . . . I can't and won't tolerate is staff being unprofessional in that line, especially when lives are on the line." Once it was brought to his attention "that these comments were being made," True ordered Raney to be put on home duty status pending an investigation of the matter.

True previously had placed roughly 10 to 15 employees on home duty, a status that does not allow an employee "back on the institution grounds." Raney had remained on home since October 1995 because the investigation True had referred to the Office of Internal Affairs was ongoing and True had no control over its length or course. (Tr. 452-53.)

Concerning the housing committee, True testified that it met in the office of the Associate Warden of Operations, which is located in the institution's administration building. To his knowledge, the Union had never requested that its meetings be held "outside the institution grounds." Associate Warden Greenfield also testified that he was unaware of any Union request that the housing committee meet "off of institution grounds." However, Greenfield's connection with the committee apparently had ended in October 1995. (Tr. 592.)

Laddie Tabor testified that the most frequent cause for placing employees on home duty status was to remove them from their job sites pending the outcome of an administrative or criminal investigation. Raney's home duty status was the same as that of any other employee on home duty. Tabor acknowl-edged that Raney asked to attend the housing committee meeting but was refused because it was held "within the institution." (Tr. 490-91.)

The Union filed a grievance on Raney's behalf, alleging that his placement on home duty, without any "just reason," violated the "master agreement, local supplemental agreement, laws, rules, regulations, policy[ies], etc." (Original in CAPS.) Requested remedy:

> Put the Grievant back to work in his assigned job, Pay all back pay, Sunday Night Differential, Overtime, Remove all documents from all files and keep no record of this incident. Make Whole . . . . . [sic] PAY ALL BILLS AT THIS [RESIDENCE]

There was no evidence concerning the outcome of this grievance, but, as noted above, Raney was still on home duty status at the time of the hearing.

Findings and Conclusions: Case No. DE-CA-60349

It must first be understood that the placing of Raney on home duty status is not part of this case. This case is only about the legitimacy of Respondent's refusal to permit him access to the Union office and its refusal to honor Raney's requests to attend meetings of the housing committee and to represent the Union by teaching its class at the annual refresher training. This understood, I reject Respondent's contention, apparently raised for the first time in its brief, that this charge and complaint are barred by section 7116(d) of the Statute because the Union elected the grievance procedure to challenge the assignment to home duty.

When a labor organization that has been accorded exclusive recognition designates an individual to represent it for a certain collective bargaining purpose, denying that individual access to the agency's facilities violates the agency's duty to negotiate in good faith with the labor organization if such denial prevents that individual from performing his designated representative duties. *Philadelphia Naval Shipyard*, 4 FLRA 255, 269 (1980). However, an agency may refuse to deal with a representative selected by the union if that representative has engaged in flagrant misconduct that warrants denying him or her access. *See U.S. Air Force Logistics Command, Tinker Air Force Base, Oklahoma City, Oklahoma*, 32 FLRA 252, 254 (1988) (*Tinker AFB*); *Internal Revenue Service, Washington, D.C. and Fresno Service Center, Fresno, California*, 16 FLRA 98, 121 (1984).

Plainly, Respondent had made no determination, when it imposed a complete (although nominally temporary) prohibition on Raney's access to the institution, that he had engaged in misconduct. Rather, Respondent seeks to justify that prohibition pending investigation of the allegations made against him. Arguably, absent proof of flagrant misconduct, such denial of access may be otherwise "warranted" (*Tinker AFB* at 254). Respondent seeks warrant for it in the FBP-Council Master Agreement, where, at Article 30, Section g.:

> The Employer retains the right to respond to an alleged offense by an employee which may adversely affect the Employer's confidence in the employee or the security or orderly operation of the institution. Employer may elect to reassign the employee to another job within the institution or remove the employee from the institution pending investigation and resolution of the matter, in accordance with applicable laws, rules[,] and regulations.

As a matter of contract interpretation, *see Internal Revenue Service, Washington,* D.C., 47 FLRA 1091 (1993), I read Section g. as a provision addressed to the problem of removing an accused employee from situations in which his job duties might conflict with the Employer's security or operational interests. The Employer's "right to respond to an alleged offense" may permit appropriate actions other than reassign-ment or removal from duties within the institution, but these examples indicate that the right is not completely open-ended. I do not read this provision as being addressed to the problem of accommodating the Union's

right to select representatives and the Employer's interest in preventing inmate disturbances. The latter problem is what I perceive this case to be about.

To the extent that the contractual provision's final phrase, "in accordance with applicable laws, rules[,] and regulations[,]" might shed any light on the parties' intent, I have examined the two decisions of the Comptroller General that Respondent has cited, reported at 38 Comp. Gen. 203 (1958) and 70 Comp. Gen. 631 (1991). These decisions indeed assume an agency's right, in appropriate circumstances, to place an employee on what Respondent calls "home duty" status. However, they contain no reference to an employee's non-duty access to the agency's facility, or to the question of accommodating collective bargaining rights.

As is implicit in the previous discussion, Respondent has a legitimate interest in protecting against unusual or unreasonable risks of inmate disturbances. Therefore, this case requires an examination of Respondent's actions with respect to whether its actions respond to this interest.

Greenfield testified to the effect that, if Raney was perceived as making inflammatory statements, Greenfield would recommend removing him "until the October disturbances were quelled." Unfortunately, the record does not tell us when, or whether, the disturbances were quelled, or even what standard Respondent would apply to make such a determination. Since the record reveals no disturbances at Leavenworth, but only an acute *risk* of disturbances related to the riots elsewhere, I infer that Greenfield was referring, directly or indirectly, to that risk. (I use the term, "acute risk" on the assumption that *some* risk of a prison disturbance is always present.)

There are circumstances in which it is appropriate to infer that a condition, once shown to exist, continues until shown to have changed. In this case, however, absent any showing of the duration of a condition of acute risk, and regarding this condition as an element in Respondent's defense, I draw no such inference. Rather, I infer that the condition is not one that by its nature would continue to infinity and that at least some time between October 1995 and August 1996, when this case was heard, the situation had returned to what must pass for normal in a penal environment.

Greenfield's testimony, together with his letter responding to Raney's self-designation to represent the Union at the refresher training, establishes that affording access to Raney was within the warden's discretion. Greenfield also testified that an arrangement could have

been made to have Raney escorted to wherever he needed to go "inside." However, Respondent's actions with respect to the Union's designations of Raney for duties involving limited access do not demonstrate a specific assessment of the feasibility of granting such access, but, rather, a rigid and peremptory stance.

First, the response to Raney's self-designation as the Union's representative on the housing committee was silence. Laddie Tabor, the official whom Raney had been instructed to contact with any questions about his status, testified that Raney's request to attend committee meetings was denied because he was on home duty status and the meetings were held "within the institution." Then, when Raney designated himself and Looney to teach the Union class, Greenfield responded that they would not be permitted on institution grounds for that purpose "[u]ntil there is a change in your duty status." Warden True testified, similarly, that, as far as he was concerned, an employee on home duty status is not "allowed back on the institution grounds."

As discussed above, the record does not show whether the conditions in the penitentiary were still *unusually* tense on January 11, 1996, when Greenfield sent his response, or remained so afterward, when Respondent continued its tacit denial of Raney's request to attend housing committee meetings, and to the middle of March, when True denied Raney's renewed request to teach at the refresher training. Thus, while True indicated that he placed Raney on home duty status because of the risk his presence at the institution posed at the time True took this action, the evidence does not establish that Respondent relied on a specific assessment of this risk when it later denied Raney limited access for particular purposes. Nor did Respondent demonstrate that it gave any consideration to the option of providing an escort.

Greenfield's January 11 letter also had the effect, simultaneously, of noting the possibility of seeking "prior approval from the Warden" and, by the letter's content and tone, negating any expectation that such approval would be granted. Greenfield's position of authority, and his unconditional denial of the request, present every appearance that he was denying the request on behalf of the warden. It would have been reasonable for Raney to believe that any appeal of this denial to the warden would have been futile. Moreover, at least from that point on, it would have been equally reasonable to assume the futility of any specific request for access to the Union office. In fact, Greenfield's equation of home duty status with total exclusion from the institution accurately reflected the

warden's view, as shown by True's March 15 letter and his testimony at the hearing.

Finally, I place no importance in any failure of the Union to request that meetings of the housing committee be held outside the institution. Respondent never responded to Raney's request to attend. Only after it became reasonably clear that Raney would not be permitted "on the institution grounds" for any Union-related purpose would a request for meetings "outside" have suggested itself as an option. However, the combination of Respondent's silence on the housing committee request and its rigid stance with regard to access did not create an encouraging atmosphere for a further request that Respondent consider a flexible approach to accommodate the Union's interest. I conclude, rather, that as long as Respondent maintained its silence with respect to the housing committee request, the ball was in its court for the purpose of suggesting any alternative arrangement.

I find that the allegations of the complaint in Case No. DE-CA-60349 have been proved, except that, because Raney made no specific request for access to the Union office, I make no finding of a refusal of such access until January 11, 1996, when Greenfield notified Raney of Respondent's position that his bar from access to the institution encompassed even limited access. I conclude that Respondent violated section 7116(a)(1) and (5) by refusing Raney access to the Union's office and thereby, in effect, refusing to recognize him as the Union's appointed representative as alleged.

CASE NO. DE-CA-60362

This case was presented pursuant to a consolidated complaint covering Case Nos. DE-CA-60362, 60365, 60405, and 60569. Paragraphs 20, 21, and 27 of that complaint allege that Respondent violated section 7116(a)(1) and (5) of the Statute by directing a bargaining unit employee who was not a Union representative to sign the food service department work schedule quarterly roster in the space designated for the signature of a Union representative.

Evidence Presented

a. Undisputed Background Facts

The FBP-Council Master Agreement provides for the formation of "work assignment roster committees" including management and Union representatives, the latter to be

designated by the Local (Union) President. The committees are to prepare quarterly rosters. Somewhat different criteria and procedures are established for work assignments and tours of duty for employees in "Correctional Services" and for employees outside of "Correctional Services." Within the Food Service section, quarterly rosters were prepared by a single manager and a Union representative, who mutually adjusted the work schedules so that each of the 16 to 20 bargaining unit employees normally rotated to another position on the roster every three months in a more or less predictable pattern. (Tr. 284-85, 349-53, 532, 545.)

Randy Madan became the food service administrator toward the end of 1995, and found what he believed to be "problem areas." He apparently attributed at least some of these problems to employees' avoidance of their assigned rotations, by trading positions so that some of them remained in the same position "for a long, long time." He attempted to address this in a draft of the roster for the quarter beginning in January 1996. (Tr. 557, 565-66.)

b. By the General Counsel in Case 60362

Union Second Vice-President Lynn Looney testified that, at a Union meeting late in 1995, an opportunity for training to become a Union steward was announced, and members were asked to submit their names for approval of official time to attend these training sessions. This was the first part of a process that culminates in being placed on the authorized list of stewards. Such placement is made by the Union president, who presents it to the agency and has it posted on bulletin boards throughout the institution.

Looney remembered employee Terrell Hill having attended one Union meeting in late 1995. At no meeting in late 1995 was Hill voted in as a steward or accepted as a Union representative, nor was he, to Looney's knowledge, ever a Union steward. Union President Raney also testified that Hill had never been appointed as a steward and had never been on any steward list provided to the agency. The minutes of the November and December monthly Union meetings purport to show that Hill attended the November but not the December meeting, and contain no indication of any action regarding either training or appointment of stewards.

Looney had no clear recollection of whether he was notified in advance about the January 4, 1996, meeting of the food service roster committee.

James Healey, a Union steward in the food service area, had been the Union representative who, alternatively

with Union President Raney, signed off on the food service quarterly rosters. Healey testified that he became aware that there would be some changes regarding the roster that would go into effect in January 1996. When Healey saw a draft of the new roster, he told Administrator Madan that he "didn't agree with it, because they had changed the days off, the rotation. They did away with jobs, and it wasn't legal" (Tr. 355).

At a staff meeting held some time after that, Madan told Healey that the new roster would be coming out soon, and that it would be signed by the committee in accordance with the Master Agreement. Healey was off duty for the next two days. When he came back, he found the new roster posted. That roster was posted with an accompanying memorandum dated January 4, 1996, signed by Madan. The roster was also signed by Madan. Madan's signature is followed by segment called "Reviewed by Roster Committee[.]" In this segment are five signatures, including Terrell Hill's, which is dated January 4, on a line set aside for "Union Representative." Healey did not know how the other signers, including some rank-and-file unit employees, had been selected.

Healey testified that he had encouraged Hill, among others, to attend Union meetings, and that Hill had attended one in late 1995. However, no discussion about Hill's becoming a Union steward or representative occurred at that meeting. Further, Healey had never asked Hill to act for him in his Union role.

Arthur Raney, a rank-and-file unit "cook foreman," a Union member, and a cousin of Union President Larry Raney, was one of the signers of the January roster. Arthur Raney did not attend Union meetings regularly, but was present at one in late 1995 that Terrell Hill also attended. He could not recall anything said about Hill being a steward, but did remember a discussion about a Union-related need for "some help in food services" (Tr. 378).

Arthur Raney testified that on January 4, he was told that there was to be a meeting of the roster committee, which consisted of the cook foremen who were at work that day. At that meeting, a management representative told the employees to look at the roster and bring up any questions they had about it. One of the employees "got mad" about some of the changes that had been made without previously consulting the "committee," and walked out of the meeting. Assistant Food Service Administrator Gunther McConnell "told" Raney to sign the roster, and he did. The employee who had walked out signed it the next day.

c. By Respondent in Case 60362

Terrell Hill confirmed that James Healey had invited him to a Union meeting and that he attended one in November 1995. Hill testified that Healey had told him that he wanted Hill to become a Union steward and help Healey because the workload was getting too much for him. At the Union meeting, Healey made a motion "that he needed help and he wanted me appointed to be a Union steward." Hill thought the motion was seconded by one of the "executive members." No objection was raised to Hill's being a Union steward. The Union president addressed the issue of the procedure through which a member had to go to be appointed as a steward. Hill understood from all of this that he "had just been appointed Union steward by the Board."

On some occasion after this meeting, someone in management asked Hill if he had been appointed as a Union steward. Hill answered, "Yes." Hill testified that this conversation did not occur at the same time as the January 4 roster committee meeting. He did not testify as to whether it was before or after the meeting.

According to Hill, he approached four or five other employees after the meeting to learn whether they had any problems with the new roster that they had chosen not to air during the meeting. He found that they did not. A couple of days later, he acceded to a request by someone in management to sign the roster as Union representative. Hill saw no problem in that request since he was a Union steward.

Assistant Food Service Administrator Blackmon, one of the signers of the January 1996 roster, testified that Hill informed him and several other staff members around January 1 that he had been appointed a Union steward.

Blackmon testified that (at an undisclosed time) he had talked to Healey about the upcoming January 4 meeting. Blackmon also testified that he notified Union Second Vice-President Looney about the meeting, at a time that he estimated to be about two weeks before the meeting. Neither Healey nor Looney showed up at the meeting. Hill, however, did. Blackmon asked Hill if he was a Union steward. Hill "indicated" that he had been specifically requested to attend a Union meeting for the sole purpose of being appointed as a steward, and that at that Union meeting he had been "announced" as a steward. Blackmon then asked him if he would represent the Union on the roster committee. (Tr. 522-23, 529, 534, R Exh. 5.)

Assistant Administrator McConnell corroborated Blackmon's phone call to Looney. McConnell overheard Blackmon using Looney's name during the call and stating that "he needed [Looney] for a roster committee meeting." However, McConnell's best recollection was that the phone call was made on the morning of the meeting or the day before. (Tr. 536-37, 547.)

At the January 4 meeting, McConnell testified, Blackmon asked Hill if he could sign for the Union, and Hill said that he could, "that he was nominated in the Union just prior to that." (Tr. 538). McConnell confirmed that neither Healey nor Looney had come to the meeting, but that he knew that Healey had an officially scheduled day off on January 4.

Administrator Madan testified that, in January, Hill told him that he was a steward. Madan also heard this from other employees, including a Mr. Wainer, who told Madan that he had been at the meeting at which the Union had appointed Hill.

Madan testified that he had given Healey several days' notice of the January 4 meeting. Healey had not told Madan that January 4 was his day off, and Madan did not know that it was. Healey did tell him that he disagreed with some of the changes in hours on the new roster.

Asked whether he had talked to anyone else "with the Union" about the meeting, Madan testified that Hill "was aware of it." He also testified that "we" talked to Looney about the upcoming meeting. The day after the meeting, Looney called Madan and said that there was a misunderstanding about the date and time of the meeting. Madan informed Looney that Blackmon had given Looney the information and that they "had a total understanding."

Findings and Conclusions: Case No. DE-CA-60362

Hill did not become a Union steward, and there is no evidence that he was designated by the Union as its representative on the roster committee. Hill probably believed that he had been become a steward, and his confusion about his stewardship may well have been shared by other employees attending the November Union meeting. Whatever may have been said about the procedure to be followed to make Hill a steward, however, no formal action was taken. This is consistent with the testimony of Arthur Raney. I believe that any such action would have been reflected in the minutes of the meeting. The Union had no reason to falsify the minutes, at the time they were

prepared, so as to omit mention of such action, and I am loath to conclude that it would have gone so far as to alter the minutes after the January incident.

Although Hill (mis)informed management that he was a Union steward, the circumstances under which this occurred remain murky. Thus, the record is inconsistent as to when, unclear as to how, and silent as to why. Also lacking is any explanation for the phenomenon of other employees telling management that Hill had become a steward, although I credit Madan that at least one employee, Wainer, did.

One or both assistant food service administrators, if not Madan, knew in advance of the January 4 meeting that Healey was off duty that day. Otherwise, Healey would have been expected to attend and there would have been no reason for Blackmon to call Looney. I find that Blackmon did call Looney, although it is not clear when he made that call and there is no evidence that he gave Looney any indication that the meeting would be other than routine. That is, there is no basis for inferring that Looney was made aware that the committee would be asked to consider substantial changes in roster practice.

A framework for analysis of these facts is discernible in what the Authority stated in *Department of Defense, Department of the Army, Headquarters, XVIII Airborne Corps, and Fort Bragg*, 15 FLRA 790, at 792 (1984):

> In *American Federation of Government Employees, AFL-CIO*, 4 FLRA 272 (1980), the Authority determined that it is within the discretion of labor organizations holding exclusive recognition to designate their representatives when fulfilling their responsi-bilities under the Statute. Further, an agency violates section 7116(a)(5) of the Statute when it refuses to deal with the particular indivi-duals selected by the exclusive representative of a bargaining unit of its employees for negotiation, and also thereby violates section 7116(a)(1) of the Statute inasmuch as its action interferes with the rights of employees as set forth in section 7102 of the Statute.

Such a refusal to deal with the particular individual selected by the exclusive representative occurs when an agency designates the individual with whom it will deal. *Department of the Air Force, 915th Tactical Fighter Group, Homestead Air Force Base, Florida*, 13 FLRA 135, 150 (1983).

Respondent does not dispute, and I find, that the matters coming before the roster committee included conditions of employment. The Union was entitled to be represented on the committee. If, as Respondent contends, it notified the Union of the January 4 meeting but no known Union representative showed up, Respondent was not free to solicit a volunteer for that purpose, nor to request an employee to "volunteer." Consistent with its bargaining obligation, one or more alternative courses were open to it. Those were not.

Nor can Respondent have satisfied its obligation if it made an innocent mistake in relying on Hill's representation that he was a Union steward. Even if he had been, it was for the Union, not for Respondent, to decide which of its representatives should serve on the committee. Nor could Respondent properly rely on Hill's express or implied representation that he was authorized to sign for the Union. Because any such representation was solicited by management, it cannot even be said that the self-proclaiming agent came forward and announced himself, as if such an event would justify reliance on the representation.

The statutory duty to negotiate in good faith is an affirmative duty, and an agency that fails to discharge that obligation violates section 7116(a)(5) notwithstanding that its failure is unintentional. Thus, the Authority held that "intent is not an element of a . . . violation" of section 19(a)(6) of Executive Order 11491 (a provision that is substantially equivalent to section 7116(a)(5) of the Statute[8].) *Department of the Treasury, Internal Revenue Service and IRS Richmond District Office*, 3 FLRA 18, 19 (1980). *See also Internal Revenue Service (District, Region, National Office Units)*, 16 FLRA 904, 922 (1984) ("[I]ntent is not an element of a section 7116(a)(5) violation in situations such as that presented herein").

In any event, Respondent's actions, in effect bypassing the Union, cannot fairly be characterized as purely unintentional. As Madan testified, Looney told him on the day after the meeting that there had been a misunderstanding about the time and date of the meeting. Madan was thus alerted at least that there might be some question about the propriety of substituting Hill as the Union's representative. Even if Madan disagreed with Looney's statement, he might at least have given the Union the

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[8] Section 19(a)(6) of Executive Order 11491 made it an unfair labor practice to "refuse to consult, confer, or negotiate with a labor organization as required by this Order."

opportunity to make its case that the action taken was based on the erroneous assumption that Hill was the Union's designated representative and should be reviewed. Instead, Madan peremptorily dismissed Looney's representation and proceeded on the dubious basis that the Union's representative had approved the new roster. This reaffirmation of the actions that led to Hill's signing of the roster cannot be shielded by any professed ignorance of Hill's incapacity to bind the Union. It demonstrates, rather, a disregard of the Union's interests in favor of maintaining the facade of regularity, thus forestalling a challenge to the roster changes approved by the "Union Representative."

For all of these reasons, I conclude that Respondent violated section 7116(a)(1) and (5) by treating Hill as the Union's representative under circumstances that were calculated to result in his signature becoming the basis for bypassing the Union.

CASE NO. DE-CA-60365

The incidents with which this case is concerned form a sequel to the events giving rise to Case 60362. Paragraph 22 of the consolidated complaint alleges that Food Service Administrator Madan told Union Steward James Healey "words to the effect that if Healey ever attempted to intimidate any of the staff, he would be put on home-duty status with the other Union representatives." Paragraph 28 alleges that Madan's conduct was an independent unfair labor practice in violation of section 7116(a)(1) of the Statute.

Evidence Presented

a. By the General Counsel in Case 60365

Arthur Raney, one of the employees who had attended the January 4 roster committee meeting and had signed the roster, was a "good friend" and "fishing budd[y]" of Union Steward and co-worker Jim Healey. Their friendship was known to others in food service. On the job, according to Raney, the employees joke around a lot and "holler stuff at each other." In this spirit, Healey sometimes says things to Raney that Raney customarily laughs off. A few days after the January 4 meeting, Healey hollered at Raney, in a manner that Raney regarded as joking, that it was illegal for Raney to have signed the roster. Raney testified that he responded to Healey that he had signed it as an employee, not as a Union representative, and that he had done so "because they said I had to."

Healey testified that he asked Raney why he had signed the roster. On January 7, Healey met in Madan's office with Madan and McConnell. Madan reminded Healey about "the first time you came in my office," referring to an episode of three months earlier that had resulted in a proposed 2-day suspension for Healey. (The charges had later been dropped.) Healey asked Madan, at the January 7 meeting, what he wanted to talk about "at this time." Madan said, "About you threatening my employee with this union garbage." Healey then asked Madan what he was talking about.

According to Healey, McConnell then stood up and said that he had heard Healey had threatened Arthur Raney about signing the roster. Healey told McConnell that he had not threatened Raney -- that they were close, personal friends. Healey suggested that they bring Raney up and ask him. Madan said that if Healey "continued to threaten or if he suspects me threatening or talking union . . . to his employees, that he would . . . walk me out of this institution, and that I would sign anything that he told me to sign." (Tr. 367-69.)

b. By Respondent in Case 60365

Madan testified that he had a conversation with Healey about intimidating employees, but that it had nothing to do with the roster committee meeting. It had to do with Healey, as it had come to his attention, telling employees that they should not sign anything that Madan tells them to sign, including the roster. Then Madan modified his prior statement and drew a connection with the roster committee meeting because Healey was telling employees not to do certain things about the roster committee. Specifically, Madan had heard that Healey had told Arthur Raney he was stupid for signing a statement relating to sick leave, had "attacked" Raney for signing the roster, and had told Terrell Hill he was stupid for signing the roster. (Tr. 569-71.)

Madan denied that he told Healey that if he ever intimidated staff he would be on home duty status with the other Union representatives. He also denied that he said anything like that, or even remotely like that. (Tr. 561.) Madan did testify, however, that, "I basically asked [Healey] why he was doing what he was doing, and that he was not to conduct union business in the operation without my knowledge and that I would not allow him to intimidate staff and countermand my directions to supervisors." (Tr. 561, 570.)

McConnell testified that Madan told Healey that he had to stop intimidating several of his staff members and that "it needed to stop right now." McConnell denied that Madan said anything about Healey being placed on home duty status like other Union representatives. (Tr. 539.)

Assistant Food Service Administrator Blackmon, whom McConnell identified as also having been at the meeting in Madan's office, testified that he overheard Madan speaking to Healey in early January. Blackmon could not recall Madan's exact words, but the gist of the conversation had to do with derogatory comments Healey reportedly made to Hill and Raney about their signing off as roster committee participants. Blackmon testified that Madan told Healey that he would not tolerate any intimidation or coercion of any of his staff. Madan said he would not tolerate "any personal or outside agendas that interfered with cook foremen performing their duties." Blackmon also denied hearing Madan say anything about Healey being on home duty status with other Union representatives, or hearing Madan say anything like that.

Findings and Conclusions: Case No. DE-CA-60365

A credibility-related problem similar to that presented in Case 60049 arises here because Respondent's witnesses were asked to, and did, deny that Madan made the statement alleged in the complaint but did not deny that he made the statement that Healey testified that he made. Thus, these witnesses denied that Madan threatened Healey that he would be placed on home duty status like other Union representatives, but said nothing about Madan's telling Healey that he would "walk [him] out of the institution" if Healey continued to, or was suspected of, "threatening or talking union" to employees.

Here, since the reliability of Healey's account of Madan's statement is not as well established as Michaud's account of the telephone conversation in Case 60049, the discrepancy between the complaint allegation and Healey's testimony, and the resulting denial of the "wrong" statement, is more troubling. In these circumstances, to what extent is it appropriate to rely on the failure of Respondent's counsel to ask about, and on the failure of its witnesses to deny, the "walk me out of this institution" statement? A separate but related question is whether the statement alleged in the complaint and the statement Healey testified about are sufficiently similar that a denial of the first, or anything "even remotely like that," implicitly denies the second. And if not, is the discrepancy between the first and the second so great as to raise a question of

whether Respondent was denied due process? The Authority has held it must address such an issue irrespective of whether a party has raised it. *American Federation of Government Employees, Local 2501, Memphis, Tennessee*, 51 FLRA 1657 (1996).

If the dispositive issue here were whether Madan threatened Healey with home duty status or with being "walk [ed] out of the institution," I would find no substantial difference and would find, further, that Madan said something to the effect that Healey might find himself outside. However, that in itself is not a restraint on protected activity. The dispositive issue is the nature of the conduct that Madan said would place Healey at such risk. If that conduct was Healey's future threatening or intimidation of employees, I would find that Madan's statement referred to unprotected activity. In this connection, I reject the General Counsel's reliance on evidence that tends to show that Healey had not acted in an intimidating manner toward Arthur Raney. I find, consistent with Healey's account, that by the time Madan made the disputed statement, the participants in the meeting had disposed of the Raney business (which Raney characterized as a joke, not union activity). Madan then warned Healey about future conduct. The question is, what kind of conduct?

If, as Healey testified, Madan also warned him against "talking union," he interfered with protected activity. The problem, however, comes back to due process. The complaint alleges that Madan used words to the effect of a threat conditioned on Healey's "attempt[ing] to intimidate any of the staff." This allegation, consistent with the General Counsel's theory of the case as set forth in his counsels' brief, contains no suggestion that the vice in Madan's statement was that he warned against conduct that would have been protected. The focus is, rather, on the consequences of Healey's failure to heed the warning.

Although Madan admitted that he told Healey "not to conduct union business in the operation without my knowledge," the General Counsel has not suggested that this constituted a prohibition of union activity outside of duty hours, and I do not so construe it. Thus, if I accept Madan's version of his reference to "union business," rather than Healey's version-- "talking union" -- there was no

threat directed at protected activity, and the due process problem is mooted.[9]

I do, basically, accept Madan's version. Healey's testimony (to this extent consistent with that of Respondent's witnesses) characterizes the meeting as being about his allegedly having threatened or intimidated Raney. Testifying about what Madan said regarding the consequences of such conduct, Healey added, in what has the appearance of an afterthought, that Madan also warned him against "talking union." That fleeting reference, viewed alongside Madan's somewhat less fragmentary version, which at least suggests some context for the remark, is insufficient, in my view, to establish that Madan issued a broad prohibition of union activity during non-working hours. The bottom line here is that the General Counsel has not carried the burden of proving that Madan made an unlawful threat.

CASE NO. DE-CA-60385

In a separate complaint, the General Counsel alleges that, after an untimely disapproval of a local supplemental agreement that Respondent and the Union negotiated in 1993, Respondent changed the agreement on or about February 6, 1996, and reproduced it for distribution to bargaining unit employees. The complaint also alleges that on or about February 6, Respondent, through Warden True and Associate Warden Greenfield, ordered the Union to relocate its office within Respondent's facility without providing the Union with notice or the opportunity to negotiate the substance or the impact and implementation of the change.

Evidence Presented

a. Undisputed Background Facts

Article 9 of the FBP-Council Master Agreement provides for the negotiation of local supplemental agreements. It

[9] Madan's testimony about telling Healey not to "conduct union business" was not elicited as part of Respondent's case but came out as part of a response to a question from the bench concerning the time that this conversation occurred (Tr. 570-71). It was not developed further. Therefore, if this aspect of the conversation cannot be said to fall within the scope of the complaint, it is questionable that it can be considered nevertheless to have been "litigated fully and fairly." *See Bureau of Prisons, Office of Internal Affairs, Washington, D.C. and Phoenix, Arizona*, 52 FLRA 421, 428-32 (1996).

permits local agreements to include "any matter that does not specifically conflict with the provisions of the Master Agreement. Section d of Article 9 provides, in pertinent part, that:

> Once an agreement has been reached at the local level, it shall be reduced to writing and signed by the local parties within 15 calendar days from the conclusion of negotiations. A copy of the signed and dated proposed agreement shall be forwarded to the Labor-Management Relations Section by local management . . . . Incomplete, unsigned or undated agreements will be returned to the parties without action.
>
> The parties at the national level shall have 30 days, from the date that the proposed agreement was signed, to independently review the agreement and determine if the proposed agreement complies with the provisions of this Agreement and applicable laws and regulations.

An appendix to the Master Agreement contains a "standard set of ground rules" that the local parties are required to adopt if they are unable to negotiate their own ground rules. One of the "standard" ground rules is:

> 15. The union negotiating team has the authority to speak for the local membership, however, *[sic]* the local supplemental agreement will not be binding upon the union unless ratified by the membership.

In 1993, Respondent and the Union negotiated a local supplemental agreement. There is no evidence that they negotiated their own ground rules. Completion of the negotiations for that agreement is evidenced by a letter dated October 8, 1993, from W. Scott, then Respondent's warden, congratulating Union President Larry Raney on the "recently completed negotiations." The letter continues: "Although not yet ratified, it is quite evident from the draft of the agreement that everyone worked in the spirit of cooperation."

The Union membership ratified the agreement at a meeting on October 19, 1993. The date the ratified agreement was signed by the parties is in dispute. Warden Scott sent "the recently signed local institution supplement" to an FBP supervisory LMR specialist for review,

with a covering memorandum dated February 16, 1994. On March 14, 1994, a memorandum signed by Calvin R. Edwards, assistant director of FBP's Human Resource Management Division, responding on behalf of the agency head, declared that certain provisions of the agreement were in conflict with either the Master Agreement or controlling laws and must be stricken. Some other provisions were approved conditionally, on the assumption that they would be interpreted in a certain manner. Included among the disapproved provisions was Article 12, Section H, of the agreement, which provided, in pertinent part, that "the Employer will renovate the existing Union office inside the walls of USP, Leavenworth to be for the exclusive use of Local 919." Edwards' expressed reason for disapproving that provision was that it conflicted with Article 12, Section c, which provides, in pertinent part:

> The Employer, at its discretion, may informally authorize the use of office space when available.

Edwards' memorandum states, finally, that except for the "conflicting" provisions, the agreement may be implemented immediately, but that the results of any renegotiation of the stricken provisions are subject to agency review.

Raney responded to Edwards with a memorandum asserting that the agency had missed the "time frames" for disapproving the agreement. Raney concluded his memorandum with the following pleasantry:

> LOCAL 919 IS ENFORCING THE CONTRACT AS NEGOTIATED, HAVE A NICE DAY.

b. By the General Counsel in Case 60385

Union President Raney testified that he informed then-Warden Scott that the membership had ratified the local supplemental agreement the day after the October 19, 1993, Union meeting. A week later, Warden Scott told Raney that he was going to have Laddie Tabor go around and have all the participants sign it. The signatures were placed on the agreement a week after "we ratified it in the union meeting." "Once they signed it, then about December we finally got them to produce [reduce?] it to writing because I had to wait 30 days, according to the contract, for them to send it to D.C. and wait for a response." It was in December, after Raney started "putting some pressure on the warden," that "[t]hey got it in print." (Tr. 599-601.)

However, Raney had testified earlier that "we" signed the agreement, on the back cover sheet, "a week after the last day of negotiations, after the agency got it printed up" (Tr.145).

According to Raney, after he responded to the "national level" agency disapproval of provisions of the local agreement, Warden Scott told him that he thought it was a good contract and that he was going to live with it. Raney, corroborated by Lynn Looney, also testified that Respondent renovated the existing Union office pursuant to the local supplemental agreement (notwithstanding the pertinent provision in that agreement having been disapproved).

On January 31, 1996, Raney received a call at home from Lynn Looney or Joe Corriston informing him that Looney and Corriston had been ordered to move the Union office. Raney consulted his copy of the local supplemental agreement and discovered that certain provisions in the original had been deleted from the copy he had received from one of the Union officials. He noted that the Union office provision and the contract duration provision had been deleted. This was how Raney learned that Warden True had "changed [the] contract." He also testified that the warden had never talked to him about moving the Union office (Tr. 136).

Raney immediately sent a letter to the warden, by way of Tabor, protesting the relocation of the Union office, request-ing to negotiate "the impact, substance and implementation prior to any moving of union equipment," and requesting the rescission of the "light green book" in which the changes in the local agreement had been printed (GC Exh. 8).

Joe Corriston testified about being called into Greenfield's office, with Looney, in January 1966. Greenfield told them that he wanted the Union office moved. Looney responded that the Union had just gone through this matter with the previous administration and had negotiated the existing location in the local supplemental agreement. Greenfield told them that he was not going to be held to that contract. Looney told Greenfield that he would not disobey a direct order, but was protesting the move. The meeting ended with Greenfield's indication that he would get back with them and tell them *when* he wanted the office moved. (Tr. 257-59.)

Looney testified about the same meeting with Greenfield, although he assented to counsel's suggestion that it occurred on February 6. His account agreed substantially with Corriston's, except that, as Looney

remembered it, the meeting ended with Greenfield's order to move the office "today." According to Looney, the move was delayed only after Looney and Corriston, on inspecting the location to which they were supposed to move the office, found that it was being used to store various equipment and reported this situation to Human Resources Manager Tabor, who gave them permission to wait until the equipment was moved.

Looney also added to Corriston's account of the meeting with Greenfield, that Corriston asked Greenfield whether, as rumor had it, the warden was afraid that Union officials (in the existing office under the warden's) were listening to him through an open pipe the warden had found. Greenfield responded to the effect that this might be so. (Tr. 285-87, 321.) This part of the conversation was apparently reported to Raney, who mentioned it in his January 31 letter to the warden as "[t]he reason given to the union" for the move.

When the order to move was renewed some days later, Looney was unavailable. Corriston was instructed to move the office. He ran into Warden True and told him he needed help. The warden agreed, and eventually someone located Chief Steward Roger Michaud and, later, Secretary-Treasurer John Johnson to help him. During the move, Warden True stopped by, watched for a while, and chatted with them.

The new location of the Union office was, as noted in Case 60349, inside the penitentiary's "third grill." According to Corriston, the old location was more desirable for the purpose of meeting with people from the outside, such as representatives of the Authority, or with employees who had been put on home duty. Looney testified similarly, adding that the new location was not separated from inmates by any security grill and that the office could be accessible to inmates in the event of a prison disturbance.

c. By Respondent in Case 60385

Laddie Tabor testified that the local supplemental agreement was "finally signed" on February 17, 1994, "as I recall." Tabor was one of the signers. The Union requested that Respondent have the agreement printed shortly after that, although "[t]hey realized that it had to go for agency review," because, the Union said, enough time had gone by. Respondent complied with that request and "publish[ed]" the agreement during the week of the February 17 signing or the following week. (Tr. 485-87.)

Kimberle Sachse, a human resource specialist, testified that she prepared the covering memorandum forwarding the

agreement for agency head review, for Warden Scott's signature. Sachse was also one of the signers of the agreement. She testified that there was an LMR meeting on February 17. Sachse remembered some of the parties' representatives "coming up and signing it on that date[,]" and that "we got the rest of the signatures after the LMR meeting on February 17." Sachse prepared the covering memorandum for Warden Scott on February 16, anticipating "that they were getting ready to sign it." After everyone signed, she forwarded the agreement for agency review. (Tr. 506-07.)

Tabor testified that after Respondent received the agency review requiring certain items to be stricken from the agreement, Respondent stapled copies of the agency review memorandum inside the front covers of the original agreement and distributed them. Tabor believed that the Union was aware of this. He received no complaints, grievances, or objections about it. Eventually, Respondent ran out of copies of the original agreement, so it printed a revised edition omitting the disapproved provisions.

Warden True testified that, at the end of September or the beginning of October 1995, he called Larry Raney and told him that he would be moving the Union office, then located directly underneath True's office, because, during a search for the presence of listening devices, three holes had been discovered in the ceiling-floor separating the two offices. True testified that Raney's response was, "How long have you known about it?" Asked whether he received any request to negotiate over this matter in September, October, or November, True answered that he never received such a request. He also testified that the local supplemental agreement had not been republished or reprinted during his tenure as warden.

Greenfield testified about the office move. He was under the impression that the Union had been given several months' notice that the office would be moved, but he did not know specifically when the Union had been notified. Greenfield characterized the move as part of a series of shifts of departments in which space was reallocated. He believed that when he called on the Union to consummate the move, he provided two hours' notice.

Findings and Conclusions: Case No. DE-CA-60385

The complaint allegations concerning Respondent's actions with respect to the local supplemental agreement are based on the underlying allegation (paragraph 16 of the complaint) that the March 14, 1994, disapproval of certain

provisions of that agreement was untimely. That allegation, in turn, is based, as it must be, on establishing the date on which the time for disapproval began to run. Establishment of that date is, therefore, a necessary element in the General Counsel's case.

Consistent with section 7114(c) of the Statute, the Master Agreement provides that the parties at the national level shall have 30 days "from the date that the proposed agreement was signed" to review the agreement. The Master Agreement places further emphasis on the act of signing the local agreement, first in a requirement that the agreement reached be "reduced to writing and signed by the local parties" and, in the same paragraph, requiring that a copy of the "signed and dated proposed agreement" be forwarded for review and specifying that "[i]ncomplete, unsigned or undated agreements will be returned to the parties without action."

Had the local parties complied with the requirement that the forwarded copy be dated, or had someone at the national level enforced that requirement by returning the agreement without action, this aspect of the case would probably not be in dispute. It probably would not have arisen in the first place. However, I conclude that neither this noncompliance nor the parties' apparent noncompliance with the Master Agreement's requirement that the agreement be signed "within 15 calendar days from the conclusion of negotiations" renders the remaining contractual procedures inoperable.

I find that the General Counsel has not established that the agreement was "signed by the local parties" more than 30 days before the disapproval. I read the Master Agreement's signature requirement, consistent with the actions of the parties here, as a requirement that the agreement be signed by *all* of the parties' representatives whom the parties have agreed as the appropriate signatories. Thus, I infer that the original printed version of the local agreement (GC Exh. 11) faithfully reproduced on its signature page the list of party representatives whose signatures were understood as being required before the agreement would be forwarded for review.

Given this requirement, I find Raney's testimony to be insufficient, in view of the record as a whole, to establish a reliable date, or range of dates, on which the 30-day period began to run. Raney's testimony appeared somewhat self-contradictory or, at least, confused. He testified at different times about the agreement being signed before *and* after it was printed. In either case, he may have been

referring to the time he, as the Union's spokesman whose name appears at the top of the signature page, signed. He may have signed before all the other 14 signatures appearing on that page were obtained.

While it is clear that signatures were placed on the typed-out signature page of the agreement, Raney may have intended to use the term, "printed," in one instance to signify the reproduction and binding of copies for distribution and in the other instance to signify the providing of a typed copy for signature. If so, I believe for reasons I shall discuss below that he was mistaken in his recollection that the agreement was "signed" before December, when he "[put] some pressure on the warden" to "g[e]t it in print." If, on the other hand, Raney's meaning was that the agreement was signed *after* his pressure on the warden resulted in "[getting] it into print," he fixes no time-frame for the actual signing.

Respondent had no reason that I can perceive to purposely delay forwarding the signed agreement for review. Human Resource Manager Tabor had been in his position for about four years, and was an experienced professional in his field, when these events occurred. He knew about the necessity for agency review, and I infer that he knew about the time limits for such review and the consequences of exceeding those limits. For the same reasons, I do not believe that Tabor's office negligently failed to forward the agreement immediately. Therefore I credit Tabor's and Sachse's testimony that the date on which at least some necessary signatures (even if some were obtained earlier) were affixed was February 17. Sachse's linking of this event to an LMR meeting on that date is also persuasive. Moreover, even if the date had been as early as February 14 (Monday of the same week), Raney's acknowledged March 16 receipt of the disapproval memorandum would have made the disapproval timely. I therefore find no violation of section 7116(a)(1) or (5) in Respondent's actions in derogation of the disapproved provisions of the agreement.[10] I also therefore find no unlawful repudiation of the agreement when Respondent ordered the Union to move its office.

Remaining to be considered is the allegation of a section 7116(a)(1) and (5) violation for failing to give the Union notice and an opportunity to negotiate over the office move. There is conflicting testimony by Raney and True as

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In the absence of a request to renegotiate the disapproved provisions, I see no basis for finding unlawful Respondent's distribution of copies of the agreement omitting such provisions.

to whether the Union was given notice, and, by implication, opportunity. True testified that he told Raney in September or October that he would be moving the Union office. Raney denies that the warden ever talked to him about it. I find it more probable that the warden mentioned the prospect of a move to Raney than that he did not. However, I do not find that such "notice" exhausted Respondent's obligation to negotiate about the move.

The providing of office space for a union that represents the agency's employees is a negotiable condition of employment over which "substance" bargaining as well as "impact and implementation" bargaining is required prior to effecting a change. *U.S. Department of the Army, Lexington-Blue Grass Army Depot, Lexington,* Kentucky, 34 FLRA 247, 254 (1990). *See also National Treasury Employees Union and U.S. Department of the Treasury, Internal Revenue Service*, 38 FLRA 615, 618-21 (1990). The negotiability of this subject extends to proposals concerning the location of the space to be allocated to the union. *Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 41 FLRA 1268, 1278 (1991). Moreover, the local parties' 1993 agreement to permit the Union to remain in its "existing" office, although later disapproved, and the Union's actual use of that office for the following two years and several months, constitute compelling evidence that occupancy of that space had become an established practice. *See Norfolk Naval Shipyard*, 25 FLRA 277, 286 (1987).

A union may waive its statutory right to bargain. However, such a waiver must be clear and unmistakable. *Bureau of Engraving and Printing, Washington,* D.C., 44 FLRA 575, 582 (1992) (*Bureau of Engraving)*.[11] In certain circumstances such a waiver may be found on the basis of a union's failure to request bargaining. However, even if a waiver of the right to bargain over the substance of a change can be established, waiver of the right to bargain concerning the impact and implementation of the decision to change is another matter. *Id.* at 582-84.

A waiver by inaction may be found only when such inaction follows the union's receipt of notice that is deemed adequate, or reasonable, that is, notice that is

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[11] In *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1004 (1993) and in *Internal Revenue Service, Washington, D.C.*, 47 FLRA 1091 (1993), the Authority abandoned or modified its "clear and unmistakable waiver" doctrine for certain classes of cases. Those decisions do not affect this case.

sufficient under the circumstances to generate the requirement that the union respond affirmatively in some appropriate manner, whether by submitting proposals, requesting additional information, or requesting additional time. *See Department of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio*, 51 FLRA 1532, 1536 (1966). The question of the notice's sufficiency encompasses not only timeliness, but such factors as whether the union was provided with sufficient details about the change. *Blue Grass Army Depot, Richmond, Kentucky*, 50 FLRA 643, 644, 651-52 (1995).

Sufficiency with regard to details must mean that the union has been given enough information to allow it "to make a responsible input," *Internal Revenue Service*, 16 FLRA 928, 938 (1984), into the proposed change. Stated more broadly, the circumstances must be such that the union's failure to respond to an earlier notice of a future change demonstrates that it clearly and unmistakably waived its right to bargain over the negotiable aspects of the change that was ultimately imple-mented. *Id.* at 938-39. *See also Air Force Accounting and Finance Center, Lowry Air Force Base, Denver, Colorado*, 42 FLRA 1226, 1240, 1257 (1991); *Bureau of Engraving at 584*. Thus, waiver by inaction has been found where the union had acquiesced in a previous assertion of management's right to take the action it later took and where there was nothing left to negotiate about with respect to the decision to exercise that right. *Bureau of Engraving* at 582-83. Waiver was also found where, after receiving the details of a program that management proposed to implement, the union ignored an offer to bargain and a request for proposals. *Division of Military and Naval Affairs, State of New York, Albany, New York*, 8 FLRA 307, 318-20 (1982).

Neither the notice Warden True gave the Union here, nor the surrounding circumstances, meet the conditions for establishing a waiver. Merely telling the Union's president that he would be moving the Union's office, without any further information as to where or when, did not transfer to the Union the obligation to initiate bargaining.

According to True, Raney's response to this notice was to ask how long True had known about the holes in his office floor. Had the conversation ended on that note, there would be insufficient basis for finding a clear and unmistakable waiver. It is highly unlikely that the conversation did end at that point. However, absent any evidence of what else was said, there is no indication that Raney, by word or conduct, gave the warden an unequivocal assent to his proceeding unilaterally to move the Union office whenever and wherever he saw fit. Therefore, the Union did not waive

its right to bargain, over either the substance or the impact and implemen-tation of the move, and the obligation to provide the Union with the opportunity to bargain over the proposed move remained. Having failed to provide that opportunity, Respondent violated section 7116(a)(1) and (5) of the Statute.

CASE NO. DE-CA-60405

The allegation here, found at paragraphs 23 and 28 of the consolidated complaint in Case Nos. DE-CA-60362, 60365, 60405, and 60569, is that Respondent violated section 7116 (a)(1) by Associate Warden Greenfield's telling James Evans words to the effect that if Greenfield ever saw Evans with a particular MSPB decision, Evans would be out on the street without a paycheck to support his union ass.

Evidence Presented

a. Undisputed Background Facts

During a previous assignment as a warden in Chicago, Warden True had been involved in an employee's "removal" that became the subject of a proceeding before the Merit Systems Protection Board (MSPB). Early in February 1966, a stack of documents, consisting of what purported to be a single page extracted from a commercial publisher's version of the MSPB's decision in that proceeding, was found in the penitentiary and was called to Greenfield's attention. This page contained a statement concerning True's "'intense' motive" to retaliate against the employee, apparently for his previous filing of EEO complaints. The extracted page recites that the MSPB's administrative judge had found that True had so retaliated but that the MSPB concluded that the action would have been taken in the absence of the employee's activity. The paragraph describing the administrative judge's finding was circled for emphasis on the reproduced page (GC Exh. 29).

Greenfield suspected Evans of having something to do with the presence of the stack of pages. He had Evans summoned to his office.

b. By the General Counsel in Case 60405

Evans testified that, on receiving this summons from Greenfield, he called the warden's secretary and stated that he would be there as soon as he could obtain a Union represen-tative. Greenfield phoned back and advised Evans

that he had five minutes to get there and should not bring a Union representative. (Tr. 221.)

When Evans entered Greenfield's office, Greenfield was waving a copy of the purported MSPB excerpt in the air. Greenfield said something to the effect of: "This is some low in the mud shit here. The warden is trying to forget his past." Greenfield then asked Evans if he had been circulating the document. Evans told him he had not, but that he had been studying the case in which that excerpt appeared.[12] Greenfield then asked, according to Evans, "Well, what if I told you that I had somebody that saw you distributing this?" Evans testified that he answered, "Then you wouldn't be asking me, you would be accusing me . . . ." (Tr. 221, 227.)

According to Evans, Greenfield then said:

> If I find out you are distributing this document throughout the institution, I will put your union ass on the outside looking in, with no paycheck to support your union ass; just like Larry Raney.

Evans acknowledged that Raney was then on home duty status. He testified that the meeting ended as Greenfield handed him a stack of the documents they had been discussing.

c. By Respondent in Case 60405

Greenfield testified that Warden True had given him the stack of documents and had told him that it was found on a credenza in the warden's conference room area. Access to that areas is limited to a few people with keys. The warden asked Greenfield to look into it, and Greenfield questioned an employee who worked in that area. She told him that she thought Jim Evans had been in the area.

According to Greenfield, he summoned Evans and told him that he had it on good authority that Evans had been seen in the area where the stack had been found. He told Evans that he was not saying that Evans put it there, but that "we don't need this type of activity inside of the institution [,]" and that "[w]hatever happened in Chicago shouldn't pertain or shouldn't be spread about here." Evans replied that he had not been in the area and had not placed the documents there. Greenfield then said, "Well, Jim, that's

[12] Evans testified that he was studying the case because he intended to use it at an upcoming arbitration hearing.

fine; I just want to let you know that if you're doing it, stop; if you don't do it, then no problem." As Evans got ready to leave, Greenfield gave him the stack and told him he could take it with him.
Greenfield denied making any threats or using any profanity.

Finding and Conclusion: Case No. DE-CA-60405

Although I found Greenfield to be an honest witness, in this instance I believe that his recollection of the conversation with Evans, although corroborative of Evans to some extent, was incomplete. Evans' account, containing details including the phrase, "your union ass on the outside looking in," essentially tracks an account of the incident he signed, purportedly on February 8, 1996, giving February 8 as the date of the incident. That account was filed as the descriptive portion of the unfair labor practice charge in this case.[13] Whether I accept the account in the charge as corroborative evidence or merely take the fact that Evans made a contemporaneous record of the conversation, consistent with his later testimony, as enhancing the reliability of his memory, it contributes to my crediting of the substance of his testimony.[14]

In one respect, minor as to substance but significant as to credibility, a discrepancy between the account in the

[13] Visible at the bottom of the copy of the unfair labor practice charge form that is part of the record is the upper portion of a notation that appears, consistent with other charge forms in the record, to signify someone's acknowledgment of the charge on February 8 or 9.

[14] The unfair labor practice charge was admitted only as part of the General Counsel's "formal papers," and would not ordinarily be considered for what, under the rules of evidence, are deemed "hearsay purposes." However, Section 2423.17 of the Authority's Rules and Regulations provides that *the parties* are not bound by the rules of evidence, but that the Administrative Law Judge may exclude evidence that is "immaterial, irrelevant, unduly repetitious or customarily privileged." Section 2423.19 charges the judge with the duty "to inquire fully into the facts as they relate to the matter before [the] judge." Section 2423.19 (h) empowers the judge to limit testimony that is "immaterial, irrelevant, unduly repetitious, or customarily privileged[.]" It omits reference to any other basis for excluding evidence. I believe, however, that hearsay evidence may be excluded when its admission will, on balance, impede rather than advance the judge's inquiry or the course of the hearing. Here, it does not.

charge and Evans' testimony helps to resolve a problem. Evans' attribution to Greenfield of the remark that Evans would be outside with no paycheck, "just like Larry Raney," is discordant because Greenfield presumably knew that Raney, on home duty status, was receiving pay. In the account Evans wrote for purposes of the unfair labor practice charge, Greenfield did not link Raney with "no paycheck" so directly. Thus, according to the charge, Greenfield told Evans he would find his union ass on the outside without a paycheck, and then said, "Now don't push me to this, Evans [.] You see where Raney has his ass now[.] You can be with him."

I believe that Evans testified truthfully about the substance of Greenfield's remarks, which included *some* reference to Raney. Evans was probably mistaken in his testimonial version to the extent that he attributes to Greenfield the implication that Raney was not being paid. However, this mistake appears to have arisen only from an inability to remember exactly how Greenfield phrased his reference to Raney. The words that would have jumped out at Evans, and been retained in his memory, were those about Evans' "union ass" being put outside without a paycheck. Such phrases seem relatively unlikely to have been made up by Evans, especially when his recorded contemporaneous account so reduced his opportunity to embroider the story.

Having found that Greenfield threatened Evans' job security if he distributed the MSPB extract anywhere within the institution (not only if he distributed it within the restricted area in which the stack was found) the remaining question is whether such distribution would have been protected activity. The answer depends on the relationship between the contents of the extract and the terms and conditions of employment of Respondent's employees.

On its face, the extract refers to events at an unidentified facility at some unspecified time. What information about Warden True it contains is ambiguous at best, and its actual relevance to Respondent's employees is difficult to ascertain. Moreover, its relevance would appear greater to any employees who thought, erroneously, that the events occurred during True's tenure at Leavenworth. There is, further, some risk of misuse of the sketchy information in the extract. On the other hand, any information that at least arguably sheds light on a supervisor's management style or employment-related attitudes is of legitimate collective concern. In short, there are substantial competing interests here. How must they be reconciled under the Statute?

The Authority has not spoken on the limits, if any, on the permissible *uses of* information about supervisors.[15] The National Labor Relations Board (NLRB), even with its longer history and vastly greater body of unfair labor practice case law, has had difficulty in coming to grips with the boundaries to be established concerning the uses of such information. *Compare Hoytuck Corp.*, 285 NLRB 904 n.3 (1987) *with Brother Industries*, 314 NLRB 1218 n.2 (1994), in which the NLRB signals some uneasiness with limits expressed in *Hoytuck*.

Ultimately, however, the breadth of Greenfield's prohibition is fatal to the assertion that it affected no protected activity. As Counsel for the General Counsel notes, Greenfield's threat was pre-emptive. It was not limited to Evans' repeating of his suspected placement of the stack in a "restricted area." And it is hazardous to draw from the immediate circumstances an inference that a statement, otherwise reasonably seen as interfering with protected activity, had a narrower, legitimate focus. *See Department of the Air Force, Scott Air Force Base, Illinois*, 34 FLRA 956 (1990).

Evans testified that information like that found in the extract might be used by Union stewards in the course of preparing cases in (what I understand he meant were) grievance proceedings. Such information might or might not be useful for that purpose. It might even be counterproductive for a steward to suppose that such information would be helpful, but no one is in a position to second-guess him or her in determining how to proceed. Similarly, one cannot reasonably conclude in advance that the Union's publicizing of that information would exceed the scope of protected activity regardless of its purpose. I therefore conclude that Greenfield issued an overly broad prohibition on the distri-bution of the purported MSPB extract, which interfered with employee rights in violation of section 7116(a)(1) of the Statute.

CASE NO. DE-CA-60569

This case concerns statements attributed to Warden True at and after a "staff recall" meeting for all employees on

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15 It has, in contrast, dealt with the *content* of statements a union publishes about management officials. *See, for example, Veterans Administration, Washington, D.C. and Veterans Administration, Medical Center, Cincinnati, Ohio*, 26 FLRA 114 (1987) (racial epithets and stereotyping are unprotected).

March 25, 1996. At the meeting, the warden is alleged to have read aloud a letter written by Union President Raney, requesting an official investigation of certain conduct by the warden. The warden is then alleged to have referred to Union officials using words to the effect that they were "pissant tin soldiers" and to have threatened to "get them." The next day, the warden allegedly spoke to Union Second Vice-President Looney in words to the effect that he could fire him any time he wanted to and that "the Union thought it ran this place but that now it had run into a buzzsaw." These statements are alleged to have violated section 7116 (a)(1) of the Statute.

Evidence Presented

a. Undisputed Background Facts

Groups of Respondent's employees having special interests hold programs to which the warden is invited. In early March 1996 Warden True attended a Black Affairs banquet, at which he gave a speech. On March 19, Union President Raney sent a letter to Joe Chapin, whom Raney believed to be the chief of labor relations at FBP's central office in Washington. The letter contains a "cc:" line followed by the names of Warden True, FBP Regional Director Patrick Kane, FBP Director Kathleen Hawk, AFGE National President Sturdivant, "Joe Jarvis, President CPL-33," and "Ron Melton, NCRVP."

The body of the letter contains allegations, based on information that Raney states in the letter that he heard from employees attending the Black Affairs dinner, concerning Warden True's conduct at the dinner. The letter asserts that this alleged conduct violated the "Code of Conduct" and there-fore should be the subject of an official investigation. The following excerpts convey the essence and flavor of the letter:

> [W]hen Mr. True gave his talk, he continued to refer to his blacks, and how he awards them and takes care of his blacks. Mr. True made state-ments to the effect, when I was coming up the drive and seen those shinny [sic] cars in the parking lot, I thought I had better call Internal Affairs.
>
> He made comments about the D.J. referencing that he thought they were a gang. . . . The comments that went on were totally out of line by a Warden. Remember this is all hearsay and I was not there.

> Now there is an investigation going on, not what Mr. True said on the [videotape of the speech] but who is trying to get the tape. . . . [M]aybe [there have] been some Civil Rights violated at this banquet, and Mr. True again with all his tactics is trying to strong[-]arm employees to keep their mouth shut.
>
> I'm requesting an official investigation for all the employees that are in fear for their jobs because of just how Mr. True operates. The union is making this complaint to the Bureau of Prison [sic] under the whistle blowers act, protection for the Executive Board for the union[,] and all Bargaining unit staff.

Warden True called a staff recall meeting on March 25. He read Raney's letter to 200-300 employees in attendance and exhibited a videotape of his speech. After showing the videotape, the warden made some further remarks, including as the warden admitted, "some inappropriate comments about ridding the institution of scum, a cancer, and tin soldiers."

b. By the General Counsel in Case 60569

Raney testified that he had received "some phone calls from employees" who told him that they thought the warden had been unprofessional in his comments at the Black Affairs banquet. They reported to him the comments that he later attributed to the warden in his March 19 letter to Chapin. Raney testified that some of the African-American employees were offended by the warden's statements. Raney tried to get his callers to give him memoranda "referencing that incident," but they refused, telling him that they knew "what was going on" and that they were not "getting into this" but were just letting Raney know. Raney thought that some employees had complained about the warden's alleged remarks through EEO channels but that "nothing had been done." (Tr. 131-32.)

Lynn Looney testified that he, too, had received complaints from "line staff" who asked Looney if the conduct attributed to True "had happened, and if the Union was looking into it" (Tr. 293).

Union First-Vice President Evans attended the March 25 staff recall. (Tr. 231-34.) He testified that the warden

first announced that "some persons had made allegations" that the warden had made racial comments and racial slurs at the Black Affairs banquet. The warden read Raney's letter aloud, including the part stating that the letter "was made under
. . . the Whistle-Blower Protection Act." The warden identified Larry Raney as the author of the letter. Then he showed the videotape. After the showing, True waved Raney's letter in the air and said, according to Evans:

> What kind of person would make this type of complaint? What would you call them? I call them pissant tin soldiers, running around trying to stir up institutions. . . . [Y]ou call them scum, you call them cancer. Don't worry, I am about to excise him from the institution. Here I am, come and get me, because I am coming after you. And it won't be long, folks. It won't be long.

Lynn Looney corroborated, in its essentials, Evans' account of True's remarks at the March 25 meeting. However, Looney placed a sharper focus on the remark about "stir [ring] up." According to Looney, True referred to people "stirring this racial stuff up around the institution." (Tr. 298-302.)

Union Secretary-Treasurer John Johnson and Sergeant-at-Arms Joe Corriston also testified about the March 25 recall meeting, consistent with the accounts Evans and Looney (Tr. 399-402, 264-66). Johnson and Corriston added that True had specifically stated that the letter was "from your Union president." After reading the letter, True, according to Johnson, expressed himself to the following effect:

> What do you think of somebody who would write a letter like this? Well, there is always people trying to cause trouble in, you know, a place like this, and if it was not him, it would be one of his pissants or tin soldiers.

Unit employee John Trott testified that he joined the Union some time after the March 25 meeting to show his support. He essentially corroborated the accounts of the other witnesses presented by the General Counsel, emphasizing the warden's repeated use of the word, "pissant." Trott, like Johnson, described the warden's demeanor at that point as having turned angry. (Tr. 415-21.)

Looney testified that on March 26, the day after the recall, he met with Warden True at his own request. When he walked into the warden's office, Looney told him that he didn't think the warden would see him, and True answered that he didn't want to. Asked why not, the warden told Looney that he didn't like him. Looney then told True that he had taken offense at the things True had said at the recall and that he knew True was talking about Looney.

True told Looney that he was right--that True had been talking about him--and that True wanted him to be offended. The warden then referred to a conversation that occurred on Looney's recent return from (an otherwise unexplained) month of home duty, in which the warden had warned Looney against trying to intimidate or bully people into adopting his way of thinking. Looney, at the March 26 meeting, then denied that he had been doing that. True responded that he had, that he had been "stirring things up." They disagreed about something Looney had said to an EEO counselor. The warden told Looney he "could fire [him] any time I want." Looney responded that he understood that, but that he was there to tell the warden that "these things didn't happen." True called Looney a liar, Looney denied it, and the meeting ended. (Tr. 305-08, 318.)

c. By Respondent in Case 60569

Respondent, through Warden True, first presented, as context for the events resulting in Case 60569, the background facts previously set forth under Case No. DE-CA-60349 with respect to the circumstances surrounding the October 1995 lock-down. The warden then testified that his speech at the Black Affairs banquet had been in praise of the African-American staff, but that shortly afterward he began to hear rumors that he "had made racial comments at that celebration."

The employee who had coordinated the entertainment portion of the Black History Month celebration came to see True. She was upset and asked for the warden's assistance "in stopping the harassment that she was getting," apparently in connection with the banquet. The warden learned that this employee had a videotape of "the whole thing." When he "realized that things were getting out of hand at the institution," and feared that the perception that he was a racist would lead to "unrest and a riot on my hands in short order," the warden asked this employee for a copy of the videotape in order to show it to the staff. (Tr. 454-57.)

True testified that he opened the March 25 meeting by apologizing to the staff for "putting them through this," then read the Raney letter. Following this, True made what he called "inappropriate comments about ridding the institution of scum, a cancer, and tin soldiers." Those comments were directed at "[a]nybody that would play dirty tricks, that would cause a disruption in U.S.P. Leavenworth, that could cause a riot or a serious disruption. It doesn't matter to me who it was." (Tr. 457-58.)

Other witnesses presented by Respondent regarding the March 25 recall testified that True, essentially, told the staff that he wanted the staff to have the opportunity to view the videotape so they could decide for themselves whether, as had been alleged, he had made racist comments (Tr. 516-17, 540, 563). One witness, Captain Tracy Johns, denied that the warden "refer[red] to the Union in any way" (Tr. 517).

Warden True's account of his March 26 meeting with Looney characterized Looney's objection to True's March 25 remarks as focused on True's calling him a "pissant tin soldier." True testified that, in response to that objection, he told Looney that he had "never called anybody any name," but that, "if the shoe fits, wear it." True denied that he said anything like that he could fire Looney any time he wished. (Tr. 461.)

Findings and Conclusions: Case No. DE-CA-60569

The weight of the evidence concerning Warden True's remarks at the March 25 staff recall establishes that he referred to Union officials as "pissants" or "pissant tin soldiers," and that his references to "scum" and "cancer(s)" were reasonably perceived as directed at Union officials. Thus, it was such employees of whom the warden said he would rid the institution. Notwithstanding True's testimony about what he meant, the credible evidence is fairly overwhelming to the effect that, in identifying and reading all of Raney's letter, the warden made it clear that the author was the Union president, that the letter was a Union-instigated piece, and that he would not tolerate such conduct.

Respondent argues, among other things, that the letter and its distribution were unprotected activities because its contents were vitriolic, in reckless disregard for the truth, and malicious. Respondent further characterizes the conduct of Union officials in connection with the alleged racist comments at the Black Affairs banquet as unacceptable, regard-less of their knowledge of the truth or falsity of the rumors regarding the warden's speech, and

that it accordingly constituted flagrant misconduct. However, there is nothing in the record (nor would the videotape, which I excluded from the record, have provided such evidence) that any Union officials had such compelling reason to dismiss what they had been told about the warden's speech that it was irresponsible for them to urge that the matter be investigated. Nor can their choice of avenues for pursuing the matter convert this into flagrant misconduct. I therefore conclude that the conduct against which the warden railed before the 200 to 300 employees at the March 25 recall was protected activity and that his remarks were coercive within the meaning of section 7116(a)(1).

I also find Looney's description of his March 26 conversation with the warden to be credible in its essentials. Looney was a consistently credible witness with respect to incidents that he could remember. The details he provided in his account of the March 26 conversation, especially those surrounding the disputed warning that True could fire him, are vivid and fit the circumstances. Whether or not Looney is capable of constructing such a realistic scenario out of his imagination, I do not believe he did so here. Moreover, the statements he attributed to True are consistent with the warden's style, as exhibited on this record.

True came close to admitting the warning about firing Looney, when he testified that he told Looney, "If the shoe fits, wear it," a reference to Looney's being one of the unnamed "pissant tin soldiers" whom True, the previous day, had threatened to get rid of. Use of the exact words, "I can fire you," would have added little to the cumulative effect of the warden's March 25 remarks and the "shoe fits" comment to Looney. Nevertheless, the credible evidence supports the allegation that True used words to the effect that "I can fire you any time I want." Applying the same objective standard
used in my analysis of Case Nos. DE-CA-60027 and 60050, and Case No. DE-CA-60049, above, I find that Looney could reasonably have drawn from the warden's March 26 statements that the threat of discharge was directed, at least in part, at his protected union activity. These statements therefore constitute an additional violation of section 7116(a)(1). However, I find no support for the "[Union] had run into a buzzsaw" part of the allegation.

Summary of Violations Found

Cases 60027 and 60050: Respondent violated section 7116(a)(1) of the Statute by Warden True's several

statements that he had ways to make Evans back off the Melody Beyer case.

Case 60026: No violation found.

Case 60049: Respondent violated section 7116(a)(1) by True's statement to Michaud to the effect that he was going after Raney and Evans because they were *effing* with him all the time in conducting their union activities.

Case 60028: Respondent violated section 7116(a)(1) by Bennett's statement to Evans that he was being removed from the SPC because the warden did not like the way that he represented employees, and violated section 7116(a)(1) and (2) by removing Evans from the steering committee of the SPC. This conduct did not violate section 7116(a)(5).

Case 60051: Respondent violated section 7116(a)(1) and (8) by conducting a "formal discussion" without giving the Union the opportunity to be represented, but committed no independent violation of section 7116(a)(1).

Case 60349: Respondent violated section 7116(a)(1) and (5) by refusing to allow Union President Raney access to the Union's office and by refusing in effect to recognize him as the Union's representative on the housing committee and as its designated presenter at the annual refresher training.

Case 60362: Respondent violated section 7116(a)(1) and (5) by treating an employee who was not designated by the Union as the Union's representative on the food service roster committee.

Case 60365: No violation found.

Case 60385: Respondent violated section 7116(a)(1) and (5) by failing to provide the Union with the opportunity to negotiate over the substance or the impact and implementation of moving the Union's office. No violation was found with respect to Respondent's actions in connection with the local supplemental agreement.

Case 60405: Respondent violated section 7116(a)(1) by prohibiting Evans from distributing an extract from an MSPB decision within the institution.

Case 60569: Respondent violated section 7116(a)(1) by Warden True's public references to Union officials as "pissants" or "pissant tin soldiers," "scum," and "cancer," and threatening to rid the institution of them. Respondent further violated section 7116(a)(1) by Warden True's warning

to Evans that he could fire him, under circumstances in which Evans reasonably could infer that the statement was directed at his protected union activities.

REMEDIES

The General Counsel sees these cases, collectively, as an example of the kind of unusual situation that requires the application of some nontraditional remedies in addition to an order to cease and desist, to post a notice, and to take violation-specific affirmative action. Some of the requested remedies appear to be designed to associate the individuals responsible for the unfair labor practices with the remedial provisions, so as to give employees a credible assurance that the Statute will be enforced, and further to impress those individuals with an appreciation of their obligations under the Statute so as to deter future violations. Thus, the General Counsel requests that (1) the notice to employees include the names of management officials or supervisors who are associated with the unfair labor practices, (2) Warden True be required, at the Union's request, to call a special recall meeting at which he must to read the remedial notice aloud, and (3) a nondisciplinary entry be placed in the warden's official personnel file stating that his actions in these cases were found to violate the Statute. Also requested is a requirement that the Authority's order be posted with the notice and that copies of the remedial notice and the order be provided to all of Respondent's supervisors, management officials, and bargaining unit employees.

The Authority recently set forth, in broad outline, the approach it would follow in assessing the appropriateness of nontraditional remedies:

> [A]ssuming that there exist no legal or public policy objections to a proposed, nontraditional remedy, the questions are whether the remedy is reasonably necessary and would be effective to "recreate the conditions and relationships" with which the unfair labor practice interfered, as well as to effectuate the policies of the Statute, including the deterrence of future violative conduct. These questions are essentially factual. As such, they should be argued and resolved in essentially the same fashion as other factual questions brought before us. As with other factual questions, the General Counsel bears the burden of persuasion, and the Judge is

> responsible for initially determining whether the remedy is warranted.

F.E. Warren Air Force Base, Cheyenne, Wyoming, 52 FLRA 149, 161 (1996) (citation omitted) (*Warren*). *Warren* also acknowledges private-sector precedent as a guide for the application of unfair labor practice remedies. *Id.* at 160.

At least one of the proposed nontraditional remedies, the compulsion of Warden True to read the notice at a special recall meeting, is subject at the outset to what I regard as a "public policy objection" recognized by courts and the NLRB. The NLRB, in certain cases involving particularly egregious unfair labor practices, has provided such a remedy, with mixed reactions from the courts. J. Freedley Hunsicker, Jr. et al., *NLRB Remedies for Unfair Labor Practices* 87, 209-10 (revised ed. 1986). However, in *Three Sisters Sportswear Co.*, 312 NLRB 853 (1993), followed by *Fieldcrest Cannon,* Inc., 318 NLRB 470, 470 n.7 (1995) and *Harbor Cruises, Ltd.*, 319 NLRB 822 (1995), the NLRB modified the public reading remedy, "mindful of the Second Circuit's decision in *S.E. Nichols . . . .*" *Three Sisters*, supra. This reference is to *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 962 (2d Cir. 1988), where the court reaffirmed a previous holding that "there is an element of some humiliation in the requirement that a company official personally and publicly read the notice." The court therefore required the NLRB to afford the respondent the option of having the notice read by an NLRB representative.

Placing this objection within the category that the Authority referred to in *Warren* as "public policy objections," does not necessarily make it an absolute bar to the use of such a remedy.[16] The "humiliation" factor is, nevertheless, a significant one in assessing the appropriateness of requiring the warden to read the notice, and, under the framework for analysis set forth in *Warren*, its consideration appears to belong in the first stage of this assessment.

The second stage of the *Warren* analysis is to assess whether the General Counsel has sustained the burden of persuasion with respect to the "factual questions" of whether the requested remedies are "reasonably necessary and

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16 Seven months before deciding *Three* Sisters, the NLRB, while attempting to harmonize its order with *S.E. Nichols*, required an offending company official to read the notice where his personal conduct was particularly outrageous and included physical violence. *Domsey Trading Corp.*, 310 NLRB 777, 779-80 (1993), *enforced* 16 F.3d 517 (2nd Cir. 1994).

would be effective to 'recreate the conditions and relationships' with which the unfair labor practices interfered, as well as to effectuate the purposes of the Statute, including the deterrence of future violative conduct." Construed literally, such language might suggest that, in order to sustain the burden of persuasion, the General Counsel must establish the affirmative with respect to each of the named elements. However, I am reluctant to assume that the Authority would apply the standard that stringently. Rather, I view the standard as requiring only that the remedies are "reasonably necessary and would be effective" to bring about results of the kind described. At the same time, the Authority noted in *Warren*, at 160, that the deterrence of future violative conduct is not in itself the principle objective of a remedial order. I believe this to be an implicit acknowledgment that an order may not be justified solely on the basis of its deterrent effect. See *Steelworkers v. NLRB*, 646 F.2d 616, 629-30, 106 LRRM 2573, 2583 (D.C. Cir. 1981).

Respondent, and principally Warden True, committed many serious unfair labor practices. Counsel for the General Counsel characterize them as representing so blatant an extended pattern of conduct as is "unprecedented in federal labor relations" and as to have "crippled the concept of 'collective bargaining'." However, I am not persuaded that the violations I have found were so flagrant or pervasive as to render inadequate the more typical Authority remedies, including those affirmative measures specifically tailored to recreating the conditions and relationships with which the unfair labor practices interfered. *See Social Security Administration, Baltimore, Maryland*, 14 FLRA 499, 500 n.2, 533-34 (1984) (*SSA Baltimore*). The unlawful conduct seen here, while disparaging of Union officials and bargaining rights, appears to be more the product of anger, and of the zealous protection of perceived management prerogatives, than of a calculated effort to "break" the Union.

This conduct was simply not in the same league with the kind of egregious "union busting" that is generally deemed in the private sector to warrant nontraditional remedies. Nor, to the NLRB, do even pervasive "union busting" violations that warrant some of the Board's strongest bargaining-related remedies also warrant, absent special circumstances, special provisions to augment the educational effects of a Board notice. *See Outboard Marine Corp.*, 307

NLRB 1333, 1348 (1992); *Carbonex Coal Co.*, 262 NLRB 1306, 1306-07 (1982).[17]

One of the most significant indications that a remedy focusing on the identity of the individual who engaged in the unlawful conduct should be given serious consideration is his or her demonstrated willingness to violate the Statute in open defiance of past Authority orders. As the District of Columbia Circuit stated in *Steelworkers v. NLRB*, supra, 646 F.2d at 631, 106 LRRM at 2584 (1981), such willingness may have an effect on employees that is not present in the case of a first-time offender. Even multiple violations by the same individual before being subject to a cease-and-desist order can reasonably be expected to have a less pernicious effect than the same violations committed in defiance of an order.
See SSA Baltimore.

Nothing in Warden True's conduct suggests that he is likely to defy an Authority order. While exhibiting an insufficient appreciation for employee rights, and whether or not he fully understood his statutory obligations, at least as I have found them to have been, the warden must be presumed to have an adequate appreciation of how repeated violations would affect, among other things, his own reputation and that of FBP. Nor do I believe that his employees have a reasonable basis for doubting this and thus require unusual measures of assurance that he will respect their statutory rights in the future. *Cf. Department of Veterans Affairs Medical Center, Phoenix, Arizona*, 52 FLRA 182, 185-87 (1996) (record did not establish the appropriateness of placing in the notice the names of the supervisors involved). These considerations persuade me that neither the naming of the warden and other management officials in the notice nor the requested annota-tion in the warden's official personnel file is reasonably necessary under the *Warren* standard.

Neither am I persuaded that the calling of a special recall meeting at which the notice is to be read to employees is warranted. The NLRB reserves such readings for only the most massive and egregious violations. *See Heck's, Inc.*, 191 NLRB 886 (1971). I have concluded that, however

[17] The Authority's remedial notices now conform to the NLRB's notices in stating that the Authority has found the respondent to have violated the Statute. The Authority has stated that the purposes of the notice will be enhanced by such explicit statement. U*nited States Department of Justice, Immigration and Naturalization Service*, 51 FLRA 914 (1996).

Respondent's violations may compare with violations committed in other cases arising under the Statute, they do not place this situation within that very select category of cases that requires such a special provision. As discussed above, the requirement that the responsible management official read the notice is subject to the objection of unnecessary humiliation. But even the substitution of a reading by an Authority agent would be excessive in these circumstances and therefore an unwarranted intrusion into the operation of the facility, notwithstanding the warden's use of a staff recall meeting to make some of the coercive statements found here. The staff recall had a legitimate purpose, which was served by the warden's showing of the videotape and making the case that none of his remarks had been intended as racial slurs. He went out of bounds at that meeting only when he went on to make comments that he has already acknowledged to have been inappropriate and that I have found to have been directed at Union officials.

The necessity for each of the requested nontraditional remedies, and in particular those that pertain to the manner in which the notice to employees is to be publicized, is based in part on the General Counsel's assertion that a posted notice "is likely to be rarely read and soon forgotten." Under *Warren*, the General Counsel has the burden of demonstra-ting the validity of that assertion. If its validity were to be presumed, posting of notices should no longer be regarded as the standard method of informing employees of what the Authority deems that they need to know. *See U.S. Department of Treasury, Customs Service, Washington, D.C. and Customs Service, Region IV, Miami, Florida*, 37 FLRA 603, 604-05 (1990) (posted notices "provide evidence that rights guaranteed under the Statute will be vigorously enforced").

The other nontraditional notice provisions that the General Counsel has requested here are the posting of the Authority's order along with the notice and providing a copy of the notice and order to all of Respondent's supervisors, management officials, and bargaining unit employees. The General Counsel has provided no explanation for the necessity of including the order with the notice, and I see no reason to consider it further. Providing everyone with a copy of the notice is analogous to the NLRB's remedy, in appropriate cases, of requiring that the notice be mailed to employees. But while the NLRB orders such a remedy somewhat more liberally than it does readings to employees, *Heck's, Inc.* at 887, it still demands a showing of special circumstances beyond the commission of pervasive unfair labor practices. *Carbonex Coal Co.* Here, there is no particular reason to doubt that the usual postings, in a

facility with what appears to be not much in excess of 300 employees, with an established local union that publishes its own newspaper, will insure that virtually every employee, supervisor, and management official is made aware of the contents of the notice.

There is one further consideration that make me reluctant to recommend bundling these cases into a "lead" case on the imposition of nontraditional remedies, at least in the absence of a much more compelling showing.[18] As alluded early in this decision, what the parties most reasonably expect from the Authority is closure--a final resolution of their dispute. None of the eloquent-sounding objectives of an Authority order are achievable until such closure is obtained. An ongoing labor dispute contributes negatively to an agency's mission. And within a prison, such an unresolved source of tension between management and staff is not only undesirable but, at least potentially, dangerous.

Recommendation of the kinds of remedies the General Counsel has requested here would virtually guarantee exceptions to this decision. Failure to recommend them by no means makes the filing of exceptions, which is the right of any party, unlikely. Nor does it become a judge to discourage exceptions to his or her decisions. On the other hand, in view of the circumstances described above, there is no wisdom in maximizing the chance that such right will be exercised.

Failing resolution of the dispute at this point, the prospects for any early resolution appear extremely dim. During the period during which review is awaited, a bad situation may well become worse. And when such review is completed, and some relief, if any, is provided, it may come too late to be of much use. As the future Justice Ginsburg wrote:

> I note as a postscript to the many pages we have written that as a court of review we must wrestle with the "matters of high principle" aired in this case. See Weiler, *Promises to Keep: Securing* Workers' Rights to Self-

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[18] Remedial issues similar, although not identical, to those raised here are currently before the Authority on exceptions from the judge's decision in *U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Ocean Service, Coast and Geodetic Survey Aeronautical Charting Division, Washington, D.C.*, Case Nos. WA-CA-40661 et al., OALJ 95-57 (May 19, 1995).

> *Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1794 (1983). The point has been made tellingly, however, that "[i]f the law is to have any chance of vindicating the employees' group right to 'bargain collectively through representatives of their own choosing,' the [relief] it promises must come quickly." *Id.* at 1793. * * * The long delays at every stage of this and similar proceedings may indeed render the Board's remedies, however stiff, "beside the point." *Id.* at 1794 (footnote omitted).

Conair Corp. v. NLRB, 721 F.2d 1355, 1402, 114 LRRM 3169, 3205 (D.C. Cir. 1983) (separate concurring statement of Ginsburg, J.)

I recommend that the Authority issue the following order.

ORDER

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations, and Section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the United States Penitentiary, Leavenworth, Kansas, shall:

1. Cease and desist from:

a. Making statements to employees which disparage union officials and threaten union officials with discharge or other adverse consequences because of their activities that are protected by the Statute.

b. Telling any employee that the employee is being removed from a committee assignment because the warden does not like the way the employee is representing other employees.

c. Removing any employee from a committee assignment because of that employee's activities that are protected by the Statute.

d. Conducting a formal discussion without first giving the American Federation of Government Employees, Local 919 (Local 919), the agent of the employees' exclusive collective bargaining representative, a reasonable opportunity to participate.

e. Refusing to allow the employee duly designated by Local 919 to enter and have access to the grounds of the U.S. Penitentiary, Leavenworth, Kansas, in order to have access to the Union office, to act as Local 919's representative on the Housing Committee, and to teach a class during annual refresher training.

f. Selecting an employee who has not been designated by Local 919 to serve as its representative on the Food Service Department's roster committee.

g. Relocating Local 919's office without first giving it an opportunity to negotiate concerning the move.

h. Threatening any employee with discharge if that employee distributes documents concerning conditions of employment within the institution.

i. In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights assured them by the Statute.

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

a. Upon his request, restore James Evans to the steering committee of the Strategic Planning Committee.

b. Upon request by Local 919, permit its duly designated representatives to enter and have access to the grounds of the U.S. Penitentiary, Leavenworth, Kansas, in order to have access to the Local 919 office, to act as Local 919's representative for the Housing Committee, and to teach a class during annual refresher training.

c. Upon request by Local 919, restore its office space in the basement of the administration area and bear the cost of such restoration.

d. Notify Local 919 of any proposed move of its office space; upon request, bargain in good faith concerning such proposed action; and maintain Local 919's restored office space until negotiations with respect to the office space have been completed.

e. Post at the United States Penitentiary, Leavenworth, Kansas, copies of the attached Notice to All Employees on forms furnished by the Federal Labor Relations Authority. Upon receipt of the forms, the Notice shall be signed by the Warden of the U.S. Penitentiary, Leavenworth, Kansas, and they shall be posted and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the Notice and Order are not altered, defaced, or covered by any other material.

f. Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Federal Labor Relations Authority, Denver Region, in writing, within 30 days from the date of this Order as to what steps have been taken to comply.

IT IS FURTHER ORDERED that all remaining allegations of the complaints in these cases are dismissed.

Issued, Washington, D.C., February 28, 1997

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JESSE ETELSON
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 United States Penitentiary, Leavenworth, Kansas, 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 to our employees to the effect that the Warden has ways of getting Union representatives to back off of a grievance.

WE WILL NOT make statements to our employees to the effect that the Warden is going after Union representatives James Evans and Larry Raney because of the way they conducted their activities as Union officials.

WE WILL NOT make statements to any employee to the effect that the Warden was removing him or her from the Strategic Planning Committee because the Warden did not like the way that employee represented other employees.

WE WILL NOT make statements to any employee to the effect that if he or she ever distributes within the institution a document that mentions the Warden's involvement in a matter at another institution, the employee's "union ass" would be put outside without a paycheck.

WE WILL NOT make statements to our employees to the effect that certain Union officials are a cancer, scum, and pissant tin soldiers, and that the Warden was going to get rid of them.

WE WILL NOT make statements to any employee who is a Union official to the effect that the Warden could fire him or her any time he wanted to do so because of Union-related activities.

WE WILL NOT remove James Evans or any other employee from the steering committee of the Strategic Planning Committee because of that employee's activities that are protected by the Federal Service Labor-Management Relations Statute.

WE WILL NOT conduct a formal discussion without giving the Union an opportunity to participate.

WE WILL NOT refuse to allow the employee duly designated by the Union to enter and have access to the grounds of the U.S. Penitentiary, Leavenworth, Kansas, in order to have access to the Union office, to act as the Union's designated representa-tive for the Housing Committee, and to teach a class during annual refresher training.

WE WILL NOT select an employee who has not been designated by the Union to serve as the Union's representative on the Food Service Department's roster committee.

WE WILL NOT relocate the Union office without first giving the Union an opportunity to negotiate concerning the move.

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

WE WILL, on his request, restore James Evans to the steering committee of the Strategic Planning Committee.

WE WILL, upon request by the Union, permit its duly designated representatives to enter and have access to the grounds of the U.S. Penitentiary, Leavenworth, Kansas, in order to have access to the Union office, to act as the Union's representative for the Housing Committee, and to teach a class during annual refresher training.

WE WILL, upon request by the Union, restore its office space in the basement of the administration area and bear the cost of such restoration.

WE WILL notify the Union of any proposed move of this office space and, upon request, bargain in good faith concerning such proposed action, and will maintain the Union’s restored office space until negotiations with respect to the office space have been completed.

_____
(Activity)

Dated:_____ By_____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. If employees have any questions concerning this Notice or compliance with its provision, they may communicate directly with the Regional Director for the Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 100, Denver, Colorado, 80204, (303) 844-5224.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by JESSE ETELSON, Administrative Law Judge, in Case Nos. DE-CA-60026, DE-CA-60027, DE-CA-60028, DE-CA-60049, DE-CA-60050, DE-CA-60051, DE-CA-60349, DE-CA-60362, DE-CA-60365, DE-CA-60385, DE-CA-60405, DE-CA-60569, were sent to the following parties in the manner indicated:

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Dated: February 28, 1997
Washington, DC