

92ND COMBAT SUPPORT GROUP, FAIRCHILD AIR FORCE BASE SPOKANE, WASHINGTON  
.Respondent .and . Case Nos.  
SF-CA-20011 . SF-CA-20020

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 11 .Charging Party .  
Capt. Scott R. Marchand For the Respondent  
Yolanda Shepherd-Eckford For the General Counsel  
Before: Eli Nash, Jr. Administrative Law Judge

## DECISION

### **Statement of Case**

This case arose under the Federal Service Labor- Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. 7101, et seq. (herein the Statute). On an unfair labor practice charges filed by the captioned Charging Party (herein the Union) against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for the San Francisco Regional Office, issued a Consolidated Complaint and Notice of Hearing alleging Respondent violated section 7116(a)(1) and (2) of the Statute by issuing a counselling memorandum to a union steward; making an entry in an employee's 971 file; and, requiring the employee to take annual leave in connection with his attendance at a training session because these employees each engaged in protected activity. The Consolidated Complaint also alleges that Respondent violated section 7116(a)(1) of the Statute by making threatening statements to an employee concerning his protected activity.

A hearing on the Consolidated Complaint was conducted in Spokane, Washington at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by Respondent and the General Counsel and have been carefully considered.

Upon the entire record in this matter, my observation of the witnesses and their demeanor and from my evaluation of the evidence I make the following:

### **Findings of Fact**

The Union is the exclusive representative of a unit of employees at the Respondent. At all times material herein, Danny Spiller was a Union steward who represented employees in Respondent's Vehicle Maintenance Shop (herein called the Shop). Spiller also conveyed complaints in the Shop to the Union President, David Newlun and Chief Steward, Michael Sveska for additional action, if he was unable to personally resolve complaints.

On or about June 20, 1991, Spiller wrote a letter of inquiry raising the possibility that an employee had been pre-selected for a position in the Shop. The Union submitted the letter to Respondent's Civilian Personnel Office (herein called CPO). Ben Lynch, a Labor Relations Specialist and the Acting Civilian Personnel Officer at the Respondent responded to Spiller's letter, denying the validity of Spiller's complaint.

Sometime in early August 1991, employees in the Shop were issued performance appraisals for the February 1990-June 1991 appraisal period. Some employees received lower appraisals and registered their complaints with Spiller, who submitted the employees' complaints to the Union President and Chief Steward. Later in August, the Union filed grievances on behalf of four Shop employees who complained about their performance appraisal ratings. The grievances worked their way through the negotiated grievance procedure from August 1991 through October 1991. Spiller and Arnold Knuth were among the four employees who grieved their appraisals. Prior to the four performance appraisal grievances filed in August, there had never been a grievance filed by, or on behalf of any employee working in the Shop.

Approximately 15-20 civilian employees work in the Shop. Warren Greenwood, the Vehicle Maintenance Officer is in charge. Sergeant Mischel, the Maintenance Chief, two first level supervisors, Sergeant Raymond AuCoin and Tech. Sergeant LeMay, and LeMay's Assistant, Sergeant Albert Renshaw are all under Greenwood in the Shop. Knuth's grievance alleged that he had been improperly rated by AuCoin.

Employee witnesses testified to a certain tenseness in the Shop atmosphere after the grievances were filed. One grievant, Duane Renz explained that the tenseness resulted from the grievants being closely watched by management. Another grievant, Spiller, noted the change in tone utilized by his supervisor, Renshaw, when addressing him.

Sometime in August, 1991, after the filing of the grievances Lynch conducted an aggressive campaign, seemingly aimed at Spiller, to dissuade the Union from pursuing the grievances.<sup>(1)</sup> On one occasion, Spiller was in the CPO concerning another matter, and Lynch, approached him and initiated a discussion concerning the grievances. Lynch told Spiller that the grievances were unnecessary and that the performance appraisals were "good enough". Lynch further stated to Spiller that the grievances would just cause him more work and that it didn't matter whether the employees won the grievances or not, they would lose.<sup>(2)</sup> Spiller replied that the employees had not been counselled and there was no documentation to justify lower appraisals. Spiller's uncontroverted testimony establishes that Lynch replied, "If documentations [sic] what you want, documentations [sic] what you're going to get."

On another occasion, Lynch phoned Spiller while he was at home on sick leave and tried to convince Spiller to withdraw the grievances. Spiller defended the validity of the grievances and refused to acquiesce. In response to Spiller's refusal to withdraw the grievances Lynch stated, "Well if that's your answer, no matter what, if you win or lose, you're a loser".

Respondent's displeasure that the grievances had been filed is further shown by its treatment of the grievants. When one grievant, Renz, returned from filing his grievance, his supervisors, LeMay and Renshaw called him into their office and notified him that he was being written up concerning work which he had performed a while ago. The job for which he was written up had been previously inspected and passed by Renz' supervisor and the Quality Inspectors in the Shop.

About one week after the grievances had been filed, Greenwood observed two of the grievants, Renz and Knuth talking in the work area. The record disclosed that both Knuth and Renz were in what was accepted in the Shop as the work area. Greenwood asserted that the employees were smoking. Knuth testified that

smoking was allowed outdoors, but that he was not smoking because he was busy working on a vehicle. Greenwood testified that "there was no vehicle in the area for Mr. Renz to work on", suggesting that the vehicle upon which Knuth had been working was in the area. While Greenwood did not hear the grievances until October, he admittedly was aware of their filing soon after they were filed. Greenwood commented to Renz and Knuth that it was not break time, and then sought out the supervisors in charge, LeMay, Renz' first level supervisor and the employees' second level supervisor, Mischel. Greenwood stated that he wanted the employees documented as being out of their work areas.<sup>(3)</sup> A conversation ensued between Renz and Greenwood in which Renz indicated that if he were written up, he might possibly file another grievance. Although Greenwood could not recall what was said that day, both Renz and Knuth credibly testified that Greenwood replied in a loud angry tone that he "didn't give a damn" how many grievances the employees filed.

Renz' uncontroverted testimony establishes that later that same day, LeMay told Renz that he "would have to document (him) as being out of the work area", but he "wasn't going to make a big deal about it." LeMay had Renz initial a statement to be entered into Renz' records which stated that Renz had been "briefed on work areas". This statement however, was not initialed by the employee pursuant to procedures established by the parties in the collective bargaining agreement.

The next day, Knuth had a conversation with his supervisor, AuCoin, who told him that Greenwood had asked both he and LeMay what they were going to do about Knuth and Renz being out of their work areas. It is not disputed that Knuth and AuCoin discussed what statement would be placed in Knuth's records, and agreed that the statement would merely indicate that the two had "discussed work areas". Knuth later learned, however, when viewing his personnel records, that the agreed-upon statement was not the statement which had been placed in his records. Rather, the initial statement proposed by AuCoin, that Knuth had been observed out of his work area, had been placed in Knuth's file.

Employees in the Shop are not restricted to a certain area of the shop. In order to perform their work duties, they are required to freely move about the shop area, including outdoors. The testimony of the three employee witnesses, who testified with significant detail concerning the duties performed in different areas in the shop is credited over that of Greenwood, who admittedly does not work on the shop floor.

In another step, Respondent required Knuth to take annual leave in connection with his attendance at a training session. This incident occurred while Knuth's grievance was at the third step of the grievance procedure, awaiting a hearing before a grievance panel. On September 24, 1991, Knuth attended an approved training session. On the day prior to the training session, Knuth informed AuCoin that he would be attending the training. Knuth had been placed on a waiting list and did not receive confirmation that he had been selected for the training until the day prior to the training session. Knuth had been notified by Gloria Sands, a training coordinator in Respondent's CPO, that he should report directly to the training session.<sup>(4)</sup> Knuth reported directly to the training session, and then went to work after the training was completed. Upon reaching work that same day, Knuth was informed by AuCoin that he would be charged AWOL if he did not fill out a leave slip, because the training class began at 9:00 a.m., and Knuth's normal duty hours started at 7:00 a.m. Knuth told AuCoin that he had been notified by Sands to report directly to the training session. AuCoin continued to insist that Knuth had been AWOL and would be required to take leave. Upon consultation with Greenwood, AuCoin required Knuth to take 1.25 hours of annual leave. It is not disputed that Respondent's CPO is responsible for notifying supervisors of employee training.

Employee witnesses credibly testified that it was the normal practice in the Shop for employees to report directly to training sessions, rather than to the Shop in order to avoid the necessity of travel vouchers. Spiller testified that he had reported directly to training without incident when his shift started at 7:30 a.m., and the training class did not begin until 8:30 a.m. or 9:00 a.m. There is no record evidence that in the recent past, Shop employees reported to work before attending a training session, or were required to take annual leave in connection with the attendance of a training session.

Spiller's uncontroverted testimony was that after the grievances were filed he was verbally reprimanded by Renshaw concerning the manner in which he handled work orders, where before the same conduct had gone without comment. Further, Spiller was issued a written counselling statement concerning his representational activities during the same period the Union was pursuing his and the other employees' grievances.

Spiller was also verbally reprimanded by Renshaw when he spoke briefly to Knuth on the shop floor in an attempt to calm Knuth down when he appeared upset about something. Renshaw's recollection of this incident was that it occurred some 2-3 weeks prior to September 25, 1991, which would put it squarely in the time frame of the case. Spiller was approached by Renshaw, who harshly warned Spiller not to conduct union business without permission, and threatened to write Spiller up if he conducted union business again without permission. Spiller credibly says that several such conversations had gone on with employees in the past, but without comment by management.

Approximately three weeks later, Spiller was issued a counselling memorandum based on an incident involving Knuth. On September 25, 1991, Spiller had a meeting with Knuth concerning a representational matter. The meeting between Knuth and Spiller was arranged through each of the employee's first level supervisors, LeMay and Renshaw. Spiller approached Knuth later that same day and inquired whether Knuth needed to document time in his records for a job that he had assisted Spiller with a few weeks earlier. Spiller left the area after having learned that Knuth did not need the additional time for his records. He was soon confronted by Renshaw, however, who accused him of conducting union business without permission. Spiller, who had a work order in his hand at the time, denied the accusation, to no avail.

The following day, Renshaw and LeMay called Spiller into their office and issued him a written counselling memorandum to be placed in his records. The memorandum stated that Spiller had conducted union business without permission. The meeting which took place early in the day on September 25, 1991 with Knuth is referred to in the memorandum as a meeting with a "fellow union member". Prior to issuing the memorandum to Spiller, Respondent conducted no investigation to ascertain the subject of the conversation regarding which Spiller was counselled. Renshaw admittedly had not questioned Knuth concerning the topic of the discussion between Knuth and Spiller. Also he stated that he did check work records to see whether Knuth and Spiller had worked on the same job, only in connection with the present unfair labor practice charges. Renshaw alleges that he asked Spiller the topic of the discussion just prior to handing him the memorandum, in an attempt to further investigate. Such testimony is observed with skepticism, particularly in light of the fact that the memorandum admittedly was already prepared at that time. While plausible, it must be viewed as purely perfunctory.

After the grievances were filed, Greenwood approached Newlun, the Union President and asked Newlun to remove Spiller from his steward position because he "could not get along with him". Greenwood made this request immediately after hearing one of the four grievances filed in the Shop which Spiller helped initiate. Greenwood also approached the Union Chief Steward, Sveska, and asked him to consider removing Spiller

from his steward position because he could not get along with Spiller anymore. This conversation also occurred after a grievance meeting concerning one of the four performance appraisal grievances Spiller had sought to process. Greenwood also conveyed to Lynch that he could not work with Spiller.

## **Conclusions**

### **A. KNUTH WAS DOCUMENTED IN HIS 971 FILE AS BEING OUT OF HIS WORK AREA AND REQUIRED TO TAKE ANNUAL LEAVE IN CONNECTION WITH HIS ATTENDANCE AT A TRAINING SESSION IN REPRISAL FOR HIS PROTECTED ACTIVITY IN VIOLATION OF SECTION 7116(a)(1) AND (2) OF THE STATUTE.**

This case is controlled by Letterkenny Army Depot, 35 FLRA 111 (1990). In such cases the General Counsel need only make a prima facie showing that the violation of section 7116(a)(1) and (2) of the Statute occurred. Respondent then has an opportunity to establish by a preponderance of the evidence that its actions were justified. Here the preponderance of the evidence is short of proving that Respondent had legitimate justification for the actions it took against Knuth, for being out of his work area or in requiring Knuth to take annual leave in connection with his attendance of a training session. In this regard, weaknesses in the General Counsel's case disappear when the testimony of Respondent's own witness, Greenwood, is considered. Greenwood's candor established that he was smitten by the achievements and "awards" of the Shop. His total testimony confirms that he did not want that record jeopardized by grievances. Classic is his statement that "they" wouldn't consult me or they wouldn't give us an opportunity to work the problem out. These statements carry little weight since the record shows that the grievances involved in this case went through the normal two steps of the contractual procedure and the Union was just not satisfied with the responses from Greenwood's supervisors, so they continued the grievance process. Furthermore, Greenwood's hand is apparent in most of the actions taken against the employees herein. In my opinion, this first level supervisor set the tone for handling the employees who filed grievances. The evidence, in my opinion, demonstrates that Respondent's attempts to justify its actions against Knuth are contrived, and that it would not have taken the actions against Knuth in the absence of protected activity.

The record reveals that less than a week after Knuth had grieved his performance appraisal, along with others in the Shop, he began experiencing problems with supervision. Indeed, problems that he had not previously experienced. Greenwood, who admittedly had knowledge of the grievances soon after they had been filed, initiated annotations in two of the four grievants 971 files concerning work areas. Knuth was among those two. Similarly, in September, when Knuth's grievance was awaiting a 3rd step hearing before a grievance panel pursuant to the negotiated grievance procedure, he was charged AWOL and required to take annual leave under circumstances in which other employees who had done the same thing, had not been charged. The timing of the annotation in Knuth's 971 file, as well as the AWOL charge relative to the filing and processing of his performance appraisal grievance, raises questions about the appropriateness of Respondent's actions.

The record also shows animus toward employees involved in protected activity. The attitude of Respondent's supervisors toward the employees' having exercised their protected right to file grievances under the negotiated grievance procedure was certainly not one of compassionate acceptance. The general view on grievances is portrayed by Greenwood in his statement that the employees could file as many "damn grievances" that they wanted, when discussing the work area issue with Renz. Respondent's contempt is

further defined by the prophecy of Lynch that the employees were going to be getting the documentation that they had found lacking, if they pursued the grievances. Lynch's forecast, unlike the local weatherman, could not have been more accurate, as evidenced by the actions taken against Knuth and against Spiller, whose case will be discussed in more detail below. The views expressed above, in my view constitute animus in this case.

The manner in which Respondent chose to annotate Knuth's 971 file helps explain its unlawful motive. It also demonstrates that Knuth's 971 file would not have been annotated in the absence of protected activity. The idea of a work area in the Shop seems to have found its genesis only after the four grievances were filed in August 1991. This is evidenced by credited testimony, as well as both Renz' and Knuth's vehement protests against being documented as being out of their "work areas". Respondent offered no evidence that it ever imposed "work area" restrictions on employees in the Shop prior to the admonishments initiated by Greenwood. Returning to the 971 file, AuCoin's action in agreeing to place a statement in Knuth's file only to the effect that he had discussed work areas with Knuth, and then placing remarks in Knuth's file denoting that Knuth had been viewed out of his work area, seems to be unnecessarily crafty. In the absence of anything improper with respect to documenting an employee for being out of his work area, the need for such guile becomes apparent. The pretext, in my view, was unveiled showing that Respondent's actions were clearly aimed at undermining two grievants, Knuth and Spiller.

There is also a close relationship between the annotation in Knuth's 971 file, and the issue raised in Knuth's grievance concerning his performance appraisal which further helps confirm Respondent's unlawful motive, and assists in showing that such action would not have been taken in the absence of protected activity. Thus, Knuth's supervisor, AuCoin, admitted that because Knuth's grievance argued that there had not been sufficient documentation to support the lower appraisal, he sought to address this issue by creating more documentation to back up his actions. While AuCoin sought to characterize this as a policy which he adopted uniformly throughout the Shop, the evidence suggests that this fresh approach on his part, not only resulted from Knuth's grievance, but was also applied solely to the grievant, Knuth. Although, AuCoin testified that during the time he had known Knuth, Knuth had been "consistently" counselled, it was only after Knuth filed a grievance that AuCoin deemed it necessary to put something in writing concerning Knuth's alleged deficiencies. In the circumstances, Repondent's unlawful motive, becomes more clear.

In seeking to justify its action regarding the annotation in Knuth's 971 file, Respondent maintains that it only sought to accommodate the Union in its request that management have tangible justification for changes in the ratings given to employees. This is simply another way of saying that the grievants received the documentation that they had argued did not exist in support of their lower ratings. The result of Respondent's subsequent finger-pointing at the Union, as the reason behind its own conduct, has an obvious impact on the Union concerning the manner in which employees will view the Union after the instant grievances. Clearly, the Union was not asserting in its grievances that Respondent make a wholesale effort to put as much paper in the grievants' files as possible. Respondent's explanation that its actions were justified by the Union's grievance, are in my opinion, too transparent for serious consideration.

Respondent's claim that the documentation issued to the grievants was consistent with the recommendations of the 3rd step grievance panel, that all performance related discussions be documented and that regularly-scheduled performance discussions be implemented, requiring annotation in the employee's 971 file, is rejected. The actions complained of in the complaints in this matter clearly all occurred before the 3rd step grievance decisions were issued. Unless they were clairvoyant, the supervisors involved could hardly know the outcome of the grievance panel's recommendations before they were made. Moreover, Respondent's actions can not be argued as consistent with the grievance panel's recommendation, since there is no evidence

that the grievance panel ever suggested that the grievants be issued a swell of documentation concerning matters which had before gone unnoticed by Shop supervisors.

Moving ahead to the threatened AWOL charge against Knuth when he went directly from home in the morning instead of reporting to work before going to a training session. Knuth was required to take annual leave for the time. Knuth's attendance of the training session provided a good opportunity for Shop supervisors to show him that he was operating under a different set of rules than those that applied before he filed a grievance. The record evidence is quite clear that no employee had ever been required to take annual leave in connection with attendance at a training session, and no employee in the shop had ever reported to work prior to attending a training session. Respondent's motive in the matter is illuminated by its insistence upon placing blame on Knuth notwithstanding factors suggesting that Knuth was justified in doing what every other employee did when assigned to early morning training. Aside from employee witnesses testifying, that they reported directly to training sessions to avoid the necessity for filling out travel vouchers, there was absolutely no evidence of any employee who attended a training session before reporting to work, ever being required to take annual leave for that time.

Also indicative of the incompatible treatment Knuth received is the formula which Respondent used to determine the amount of annual leave that Knuth would be required to take. The evidence suggests that Respondent intended to treat Knuth differently. According to Greenwood, he and AuCoin figured that Knuth should be attributed 45 minutes for clean-up and travel time, and, thus required to take 1.25 hours annual leave to make up the two hour discrepancy. At the same time, however, Greenwood admitted that employees who were scheduled for an 8:30 a.m. training session, whose work day began at 7:30 a.m. were not required to report to work, the 45 minute travel allowance, presumably not being applicable. He then attempted to explain the discrepancy away by asserting that the manner in which timekeeping was accomplished had been changed. Upon further examination, Greenwood admitted that he did not know whether the timekeeping method had changed at the time that Knuth had been required to take annual leave. Greenwood's statements show that the matter was handled haphazardly not because Knuth was not allowed the extra 15 minutes, but rather that no "formula" existed prior to Knuth's situation.

AuCoin insisted upon placing fault upon Knuth for not notifying him of the training in a timely fashion. However, Knuth notified him about the training session the day before the scheduled session, which was the day that Knuth himself, learned that he had been selected to attend the training. AuCoin additionally admitted that the CPO is normally responsible for notifying supervisors of employee training. It is unclear what more Knuth could have done. Furthermore, Knuth says that Sands directed him to report directly to the training class. Sands' directive to the employee was simply ignored by AuCoin. AuCoin, ignoring the fact that Sands had directed Knuth to go straight to training without first reporting to Fairchild helps establish that Respondent was groping for reasons to discipline the grievants.

The record evidence demonstrates that Respondent had a discriminatory motive both in annotating Knuth's 971 file and in requiring him to take annual leave in connection with his attendance at a training session. Respondent failed to establish by a preponderance of the evidence that any justification existed for its actions against Knuth. Accordingly, it is found that Respondent violated section 7116(a)(1) and (2) when it required Knuth to take annual leave in connection with his attendance of a training session. Respondent also violated section 7116(a)(1) and (2) when it annotated Knuth's 971 file based on a fictional "work area" policy.

**B. SPILLER WAS ISSUED A COUNSELLING MEMORANDUM BASED ON HIS REPRESENTATIONAL ACTIVITIES BECAUSE OF HIS EXERCISE OF PROTECTED ACTIVITY.**

Regarding the counselling memorandum issued to Spiller, one need only examine the testimony of Greenwood, who described him as "working against us." Greenwood also described his basic problem with him as follows:

The problem with Mr. Spiller is he wouldn't give us an opportunity--and I say "us", management, I got a superintendent that works for me--they wouldn't give us an opportunity to work the problem. Whenever there was a slight problem or a confrontation or a counselling or whatever, the first thing that was done, they wouldn't even consult me. They just come up, they tell me, "We're going to the Union." I asked them, "Can't we talk about this?"

"Whoop, we're going to the Union."

Greenwood's disdain for Spiller is graphically illustrated on cross-examination when he revealed his attempts with Newlun and Sveska, both high Union officials, to have Spiller removed as a steward, because of his involvement in the filing of the performance appraisal grievances. Greenwood was infuriated because of the following:

. . . they don't even give us a chance to work the problem, like the appraisals. I didn't even know these people were dissatisfied with their appraisals until the grievance was filed. . . .

He added:

. . . I never even had an opportunity to even get involved in it until we went to the panel, and I just don't feel that I have a fair shot at trying to solve these problems. . . .

He also felt that Spiller was wrong in his involvement in filing the grievances. Greenwood also let Lynch know that he could not work with Spiller.

Greenwood's outrage that he had to deal with a grievance when prior to that time, the Union had never filed a formal grievance in the Shop can not be mistaken. It is also clear, that Greenwood blamed Spiller for the grievances, although Spiller has a Statutory right to assist employees in grieving their appraisals under the negotiated procedure. In Greenwood's view, Spiller was fine as a Union steward for only as long as he did not actively assist employees or his own protected rights.

Renshaw's animus is also shown by the record. Again, the timing is a key factor. See Naval Air Engineering Center, supra. Renshaw virtually admits the fact that the counselling memorandum would not have been issued in the absence of protected activity. First, Renshaw says that he decided to research how much official time Spiller was allowed approximately two to three weeks prior to verbally reprimanding Spiller on this subject. Since the record establishes that the verbal reprimand occurred in early September, it appears that Renshaw's sudden urge for research concerning Spiller's allotted official time occurred almost immediately after the August 8, 1991 date of Spiller's first step grievance. Then Renshaw says that since approximately April 1991, he suspected Spiller was conducting Union business without permission. Yet, it was not until after the performance appraisal grievances were filed that Renshaw warned, and subsequently counselled Spiller on the matter. Furthermore, Renshaw admitted that he allowed employees casual conversations in the shop which

lasted two to four minutes, without questioning the conversation. He stated that a conversation becomes "burdensome" when it lasts 15 or 20 minutes, and that it was at this point that he inquired about the nature of the conversation, and why the employees were not performing their jobs. However, Renshaw never indicated that he had witnessed Spiller and Knuth conversing for 15 or 20 minutes. Renshaw found it necessary to break up Knuth's and Spiller's conversation, although the record shows that such a conversation would otherwise have been allowed. Renshaw's action demonstrated not only a motive, but also helps show that the action would not have been taken in the absence of protected activity.

Respondent's motive in issuing the counselling memorandum to Spiller is also betrayed by its failure to investigate the matter for which Spiller was counselled. As previously noted, Renshaw assumed that Spiller and Knuth were discussing a representational matter, although he did not hear the conversation, simply because the two had met earlier that day on a representational matter. While Renshaw says that he provided Spiller the opportunity to explain the nature of his conversation with Knuth, the opportunity came with the disciplinary action in his hand. Such a move is easily recognized as a belated attempt to justify his actions. The total record makes it pretty clear that Respondent's supervisors made no attempt to cover their dislike for protected activity or to secure the truth, or even to obtain "evidence" which would sustain their action against Spiller. In this case, there is abundant evidence that the counselling memorandum issued to Spiller was motivated by discriminatory reasons. Accordingly, it is found that Respondent failed to establish by a preponderance of the evidence that there was any justification for its issuing a counselling memorandum to Spiller for conducting union business without permission. Respondent's action, therefore, was in violation of section 7116(a)(1) and (2) of the Statute.

### **C. LYNCH'S STATEMENTS TO SPILLER VIOLATED SECTION 7116(a)(1) OF THE STATUTE**

The test applied in situations such as here is whether the alleged statement tends to coerce or intimidate employees in the exercise of section 7102 rights under the Statute, or whether employees could reasonably draw a coercive inference therefrom. U.S. Department of Agriculture, Forest Service, Chatahoochee-Oconee National Forest, Gainsville, Georgia, 45 FLRA 1310 (1992). Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah, 35 FLRA 891, 895 (1990) (Ogden Air Logistics Center).

In the instant matter, the testimony that Lynch told Spiller that if "documentation was what the employees wanted, then documentation was what they were going to get." is undenied. Also, Lynch did not deny that on at least one occasion, he may have told Spiller that the employees who filed the grievances may lose, even if they won the grievances. Thus, Lynch is imputed with making two statements to Spiller which violated the Statute.

It was decided sometime ago that statements by managers or supervisors tending to interfere with or coerce an employee in the exercise of the protected right to file a grievance violates the Statute. See Bureau of Engraving and Printing, 28 FLRA 796 (1987). Telling an employee that he will lose, even if he wins his grievance can leave only one impression, and that is that there will be certain backlash for having filed the grievance. See U.S. Department of the Air Force, Nellis Air Force Base, Nevada, 38 FLRA 39 (1990) (where the Authority upheld an administrative law judge's finding of a violation where the agency informed an employee who had grieved her performance appraisal that she had been "marked" as a person who had gone to the union and civilian personnel). Consequently, it is found that this first statement constituted a violation of section 7116(a)(1). The second statement attributed to Lynch, that employees were going to get the documentation that they had argued should have been present in order to justify their lowered appraisals, is

equally violative of the Statute. It constitutes a blatant threat to "paper" employees who filed the grievances, which is what in fact did occur. There is no question, in my opinion, that such a threat would tend to chill an employee in the exercise of the protected right of filing a grievance. Accordingly, it is found that both statements attributed to Lynch, as set out above, violated section 7116(a)(1) of the Statute.

Based on the foregoing, it is found that Respondent violated section 7116(a)(1) and (2) of the Statute. Therefore, it is recommended that the Authority adopt the following:

### **ORDER**

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that 92nd Combat Support Group, Fairchild Air Force Base, Spokane, Washington, shall:

1. Cease and desist from:

(a) Discriminating against bargaining unit employees in the Vehicle Maintenance Shop because of their involvement in protected activity on behalf of National Federation of Federal Employees, Local 11, by issuing a counselling statement to an employee; by requiring an employee to take leave in connection with his attendance of work-related training; and, by making annotations in an employee's 971 file, because of the employees' exercise of protected activity.

(b) Making statements which interfere with, coerce, or discourage any employee from exercising the rights afforded by the Federal Service Labor-Management Relations Statute to file and process grievances under the negotiated grievance procedure freely and without fear of penalty or reprisal, such as making statements which indicate that employees will suffer repercussions because they file grievances under the negotiated grievance procedure.

(c) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights assured them by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Rescind the August 1991 annotation in a bargaining unit employee's 971 file, stating that the employee had been viewed out of his work area.

(b) Rescind the September 24, 1991 AWOL charge against a bargaining unit employee and restore the 1.25 hours of annual leave which the employee was required to take in connection with his attendance of the September 24, 1991 training.

(c) Rescind the September 16, 1991 counselling statement in a bargaining unit employees' 971 file stating that the employee had conducted Union business without obtaining the appropriate authorization.

(d) Post at its facilities at Fairchild Air Force Base, Washington, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commanding Officer of the 92nd Combat Support Group, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region 9, Federal Labor Relations Authority, 901 Market Street, Suite 220, San Francisco, California, 94103, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, April 29, 1993

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ELI NASH, JR.

Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discriminate against bargaining unit employees in the Vehicle Maintenance Shop because of their involvement in protected activity on behalf of National Federation of Federal Employees, Local 11, by issuing a counselling statement to an employee; by requiring an employee to take leave in connection with his attendance of work-related training; and, by making annotations in an employee's 971 file, because of the employees' exercise of protected activity.

WE WILL NOT make statements which interfere with, coerce, or discourage any employee from exercising the rights afforded by the Federal Service Labor-Management Relations Statute to file and process grievances

ORDER

under the negotiated grievance procedure freely and without fear of penalty or reprisal, such as making statements which indicate that employees will suffer repercussions because they file grievances under the negotiated grievance procedure.

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

WE WILL we take the following affirmative actions in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

WE WILL rescind the August 1991 annotation in a bargaining unit employee's 971 file, stating that the employee had been viewed out of his work area.

WE WILL rescind the September 24, 1991 AWOL charge against a bargaining unit employee and restore the 1.25 hours of annual leave which the employees was required to take in connection with his attendance of the Septemeber 24, 1991 training.

WE WILL rescind the September 16, 1991 counselling statement in a bargaining unit employees' 971 file stating that the employee had conducted Union business without obtaining the appropriate authorization.

\_\_\_\_\_  
(Activity)

Dated: \_\_\_\_\_ By: \_\_\_\_\_  
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with Regional Director of the Federal Labor Relations Authority, San Francisco Regional Office, 901 Market Street, Suite 220, San Francisco, CA 94103, and whose telephone number is : (415) 744-4000.

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1. Lynch, in another conversation with Spiller, over the submission of a letter involving a personnel matter unrelated to the present one, was alleged to have expressed his displeasure that the letter had been submitted, and told Spiller that he should have spoken to someone prior to its submission.
  2. Lynch stated that he could not remember whether he had made the statement. However, he did not deny making the statement.
  3. Initially, Greenwood, denied that he had asked the lower level supervisors what they were going to do about Renz and Knuth having been observed out of their work areas. On cross-examination, however, he admitted that he told the lower level supervisors that the employees were out of their work areas and told them to take care of it.
  4. Sands did not testify at the hearing on this matter. Though Respondent denied that Sands was its agent, the record leaves no doubt that she is. Lynch testified that Sands' job was to "work in (the Civilian Personnel) office indirectly for the Base Commander." He further stated that Sands worked for both management and employees and that she "help(ed) employees." Sands' position description shows that she furnishes an "Advisory Service to management and employees on policies, procedures and entitlements under Employee Development and Training programs". Sands' Position Description also states that she "provides management and employees with sound advice that is timely, procedurally correct and in accordance with applicable directive."