

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF THE AIR FORCE EGLIN AIR FORCE BASE EGLIN AFB, FLORIDA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1942 Charging Party	Case No. AT-CA-02-0595

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 her Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **AUGUST 23, 2004**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

SUSAN E. JELEN
Administrative Law Judge

Dated: July 22, 2004
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: July 22, 2004

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF THE AIR FORCE
EGLIN AIR FORCE BASE
EGLIN AFB, FLORIDA

Respondent

and

Case No. AT-CA-02-0595

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1942

Charging Party

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

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

U.S. DEPARTMENT OF THE AIR FORCE EGLIN AIR FORCE BASE EGLIN AFB, FLORIDA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1942 Charging Party	Case No. AT-CA-02-0595

Christopher D. Thurner, Esquire
For the Respondent

Laurie R. Houle, Esquire
For the General Counsel

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

Statement of the Case

On January 31, 2003, the Regional Director for the Atlanta Region of the Federal Labor Relations Authority (herein called the Authority), issued a Complaint and Notice of Hearing in the captioned matter. (G.C. Ex. 1(b)) This proceeding was initiated by an unfair labor practice charge filed on July 25, 2002, by the American Federation of Government Employees, Local 1942 (herein called the Union). (G.C. Ex. 1(a)) The Complaint alleged that the U.S. Department of the Air Force, Eglin Air Force Base, Eglin AFB, Florida (herein called Respondent or Eglin AFB) violated section 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (herein called the Statute) by lowering the performance appraisal of Union President Earle "Rocky" Tasse due to his protected activity. The Complaint further alleges that the Respondent violated section 7116(a)(1) and (5) of the Statute by changing the number of critical elements in Mr. Tasse's performance

standards, without providing the Union with notice and opportunity to negotiate the changes.

On February 14, 2003, Respondent filed its Answer, denying the substantive allegations made in the Complaint. (G.C. Ex 1(c)) On April 3, 2003, the Complaint was transferred to the Boston Region of the FLRA for further proceedings.

A hearing was held in the captioned matter in Shalimar, Florida. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The Respondent and the General Counsel submitted post hearing briefs which have been fully considered.

Findings of Fact

The hospital at Eglin Air Force Base falls under the 96th Air Base Wing, which is part of the Air Armament Command (AAC) of the Department of the Air Force.

(Tr. 14-15) Earle "Rocky" Tasse has been a Registered Nurse, GS-9, at the Eglin Hospital for about ten years, assigned to the operating room/surgical services (OR).

(Tr. 14-15) During his tenure in the operating room, Tasse was the only civilian employee; the remaining staff were all military personnel. (Tr. 16)

From approximately March 2001 through August 2001, Tasse's first line supervisor was Major Karen Jones.

(Tr. 21) His supervisor both immediately before and after Major Jones was Major Mary Jaco, from approximately January 2000 and ending in February 2002. Major Jaco maintained a working relationship with Tasse during this entire period as the operations officer of the surgical unit. (Tr. 198) From early February 2002 until he began 100% official time, Tasse's first line supervisor was Lieutenant Colonel (then Major) Harriet Young. (Tr. 19) Colonel (Dr.) David Noll was Tasse's third line supervisor as the commander of the surgical operations squadron from the summer of 1999 until Tasse began 100% official time. (Tr. 292)

Tasse's position is part of a bargaining unit represented by the Union. Tasse has held the position of President for about eight years. Tasse represents approximately 840 bargaining unit employee on three bases in the surrounding area, as well as unit employees located at the hospital. (Tr. 15-16) 1

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The parties are subject to a new collective bargaining agreement that became effective in August 2002.

Beginning on April 1, 2002, Tasse was placed on 100% official time. Prior to that time, Tasse was allowed a set amount of official time of six hours per week. The Union and the Respondent had worked an agreement that Tasse was on official time two afternoons a week, for three hours each afternoon. If he needed additional official time, he put in a request to his immediate supervisor, generally the Operations (Ops) Officer. Major Mary Jaco served as Ops Officer for most of the time involved in this particular matter. Tasse and Major Jaco were apparently able to work out any additional official time usage. If the additional time requested was not suitable for the OR, Tasse was provided with alternative times. (Tr. 16-19, 49, 70-71, 154-156, 216)

Tasse primarily functioned as a circulating nurse in the OR. During the pre-operative stage, Tasse made sure that the OR was ready, that the necessary supplies were available, conducted the patient history and made sure the patient and family understood the surgical procedure as well as the risks involved. (Tr. 21-22) The patient was then pre-medicated and brought into the OR. In the OR, Tasse ensured that the patient was positioned properly and was secure so that the anesthesia could be administered. (Tr. 22)

During the actual surgery, Tasse was not usually scrubbed at the operating table, but he remained in the OR to help in whatever capacity was needed. For example, he ensured that equipment ran properly and that all instruments were accounted for prior to closing. (Tr. 23-24) He also used the computer or phone in the OR for lab, x-ray and specimen information. (Tr. 24) While in the OR, some circulating nurses, including Tasse, checked their e-mails or did paperwork. Personal calls were also taken during this time. For most of his years as Union President, Tasse was allowed to answer union-related e-mails or phone calls without issue and he ensured that he kept such communications brief. (Tr. 24-25)

During the post-operative phase, Tasse was responsible for securing the dressing and surgical site and would transport the patient from the table to a stretcher. He was responsible for waking the patient and ensuring the patient was stabilized before being sent back to recovery. (Tr. 26)

Tasse also served as the nurse manager of the oral surgery department. He was the laser surgery officer and was in charge of education and training. (Tr. 26-27)

The appraisal year at issue in this matter was from April 1, 2001 through March 31, 2002. (Tr. 29)

During the spring and summer of 2001, Major Jones was involved in an attempt to have Tasse's position reclassified from GS-9 to a GS-11. She did most of the work herself, contacting other facilities and reviewing position descriptions. She also discussed this with Tasse. As part of this effort, she rewrote Tasse's position description, with a finalized version called a core document that was signed off by Major Jaco in March 2001. All of the paperwork for the position upgrade was submitted in the fall of 2001. Col. Noll was aware of the efforts to get Tasse's position upgraded, but did not involve himself in the process. (Tr. 168, 204-206)

In the fall of 2001, the request to upgrade the position was denied. Col. Noll informed Tasse of this decision in September or October, 2001. According to Col. Noll, Tasse was very upset with the decision and thought that Col. Noll should have done more to have his position upgraded. (R. Ex. 8; Tr. 336-337, 341-342, 363) Major Jones testified that at some point Col. Noll told her that Tasse would not be upgraded because of who he was, but Col. Noll did not remember making such a statement. (Tr. 172, 343)

On October 22, 2001, Col. Noll gave Tasse a letter of counseling, which states:

1. From personal observation and multiple inputs from numerous squadron members, you often display unacceptable behavior. You frequently lose your temper, go into tirades, deride others and are verbally abusive. The environment you create is hostile. You are viewed as being overly aggressive, disrespectful to others and disruptive.

2. *This behavior pattern must stop and will not be tolerated. While I also recognize the many positive contributions you make--too often what you do is negative. You should make every effort to improve your conduct.*

(R. Ex. 5)

Tasse filed an informal grievance over the counseling, which went through the informal stages without resolution. In January 2002 the grievance was elevated to the formal

level. 2 During the processing of the grievance, some letters containing unfavorable information were discovered. 3 Eventually the counseling was upheld, while some of the letters were to be destroyed. 4 (Tr. 82-85, 86, 298)

Starting in December 2001 and January and February 2002, Tasse became the sole negotiator for the Union in the contract negotiations and apparently began requesting additional official time over his pre-approved six hours per week. On January 14, 2002, Col. Noll sent an email to Tasse, indicating that there was a problem with last minute requests for official time and indicating that he was going to need five (5) days lead time for such requests. "We need the advance notice to balance our mission requirements while considering time away from work requests for anyone." (G.C. Ex. 4)

On January 28, 2002, Col. Noll also sent a letter to Tasse, primarily regarding official time for his union representational duties. The letter states:

I fully understand that you are afforded certain statutory protections when you are functioning in your representational role. However, aside from your role of union president, you are an employee in my organization. I am aware of your statutory rights when you are functioning in your role as union president. In order for you to perform your statutory role as a union representative during your official duty hours, you must have my advance permission. You are not permitted to perform your union representational duties, even to represent yourself, outside your officially approved release time, without my permission. You are not free to

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There are a series of e-mails between Tasse and various management officials, including labor relations, regarding scheduling a mediation in January 2002. It is not clear if a mediation was ever scheduled.

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Tasse referred to this as an "UIF", or unfavorable information file, but this language was not adopted by anyone else.

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While first drafting Tasse's performance appraisal, Major Jaco was under the impression from Tasse that the counseling had been removed. However, she was informed by Col. Noll that the counseling had been upheld and should be considered in her appraisal. (Tr. 318)

move back and forth at will from your employee status to your union president role in order to insulate yourself from the rules that apply to both you and the other employees of my organization.

You are authorized to perform your union representational duties during your duty hours only when you have requested, and been granted, official time to do so by me or my deputy. Therefore, your personal behavior, and my reaction to it, will be governed by whether, or not, you have been granted official time to accomplish your representational duties, including those times you act as your own union representative. If you are not on approved official time to act as a union representative during your official hours of work, you will be considered to be in your official capacity as my employee. As an employee you will be expected to meet the same performance and conduct standards as other personnel assigned to my organization.

At present, you are permitted two afternoons per week to perform your union representational duties. You are released for this purpose when you start your one hour unpaid lunch break at 1115 (or as soon thereafter as mission needs dictate) and your official time continues for the remainder of your duty day on Mondays and Wednesdays. The only exceptions to this scheduled official time will be *bone fide* mission needs. If you have additional need to use official time for representational purposes, I request that you provide me 5 duty days advance notice to permit acceptable schedule adjustments. *Bone fide* mission needs will take precedence.

Major Jaco (or other designated successor) remains your first-level supervisor. As such, she assigns your work; rates your performance, approves your annual and sick leave (either I or my deputy approves your requests for official time to perform representational duties outside your two afternoons per week), recommends you for appropriate recognition, counsels you as may be appropriate, initiates appropriate disciplinary action as may be required. Regarding your performance feedback, official records indicate you were provided feedback for the first quarter on 21 June 2001 and for the second quarter on

19 September 2001. Major Jaco will provide you third quarter performance feedback on or before 31 Jan 02. The feedback you receive from her will be her own.

A copy of this email will be placed in your AF Form 971 for future reference should you lose your copy. If you have any questions regarding this matter, please make an appointment to see me.

(R. Ex. 6)

Tasse testified that he followed the new requirement of five days notice whenever possible. Apparently Tasse was never denied any of his requests for official time beyond the two afternoons normally allocated, however, sometimes the actual time had to be rearranged to meet mission needs. 5

On January 29, 2002, Major Jaco met with Tasse for feedback discussions for the September through December 2001 quarter. Since Tasse's personnel folder had been lost, she did not have a copy of his old performance plan, but reviewed his performance based on her memory of the fourteen elements. These marks were all on the high end of the scale. The intent of the meeting was to tell the employee whether he had met the performance standards. There is no indication that Major Jaco raised any performance issues with Tasse during this meeting. (G.C. Ex. 53; Tr. 143, 207-208, 235, 254)

Major Jaco was tasked with writing Tasse's performance appraisal for the period in question. There were serious time constraints since she was scheduled to be deployed to Turkey on Monday, March 26, 2002. She used the core document given to her by Col. Noll in October 2001 to evaluate Tasse's performance. (Tr. 209-210) She wrote a draft of the performance appraisal, which she submitted to Col. Noll on Thursday. The draft appraisal did not have an overall performance rating entered, but it did evaluate all six elements as exceeds. Thus the overall rating would have been Superior. Col. Noll discussed the performance appraisal with her, indicating that he thought she should rethink portions of the appraisal and should take the counseling into consideration. Major Jaco rewrote the

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There is no evidence that the Union filed a grievance or an unfair labor practice charge regarding this January 28, 2002 letter from Col. Noll. And the complaint in this matter does not allege any change with regard to the manner in which Tasse requested or was granted official time.

performance appraisal and left it with Col. Noll on Friday before she was deployed. Major Jaco and Col. Noll both deny that he ordered her to lower Tasse's performance appraisal ratings. After reviewing the second draft, Col. Noll raised element one from "met" to "exceeds". He also eliminated all of the language for the elements that were "met", since explanatory language is not required. (Tr. 207, 210-212) Major Jaco explained that she considered Tasse an excellent nurse and that she would have liked to have given him the higher ratings in the first document, but had to take other factors into consideration. (Tr. 213) In particular she noted his demeanor and how he interacted with other staff (Tr. 214) and that there were difficulties working with him that she could not ignore as a supervisor. (Tr. 216) She denied that she took Tasse's union activities into consideration in drafting his performance appraisal. (Tr. 216)

In May 2002, Tasse's supervisor showed him a copy of the core document that contained his performance elements. The document had been signed by Major Jaco in March 2001 and by the classifier in October 2001. Tasse refused to sign the document in May 2002. (Tr. 95)

On June 17, 2002, Tasse received an email from Wanda L. Riley informing him that his annual appraisal was available for him to pick up at any time that day at the office of Col. Kirkpartick's secretary. The email further indicated that Col. Noll was on leave, but would be available to provide an appraisal discussion any time after June 24, 2002. Tasse received his performance appraisal on June 20, 2002, in his mailbox in a sealed envelope. (G.C. Ex. 33; Tr. 92)

Tasse's appraisal contained the same nine appraisal factors as his previous performance appraisals: work effort, adaptability to work, problem solving, working relationships, communication, work productivity, self-sufficiency, skill in work, and work management (G.C. Exs. 48-52) From 1997 through 2001, Tasse consistently received scores exclusively in the high range, that is, seven, eight or nine on a scale of one to nine. (G.C. Exs. 48-52). Furthermore, Tasse was also rated on the elements derived from his performance standards. (G.C. Ex. 48-52) In 1997 there were seven elements, six critical. (G.C. Ex. 48) From 1998 to 2001, he was rated on fourteen elements, thirteen critical. (G.C. Ex. 49-52) From 1997 to 2001, Tasse exceeded all of the elements and glowing narratives accompanied those scores. (G.C. Ex. 48-52; Tr. 30-35) For these appraisal years, Tasse received an overall rating of superior, and was eligible for a performance award.

Once he received his appraisal for 2001-2002, Tasse's overall evaluation contained scores drastically lower than previous evaluations. For the nine appraisal factors, he received ratings in the central range, with a four, two fives, and six sixes. (G.C. Ex. 54; Tr. 42-43) Further he was rated on six elements only, and was only marked as exceeds in one element. Overall, he received a "fully successful" rating. (G.C. Ex. 54; Tr. 42-44) The evaluation was signed by Major Jaco and Col. Noll, but was dated by a third person. (G.C. Ex. 54)

When Major Jaco returned from her deployment, Tasse asked her if the evaluation he received was the one that she submitted. She told him that the numeric ratings were the same, but that she had included narratives next to the elements which were no longer there. (G.C. Ex. 54; R. Ex. 4; Tr. 92-93, 218-219) She explained that she had changed the earlier draft because Col. Noll had directed her to consider the October 21 Letter of Counseling and "on-going inappropriate behavior". (R. Ex. 4 and 5; Tr. 93, Tr. 213-214.)

According to Tasse, Major Jaco showed him a draft version of his evaluation in late February 2002, which rated him again mostly nines in the appraisal factors and exceeded in all fourteen elements. (Tr. 89-90) The narrative was written for all fourteen elements. (Tr. 89) A final overall rating was not entered; Major Jaco told him that it had to go through Col. Noll and that she expected changes. (Tr. 91). Major Jaco denied that she showed Tasse his preliminary evaluation or that she even drafted a 2002 appraisal using the 14-element plan. (Tr. 209, 246) Both Major Jaco and Col. Noll admit that, in the preliminary evaluation, Major Jaco rated Tasse at eight in all factors except working relationship, where she gave him a seven. (R. Ex. 3 and 4; Tr. 209-210, 317-318). In addition, Major Jaco wrote that Tasse had exceeded all of his elements, which would have resulted in a superior rating and made him eligible for a performance award. (R. Ex. 3; Tr. 213.)

Positions of the Parties

General Counsel

Counsel for the General Counsel asserts that the Respondent discriminated against Rocky Tasse by lowering his performance evaluations due to his protected union activity. Citing the analytical framework set forth by the Authority in *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*), the General Counsel asserts that Tasse was engaged in

protected union activity of which the Respondent was fully aware; that Tasse's protected activity was the motivating factor in receiving an unprecedented low evaluation for the 2001-2002 performance year; and that Respondent's reasons for lowering Tasse's evaluation were not supported by the record and were merely pretext.

The General Counsel also asserts that the Respondent changed Tasse's working conditions by changing his performance standards without giving the Union proper notice and the opportunity to bargain to the extent required by law. The new core document, used in Tasse's 2001-2002 evaluation, was a change that was more than *de minimis* in nature. It decreased the number of performance standards from fourteen to six as well as removing objective measurements, making the evaluation process more subjective. While implementing new performance standards or critical elements is an exercise of management rights under section 7106(a) of the Statute, there is still an obligation to bargain the procedures used in exercising that right and appropriate arrangements for employees adversely affected by changes that have more than a *de minimis* effect on conditions of employment. *U.S. Department of Housing and Urban Development*, 56 FLRA 592 (2000) (*HUD*) and *56th Combat Support Group (TAC), MacDill AFB, Florida*, 43 FLRA 434 (1991) (*MacDill*). Since the Respondent implemented the new core document without giving the Union notice and the opportunity to bargain, the General Counsel asserts that a violation of the Statute must be found.

As a remedy the General Counsel seeks an appropriate Notice To All Employees, signed by the Commander of Eglin Air Force Base, and an order to rescind the performance standards found in General Counsel Exhibit 55 and return to those found in General Counsel Exhibit 52. Further the General Counsel seeks that the Respondent should rescind the evaluation given to Tasse for the performance year April 1, 2001 through March 31, 2002, and should reevaluate him, using the old performance standards, without taking his protected union activity into consideration. Finally, the General Counsel requests that, pursuant to the Back Pay Act, that Respondent be ordered to pay Tasse the performance award he would have received for the 2001-2002 performance year had he received an overall superior rating consistent with his previous evaluations, plus interest. See *Federal Aviation Administration*, 55 FLRA 1271, 1277 (2000) and *Department of Health and Human Services, Social Security Administration, Area II, New York*, 48 FLRA 370, 378 (1993).

Respondent

While Respondent concedes that the General Counsel has met the first prong of the *Letterkenny* analysis, i.e., that Tasse was engaged in protected activity that was known to the Respondent, Respondent denies that the General Counsel has met its burden of proof that Tasse's protected activity was a motivating factor in the agency's treatment of him. Respondent argues that Tasse's rating was Major Jaco's decision and uninfluenced by Col. Noll. There is no evidence that Major Jaco was motivated even in part by union animus. Respondent argues that even if the General Counsel could argue that Jaco had been partly motivated by union animus, Respondent's affirmative defenses defeat the resulting *prima facie* case because Major Jaco established that the appraisal was a legitimate decision and would have been the same regardless of Tasse's union activities.

With regard to the section 7116(a)(1) and (5) allegation, the Respondent asserts that establishing new critical elements and performance standards without notice to the union and an opportunity to bargain violates the Statute "if the changes have more than a *de minimis* effect on conditions of employment." *HUD*, 56 FLRA at 595. Respondent asserts, however, that regardless of the changes to the new core document, the duties of Tasse's position and the expectations on him were the same under both the old and the new standards, and therefore the change was no more than *de minimis* in nature.

With regard to remedy, the Respondent argues that, assuming a violation is found, a *status quo ante* remedy is not appropriate in this matter, citing *U.S. Department of Health and Human Services, Social Security Administration*, 50 FLRA 296, 297 (1995) (quoting *Federal Correctional Institution*, 8 FLRA 604, 606 (1982)). A more appropriate remedy would be an order to cease and desist from unilaterally changing performance standards in the future and a retroactive bargaining order for Respondent to comply with its bargaining obligations with respect to changing the old performance plan and then to implement the results of that bargaining. With regard to the section 7116(a)(2) alleged violation, Respondent asserts that, at most, the remedy would be an order to award Tasse the rating originally proposed by Major Jaco (R. Ex. 3).

ISSUES

A. Did the Respondent violate section 7116(a)(1) and (2) of the Statute by lowering the Union President's performance appraisal for the performance year April 1, 2001 through March 31, 2002, in reprisal for his protected union activity?

B. Did the Respondent violate section 7116(a) (1) and (5) of the Statute by implementing new performance standards for the Union President during the 2001-2002 performance year without giving the Union proper notice and the opportunity to negotiate to the extent required by law?

ANALYSIS

The Analytical Framework

Section 7102 of the Statute guarantees employees the right to form, join, or assist any labor organization or refrain from such activity without fear of penalty or reprisal. Section 7116(a) (2) of the Statute makes it an unfair labor practice for an agency "to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment."

In *Letterkenny*, 35 FLRA 113, the Authority articulated an analytical framework for addressing allegations of discrimination claimed to violate section 7116(a) (2). Under that framework, the General Counsel has at all times the overall burden to establish by a preponderance of the evidence that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in connection with hiring, tenure, promotion, or other conditions of employment. *Indian Health Service, Crow Hospital, Crow Agency, Montana*, 57 FLRA 109, 113 (2001) (*Crow Hospital*); *Letterkenny*, 35 FLRA at 118. As a threshold matter, the General Counsel must offer sufficient evidence on these two elements to withstand a motion to dismiss. See, e.g., *Crow Hospital*, 57 FLRA at 113. Whether the General Counsel has established a *prima facie* case is determined by considering the evidence in the record as a whole, not just the evidence presented by the General Counsel. *Department of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 55 FLRA 1201, 1205 (2000).

Satisfying this threshold burden establishes a violation of the Statute only if the respondent offers no evidence that it took the disputed action for legitimate reasons. Where the respondent offers evidence that it took the disputed action for legitimate reasons, it has the burden to establish, by a preponderance of the evidence, as an affirmative defense that: (1) there was a legitimate justification for its action; and (2) it would have taken the same action even in the absence of protected activity.

See, United States Air Force Academy, Colorado Springs, Colorado, 52 FLRA 874, 878-879 (1997); Federal Emergency Management Agency, 52 FLRA 486, 490 n.2 (1996); Letterkenny, 25 FLRA at 118. The General Counsel may seek to establish that the agency's reasons for taking the action were pretextual.

In this matter, it is undisputed that Tasse engaged in activity protected by the Statute. During the time period in question, Tasse was president of the Union and represented unit employees in the parties' grievance procedure. He was also the Union's primary spokesperson for the negotiations for a new collective bargaining agreement and was often involved in matters with the Base management. An agreement had been worked out in which he was granted six hours of official time each week, on two afternoons. Tasse's need for official time increased during the 2001-2002 performance year, and he often requested additional official time, which was generally granted, although not always for the specific time requested.

The question then becomes whether Tasse's protected activity was a motivating factor with regard to his lowered performance appraisal. The record evidence does not establish that Major Jaco, the rating official, had any union animus and apparently had a good working relationship with Tasse. Although the Respondent argues that Major Jaco was solely responsible for the Tasse performance appraisal, the evidence clearly shows that Major Jaco changed her draft appraisal following her conversation with Col. Noll, in which he asked her to consider the counseling that Tasse received. Further the evidence is clear that Tasse and Col. Noll had engaged in escalating conflict over the issues of official time and Tasse's perceived inappropriate behavior. Col. Noll attempted to distinguish his concerns regarding Tasse's behavior as an employee and Tasse's behavior as the Union President. However, the record evidence shows that Tasse's protected activities as Union President were an integral part of the ongoing conflict. As Tasse's need for official time increased, the overall conflict between Tasse and Col. Noll intensified. Eventually Tasse was placed on 100% official time; ensuring that he was no longer working in the OR and was replaced by non-bargaining unit contract workers. While management clearly has a right to monitor and control official time in relation to its mission requirements, it cannot take action against an employee for his protected activity in using official time. Respondent offers little specific evidence relating to Tasse's behavior; other than the incidents with the secretary and the airman, there are only vague references to complaints. There is, however, substantial

evidence of the frustration with the increased need, even though granted, of Tasse's official time, relating to motivation on the part of Col. Noll and thus to the actions of Major Jaco. The issue of official time outweighs all other considerations and is the primary factor in the ongoing conflict between the parties.

There is no evidence that Tasse in any way abused official time and his requests for increasing amounts of official time were uniformly granted. Rather the evidence as a whole shows an increasing frustration on the part of Respondent with having to deal with Tasse's requests for official time in the context of Respondent's mission of running the OR. Therefore I find that Tasse's protected activity was a motivating factor in his lowered performance appraisal.

The question then becomes whether the Respondent has established that it took the disputed action in this matter for legitimate reasons, *i.e.*, that there was a legitimate justification for its action and it would have taken the same action even in the absence of protected activity.

Respondent argues that Tasse's performance was not on par with previous years and that his behavior and attitude towards staff had worsened and could no longer be tolerated. Respondent therefore argues that Tasse's performance appraisal would have been lowered for the 2001-2002 period, due to his actual performance, even in the absence of protected activity. After September 11, 2001, the military staff was diminished and Tasse's absence on official time caused a strain in the OR. In her explanation of her rating of Tasse's performance, Major Jaco emphasized the one counseling in his record as well as unspecified complaints about him during the year. She indicated that she felt his performance was not as good as previous years. However, there is no evidence that Tasse was ever counseled or even criticized regarding his work performance during the rating period. Tasse's immediate supervisors had even worked to increase his grade during this period. ⁶

It is clear that Tasse's behavior towards other personnel was an issue the Respondent attempted to deal with. While the General Counsel attempts to place a positive spin on Tasse's behavior to subordinate personnel by using such terms as "blunt" and "forceful", it appears that his behavior had sometimes bordered on abusive.

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Col. Noll ultimately raised the one critical element dealing specifically with work performance to exceed, rather than the rating of Major Jaco of meets. (G.C. Ex. 55)

However, it is also clear that he was only counseled once about this behavior.

The testimony of Major Jaco does not support Respondent's argument that Tasse's work performance had diminished during the appraisal year and there is no evidence that Tasse was ever confronted or counseled regarding his work performance. 7 Nevertheless, his performance appraisal was dramatically lower than previous years, and I do not find the testimony of Respondent's witnesses to contain sufficient explanation for the lowered appraisal. Specifically, of the nine appraisal factors that remained the same, the rankings were lowered in all elements, not only in "working relationships" but also in such areas as "work productivity", "self-sufficiency" and "skill in work". (G.C. Ex. 54) As for the six new elements, Respondent's explanation for the lowered appraisal in such areas as "Duty 2: Assess and evaluate nursing care provided in the Surgical Suite" and "Duty 5: Participates in the continuing education program for the Operating Room Suite" (G.C. Ex. 55) is not sufficient to carry the burden that it lowered the appraisal for legitimate reasons. Nor does the evidence support that Respondent would have taken the same action even in the absence of protected activity. Based on a review of the evidence as a whole, I find that the General Counsel has sustained its burden of proof and that Tasse's performance appraisal was lowered in retaliation for his protected activity.

Implementation of new performance standards

Under section 7116(a)(1) and (5) of the Statute, prior to implementing a change in conditions of employment of bargaining unit employees, an agency is required to provide the exclusive representative with notice of the change and the opportunity to bargain over those aspects of the change that are within the duty to bargain. *U.S. Army Corps of Engineers, Memphis District, Memphis, Tennessee*, 53 FLRA 79, 81 (1997).

In this case, the establishment of new critical elements and performance standards involves the exercise of management rights under section 7106(a) of the Statute and is not substantively negotiable. *National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt*, 3 FLRA 769 (1980), *aff'd sub nom. NTEU v. FLRA*, 691 F.2d 553 (D.C. Cir. 1982); *American Federation of*

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As noted above, Col. Noll raised the first element relating specifically to work duties to exceed in the final appraisal.

Government Employees, AFL-CIO, Local 1968 and Department of Transportation, Saint Lawrence Seaway Development Corporation, Massena, New York, 5 FLRA 70 (1981) (Proposals 1-2), *aff'd sub nom. AFGE, Local 1968 v. FLRA*, 691 F.2d 565 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 926 (1983).

It is equally well established, on the other hand, that there is a duty to bargain consistent with section 7106(b) (2) and (3) of the Statute with respect to the procedures management will employ in exercising such right and respecting appropriate arrangements for employees who may be adversely affected by the changes where the changes have a more than *de minimis* effect on conditions of employment. *56th Combat Support Group (TAC), MacDill Air Force Base, Florida*, 43 FLRA 434, 447-448 (1991) (*MacDill AFB*); *Department of Health and Human Services, Social Security Administration*, 24 FLRA 403, 407-08 (1986) (*SSA*).

In assessing whether the effect of a management decision on conditions of employment is more than *de minimis*, the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on bargaining unit employees' conditions of employment. *SSA*, 24 FLRA 408.

The question of course is whether the change from the old performance plan (G.C. Ex. 52 at 4-5) to the core document (G.C. Ex. 55) was more than *de minimis*. Respondent asserts that the use of the core document did not change Tasse's duties as a registered nurse and therefore any changes were *de minimis* in nature. Major Jaco explained that the "duties of a registered nurse are pretty much defined by professional standards and job descriptions are fairly similar, duties are similar." (Tr. 224) She went on to explain that the core document "was an attempt to take what [Tasse] was doing and enhance it so that it would be qualified as a GS11, so essentially his duties hadn't changed, but they had been . . . written in such a way that hopefully it would upgrade his chances of being upgraded to a GS11." (Tr. 224-225) In comparing various provisions of the performance plan with the core document, Major Jaco observed that nursing standards and the nursing process are what define the duties of any registered nurse, whether they are express, as in the core document, or implied, as in the old performance plan. Although the old plan had 14 elements while the new core document has only 6, Respondent argues that the 14 elements were generally one sentence, while each of the 6 new elements, or duties as they are called, has from 3 to 8 standards.

A review of the earlier performance plan and the new core document does not reveal that any new duties were added to the core document, nor does the General Counsel so argue. For the most part it appears that any differences are primarily cosmetic in nature, with the core document condensing the prior number of duties into fewer number of elements, but more expansive in tone. For instance, Duty 2 in the core document is titled "Assess and evaluates nursing care provided in the Surgical Suite" and includes five standards:

- A. Performs and documents accurately preoperative assessments of patients.
- B. Regularly provides accurate information to patients and their significant others scheduled for surgery.
- C. Ensures that patients are adequately prepared for surgery, both physically and emotionally, accurately documents such preparation on AF Form 1864.
- D. Performs and documents accurately post-operative assessments of patients.
- E. Effectively participates in monitoring and evaluation activities to improve patient care.

(G.C. Ex. 55)

Similar duties are found in Elements 1 and 9 of the prior performance plan.

The main changes, as identified by the General Counsel, concern the reduction of the number of elements themselves, with little reference to the actual content of the elements, from fourteen to six. Further the new core document eliminates all references to objective standards, *i.e.*, relating to a specific number of validated errors per quarter (as set forth in all fourteen elements). ⁸

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Tasse asserted that the core document did not cover any managerial duties, but this is clearly incorrect. Duty 4 includes acting in the capacity of team coordinator/nurse manager and allows directing operating room technicians, conducting team conferences, distributing workload and regularly reviewing work in progress or upon completion. Duty 5 relates to participating in the continuing education program for the OR and Duty 6 concerns the orientation and training of newly assigned personnel.

The Respondent contends that there was no adverse impact because the nature of the work performed by Tasse did not change. However, it is not the impact on the job duties or the nature of the work that is of sole concern here, but the impact on employees' conditions of employment and the measurement of the performance of that work by the additional critical elements and standards. Here, Tasse went from performing under a performance plan consisting of fourteen elements to the core document with six elements with numerous performance standards for each element. The language of the core document is different from the previous performance elements and changes the manner in which Tasse's performance is evaluated. While his duties may not have changed, his appraisal system was altered without his knowledge. The record readily demonstrates that the impact of this change was more than *de minimis*. The reduction of the number of elements, without any explanation, and the removal of all objective standards has a significant impact on the way in which the Respondent is able to evaluate Tasse's performance. Therefore, these changes were implemented with the use of the core document, without any notice to or bargaining with the Union as required by the Statute. ⁹ *MacDill AFB*, 43 FLRA at 447-448; *Department of Health and Human Services, Social Security Administration, Dallas Region*, 32 FLRA 521, 527 (1988). In circumstances where the effect of the change is more than *de minimis*, and the agency fails to provide the exclusive representative with prior notice and an opportunity to bargain over section 7106(b)(2) and (3) matters, the agency will be found to have violated section 7116(a)(1) and (5) of the Statute. *Federal Bureau of Prisons, Federal Correctional Institution, Bastrop, TX*, 55 FLRA 848, 852 (1999).

The Remedy

Having found that the Respondent violated section 7116 (a)(1) and (5) of the Statute, after taking into consideration the factors set forth in *Federal Correctional Institution*, 8 FLRA 604, 606 (1982), it is concluded that a status quo ante remedy is appropriate. In that regard the

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Even though Tasse was the only bargaining unit employee affected by the change in performance standards, the number of employees at issue is not relevant to the finding of a violation in this matter, particularly in view of the significant impact on the one individual. *United States Department of the Air Force, 913th Air Wing, Willow Grove Air Reserve Station, Willow Grove, Pennsylvania*, 57 FLRA 852, 857 (2002); *Veterans Administration Medical Center, Phoenix, Arizona*, 47 FLRA 419 (1993).

performance standards found in the core document must be rescinded and the prior performance standards reinstated. There is no evidence that a *status quo ante* remedy would disrupt or impair the efficiency and effectiveness of the Respondent's operations.

Having found that the Respondent violated section 7116 (a) (1) and (2) of the Statute, it is further concluded that the Respondent should rescind the performance appraisal given to Tasse for the performance year 2001-2002 and that he should be reevaluated using the previous performance standards, without taking into consideration Tasse's protected union activity. I do not find either the Respondent's argument that Tasse, at most, should be given the performance appraisal originally suggested by Major Jaco, or the General Counsel's argument that Tasse should receive the 2001-2002 performance award (plus interest) he would have received had he been rated consistent with previous years, at the superior level, to be appropriate remedies.

Accordingly, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Federal Labor Relations Authority, 5 C.F.R. § 2423.41 (c), and § 18 of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7118, the U.S. Department of the Air Force, Eglin Air Force Base, Eglin Air Force Base, Florida, shall:

1. Cease and desist from:

(a) Discriminating against Earle "Rocky" Tasse, or any other employee in the bargaining unit represented by the American Federation of Government Employees, AFL-CIO, Local 1942 (Union), by lowering his performance appraisal because he exercised his right to engage in protected activities under section 7102 of the Federal Service Labor-Management Relations Statute.

(b) Making changes to Mr. Tasse's performance standards without giving the Union notice and the opportunity to bargain to the extent required by law.

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

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

(a) Rescind the performance standards found in the new core document used for Mr. Tasse's appraisal during the 2001-2002 performance year and reinstate Mr. Tasse's prior performance standards. Provide proper notice and opportunity to bargain to the Union before implementing new performance standards for Mr. Tasse's position.

(b) Rescind the performance appraisal given to Mr. Tasse for performance year 2001-2002. Reevaluate Mr. Tasse, using the previous performance standards, without taking into consideration Mr. Tasse's protected union activity.

(c) Post at the U.S. Department of the Air Force, Eglin Air Force Base, Eglin Air Force Base, Florida, where bargaining-unit employees are located, 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 Commander, Eglin Air Force Base, 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 ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Boston Regional Office, Federal Labor Relations Authority, 99 Summer Street, Suite 1500, Boston, MA 02110-1200, in writing, within 30 days of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, July 22, 2004.

SUSAN E. JELEN
Administrative Law Judge

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Department of the Air Force, Eglin Air Force Base, Eglin Air Force Base, Florida, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discriminate against Earle "Rocky" Tasse, or any other employee in the bargaining unit represented by the American Federation of Government Employees, AFL-CIO, Local 1942 (Union), by lowering his performance appraisal because he exercised his right to engage in protected activities under section 7102 of the Federal Service Labor-Management Relations Statute.

WE WILL NOT make changes to Mr. Tasse's performance standards without giving the Union notice and the opportunity to bargain to the extent required by the Statute.

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

WE WILL rescind the performance standards found in the new core document used for Mr. Tasse's appraisal during the 2001-2002 performance year and reinstate Mr. Tasse's prior performance standards.

WE WILL provide proper notice and opportunity to bargain to the Union before implementing new performance standards for Mr. Tasse's position.

WE WILL rescind the performance appraisal given to Mr. Tasse for performance year 2001-2002 and **WE WILL** reevaluate

Mr. Tasse, using the previous performance standards, without

taking into consideration Mr. Tasse's protected union activity.

(Activity)

Date: _____ By: _____
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Boston Region, Federal Labor Relations Authority, whose address is: 99 Summer Street, Suite 1500, Boston, MA 02110-1200, and telephone number is: 617-424-5730.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. AT-CA-02-0595, were sent to the following parties:

—

CERTIFIED MAIL & RETURN RECEIPT

CERTIFIED NOS:

Laurie R. Houle, Esquire **7000 1670 0000 1175 4120**
Federal Labor Relations Authority
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Boston, MA 02110-1200

Christopher D. Thurner, Esquire **7000 1670 0000 1175**
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REGULAR MAIL:

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President
AFGE
80 F Street, NW
Washington, DC 20001

DATED: July 22, 2004
Washington, DC