

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

DEPARTMENT OF THE AIR FORCE SEYMOUR JOHNSON AIR FORCE BASE Respondent	
and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R5-188 Charging Party	Case Nos. WA-CA-00424 WA-CA-00425

NOTICE OF TRANSMITTAL OF DECISION

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

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

Any such exceptions must be filed on or before **JULY 30, 2001**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, Suite 415
Washington, DC 20424-0001

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: June 28, 2001
Washington, DC

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

MEMORANDUM

DATE: June 28, 2001

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE AIR FORCE
SEYMOUR JOHNSON AIR FORCE BASE

Respondent

CA-00424 and Case Nos. WA-
CA-00425 WA-

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R5-188

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

OALJ

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WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE SEYMOUR JOHNSON AIR FORCE BASE Respondent	
and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R5-188 Charging Party	Case Nos. WA-CA-00424 WA-CA-00425

Captain Tabitha G. Macko, Esquire
Monte E. Crane, Esquire
For the Respondent

Thomas F. Bianco, Esquire
For the General Counsel

Ms. Mae Howell
For the Charging Party

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et. seq. 1, and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1 et seq., concerns whether: (a) Air Reserve Technician Tart (military rank: Technical Sergeant (Tr. 14-15)) was removed from a list selected for military deployment to France because he had engaged in protected activity, in violation of §§ 16(a)(1) and (2) of the Statute [Case No. WA-1

For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial, "71", of the statutory reference, i.e., Section 7116(a)(1) will be referred to, simply, as, "\$ 16(a)(1)".

CA-00424]; (b) Air Reserve Technician Tart on March 6, 2000, was named to a team to represent the 916th Aircraft Generation Squadron, Maintenance Squadron, in a rodeo competition at Pope Air Force Base, North Carolina from May 5-13, 2000, and was removed from the team on March 7, 2000, because he had engaged in protected activity, in violation of §§ 16(a)(1) and (2) of the Statute [Case No. WA-CA-00425].

Case No. WA-CA-00424 was initiated by a charge filed on April 12, 2000 (G.C. Exh. 1(a)) which alleged violations of §§ 16(a)(1), (2), (3), (4), (7) and (8) of the Statute. The Complaint and Notice of Hearing issued on August 30, 2000; alleged violation only of §§ 16(a)(1) and (2); and set the hearing for December 12, 2000, at a location to be determined (G.C. Exh. 1(c)). Case No. WA-CA-00425 was initiated by a charge, also filed on April 12, 2000, which also alleged violations of §§ 16(a)(1), (2), (3), (4), (7) and (8) of the Statute. The Complaint and Notice of Hearing also issued on August 30, 2000; alleged violation only of § 16(a)(1) and (2); and set the hearing for December 12, 2000, at a location to be determined (G.C. Exh. 1(d)). On October 19, 2000, a notice was issued in each case of the location of the hearing, Goldsboro, North Carolina (G.C. Exh. 1(i) and (j)); on November 28, 2000 (G.C. Exh. 1(k)), the cases were consolidated; and, pursuant to the foregoing, a hearing was duly held on December 12, 2000, in Goldsboro, North Carolina, before the undersigned.

All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which each party waived. On December 4, 2000, Respondent filed a Motion to Dismiss Case No. WA-CA-00424 "For Lack of Jurisdiction" [that the deployment to France was a military aspect of technicians' employment, the staffing of which was outside the duty to bargain (G.C. Exh. 1(L)), which I denied at the hearing because, ". . . I find nothing that convinces me that there's a lack of jurisdiction. I understand your argument on the military nature, but I think what we've been talking about, what the evidence shows . . . is that these are not really military considerations. And for that reason, I'm going to deny your motion." (Tr. 281).

At the conclusion of the hearing, with the agreement of the parties, January 26, 2001, was fixed as the date for mailing post-hearing briefs, which time subsequently was extended, on motion of the General Counsel, to which there was no objection, for good cause shown, to February 9, 2001, and Respondent and General Counsel each timely mailed, or

filed, an excellent brief, received on, or before, February 13, 2001, which have been carefully considered. Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

FINDINGS

1. The National Association of Government Employees, Local R5-188 (hereinafter, "Union") is the exclusive representative of an appropriate unit of employees of the Department of the Air Force, Seymour Johnson Air Force Base, North Carolina (hereinafter, "Respondent").

2. Mr. Jimmy L. Tart, Jr. (hereinafter "Tart"), is an Air Force Reserve Technician (hereinafter "ART") with the 916th Aircraft Generation Squadron which is an air refueling wing reserve squadron (Tr. 14) and consists of about 350 reservists and civilian employees who support ten tanker aircraft that provide air refueling and airlift support for contingency basis around the globe (Tr. 102). Mr. Tart is a Crew Chief, also known as an aircraft mechanic (Tr. 14) and has been since 1992 (Tr. 15) when he came to Seymour Johnson); has been in the Reserves since 1992; and has been an ART since 1997 (Tr. 14). An ART is a civilian employee who must maintain membership in the Air Force Reserve in order to retain his/her civilian position. His military rank is Technical Sergeant (Tr. 14-15).

3. Mr. Tart has been on deployments² including Istres, France, in the April-May time frame of 1998 (Tr. 29, 30). There was to be another deployment to Istres, France, in

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Normal TDY (Temporary Duty) assignments are listed monthly by Operations, the flying squadron. The aircraft to be sent is selected by tail number, the purpose being to rotate trips by aircraft. Selection for TDY is then made from among the reservists and ARDs assigned to that aircraft (Tr. 85-87).

Deployment, while, in a sense, also a TDY, is quite different and is handled in a very different manner. First, there usually is only one deployment each year. Second, a deployment normally covers a longer span of time, generally 30 days. Third, a deployment requires a great many more aircraft and many more people. Fourth, a 50-50 ratio of reservists to ARTs is sought, with 30% reservists being a minimum and a 40% reservist - 60% ARTs being good (Tr. 108-109).

All personnel must be in military status for all overseas deployments (Res. Exhs. 1 and 2; Tr. 112, 113).

February, 2000, and in October, 1999, Respondent requested volunteers. Mr. Tart volunteered for Istres (Tr. 30), which was an Air Expeditionary Force (AEF) to support Kosavo (Tr. 96). Mr. Tart testified that Mr. Wall, Senior Master Sergeant (Tr. 141), since March, 2000, at NASA, and from February, 1995, until March, 2000, had been Flight Chief of "A" Flight of the 916th [Mr. Tart was in "B" Flight]. Civilian grade WS-9 (Tr. 141), had told him he had been selected to go on that deployment (Tr. 30); that Mr. Wall told him, ". . . prior to November timeframe." (Tr. 30); and that Mr. Wall had a dry erase board in his office on which he listed the crew chiefs selected to go and his, Tart's, name was on there (Tr. 30-31). I do not credit Mr. Tart's testimony that he ever was selected to go on the 2000 deployment to Istres. I do not credit Mr. Tart's testimony for a variety of reasons, including, as shown hereinafter, that he was not an accurate or forthcoming witness, e.g., Mr. Tart said he was given a letter of counseling concerning two assault occurrences at the March UTA [Unit Training Assembly] (Tr. 43), whereas, this letter of reprimand was received by Mr. Tart on April 2, 2000, at 0730 (Res. Exh. 6); while Mr. Tart mentioned a second letter of counseling about, "Allegations about an affair with a lady at work" (Tr. 34), he made no reference to the fact that she is a member of the Squadron; that her husband is a member of the Wing; and that the husband had refused to fly on an airplane on which Mr. Tart was Crew Chief, until he was recalled following Respondent's testimony (Tr. 197, 198, 214-217, 235, 238) (Mr. Tart on recall, Tr. 276-278). First, Mr. Wall credibly testified that Mr. Tart was not part of his flight and that he prepared the list for "A" Flight (Tr. 145); that for deployments he wrote names in teams, i.e., ARTs; reservists that were going; the ARTs that was not to be going; and an alternate list (Tr. 144). Mr. Wall further explained that on a deployment they also select by skill level: Level 7, advance type crew chief with all qualifications to do everything required with crewing an aircraft; Level 5, assistant crew chief, a journeyman who has completed his basic requirements; Level 3, mechanic still in training (Tr. 151). Mr. Wall said that he and Mr. Darby met and they went over his list and Mr. Darby's list, to make certain, ". . . we did have all the squares filled and the commitments met. . . ." (Tr. 153) and he believed Mr. Tart was an alternate (Tr. 147, 153). Second, Mr. Adrian H. Darby, Technical Sergeant, WS-9, and Flight Chief of "B" Flight, Mr. Tart being one of his employees (Tr. 170), credibly testified that Mr. Tart, ". . . wasn't considered because he had traveled on the last deployment [to Istres]" (Tr. 173); that he was on an alternate list in case we needed him (Tr. 174, 177, 186). Further,

Mr. Darby credibly testified, without contradiction, that no one who had deployed to Istres in 1998 went on the 2000 deployment to Istres (see, Tr. 67-68, 69) [Blanks]) except a Sergeant Cameron, a load planner who went on both deployments to Istres because he was the only load planner in "B" Flight (Tr. 186-187). Third, the first deployment list, which issued October 24, 1999 (Res. Exh. 4), does not contain Mr. Tart's name. Fourth, Mr. Darby credibly testified, without contradiction, that they thought the 2000 deployment to Istres would be the same as it had been in 1998 with 20 crew chiefs per rotation, or a total of 40 to 42 crew chiefs (Tr. 174); but when the tasking came down, the 916th was cut to two aircraft and 11 crew chiefs per rotation (each two weeks) or a total of 22 crew chiefs (Tr. 174). Accordingly, not all volunteers got to go (Tr. 174). Fifth, Mr. Tart conceded, upon recall, that he had been only an alternate for Istres. He testified as follows:

"Q When did you learn that you were going to be a substitute, or alternate, for the Istres deployment?

"A It was after I was removed from the deployment all together.

. . .

"Q Mr. Tart, did I hear correctly that you just told Mr. Bianco that you learned that you were going to be an alternate for the Istres, France deployment after you said you had been removed from the deployment list?

"A Yes, ma'am.

. . .

"BY MR. BIANCO:

"Q Were there other alternates?

"A Yes.

"Q Did any of those go?

"A No, sir.

"Q No one went?

"A No, sir." (Tr. 279-280).3

4. The charge, which was dated March 14, 2000, and was filed on April 12, 2000 (G.C. Exh. 1(a)), alleged that on December 16, 1999, Mr. Tart was, ". . . briefed that it was because of his union activities. . . ." (id.); the Complaint alleged November 18, 1999 (G.C. Exh. 1(c), Par. 21); Mr. Tart testified initially that it had been, ". . . Around the first - beginning of November." (Tr. 31) and that, ". . . when you were talking with Mr. Wall, he told you you weren't going to go, what did you say? A I asked him why. Q What was his response? A He said he was directed to remove me from the list. Q Did you (sic) tell you who directed him? A Colonel Sitrin." (Tr. 32) [Lieutenant Colonel Eric Michael Sitrin (Tr. 101), ART, GS-13 (Tr. 102) and Logistics Group Commander, which includes the 916th AGS, commanded by Major Malcolm; Logistics Support Squadron, Commanded by Major Elliott; and the Maintenance Squadron, commanded by Major Shealey (Tr. 102), containing in whole 350 reservists and civilian employees who support ten tanker aircraft (Tr. 102).] On recall, Mr. Tart placed the time of his conversation with Mr. Darby as, ". . . after I had filed a grievance." (Tr. 278) [November 17, 1999, G.C. Exh. 4]. Mr. Blanks said the third week of November, before Thanksgiving (Tr. 71) and before ". . . we actually started the rotation. . . ." (Tr. 72) [November 22, 1999 (G.C. Exh. 2)]. Mr. Vaughn placed it before rotation began (Tr. 78).

I have serious reservations as to when Mr. Tart had the discussion with Mr. Darby, which was overheard by Messrs. Blanks and Vaughn, and equally serious reservations that it involved deployment to Istres at all, but, rather, that it more probably concerned the TDY restriction placed on Mr. Tart and occurred in February, 2000, after the Istres deployment had begun; but while this seems highly probable and that Colonel Sitrin used the word "deployment" to

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General Counsel's statement in his Brief,

" . . . At least some alternates were deployed. Tr. 280. Tart was not one of them. Tr. 280." (General Counsel's Brief, p. 6),

obviously is in error. Mr. Tart specifically, and emphatically, testified that no alternate deployed to Istres (Tr. 280).

General Counsel does not appear to question the fact that Mr. Tart from the beginning had been only an alternate. (General Counsel's Brief, p. 6).

include "TDYs" (Tr. 121); nevertheless Chief Master Sergeant Gaul testified that, ". . . I did make a decision that he would not be going - it wasn't November timeframe. It was later - you know, near a deployment. And the reason for that was because of several incidences that had happened." (Tr. 160); ". . . there were two incidences that occurred that led me to believe that there would be a possibility of him not being able to make that trip. Then I made the decision to pull him on that tour. I notified Major Malcolm and Colonel Sitrin. . . . First instance was . . . about a fight in the billeting New Year's Eve . . . Next incident was . . . early February before the deployment. . . ." (Tr. 162).

The trouble with this scenario is that the second incident occurred the, ". . . first weekend in February." (Tr. 34) (i.e., February 5-6, 2000) and the deployment began February 1, 2000 or earlier (Tr. 273) [January 28] (Res. Exh. 4; Tr. 273). Accordingly, Mr. Tart's name could not have been removed before the Istres deployment began for something that had not happened but was in the future. On the other hand, Mr. Tart said he filed a grievance over Chief Master Sergeant Gaul's November 3, 1999, notice of shift rotation (G.C. Exh. 2; Tr. 20) and Chief Master Sergeant Gaul said a grievance had been filed⁴; that he talked to Mr. Tart about the adverse effect shift rotation would have on him; that he talked to Colonel Sitrin and they agreed that Mr. Tart would not rotate until after he completed the semester of classes he was in (Tr. 158); that he was aware of a grievance Mr. Tart filed over Mr. Wall not permitting him to have official time (Tr. 159); and that he, Gaul, had responded to the grievance (Tr. 158). Inasmuch as the reason stated for the removal of Mr. Tart's name was false, and pretextual, the only reason left for Chief Master Sergeant Gaul's removal of Mr. Tart's name, before the February 4th and 5th incident, was Mr. Tart's protected activity. Therefore, I conclude that Mr. Darby did tell Mr. Tart in November, 1999, that he wasn't going to Istres because, ". . . I caused too many waves and he was directed to remove me from the list." (Tr. 32), i.e., that he was removing his name as an alternate. Mr. Tart's testimony was confirmed by the testimony of Technical Sergeant Blanks (Tr. 71) and by the testimony of Crew Chief Kelly Vaughn (Tr. 78). Mr. Darby testified that he did not remember telling Mr. Tart he had

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While Mr. Tart stated that General Counsel Exhibit 3 was the grievance he filed (Tr. 24), General Counsel Exhibit 3 is not a grievance but, rather, is a request to bargain the proposed shift rotation and a request for status quo pending completion of bargaining.

to take him off the list for France because he caused too many waves (Tr. 174-175) and while I found Mr. Darby otherwise to have been a credible witness, I do not credit his denial in this regard.

5. Events concerning Mr. Tart's personal conduct became quite bizarre with the dawn of the year 2000. Mr. Tart took lodging on the base for New Year's Eve so he would not have to drive (Tr. 35). After the ubiquitous, "two beers", he left the NCO Club at 1:00 - 2:00 a.m. and walked to his lodging, about a block away, and, going down the hall on the second floor to his room, he was assaulted by an unknown assailant (Tr. 36). He got a good look at him and called the MPs who took a report (Res. Exh. 5), searched the area and had Mr. Tart transported to the hospital for stitches for a laceration over his right eye (id.).

As Mr. Tart was in base housing when he was hit by an unknown person who ran down the rear fire escape (Tr. 130), Colonel Sitrin stated that no discipline was imposed on Mr. Tart and he did not direct that Mr. Tart be taken off TDYs at that point. Colonel Sitrin testified, in relevant part, as follows:

"Q Let me ask you . . . What was your reaction when you found out that Mr. Tart's name showed up in the Blotter, something happened at billeting?

"A Really no reaction, just the same thing that I do with the Blotter entries . . . Hand them to the superintendent and the commander and ask them to look at it and talk to the employee and find out what's going on. . . .

. . .

"Q Did you direct that he be taken off TDYs at that point?

"A No. No.

"Q Did you direct some sort of discipline come his way in January?

"A No. The only thing I asked the commander and first sergeant and the superintendent to do was to engage with the employee and find out what's going on." (Tr. 119-120).

Major Malcolm said, ". . . I just took note that he was involved in this incident and that was pretty much

it." (Tr. 193). Superintendent Gaul noted the report which showed, ". . . that he got jumped and really didn't know who the fight was with, or whatever." (Tr. 162). The 1st Sergeant, Senior Master Sergeant Joseph Charles Spruill (Tr. 221) testified, ". . . The fight was mainly - he met up with someone in the middle of the hallway in the morning of - I think it was January the 1st . . . He didn't know the guy. The guy hit him . . . he [Tart] ended up with some stitches out of it. Then the guy disappeared, and that's the last anybody ever heard of this person. It was something that he didn't know. He didn't know the person and we've just - that's all there was to it." (Tr. 222-223).

On either February 4th or 5th, 2000 (Tr. 34), Mr. Tart testified that he was at the bar in the Best Western Inn at about 12:00 or 1:00 a.m. when an unknown man pushed up against him and hit him with a beer bottle; they started fighting and, ". . . were pushed out the fire exit, along with two of his friends. They grabbed me, because we both fell down. They picked me up. The other guy stood up and I managed to take my right hand and get a knife and I cut one of the guys holding me. And they fled, and then the police were called." (Tr. 38); "It's just a regular pocketknife, three inch. . . . Yes, folding [blade]." (Tr. 40); "The police showed up shortly after. . . . And I spoke with him about it, told him what happened. He took my information and he said I required - I should go to the hospital to get checked out, because I got laceration. . . . I required several stitches. . . . Across the bridge of my nose." (Tr. 40-41). Mr. Tart said no police report was filed, "The following Sunday I went down to the magistrate's office and inquired about the report and they said no report was filed. . . ." (Tr. 41). Mr. Tart said he later heard rumors that the man he cut required a hundred, or more, stitches (Tr. 42) Mr. Tart said he was in the Best Western bar with co-worker Kenny Jennings (Tr. 38). Mr. Tart reported the incident, "The very next morning." (Tr. 41), to Mr. Darby and to First Sergeant Spruill (Tr. 41).

Mr. Darby said, ". . . Jimmy called me the morning of the incident about 3:00 at home. I told him to come in, and when he came in he explained all that happened. We went over the whole process and at that point in time we saw the

first sergeant and the commander⁵ and explained it to them and talked to them about it. At that point in time it was a matter of following it through to see what came of it. Ultimately what came of it was there were no charges on either side. . . ." (Tr. 177).

First Sergeant Spruill, when asked what he knew about the February incident, stated, "When he showed up the next day after the fight down at the Best Western. He showed up, he had a black eye. If I remember correctly, he had some - I think he had some stitches . . . Sergeant Darby came and told me what was going on before I'd even seen Sergeant Tart. . . . His side of the story was he was just sitting there at a - the nightclub down at the Best Western. For whatever reason, someone came and hit him over the head with a beer bottle. Then it started. He jumped up and hit someone, then two people grabbed him, and then he pulled a knife. Somehow the rumor got started that he pulled a knife and cut someone with a hundred (100) stitches. Well, I figured if someone was cut with a hundred (100) stitches there had to be charges with the police department and some other stuff. And so, I went to the Best Western . . . They said no one got really cut up, that they could recollect. . . . I went to the Goldsboro Police Department and they said in fact someone had been dispatched that night, but no charges were filed. No weapon was confiscated. And he [Tart] had told me that he had been taken to the hospital and his weapon - his knife was confiscated." (Tr. 224-226).

First Sergeant Spruill sent an e-mail message to Major Malcolm in France (Tr. 194, 227) advising him that Mr. Tart had been involved in another incident and Major Malcolm, ". . . directed the first sergeant to look into it more, and to get the details of what really happened. I directed that Mr. Tart would not go on any deployments without my permission. Because I was concerned that there was something going on in his personal life that's getting him involved in these kinds of incidents. . . ." (Tr. 194).

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Mr. Darby, "at that point in time", by his reference to the commander undoubtedly meant Superintendent Gaul inasmuch as Major Malcolm was then in France (Res. Exh. 4; Tr. 194, 227) and Chief Gaul stated, ". . . During the week, I was AGS Commander. . . . because I was the highest ranking civilian." (Tr. 157). Accordingly, with Major Malcolm out of the country, Chief Gaul was AGS Commander and Chief Gaul stated that he talked to Mr. Tart's Flight Chief, who was Mr. Darby (Tr. 162).

Sgt. Spruill made a second visit to the Best Western and on the second round of questioning was told that Mr. Tart had been harassing women in the band; that he was asked to leave and had refused and the "bouncer," i.e., ". . . someone that helps take care of discipline with the band" (Tr. 226) got into a fist fight with Mr. Tart and the fight moved outside (Tr. 226-227). Mr. Tart said he didn't start the fight; Best Western said he did (Tr. 228). Mr. Tart denied that he communicated with, or harassed, any women at the Best Western (Tr. 274-275).

Many assertions either were in direct conflict or were not explained, e.g., Mr. Tart told Sgt. Spruill that his weapon, the folding pocket knife, had been confiscated; but the police denied having confiscated any weapon; how Mr. Tart, with only his right hand free, opened an ordinary folding knife blade, as opposed to a "switch blade", was not explained; Best Western asserted Mr. Tart harassed women in the band, which Mr. Tart denied; that Mr. Tart would have been assaulted on two occasions by an unknown assailant, or assailants, when he was doing nothing, i.e., on the first occasion, he was merely walking to his room and on the second occasion he was sitting at a bar, minding his own business; Mr. Tart's insistence that he knew none of the February assailants but said that the one who hit him with the bottle went back into the bar (Tr. 40) while the other two fled; Mr. Tart said he was at the Best Western with co-workers, one of whom he said was Kenny Jennings (Tr. 38), but he did not say whether Mr. Jennings saw anything or knew any of the assailants. Because Mr. Tart was involved and, ". . . just kind of brought a bad light on us . . ." (Tr. 228), Sgt. Spruill in March had a letter of reprimand prepared (Tr. 229) when Mr. Tart came in with papers from a lawyer that Mr. Tart had sued one of the band members and they had settled out of court and Mr. Tart had got some money (Tr. 228, 229) so, Major Malcolm and he gave Mr. Tart a letter of counselling - ". . . he admitted he pulled a pocketknife . . . I told him . . . you don't need to be in those places if you have to carry a pocketknife." (Tr. 229-230). Mr. Tart stated that the settlement agreement, "It was between me and the individual who assaulted me and the individual who was cut." (Tr. 275). Although the settlement agreement may have demonstrated that Mr. Tart had not been the aggressor, it also demonstrated that Mr. Tart's insistence, that he did not know any of the assailants, if ever true, did not long persist, inasmuch as he had to know the identity of the person who assaulted him in order to sue him and thereafter the identity of the person he cut in order to obtain his statement.

In March, 2000, a third suspected incident involving Mr. Tart was being looked into (Tr. 126), which was Mr. Tart's involvement with the wife of a member of the squadron whose husband was a member of the Wing.

6. By letter dated February 16, 2000, Ms. Mae Howell, President of the Union, notified Respondent that Mr. Tart had been named as a Steward (Res. Exh. 10); the list of union officers, including Mr. Tart as Steward, was returned for correction by memorandum dated March 24, 2000 (Res. Exh. 11); and the revised list, including Mr. Tart as Steward, was not returned until June 21, 2000 (Res. Exh. 12), at which time the list was posted. Mr. Tart testified that he, ". . . was down speaking with Mae . . . and she asked would I deliver a grievance to the Colonel Sitrin since I was going back to that area." (Tr. 52-53). Mr. Tart further testified,

"Q What was your role, if any, in connection with this document [G.C. Exh. 5]?"

"A I was a Union steward. I was just delivering it to Colonel Sitrin.

"Q You delivered this document to Colonel Sitrin?"

"A Yes, sir.

"Q When was that delivery made?"

"A Around the 6th of March." (Tr. 53)
(Emphasis supplied).

Mr. Tart stated,

"A Once I delivered the document I went back to our building, 4909. I was going to speak with Mr. Love . . . At that time he received a phonecall saying that I should - I cannot go on the trip, that I'd been removed." (Tr. 54).

First Lieutenant David Clark Eastham, Jr., an ART, GS-12, Aircraft Maintenance Manager, was tasked with assembling a team for the rodeo and in January, 2000, he selected Master Sergeant Phillip Lee Love, an ART and a Crew Chief, to select the team. Sgt. Love testified that before he left for Istres, on January 28, 2000, he knew that Mr. Tart was not to be deployed for TDY and he had taken Mr. Tart's name off the deployment list (Tr. 89). I do not credit Sgt. Love's testimony in this regard for the reason

that it is contrary to the testimony of Major Malcolm, which I credit, that it was not until February, 2000, when he was in Istres, France, that he; “. . . directed that Mr. Tart would not go on any deployments without my permission.” (Tr. 194) which was fully confirmed by the credible testimony of Colonel Sitrin (Tr. 120, 121) and First Sergeant Spruill (Tr. 231). Nevertheless, Sgt. Love stated “. . . The first people I selected [for the rodeo] were Jimmy Tart and Mark Cole” (Tr. 91), neither of whom went (*id.*). Sgt. Love said he put Mr. Tart’s name on the list on March 6th, 2000, after he talked to Chief Bailey who told him, “. . . it would be okay”, but the next day, March 7, Chief Bailey, “. . . called me . . . and said that I was going to have to take Jimmy off the list, and to fill his slot with somebody else.” (Tr. 94).

Lt. Eastham stated that in January, 2000, Colonel Sitrin told him Mr. Tart was under consideration for rodeo but that he, Sitrin, had reservations (Tr. 121, 248). When Sgt. Love gave Lt. Eastham a list with Mr. Tart’s name on it, he, Eastham, stated as follows:

“. . . I told him that I had no problem with it, but I had to - at the time I had become aware that I had to have permission from Major Malcolm as his commander before I could . . . say yes or no to the names on the team, including Jimmy Tart.” (Tr. 249).

“Q Did you talk with Major Malcolm? . . .

“A E-mail, I e-mailed him.

“Q What was the response?

“A The response came back - I think the response came back to Colonel Sitrin. . . . it was to the effect of he did want to have final say where Jimmy Tart was concerned, because he had some concerns about some off duty activity that at the time I was not aware of. . . .” (Tr. 249).

Lt. Eastham further stated,

“A I believe I was directed by the Colonel, Colonel Sitrin, to call Phil Love and eliminate from final consideration . . .

. . .

"A . . . He [Colonel Sitrin] made the decision and he asked me to make the call to Master Sergeant Love. Or at least from my perception he was the one that made the decision. He's the one that gave me the information to carry out the order." (Tr. 251).

Lieutenant Colonel Sitrin testified, in part, as follows:

". . . I did ask Lieutenant Eastham to confer with Major Malcolm, who is the squadron commander. That he's comfortable with who's going on the deployment.

"Q So, you saw Jimmy Tart's name on some list?

"A No. I don't think I actually saw a list. I think probably Lieutenant Eastham briefed me on a list. . . ."

. . .

"A Well . . . I talk with my commanders every month or every drill weekend, and we had talked the January and February, March UTAs about - you know, that Jimmy, in this particular case, wouldn't go on any deployments for a while because of his couple of incidents he'd had. Plus, he had another suspected incident that Major Malcolm and Sergeant Spruill were looking at as well. So, there's a third incident out there that they were looking at as well." (Tr. 125-126).

Major Malcolm testified, in part, as follows:

"Q Were you made aware that whether Jimmy Tart's name was on a list to go as a member of the rodeo team?

"A It was brought to my attention, I believe, in early March. Lieutenant Colonel Sitrin sent me an e-mail saying that he saw that Jimmy Tart's name showed up on a list to be on the team. He thought he remembered me saying that I didn't want him going on these types of trips without my permission. So, he wanted to know if I wanted him to go.

"Q What was your reaction to that? What was your next step?

"A For something like - for a rodeo, a competition like this, high visibility type of thing, no. My reaction was, no, I don't want him going on this type of thing until I am confident that he has straightened out his personal life, and there's not going to be any problems.

"Q Who did you tell your decision to? That Jimmy Tart shouldn't be on the rodeo team?

"A Well, there was some communication between Lieutenant Colonel Sitrin and Lieutenant Eastham, the full time Maintenance officer, and myself. Because Literature (sic) Eastham had originally thought it was okay to put Tart on there because he didn't know that I had directed, when I returned from France, that he not go on any trips without my permission. He thought it would be okay. So, we had a little back and forth in e-mail where - you know, I left it to - if Colonel Sitrin wanted to override me, of course, being my boss, he has the authority to do that. But Colonel Sitrin decided, no, I'm not going to override that, if you don't want him to go then he's not going. So, Colonel Sitrin then is probably the one who passed along the information that, no, he's not going. But it was originally my decision that he not go.

"Q I'll ask you more directly. Did Colonel Sitrin tell you to pull Tart from the rodeo team?

"A No, he did not.

"Q Did anybody tell you to pull Tart from the rodeo team?

"A No, it was my decision." (Tr. 198-199).

Finally, Chief Master Sergeant Bailey testified, in part, as follows:

"A Well, you know, talking - the rodeo is a world-wide competition event. There's thirty-two (32) countries normally. They are competing. There's the best of the best that compete there. . . . The only person that I was actually involved in was Phil Love came to me. He was - Lieutenant Eastham was the team chief for the rodeo. Phil Love was the Maintenance team chief

for the maintainers, the mechanics, that was going. Phil Love came to me one afternoon and said he had a special request. They would like Jimmy Tart to be on the rodeo team.

"Q How did you respond to this special request?

"A I told him I had no problem with Jimmy going on the team, but I would have to pass that by the commander because of some of the issues that Jimmy was involved in at that time.

"Q What did you know about those issues?

"A Very little. I knew he had been in a couple scuffles off base and - you know. But no details about them. And that's why I told him that I would have to go talk to the commander about whether Jimmy could go or not.

. . .

"Q What did you do after Phil Love approached you?

"A I went and talked to the commander and I was told, no, he couldn't go because of the involvement he had had in, you know, his personal affairs.

"Q Which commander? What commander did you speak to?

"A Colonel Sitrin.

"Q Did you speak with Major Malcolm at all?

"A Well, after the fact, because Major Malcolm wasn't there at the time. I'm sure Colonel Sitrin spoke with Major Malcolm about the scenario before he told me that, no, they wanted to keep Jimmy at home for a while.

"Q How much time went by between Phil Love approaching you and you getting a response from Colonel Sitrin?

"A Well, if I'm not mistaken, ma'am, it was two days after I was approached when I got the response back. I went back and told Phil, no, that Jimmy could not go.

"Q Did you get a reason why?

"A N, no, no. Just - other than they wanted to keep Jimmy close to home because of personal involvements that Jimmy had in his personal side of his life.

"Q What was Phil Love's reaction?

"A He said, okay, he said, I understand, and that was it. That was the end of the conversation." (Tr. 258-260).

I found Colonel Sitrin, Major Malcolm, Lieutenant Eastham and Chief Master Sergeant Bailey credible witnesses. On the other hand I found Sgt. Love's testimony contrived and unconvincing. He ignored entirely any mention of Lt. Eastham and I credit Lt. Eastham's testimony that Sgt. Love gave him a list with Mr. Tart's name on it and that he, Eastham, told Sgt. Love, that, ". . . I had no problem with it, but . . . I had to have permission from Major Malcolm . . . before I could say yes or no. . . ." (Tr. 249). Further, I credit the testimony of Chief Bailey that he, Bailey, ". . . told him [Love] I had no problem with Jimmy going on the team, but I would have to pass that by the commander because of some of the issues that Jimmy was involved in at that time." (Tr. 258). Accordingly, because Lt. Eastham and Chief Bailey each told Sgt. Love that approval would have to be obtained for Mr. Tart's participation on the rodeo team, I specifically do not credit the testimony of Sgt. Love that Mr. Tart's participation on the rodeo ever was approved and/or that Chief Bailey ever told him, ". . . it [Tart's participation] would be okay. . . ." (Tr. 94).

There is no dispute that Mr. Tart, who had been removed from the list for TDY deployment in February, 2000, which Sgt. Love well knew, was denied permission in March, 2000, to participate. I have found that Chief Bailey told Sgt. Love that Mr. Tart could not go because, ". . . they wanted to keep Jimmy close to home because of personal involvements that Jimmy had in his personal side of his life." (Tr. 259-260).

7. Chief Bailey very credibly testified about a conversation he had with Mr. Tart, as follows,

"Q Did you ever have an occasion to sit down with Tart, Jimmy Tart, and speak to him about what was going on in his life?

"A Yes, ma'am, I sure did.

"Q Tell me about your conversation.

"A That's when I first went over as the acting superintendent during the process of Chief Gaul retiring. Jimmy approached me and wanted to talk one afternoon. I told Jimmy to come on in the office, and he sat down and we sat there and talked. Jimmy, at that time, he basically made the comment to me was that he felt like that he was being kind of stepped on, railroaded, you know, in some of the things that he was trying to do. I told him, I said, Jimmy, I said, I'm going to be honest with you. I'm a pretty (sic) judge of character, I said, when it comes to work, your work ethics, couldn't ask for no better. But, I said, your personal life is what you need to take care of. Your private life. And he didn't disagree with me or agree. That was basically the extent of the conversation. I just told him, I said, Jimmy, you need to take care of your personal affairs." (Tr. 260).

CONCLUSIONS

1. Removal of ART Tart as an Alternate for deployment to Istres, France.

For reasons set forth above, I have found that Mr. Tart, although not selected for the February, 2000, deployment to Istres, France, had been designated as an alternate and was removed as an alternate before the Istres deployment began on, or before February 1, 2000. Because the Superintendent, Chief Master Sergeant Gaul, testified that he removed Mr. Tart as an alternate before the Istres deployment began, I further found that the Superintendent's justification was false and was pretextual for the reason that, as of the date the deployment began, the record showed no conduct or action by Mr. Tart would have warranted removal of his name as an alternate. To the contrary, the testimony of Colonel Sitrin, Major Malcolm and First Sergeant Spruill viewed Mr. Tart as an innocent victim of an unprovoked assault on New Year's Day. Accordingly, I credited the testimony of Mr. Tart that his supervisor, Mr. Darby, told him he had been directed to remove his name because he caused too many waves, i.e., his filing of grievances and other protected activity. Mr. Tart's testimony concerning Mr. Darby's "waves" statement was corroborated by the testimony of Messrs. Blanks and Vaughn.

Respondent thereby violated §§ 16(a)(1) and (2) of the Statute. Mr. Tart was only named as an alternate and he testified that no alternate had been deployed to Istres, France in February 2000. Accordingly, he would not have gone on the Istres deployment in an event.

2. ART Tart was denied permission to participate in Rodeo because of his off-duty conduct.

There is no disagreement that Mr. Tart knew in February, 2000, that he had been removed from consideration for TDY assignments because of his off-duty conduct. Sgt. Love was well aware of Mr. Tart's TDY restriction when, in early March, 2000, he asked Chief Bailey, ". . . if there was a way that Jimmy could go. Because he's one of our better crew chiefs. . . . first he [Bailey] said he didn't think so. . . . and he said that he would talk to the colonel, Colonel Sitrin, and see what he said about it." (Tr. 92). For reasons fully set forth above, I do not credit Sgt. Love's testimony that anyone ever approved Mr. Tart's participation on the Rodeo team. To the contrary, the credited testimony of Lt. Eastham and of Chief Bailey shows that no approval was given and each told Sgt. Love that Mr. Tart could not go, as Chief Bailey stated, ". . . because of the involvement he had had in, you know, his personal affairs." (Tr. 259); and, as Lt. Eastham stated, "The response came back - I think the response came back to Colonel Sitrin. . . . but it was to the effect of he [Major Malcolm] did want to have final say where Jimmy Tart was concerned, because he had some concerns about some off duty activity that at the time I was not aware of . . ." (Tr. 249) and, ". . . I [Lt. Eastham] was directed by the Colonel, Colonel Sitrin, to call Phil Love and eliminate [Tart] from final consideration . . ." (Tr. 251). Major Malcolm stated, ". . . Lieutenant Colonel Sitrin sent me an e-mail saying that he saw that Jimmy Tart's name showed up on a list to be on the team. He thought he remembered me saying that I didn't want him going on these types of trips without my permission. So, he wanted to know if I wanted him to go. . . . For something like - for a rodeo, a competition like this, high visibility type of thing, no. My reaction was, no, I don't want him going on this type of thing until I am confident that he has straightened out his personal life, and there's not going to be any problems." (Tr. 198-199). Major Malcolm further stated that, ". . . Colonel Sitrin decided, no, I'm not going to override that, if you don't want him to go then he's not going. So, Colonel Sitrin then is probably the one who passed along the information that, no, he's not going. But it was originally my decision that he not go." (Tr. 199).

General Counsel's assertion that Respondent denied Mr. Tart permission to participate on the Rodeo team because Mr. Tart delivered a grievance (G.C. Exh. 5) to Colonel Sitrin's office appears wholly contrived, is unconvincing and the assertion is rejected. Mr. Tart was uncertain of the date he delivered the grievance, saying it was, "Around the 6th of March." (Tr. 53); but he said he was approved for the Rodeo team when he delivered the grievance and, "Once I delivered the document I went back to our building, 4909. . . . At that time he [Sgt. Love] received a phone call saying that I should - I cannot go on the trip, that I'd been removed." (Tr. 54). Sgt. Love testified that he talked to Chief Bailey on March 6, ". . . about putting Tart on the list" (Tr. 92); and that Chief Bailey called him back on March 6 and told him it was "okay" to put Mr. Tart on the list (id.) and Chief Bailey called again on March 7 and told him to take Mr. Tart's name off the list (Tr. 94). All credited testimony, i.e., of Chief Bailey, Colonel Sitrin, Major Malcolm and Lieutenant Eastham, shows, it was not less than two days after Chief Bailey was approached by Sgt. Love that Chief Bailey received a reply from Colonel Sitrin. For example, as Chief Bailey stated, ". . . Major Malcolm wasn't there at the time. . . . it was two days after I was approached when I got the response back. . . ." (Tr. 259). Thus, the asserted "approval", which I have found never occurred, or more correctly the response from Chief Bailey, was not received until March 8. According to Mr. Tart, he delivered the grievance on March 6 and when he got back to Sgt. Love's office, on March 6, Sgt. Love received a telephone call telling him to remove Mr. Tart's name. According to Sgt. Love Chief Bailey "approved" Mr. Tart's participation on March 6 and then a day later, on March 7th, called and told him [Love] that Mr. Tart could not go. Sgt. Love conceded that he did not have authority to select Mr. Tart, because he knew Mr. Tart was not permitted to go TDY (Tr. 91), and the only "list" Mr. Tart's name was removed from, was Sgt. Love's list (see; Res. Exh. 8, Respondent's March 14, 2000, list of Rodeo team members).

On the other hand, there can be no doubt that as of early March, 2000, Mr. Tart's off-duty activity was under investigation for three incidents: First, the New Year's Day assault, in government quarters, in which Mr. Tart at first appeared to have been the innocent victim. Second, the February 4th or 5th assault at the Best Western lounge. In each incident, Mr. Tart was assaulted by unknown assailants; in the February incident, Mr. Tart used a knife to apparently painfully, if not seriously, inflict injury on

an attacker. As more fully set forth above, there were many questions raised and many doubts unresolved including, by way of example: whether Mr. Tart provoked the February incident; whether the January 1st and February incidents were somehow related; etc. Then in early March, Mr. Tart was investigated for a third incident, namely, his involvement with the wife, who was a member of the Squadron and whose husband was a member of the Wing. This raised a specter of possible interrelation of the three incidents. Because of the doubt surrounding Mr. Tart's asserted non-aggressor, First Sergeant Spruill prepared a Letter of Reprimand.⁶ Accordingly, I do not find credible the assertion that Mr. Tart's delivery of grievance played any role whatever in Major Malcolm's refusal, in early March, 2000, of Mr. Tart's participation while Mr. Tart's off-duty conduct was under investigation and Mr. Tart's culpability very much in doubt.

If, contrary to my finding that protected activity played no part in Respondent's denial, in early March, 2000, of permission for Mr. Tart's participation as a member of the Rodeo team, it is determined that Mr. Tart's delivery of a grievance played a part in the denial of his request to participate on the Rodeo team, nevertheless, I conclude that Respondent would have taken the same action if there had been no engagement in protected activity. U.S. Department

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First Sergeant Spruill stated,

" . . . I found out when - let's see, was it April - between March and April that he was, I guess, suing one of the band members. And I guess they ended up settling out of court and I really don't know the whole details of that at all. But it ended up to where he wasn't really found . . . we couldn't prove that he started it . . . But . . . he was involved in that and it just kind of brought a bad light on us, so we decided to hold off on that LOR

"Q Did you meet with Mr. Tart and see any documents from a lawyer?

"A I want to say it was in April

. . .

"A We actually met with him. I'm not sure of the exact month it was, but I want to say it was April, because that's where we decided not to do an actual LOR. . . ." (Tr. 228-229).

of the Air Force, 437th Airlift Wing, Air Mobility Command, Charleston Air Force Base, Charleston, South Carolina, 56 FLRA 950 (2000); Letterkenny Army Depot, 35 FLRA 113 (1990). As noted, at the time the request was made, early March, 2000, Mr. Tart's off-duty conduct was under investigation and his status was in question, i.e., a letter of reprimand had been prepared and its issuance was under active consideration. Major Malcolm candidly stated that he did not want Mr. Tart going on a high visibility TDY, like the Rodeo, ". . . until I am confident that he has straightened out his personal life, and there's not going to be any problems." (Tr. 198-199; see, also, Tr. 213, 218). Mr. Tart later provided information, i.e., his suit against one assailant and the statement of the assailant Mr. Tart cut with his knife, that demonstrated that Mr. Tart had not initiated the attacks, although he was not found to have been innocently attacked (Tr. 202). Mr. Tart's TDY restriction has been lifted (Tr. 278).

For the reasons set forth above, the allegations of Case No. WA-CA-00425 that Respondent violated §§ 16(a)(1) and (2) of the Statute are hereby dismissed.

Having found in Case No. WA-CA-00424 that Respondent violated §§ 16(a)(1) and (2) of the Statute when it removed Mr. Tart's name as an alternate for deployment to Istres, France, because of Mr. Tart's protected activity (no alternate was deployed to Istres, although there were other alternates for Crew Chief slots), it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 2423.41 of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41, and § 18 of the Statute, 5 U.S.C. § 7118, it is hereby ordered that the Department of the Air Force, Seymour Johnson Air Force Base, shall:

1. Cease and desist from:

(a) Taking any adverse action against Air Reserve Technician Jimmy L. Tart, Jr., or any other employee represented by the National Association of Government Employees, Local R5-188, including deployments, because of engagement in protected activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

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

(a) Post wherever employees represented by the National Association of Government Employees, Local R5-188, 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 Commanding Officer, Seymour Johnson 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.

(b) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41(e), notify the Regional Director, Washington Region, Federal Labor Relations Authority, Tech World Plaza, 800 K Street, NW, Suite 910N, Washington, DC 20001, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: June 28, 2001
Washington, DC

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

The Federal Labor Relations Authority has found that the Department of the Air Force, Seymour Johnson Air Force Base, has violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT take any adverse action against Air Reserve Technician Jimmy L. Tart, Jr., or any other employee represented by the National Association of Government Employees, Local R5-188, including deployments, because of engagement in protected activity.

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.

DATE: _____ BY:

Commanding Officer
Seymour Johnson AFB

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, Washington Region, Federal Labor Relations Authority, whose address is: Federal Labor Relations Authority, Tech World Plaza, 800 K Street, NW, Suite 910N, Washington, DC 20001, and whose telephone number is: (202) 482-6700.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case Nos. WA-CA-00424 and WA-CA-00425, were sent to the following parties:

—

CERTIFIED MAIL & RETURN RECEIPT

CERTIFIED NOS:

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Dated: June 28, 2001
Washington, DC