UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: November 18, 1997

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

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

Respondent

and

Case No. AT-CA-60907

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 987, AFL-CIO

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

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

AIR FORCE MATERIAL COMMAND WARNER ROBINS AIR LOGISTICS CENTER ROBINS AIR FORCE BASE, GEORGIA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 987, AFL-CIO Charging Party	Case No. AT-CA-60907

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

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

Any such exceptions must be filed on or before **DECEMBER 18, 1997**, and addressed to:

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

JESSE ETELSON
Administrative Law Judge

Dated: November 18, 1997
Washington, DC

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

AIR FORCE MATERIAL COMMAND WARNER ROBINS AIR LOGISTICS CENTER ROBINS AIR FORCE BASE, GEORGIA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 987, AFL-CIO Charging Party	Case No. AT-CA-60907

Richard S. Jones, Esquire
For the General Counsel

Brenda S. Mack, Esquire
For Respondent

Before: JESSE ETELSON
Administrative Law Judge

DECISION

Employee James L. Colvin became a union steward in January 1996. In the first seven months of 1996 he filed an unfair labor practice charge, filed a grievance on his own behalf, and was one of several employees who initiated another grievance or a series of related grievances. On July 25, 1996, Colvin received an annual performance appraisal for the year ending June 30, 1996. This appraisal placed him in a lower "overall" rating category than the category in which he had been placed the previous year. An unfair labor practice complaint alleges that this lower rating violated sections 7116(a)(2) and (4) of the Federal Service Labor-Management Relations Statute (the Statute),

which prohibit discrimination based on certain of Colvin's activities, and also violated section 7116(a)(1) of the Statute, which prohibits interference, restraint, or coercion of any employee in the exercise of any right under the Statute.

The complaint also alleges that, during the meeting in which Supervisor Nedam Walker presented the appraisal to Colvin for review and discussion, Walker told Colvin that he had witnessed him performing union business during duty time without Walker's permission and that Walker knew when Colvin went to the union hall, filed EEO complaints, and wrote letters to Congress. These statements are alleged to constitute independent violations of section 7116(a)(1).

Respondent's answer admits that Colvin was a union steward, that he engaged in certain activities among those alleged, and that Colvin was given an overall rating that was lower than his previous rating. Respondent denies that Walker made the alleged statements and denies that the lower rating was given because of Colvin's protected activities.

A hearing was held in Macon, Georgia, on July 16, 1997. Counsel for the General Counsel and for Respondent filed post-hearing briefs.[1] The following findings are based on the record as a whole, the briefs, my observation of the witnesses, and my evaluation of the evidence. As none of the witnesses exhibited any manifestations of dishonesty or uncertainty, however, no differences in their demeanor contributed, as far as I am aware, to my resolution of the credibility of any conflicting accounts of events. On the other hand, the witnesses' apparent belief in the truth of their testimony aided me in attempting to reconcile their accounts. I shall illustrate this below.

Findings of Fact

---

[1] After the hearing closed, I reopened the record for the limited purpose of receiving and admitting into evidence, on my own motion, ALJ Exhs. 1 and 2. ALJ Exh. 1 is a blank appraisal form, AF Form 860A, Mar 89, with accompanying instructions. ALJ Exh. 2 is page 2 of AF Form 860, Feb 87 (further instructions for completing AF Form 860A). The parties were given the opportunity to object to, or comment on, these exhibits, but did not do so.

I. Chronological Summary of Undisputed and Disputed Evidence[2]

A. Colvin's Employment History, Supervision, Recognition

James Colvin has been employed by Respondent in its "CNC shop," for approximately 13 years. The CNC shop makes aircraft parts and components. Colvin's job is to set up the machines and in some cases to "program" them. Nedam Walker was Colvin's immediate supervisor for approximately ten years, including 12 weeks during the appraisal year of July 1995 through June 1996. For the remainder of that appraisal year, Milford Maglothin was Colvin's immediate supervisor.

Every witness regarded Colvin as having been a highly skilled and motivated employee for many years. According to coworkers who testified for the General Counsel, his performance remained at the same high level during the 1995-96 appraisal year, but that is in dispute. Colvin received "Sustained Superior Performance" awards in 1986 and 1988 and received "Performance" awards in five of the six years between 1990 and 1995. His 1995 performance award, carrying with it a cash amount equal to 1.3 percent of his salary, was based on an overall performance appraisal of "excellent" for the period of July 1994 through June 1995.[3] Walker, as "supervisor- rater," prepared Colvin's 1994-95 appraisal, dated July 25, 1995. That appraisal was also initialed by David Horton (Tr. 91), who apparently also supervised Colvin during that year.

B. Some Pertinent Features of the Appraisal System

An overall rating of "excellent" signifies that the employee "exceeds [the requirements of] more than half of the critical elements and meets all other elements." However, employees are also rated on "appraisal factors," which are not the same as "elements." (ALJ Exh. 1.)

There are nine "appraisal factors." An employee receives a numerical score for each of the nine factors. For 1994-95, Colvin's total raw score on the nine "appraisal factors" was 66. The second page of the appraisal form

---

[2] Statements in this section that are recited without qualification constitute my preliminary findings. Disputed evidence will be treated below.

[3] The rating system divides the overall performance ratings into five categories, "superior," "excellent," "fully successful," "minimally successful," and "unacceptable."

contains the rater's list of "Performance Elements." On each of these the employee is rated either "Did Not Meet," "Met," or "Exceeded." "Did Not Meet" and "Exceeded" ratings require a brief narrative explanation. On Colvin's 1994-95 appraisal, Walker rated Colvin as having "exceeded" on 3 out of 4 "performance elements" listed as "critical." This compilation of "critical elements" ratings, not the total score on the nine "appraisal factors," appears to have been the basis for Colvin's overall "excellent" rating and his performance award. However, the individual ratings on at least some of the appraisal factors appear to have an influence on an employee's ratings on the performance elements. (GC Exh. 3, 6.) The employee's total score on the appraisal factors is also used "in competitive actions, e.g., promotion, reassignment, change to lower grade into positions with known promotion potential, and for selection for competitive training" (ALJ Exh. 2).

C. Colvin's Activities During 1995-96 Appraisal Year

1. Evidence as to Colvin's Conduct as an Employee

As noted above, whether Colvin maintained the same level of performance in the year following the appraisal he received in July 1995 is in dispute. Unlike Colvin's coworkers who testified, both Walker and Maglothin, his supervisors during the 1995-96 appraisal year, purported to have observed some slippage in his attentiveness to his job.

According to Walker, Colvin spent too much time talking to other employees when he should have been attending to machines that were, consequently, not running. Walker identified employees Bobby Gray and Larry Smith as those with whom he observed Colvin talking. Walker testified that he had conversations with both Colvin and Smith to the effect that they had to spend more time on the machine and less time talking, but that he did not mention to Colvin, specifically, that he had observed him talking to Smith (Tr. 65).

Colvin denied that Walker ever "counseled [him] about lack of productivity and leaving the machines idle" (Tr. 26). Smith testified, in response to a question as to whether Walker ever counseled him about talking to Colvin, "No more than, you know, talking to anyone else, whether they think it's job related or whatever" (Tr. 38).

Walker also testified that Colvin's exercise of his "communication" skills suffered because of his reluctance to give certain information to an employee who had taken over an operation that Colvin had previously performed (Tr. 77).

Maglothin testified that he discussed with Walker his perception that Colvin "had gone downhill in the recent past" (Tr. 87). Maglothin corroborated Walker regarding Colvin's "refus[al] to impart [his] knowledge and [his] expertise concerning [a very high priority project that Colvin had worked on previously] to the people that were working on it." More generally, Maglothin testified that Colvin "went from an outstanding employee to just a tolerable employee" and no longer was "performing up to his potential" (Tr. 86-87, 94). Maglothin could not recall whether he counseled Colvin about these matters during his quarterly appraisals. He did not counsel him in between the quarterly appraisals. (Tr. 94.)

Both Walker and Maglothin attributed much of (what they purported to perceive as) Colvin's fall in performance to his resentment of Walker for the role Colvin believed that Walker played in the discharge in mid-1995 of another employee whom Colvin had befriended and championed (Tr. 72-77, 87-88).

2. Colvin's Union-Related Activities and Walker's Responses

Colvin became a union steward in January 1996. Another employee for whom Nedam Walker had certain responsibilities became a union steward at about the same time. Walker undertook to brief both of them on the procedures for requesting official time (Tr. 63-64). As a steward, Colvin used a minimal amount of official time, perhaps 10 to 12 hours during the appraisal year. Colvin handled no grievances for other employees. He filed one unfair labor practice charge, which involved Walker. The matter was settled in June 1996, resulting in Walker being required to remove a notice he had posted on a telephone limiting the use of Government phones.

Apart from his activities as a union steward, Colvin had filed a grievance in October 1995 that was either (it is not clear which of these) a grievance by a group of employees or one that was treated together with the similar grievances of a number of other employees. Colvin's grievance, or his part of the group grievance, alleged that Walker had improperly charged Colvin with absences and leave and was "checking on [him] every 15 minutes." The grievance was taken to step two, where it was denied as untimely and not pursued any further. (Tr. 12-13, 28-29, 62-63, GC Exh. 4.) Colvin also presented Walker with a step one (or "informal") grievance on July 17, 1996. It alleged that Walker had improperly denied Colvin the opportunity to work

overtime on June 29 and 30. The only conversation Colvin and Walker had about this grievance was Walker's request that Colvin let him know which steward he wanted as his grievance representative. On August 12 (after the events that give rise to this case) Walker responded to the grievance with a notation to the effect that overtime was not authorized for the work order to which Colvin was assigned on June 29 and 30. (Tr. 14-15, GC Exh. 5.)

D. The 1995-96 Appraisal

Walker prepared Colvin's annual performance appraisal on July 23, 1996, but first discussed the "elements" with Maglothin. Although Maglothin had been Colvin's supervisor for 40 of the 52 weeks in the appraisal year, Walker prepared the appraisal because Maglothin had been moved to another work area in June, leaving Walker to administer all of the employee appraisals. According to Maglothin (but not conceded by the General Counsel), his input into the appraisal ratings "carried as much weight" as Walker's. Maglothin initialed the appraisal. (Tr. 66-67, 84-85, 90, GC Exh. 6.)

On this performance appraisal, the numerical ratings on six of the nine "appraisal factors," numbers 2, 3, 4, 5, 6, and 8, were different from the ratings on Colvin's previous annual appraisal:

	1994-95 rating	1995-96 rating
"2. Adaptability to work"	7	8
"3. Problem solving"	9	7
"4. Working relationships"	6	7
"5. Communication"	7	5
"6. Work productivity"	8	7
"8. Skill in work"	9	8

The ratings for the remaining three appraisal factors were the same as those Colvin had received the previous year. These appraisal factors, and the respective ratings, were:
"1. Work effort" - 7; "7. Self-sufficiency" - 8; and "9. Work management" - 5.

On the second page of the 1995-96 appraisal, Walker identified 5 "performance elements" as "critical," as compared with 4 the previous year, and recorded Colvin as having "exceeded" on 2 of those 5, as compared with the previous year's 3 out of 4. These ratings resulted in an overall performance rating of "fully successful" instead of

the previous year's "excellent," and entitled Colvin to no performance award.

Walker testified that his annual appraisals of employees are based solely on their performance during the appraisal year and that he does not refer to the previous year's appraisal when he prepares the current year's. Walker testified that he probably remembered, at the time he prepared the 1995-96 appraisal, that Colvin had received an "excellent" overall rating and a performance award the previous year, but that he did not remember Colvin's ratings on individual items.

Walker also testified that he was not affected by the grievances Colvin filed involving him and that he did not "hold it against Mr. Colvin . . . in his appraisals"; nor did Walker regard Colvin's union stewardship as affecting his job performance or his union activities as having any bearing on the appraisal ratings. Similarly, Maglothin testified that the subject of Colvin's union activities did not come up in his discussions with Walker as a factor in his appraisal, and that Maglothin regarded Colvin's union stewardship duties as being "practically nil as far as any time that was taken up away from his production job" (Tr. 88-89). Nor was Maglothin aware of the grievances Colvin had filed on his own behalf.

E. July 1996 Appraisal Interview

Walker presented the 1995-96 appraisal to Colvin in Walker's office on July 25, 1996. The protocol calls for a discussion of the appraisal between the supervisor and the employee. The dispute over what occurred during this meeting has important implications for the issues presented in this case.

Colvin testified that Walker presented the appraisal for Colvin to review and discuss whatever elements he wanted to discuss. Colvin asked Walker how he could improve in certain areas. He testified that he mentioned appraisal factor 9 ("work management"), on which he "had been lowered for a couple of years" and had received a rating of 5. In the course of responding to Colvin's inquiry about appraisal factor 9, Walker said, according to Colvin, that he had observed Colvin "doing union business without his permission and made some comments to the effect that he wasn't blind, that he knew what he was seeing." Colvin further testified that Walker also said, "Don't you think I know every time you go to the union hall and tell stuff and the EEO and write letters to Congress and so forth?" Colvin testified that he asked Walker what evidence he had to support the

accusation of doing union business without his permission, and that Walker did not produce any. (Tr. 19.)

According to Colvin, Walker further explained the rating on factor 9 by stating that Colvin had never served as Walker's alternate, in which capacity he would have filled in for Walker in Walker's absence. Colvin testified that his failure to serve as Walker's alternate was something within Walker's control, not Colvin's. (Tr. 20.) Counsel for the General Counsel then asked Colvin whether he had asked Walker specifically about any of the other "lowered elements in your appraisal."[4] Colvin's responses to this and the following question raise further questions that will require discussion later in this decision:

> A. Yes, sir. There's another one on there. It's normally low communication. The only answer I get on it
> -- that [it] don't mean anything. That's just one they stick on there.
>
> Q. That's what he told you?
>
> A. Yes. I've been told that year after year.

In Walker's version of the meeting, they began by discussing the ratings on each of the nine appraisal factors, by which Walker explained that he meant that he asked Colvin whether he had any questions concerning any of the factors. Walker could not recall Colvin's "point[ing] out any particular factors." However, Colvin refused to sign the appraisal form because he did not agree with it. (Tr. 58-59.)

Although he testified that Colvin did not raise questions about any specific factors, Walker also testified that he discussed with Colvin that he had done "lots of talking to other employees on the machine that he was assigned to and not be running," and that this explanation was in reference to "a couple of the factors," including no. 6, "work productivity" (Tr. 59-60). Walker quoted himself as telling Colvin:

---

[4] The phraseology of this question was apparently based on the misapprehension that the rating on factor 9 had been "lowered." It had not. Colvin had received the same rating on factor 9 the previous year. However, he testified that, not having a copy of his previous appraisal when he discussed the 1995-96 appraisal with Walker, he thought that his rating on factor 9 had dropped (Tr. 35).

> These times that I have seen you and Mr. Bobby Gray discussing things, the machine not running, the times I have seen you and Mr. Smith discussing things, the machine not running, the times I have seen you and others in the office three-quarters of an hour when you should have been on the machine . . . . (Tr. 76.)

Walker also recalled having some discussion about factors 5 ("communication") and 8 ("skill in work"). Walker testified that Colvin asked him why his rating was not higher on no. 8, on which Colvin received a rating of 8 (down from 9), and that he had responded that Colvin had spent too much of his time on things other than performing his duties (Tr 60).

Walker denied that he told Colvin that he had witnessed him performing union business during duty time without his permission. Walker also denied that he said, "Don't you think I know when you go to the union hall and EEO to file complaints and write letters to Congress on management."

F. Alleged Colvin Query of Maglothin

Colvin testified that, shortly after he received the appraisal, he "mentioned" it to Maglothin, who told him that "he had no input in it" (Tr. 32). Maglothin denied that he had any conversation with Colvin about the appraisal. At the time of the appraisal, Maglothin and Colvin were not working in the same area (Tr. 86).

II. Related Patterns of Employee Appraisal Scores

The decrease in Colvin's appraisal scores from the 1994-95 period to the 1995-96 period was not an unusual phenomenon among Walker's supervisees. Joseph Nelson had received a raw total score of 66 and an overall rating of "excellent" from Walker in 1995, as compared with scores around 61 and 62 in recent years before and afterward (Tr. 46). Nelson had seen Colvin's appraisals for earlier years and remembered them as being in the range of 80 and 81, the last being a "perfect" score on all elements (Tr. 47). Larry Smith received a total score of 65 in one recent year, but then dropped to his more typical 62, apparently no later than 1995 (Tr. 41).

III. Credibility Resolutions on Disputed Evidentiary Facts

A. Preliminary Observations and Plan of Attack

The disputed *evidentiary* facts that are material to the issues of this case concern, for the most part,

conversations or alleged conversations between Colvin and Walker, and, of at least arguable materiality, between Colvin and Maglothin. The other major area of dispute resting on factual analysis is the motivation behind the ratings given on Colvin's 1995-96 performance appraisals. I regard that as an issue of *ultimate* fact, to be derived by *interpreting* the *evidentiary* facts found as a result of the resolutions of witness credibility. Another issue shares some aspects of each of these types of facts, and I treat it accordingly. This issue, properly framed, is that of Walker's and Maglothin's *perception* of Colvin's performance during the relevant appraisal year. This issue is inextricably tied to that of motivation, but in at least one respect it is also bound up with the first of the "conversation" issues to be addressed. I shall therefore discuss it in connection with the conversation issue and again as an adjunct to the motivation issue.

It bears stating openly that I find questions of credibility as to what someone has or has not said, especially during a private conversation, to be among the most difficult to resolve with a great degree of confidence. Not the least of the factors contributing to this difficulty is that, especially in situations in which sensitivities are apt to be heightened, some speakers tend to express their thoughts obliquely, while some listeners are predisposed to hear certain things and not others.5

Further, where, as here, the demeanor of the witnesses gives the impression that each believed the truth of his own testimony, I find it necessary to rely to a great extent on surrounding circumstances to assess the relative probabilities of conflicting versions of an event. However, surrounding circumstances provide less reliable guidance to words spoken in conversational settings than to actions taken, because such speech is usually more spontaneous and less likely to be based on the speaker's consideration of all the circumstances.

Surrounding circumstances, considered cautiously as part of the context of the alleged conversations, may still be an indispensable element in the factual determination. Here, to the extent that the witnesses' apparent belief in their respective stories leads me to consider the likelihood that each of their accounts contains at least a kernel of truth, I shall attempt to satisfy myself as to whether any combination of parts of their testimony coalesces into a

---

5 A recent article in the *Corporate Legal Times* (November 1997) was entitled, "Communication: What You Say Versus What They Hear."

narrative that is consistent with the other established facts and with common sense. Failing that, one account will have to be credited over the other, without necessarily crediting any witness's account in its entirety.

B. Conversations about Spending More Time on the Machine

I credit Walker's testimony that during the 1995-96 appraisal year he discussed with both Colvin and Smith that they should spend more time on their machines and less time talking. Smith conceded that Walker had "counseled" him about talking to Colvin, although he denied that his conversations with Colvin drew any more attention than his conversations with anyone else. Colvin denied that Walker ever talked to him specifically about talking to Smith. This corresponds to Walker's testimony. Colvin also denied that Walker ever "counseled" him about leaving machines idle. Such a denial is somewhat equivocal, although one cannot be sure it was intended as such. "Counseled" is a term of art, often understood by employees to mean a step taken before formal discipline. I am left uncertain whether Colvin intended to deny that Walker brought to his attention, in any manner whatsoever, that he should spend more time on the machine. More importantly, Smith's concession tends to support Walker's testimony to the effect that he noticed what he regarded to be excessive nonproductive time spent by Smith and Colvin and that he mentioned it to both of them.

C. The July 25 Appraisal Interview

Decisive to resolution of the independent section 7116 (a)(1) allegations of the complaint and relevant to the section 7116(a)(2) and (4) issues is a determination of whether Walker did or did not make certain remarks at the appraisal interview. Although there are many differences between the accounts of Colvin and Walker, I shall attempt to resolve only those differences resolution of which is required for purposes of the issues presented by this case.

1. <u>References to protected and other activities</u>

I find it more probable than not that Walker mentioned something about "union business" to Colvin, but not quite as Colvin recounted it. Colvin's testimony that Walker commented on his "doing union business without [Walker's] permission" implies a reference to activities during duty time, and the complaint is so framed. Thus, both Colvin's and Walker's testimony support a finding that Walker

commented on Colvin's having occupied himself during duty time on extraneous activities. Since, as I have found, Walker had previously commented to Colvin about the time he spent away from machines, it is reasonable for him to have revisited this subject in response to questions about the appraisal ratings. I find that he did. On the other hand, since official time was available for Colvin to request to conduct union business, it is not likely that Walker would have *assumed* that Colvin's duty-time conversations with other employees involved union business. Nor is there any indication that Walker would have had any particular reason to suspect that Colvin's conversations with Larry Smith, who was not even a member of Colvin's union, involved union business.

However, I do not believe that Colvin made up the story about Walker mentioning "union business." Although I do not believe that Walker *assumed* that Colvin was discussing "union business," and therefore find it improbable that he told Colvin that he observed him doing so, it may well have occurred to him that some of Colvin's conversations may have involved union business.[6] I therefore find that Walker said something to the effect that, in the event that Colvin's conversations concerned union business, he should have sought official time (or "permission"). Colvin could have interpreted such a statement as an accusation and, as he testified, have challenged Walker to support such an accusation. As discussed below, I would not find Walker's reference to "union business" to be coercive.

There remains Colvin's testimony that Walker went on to say something to the effect that he knew when Colvin went to the union hall, raised EEO matters, and wrote letters to Congress. Walker denied this as well, and I credit him.

There is no evidence about Colvin actually writing to Congress, so no context has been established from which to infer that it is more probable that Walker mentioned such an activity than that he did not. As far as going to the union hall is concerned, it seems probable that Colvin did that from time to time (although there was no direct evidence that there was a union hall for him to go to). However, it seems improbable that a supervisor would exhibit much interest in something as ordinary for a union steward as going to the union hall, unless it was an attempt to create the impression of surveillance. (As such a theory of the alleged violation has not been argued, I shall not pursue it.) A similar analysis governs my finding about Walker's

---

[6] I credit Walker's testimony that he also observed Colvin talking to Bobby Gray when he should not have been.

alleged mention of EEO matters. Walker was aware that Colvin had represented someone in an EEO case, but his knowledge of this would have been no secret to Colvin, and Walker's mention of it in the manner and the context in which Colvin described it seems improbable. I continue to regard Colvin as an honest witness but cannot account for his having the impression that Walker said these things to him. Presumably Walker said *something* that gave Colvin that impression, but, having found Colvin's version incredible, I cannot ascertain what it was.

2. Discussions of individual appraisal factors

Although Walker testified at one point that he did not recall Colvin asking to discuss any particular appraisal factors, it is undisputed that they did discuss some. However, since Colvin did not have a clear recollection, at the time of the interview, of his individual ratings for the previous year, he did not necessarily focus on the factors that accounted for his lower total in 1995-96. For example, there is no evidence that they discussed the "problem solving" factor, on which Colvin had dropped from 9 to 7.

Colvin testified that they discussed "communication." Walker testified at first that they discussed factor no. 5, "communication" (Tr. 60), but later testified that they did not (Tr. 77-78). Colvin thought they had also discussed "work management," while Walker thought they had discussed "work productivity" and "skill in work." According to Colvin, Walker told him, in effect, that his rating of 5 for "communication" was a standard score that "they [just] stick on there." However, Colvin appears to have believed that this rating was one he had received "year after year." It was not. He had dropped from a 7 to a 5 on that factor, but had remained at a rating of 5 for "work management." It seems more probable, and I find, that Walker told him that his rating for "work management" was one that they just "stick on there." I find, further, that Walker also mentioned that Colvin had never served as Walker's alternate, a comment that relates to the official description of the "work management" factor.

I also find that Colvin and Walker discussed "work productivity" and "skill in work," (on which factors Colvin's rating had dropped) although Colvin did not testify that they discussed them. Walker did not indicate who initiated those discussions. Consequently, I cannot ascertain who did. Their discussion of "communication," if any, remains a mystery.

D. *Post-appraisal Colvin-Maglothin Conversation*

As Colvin believed that he "mentioned" his appraisal to Maglothin, I find that he did so despite Maglothin's failure to remember any such conversation. However, I do not credit Colvin's characterization of Maglothin's response, to the effect that he had no input into it. I credit Walker and Maglothin that Maglothin had, in fact, an input. Such an input would have been expected, Maglothin would have known that Colvin knew it was to be expected, and there is no reason why that input would have been withheld, although the General Counsel would use Maglothin's alleged response to Colvin as evidence that it was withheld. Colvin's use of the verb, "mention," in describing his conversation with Maglothin, as well as Maglothin's failure to remember it (which I credit), suggests a casual and probably momentary conversation in which Maglothin may have responded in a manner calculated to avoid further discussion. I do not believe he lied to Colvin, telling him that he had no input, but he may well have sought to diminish his role by indicating something to the effect that Walker prepared the appraisal. By all indications, the conversation went no further.

IV. Additional Finding on Walker's Methodology

Walker's testimony that the annual appraisals he prepares for employees, including the one he prepared for Colvin for 1995-96, are based solely on the employees' performance during the appraisal year, has two distinct implications. The first is that, as Walker also affirmed directly, he did not, in Colvin's case, refer to the employee's previous appraisal. My evaluation of this testimony is largely a matter involving credibility, and I shall address it here. The second implication is that the appraisal was based on nothing except Colvin's performance. This goes directly to the ultimate factual question of Walker's motivation, and I reserve its analysis for the concluding part of this decision.

I credit Walker, responding to apparently unanticipated questions from the bench and on further cross-examination, that he does not, and did not in Colvin's case, refer to the previous appraisal. While some supervisors undoubtably would feel more comfortable with their ratings if they compared them to the previous year's, Walker's testimony is plausible. Moreover, a practice of referring to previous appraisals might have a tendency to minimize changes in ratings from year to year, yet Walker had made significant changes in the successive ratings of at least two of his other supervisees. I also note that Walker followed a different pattern on his 1996 notations on page 2 of the

appraisal form than he did in 1995. In 1995, in the spaces provided for brief narrative statements to substantiate certain ratings, he wrote, "Laudatory comments documented." (I do not know what that means.) In 1996, he wrote his substantiating statements out in those spaces. He also used a slightly different notation in 1996 to indicate that those ratings not requiring a substantiating statement represented performance elements that Colvin had "met." In 1995 he had written, "Requirements met." I find that each of these actions tends to corroborate Walker's use of a "start from scratch" approach.

Discussion and Conclusions

I. Alleged Independent Violations of Section 7116(a)(1)

The only statement I have found Walker to have made that relates to the allegations of independent violations of section 7116(a)(1) was to the effect that, if Colvin was discussing union business during the duty-time conversations Walker had observed, he should first have received permission. I also find that, in context, this should have been understood as a reminder to request official time.

The standard for determining whether a statement by a representative of management violates section 7116(a)(1) is whether, under the circumstances, it tends to coerce or intimidate the employee (or employees) to whom it is addressed, or whether the employee could reasonably have drawn a coercive inference from the statement. *See, for example, Department of the Air Force, Scott Air Force Base, Illinois*, 34 FLRA 956, 962 (1990) (*Scott AFB*). Bearing in mind that section 7116(a)(1) prohibits only interference, restraint, or coercion with respect to the exercise of rights under the Statute, a violation of the section cannot be found when an employee is "coerced" merely to perform his or her job during duty hours. Stated otherwise, management exercises its right to assign work and its right to direct employees by holding employees accountable for the performance of their work. *Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Jamestown, New York District Office, Jamestown, New York*, 34 FLRA 765, 769 (1990). That is essentially what occurred here.

Irrespective of whether Walker "accused" Colvin of doing union business on duty time or reminded him of his obligation to spend his duty time at his job unless he had been granted official time for union business, there was no suggestion that Colvin refrain from legitimate union activities. The fact that this conversation occurred during

Colvin's appraisal interview does not compel a different analysis. I have not found that Walker's reference to "union business," or words to that effect, was part of his explanation for Colvin's ratings. Rather, I have found that Walker, having explained that he perceived Colvin as spending too much time away from his job duties, referred to the possibility that the conversations that were not work-related were union-related, but also implied that such "business" would be permissible under certain circumstances. I need not decide whether this was the sort of statement that the Authority would deem to be an attempt to accommodate management and employee rights. *See Scott AFB*, 35 FLRA at 963-64. It simply did not impinge on employee rights. I shall therefore recommend that the independent section 7116(a)(1) allegations be dismissed.

II. Alleged Discrimination

A. Reframing of Issue Presented

The complaint alleges that Respondent violated the Statute by providing Colvin with an overall rating that was lower than the overall rating provided to him for his previous evaluation, because Colvin engaged in certain activities. However, I have found that Colvin's 1995-96 rating was given without reference to his previous evaluation, and that it was not unusual for Walker to give employees different ratings from year to year. These facts not only negate any presumption that Colvin should have received the same overall rating for the later year, but also marginalize any significance in a comparison between the two years' ratings. Colvin's performance in 1995-96 might have warranted the same or even a higher overall rating than he received the previous year, or might have warranted a lower rating than the one he actually received in 1995-96. The issue, as I see it, is whether Respondent gave Colvin an overall rating for 1995-96 that was lower than it otherwise would have been because he engaged in the activities described in the complaint.

B. Applicable Principles

Section 7116(a)(2) of the Statute makes it an unfair labor practice to encourage or discourage membership in any labor organization by "discrimination in connection with hiring, tenure, promotion, or other conditions of employment." Section 7116(a)(4) makes it an unfair labor practice to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or

testimony under the Statute. Unlike section 7116(a)(2), section 7116(a)(4) does not, by its terms, limit the proscribed discrimination to actions in connection with hiring, tenure, promotion, or other conditions of employment. Because, for reasons that will appear below, the disposition of the section 7116(a)(4) part of this case could be affected by it, I find it appropriate to explore the question of whether "otherwise discriminate" under section 7116(a)(4) refers only to actions in connection with conditions of employment.

That part of section 7116(a)(4) that describes the action to be proscribed follows the language of section 19 (a)(4) of Executive Order 11491, which protects employees against discipline or other discrimination for filing a complaint or giving testimony under the Order. Any discussion or debate concerning the insertion of this language into the Statute has escaped my research of the legislative history. Section 7116(a)(4), and its predecessor in the Executive Order, also follow section 8(a)(4) of the National Labor Relations Act in their use of the term "otherwise discriminate" and in the absence of limiting language to modify that term.

Section 8(a)(4) protects employees who have "filed charges or given testimony under this Act," and thus is the private sector counterpart to section 7116(a)(4). *See Consumer Product Safety Commission*, 4 FLRA 803, 810, 838-44 (1980). The National Labor Relations Board (NLRB) has read section 8(a)(4) expansively, in view of "the crucial importance of that section to the effective operation of the National Labor Relations Act," and has "found conduct to be violative of Section 8(a)(4) even where the conduct did not directly affect terms and conditions of employment." *Power Systems, Inc.*, 239 NLRB 445, 447-48 (1978), *enforcement denied on other grounds*, 601 F.2d 936 (7th Cir. 1979). *Cf. Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983) (NLRB may properly find, at least in certain circumstances, that a retaliatory, baseless lawsuit filed by an employer against an employee violated section 8(a)(4)). As section 7116(a)(4), like Section 8(a)(4), functions not only to protect employees directly but also to prevent interference with the statutory processes for implementing the purposes of the legislation, I recommend that the Authority apply section 7116(a)(4) to any act of discrimination that is motivated by those employee actions described in section 7116(a)(4) without respect to any connection between the agency's act and the employee's conditions of employment.

Once it is determined that the act that is alleged as discriminatory falls conceptually within either section 7116 (a)(2) or (4) of the Statute, the question of whether such an act has occurred must be resolved by employing the analytical framework set forth in *Letterkenny Army Depot*, 35 FLRA 113, 118 (1990) (*Letterkenny*). *See Department of Veterans Affairs Medical Center, Brockton and West Roxbury, Massachusetts*, 43 FLRA 780 (1991).

Under *Letterkenny*, a *prima facie* case of discrimination will be found if the General Counsel establishes two things. The first is that the employee against whom the alleged discriminatory act was taken was engaged in protected activity.[7] Where the allegation is that section 7116(a)(4) has been violated, of course, it is not sufficient that the employee has engaged in protected activity. The employee must have engaged in an activity within the narrower scope of activities described in section 7116(a)(4). The second essential element for a *prima facie* case is that it be established that "such activity was a motivating factor" in the action taken against the employee. If the General Counsel fails to make this showing, the case ends without further inquiry. *Letterkenny*, 35 FLRA at 118.

In *Letterkenny*, the Authority adopted the dictionary definition of *prima facie* case, with the accompanying explanation that focuses on the sufficiency of "plaintiff's evidence." *Id.* at 119. This, taken alone, might suggest that the Authority intended to consider the General Counsel's evidence alone in determining whether a *prima facie* case had been established. However, in the life of the law, to paraphrase Holmes' famous dictum, experience trumps logic. Thus, *in U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 37 FLRA 161, 172 (1990) (*SSA*) the Authority concluded that an agency's actions "were based on consideration of [the alleged discriminatee's] protected activity and, accordingly, the General Counsel has established a *prima facie* case that the Respondent violated section 7116(a)(2) of the Statute." In so concluding, the

[7] I have questioned the requirement that the alleged discriminatee have actually engaged in protected activity. Such a narrow reading of the basis of the discrimination would exempt retaliations against employees for their *suspected* activities or the activities or suspected activities of others. *Wright Line*, 251 NLRB 1083 (1980), employing what the Authority described in *Letterkenny*, 35 FLRA at 122, as "the same test" as the Authority's, does not so limit the scope of proscribed discrimination. *See F&E Erection Co.*, 292 NLRB 587 (1989).

Authority relied on "the absence of any other explanation for the Respondent's disparate treatment" of the alleged discriminatee. What such reliance suggests was made explicit in *Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 49 FLRA 1522, 1532 (1994), where the Authority concluded, "[o]n the basis of the entire record, . . . in agreement with the Judge [at 1558-59], that the General Counsel failed to establish a *prima facie* case . . . ."[8]

Thus, once a complete record has been made and all the evidence has been heard, it can be extraordinarily difficult to make sense of a complex issue like motivation by looking at it piecemeal. Here, for example, since I have determined that the issue, properly framed, is whether Respondent gave Colvin, because of his protected activities, a lower rating than it otherwise would have, I find it virtually impossible to assess Respondent's motivation without considering its explanation for the rating and the evidence supporting that explanation.[9]

C. Effect of Walker's Actions on Colvin's Conditions of Employment

1. Relationship between "appraisal factor" ratings and "overall" rating

As found in part I.A. of my findings of fact, an employee's overall rating is derived from his or her ratings on the "performance elements" on page 2 of the appraisal form. It is not apparent from the record exactly how these "performance elements" relate to the "appraisal factors" on page 1 of the form, or what is required, with respect to the "appraisal factors," to earn an "exceeded" rating on a "performance element." Moreover, although an overall rating of "excellent" requires an employee to have "exceeded" more than one-half of the "critical elements," the record does not identify the "critical elements," in Colvin's

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

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

appraisals, of which there appear to have been 4 in 1994-95 and 5 in 1995-96.

However, certain relationships can be deduced (at the usual risk of error). Colvin's overall rating of "excellent" for 1994-95 was based on his receipt of three "exceeded" ratings on "critical elements." These "exceeded" ratings, in turn, were related in some manner to superior ratings (8 or 9) on four different appraisal factors. Thus, Colvin's "exceeded" rating on critical element 1E had some connection with his rating of 8 on appraisal factor no. 6, "work productivity." His "exceeded" rating on critical element 2E had some connection with his rating of 8 on appraisal factor no. 7, "self-sufficiency," *and also* with his rating of 9 on appraisal factor no. 8, "skill in work." Colvin's final "exceeded" rating, on critical element 3E, had some connection with his rating of 9 on appraisal factor no. 3, "problem solving." (GC Exh. 3, ALJ Exhs. 1, 2.) On the basis of the connections I have thus formulated, and the absence of any other correlations with "exceeded" ratings, I deduce further that an employee can earn an "exceeded" rating on a critical element only by receiving a rating of at least 8 on the appraisal factors that are associated with that critical element, or, possibly, by achieving an average of at least 8 on all of the associated appraisal factors.10

For the 1995-96 appraisal year, Colvin "exceeded" on only two critical elements, resulting in an overall rating of "fully successful." His overall rating is the basis of the allegation in the complaint that Respondent violated sections 7116(a)(2) and (4), and, (derivatively) 7116(a)(1). There is some indication that certain critical elements, or their functional equivalents, were renumbered for 1995-96. For example, the critical element numbered 1E for 1995-96 is associated with appraisal factors nos. 7 and 8, as was element 2E for 1994-95, whereas 1E on the 1994-95 form is associated instead with factor no. 6, "work productivity." Thus, Colvin retained an "exceeded" rating on a critical element associated with both "self-sufficiency" and "skill

10 Although the appraisal form describes a rating of 7 as "above fully successful" and even a rating of 6 as "slightly above fully successful," I find these labels, viewed most charitably, to be meaningless. Less charitably, they are calculated to confuse, for they require either that the word, "above," be taken to mean something other than it normally means or that "fully successful" be taken to signify something different from what it signifies in the overall ratings. Thus a rating of "above fully successful" on every appraisal factor would appear to earn an overall rating of "fully successful."

in work" and lost an "exceeded" rating associated with "work productivity" and another associated with "problem solving," but *gained* an "exceeded" rating in the critical element numbered 3E on the 1995-96 form, which is associated with appraisal factor no. 2, "adaptability to work." (GC Exh. 3, 6.)

The "exceeded" rating thus gained can be attributed to Walker's awarding Colvin a rating of 8 for "adaptability to work" in 1995-96, compared to 7 in 1994-95. The two "exceeded" ratings that Colvin lost can be attributed to ratings of 7 in "problem solving" (down from 9) and 7 in "work productivity" (down from 8). The changes in appraisal factors nos. 4, 5, and 8 ("working relationships - 6 to 7, "communication" - 7 to 5, and "skill in work" - 9 to 8) had no detectable effect on Colvin's overall rating for 1995-96.

2. Connection with "conditions of employment"

As noted, the complaint's allegation of discrimination focuses on Colvin's overall rating. It does not mention his ratings on the "appraisal factors." Therefore, it is at least arguable that the evidence that may be considered with respect to the connection between the alleged discrimination and Colvin's conditions of employment is limited, on "due process" grounds, to the effect of Colvin's appraisal factor ratings on his overall rating. *See Bureau of Prisons, Office of Internal Affairs, Washington, D.C. and Phoenix, Arizona*, 52 FLRA 421, 431 (1996). Although the evidence presented at the hearing was directed at the appraisal factor ratings, there were only passing, oblique references to the relationship between those ratings and the overall ratings (Tr. 41, 46, 53, 68-69).

I conclude, based on my previous deductions, that in order to support an inference that Walker gave Colvin a lower overall rating because of his protected activities, the General Counsel must have shown that Colvin was presumptively entitled to a rating of at least 8 on one or more of the appraisal factors on which he received less than 8 *and* which would have been associated with a critical element.
For 1995-96, Colvin was rated at less than 8 on six of the nine appraisal factors, but there is nothing in the record to associate any of those factors with a critical element except, inferentially, nos. 3 and 6, "problem solving" and "work productivity," which I am able to associate with critical elements at least in 1994-95. It is the ratings on these two appraisal factors that must be addressed,

therefore, in order to determine whether there was discrimination in connection with Colvin's overall rating.

On the other hand, if the complaint, and the issue as litigated, is construed broadly enough to encompass any discrimination in the ratings having a connection to Colvin's conditions of employment, the analysis could be much simpler. An employee's "total score" on the appraisal factors is used "in competitive actions, e.g., promotion, reassignment . . . (ALJ Exh. 2). Such uses undisputably concern conditions of employment. Therefore, *each* of Colvin's appraisal factor ratings affected his conditions of employment. Because I have concluded, as explained below, that in neither event has a *prima facie* case of discrimination been established, I need not decide whether to construe the allegation narrowly or broadly. As for the alleged violation of section 7116(a)(4), a finding of a connection with conditions of employment is unnecessary for reasons previously set forth.[11]

D. A Prima Facie Case Has Not Been Established

Without more, an employee's protected activity, known to management, followed by his or her being placed in a position that is less favorable than it was in the past, does not warrant an inference of a causal relationship. Such a relationship must be proved (in the manner in which proof is understood in legal, not scientific, terms). *See U.S. Department of Justice, Federal Prison System, Federal Correctional Institution, Milan, Michigan*, 17 FLRA 1023, 1037 (1985). While a causal relationship may be established by either direct or circumstantial evidence, there must be *some* credible evidence to augment the mere confluence of the protected activity and the employee's treatment.

Counsel for the General Counsel cites the judge's *dictum* in *United States Department of Interior, Office of*

[11] I have seen fit to pass on this aspect of section 7116(a)(4) although it is only contingently necessary for the disposition of this case--that is--only if a reviewing authority determines that Colvin's filing of an unfair labor practice charge was a motivating factor in any rating that is properly in issue *and* that has not been shown to have affected Colvin's conditions of employment. Unlike the due process issue, resolution of which would be a more or less subjective and fact-specific exercise of judgment, I have found with respect to the interpretation of section 7116(a)(4) what I believe to be a principled basis for my conclusion. Moreover, this conclusion, if adopted, would have significance beyond the instant case.

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

Amen.

Counsel for the General Counsel does not, of course, rest by asserting such a "presumption." He argues that the existence of a *Letterkenny* motivation is supported by the animus implicit in Walker's (alleged) antiunion statements at the appraisal interview. However, I have not found Walker to have made any statements that may fairly be characterized as antiunion. Counsel for the General Counsel concedes that a supervisor is privileged to warn an employee during the appraisal year that he is suspected of abusing official time. On my credibility findings, and my analysis of the facts so found, I would characterize Walker's remarks in question as roughly equivalent to such a warning, noting, however, that it was given at the appraisal meeting rather than "during the appraisal year." The General Counsel attributes such significance to that difference that, as he argues, it establishes unlawful motivation. I disagree.

Walker's comments, to the extent that they suggested a possible link between Colvin's appraisal ratings and his use of duty time for union activity, focused on the amount of duty time that Walker perceived Colvin to have been spending away from the machines on which he was supposed to be working. Walker had mentioned this downtime to Colvin previously, and any reference to union business was in that context. It was not an adverse comment on union business as union business, only on the possibility that the time away from work was without permission, *i.e.*, without a request for official time.

Nor is there any other evidence that warrants the inference that either Walker or Maglothin had an antiunion attitude or that either took umbrage at Colvin's having challenged some of Walker's actions. Implicit in the previous analysis is that such attitudes cannot simply be presumed: supervisors sometimes react appropriately to opposition from their employees and sometimes do not. Moreover, Walker's initiative in explaining to Colvin and the other steward how to request official time tends to negate an antiunion attitude. Walker also exhibited helpful rather than resentful behavior when, shortly before the appraisal, Colvin filed a grievance over Walker's denying him the opportunity to work overtime. Walker did not question Colvin's decision to file a grievance but asked him to select a steward to represent him.

Although not specifically argued by the General Counsel, there is at least a superficially close connection in time between some of Colvin's protected activities, and events arising from them, and the July 1996 appraisal. However, the proximity in time between these events and the appraisal is insignificant where, as here, the timing of the annual appraisal was dictated by a prearranged requirement.

As the Authority, in *SSA*, relied on the absence of an explanation for the respondent's actions, I note here that Respondent did have an explanation both for Colvin's appraisal ratings *and* for the fact that some of them were lower than the previous year's ratings. Nor is there basis for finding that explanation to be pretextual. I have credited Walker and Maglothin to the effect that Maglothin had "input" into Colvin's 1995-96 ratings. While it is not clear whether Maglothin's contribution occurred before or after Walker had entered any ratings on the form, I conclude that the two agreed on the ratings and that Maglothin's agreement accorded, at least in general, with his observation of Colvin's performance.

Both Walker's and Maglothin's perception that Colvin's performance was not up to its previous level had at least some basis, as evidenced by Walker's credited testimony that he had told Colvin, during the appraisal year, that he should spend more time on the machine and less time talking. Walker credibly attributed the change in Colvin's overall rating to this downtime (Tr. 68-69). I also have credited Walker's and Maglothin's testimony that Colvin was reluctant to share information, about a program he had worked on, with the employee who took over those duties, and Walker's further testimony that he viewed Colvin's performance in "communication" as having suffered as a result.

Nor does the pattern of changes in the appraisals from 1994-95 to 1995-96 lend much support for an inference of discriminatory intent. Of the six 1995-96 factor ratings that were different from the previous year's, two were higher. These two included the rating of 8 for "adaptability to work," resulting in an "exceeded" rating on a critical element that Colvin had failed to achieve for 1994-95.

Also of some significance is the fact that Colvin, although he had the opportunity at the appraisal interview to question the lower rating he received in "problem solving," did not do so, and that, with regard to the lower rating in "work productivity," had no recollection of questioning it.
These were the only lowered ratings that, as far as is discernible from this record, could have affected his overall rating adversely. As Colvin was cognizant enough of the import of these ratings to refuse to sign the appraisal, his failure to address them, while questioning others, is entitled to at least some weight in determining whether there was discrimination in connection with his overall rating. With regard to his rating in "communication," which was lower (and affected his conditions of employment as all of his ratings did) but did not affect his overall rating, there is no credible evidence as to what discussion, if any, they had.

None of these facts, by themselves, necessarily precludes an inference that Colvin's protected activity was a "motivating factor." Together, however, along with the absence of recognized indicia of unlawful motivation, they tend to undermine the basis for such an inference, either as to the appraisal factors that affected Colvin's overall rating or as to any of the other appraisal factors. Thus I decline to draw such an inference. I conclude that the General Counsel has not established a *prima facie* case, under *Letterkenny*, whether the complaint is read narrowly to place in issue only actions that affected Colvin's overall rating or broadly to all effects of each of the appraisal factor ratings on his conditions of employment. Based on the same considerations, I conclude, independently, with respect to the allegation that Respondent violated section 7116(a)(4) of the Statute, that Colvin's filing of an unfair labor practice charge was not a motivating factor in any of the ratings he received, whether or not such ratings affected his conditions of employment. I shall therefore recommend that the allegations of discrimination under

sections 7116(a)(2) and (4) be dismissed.[12] Accordingly, I recommend that the Authority issue the following order.

ORDER

The complaint is dismissed.

Issued, Washington, DC, November 18, 1997.

_____
JESSE ETELSON
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that copies of this DECISION issued by JESSE ETELSON, Administrative Law Judge, in Case No. AT-CA-60907, were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT **CERTIFIED NOS:**

[12] The Authority has stated that it requires "a showing of disparate treatment of similarly situated employees in order to find a violation of section 7116(a)(2) or (b)(2)." *American Federation of Government Employees, AFL-CIO*, 51 FLRA 1427, 1439 n.11 (1996). I have previously searched for an appropriate method by which to apply that requirement. *U.S. Penitentiary, Leavenworth, Kansas*, Cases Nos. DE-CA-60026, *et al.* at 23-25 (Feb. 28, 1997). In my view, no such showing has been made in the instant case, but I find it unnecessary to decide whether, in the circumstances presented, it was a prerequisite to finding a violation.

Richard Jones, Esquire P600-695-786
Federal Labor Relations Authority
Marquis Two Tower, Suite 701
285 Peachtree Center Avenue
Atlanta, GA 30303

Brenda Mack, Esquire P600-695-787
WR-ALC-JAL
215 Page Road, Suite 186
Robins AFB, GA 31098

_____

Dated: November 18, 1997
Washington, DC