

UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE  Respondent	
and  AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2718, AFL-CIO  Charging Party	Case No. CH-CA-40010

NOTICE OF TRANSMITTAL OF DECISION

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

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

Any such exceptions must be filed on or before **FEBRUARY 21, 1995**, 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: January 19, 1995  
 Washington, DC

MEMORANDUM

DATE: January 19, 1995

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON  
Administrative Law Judge

SUBJECT: UNITED STATES DEPARTMENT OF  
JUSTICE, IMMIGRATION AND  
NATURALIZATION SERVICE

Respondent

and

Case No. CH-CA-40010

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 2718, 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**

UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE  Respondent	
and  AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2718, AFL-CIO  Charging Party	Case No. CH-CA-40010

Philip T. Roberts, Esquire  
For the General Counsel

Marian M. Luisi, Labor Relations Specialist  
For the Respondent

Rodolfo Medellin, President of the Charging Party

Before: JESSE ETELSON  
Administrative Law Judge

**DECISION**

The complaint in this case alleges that the Respondent (INS) violated sections 7116(a)(1), (2), and (4) of the Federal Service Labor-Management Relations Statute (the Statute) by denying to employee David Harding a Sustained Superior Performance cash award for which his supervisor recommended him, because of activities that Harding engaged in on behalf of the Charging Party (the Union). INS admits each allegation of the complaint except the allegations that it denied the award because of Harding's union activities and that it committed unfair labor practices.

A hearing was held on October 19 and 20, 1994, in Chicago, Illinois. Counsel for the General Counsel and for INS filed post-hearing briefs.

## Findings of Fact

David Harding became a full-time employee in the Chicago District Office of INS as a deportation officer in 1987. In November 1990 he was elected Executive Vice President of the Charging Party (the Union), the authorized local representative of the national bargaining representative of INS employees. In 1992 Harding filed a grievance concerning the rotation of employees to the U.S. Penitentiary at Terre Haute, Indiana. In July 1992 the Union filed an unfair labor practice charge alleging that INS ordered Harding on a detail to the Terre Haute facility as a disciplinary measure to restrain his union activities (G.C. Exh. 5). This charge resulted, on January 15, 1993, in a complaint issued by the Authority's Regional Director. (G.C. Exh. 6). The case was subsequently settled, between the INS and the Regional Director, without the Union's participation. The settlement included posting of a Notice to All Employees (G.C. Exh. 7).

In early 1993, Harding participated in the continuation of a lengthy negotiation concerning the assignment of overtime. Harding was one of three members of the Union's bargaining team, headed by Union President Rodolfo Medellin. At least at the later stages of these negotiations, Harding assumed a major role. Some of the discussions became heated, and Harding made some comments that exasperated members of the INS bargaining team, headed by Deputy District Director Brian Perryman. Perryman later told Medellin that he thought Harding had been disrespectful to INS bargaining team member Marian Luisi. Harding participated in other negotiations, and processed some grievances, in the spring of 1993.

On April 19, 1993, Harding received an "Outstanding" performance appraisal for the annual rating period ending March 31, 1993 (G.C. Exh. 2). The appraisal had been made by his immediate supervisor, Diana Rodriguez, and endorsed by Deputy Assistant Director Diane Esbrook, Rodriguez's supervisor. On May 5, Rodriguez forwarded a recommendation that Harding receive a Sustained Superior Performance cash award (G.C. Exh. 3). This recommendation was endorsed by Esbrook and her superior, Assistant District Director Roger Piper.

On April 30, Harding had sent to District Director Moyer a letter, signed by Harding as Union Executive Vice President, on behalf of unit employee Robert Reidell. The letter informed Moyer that Reidell had not received any response to a request he had made to two named supervisors for a review of his annual performance appraisal. The April 30 letter

requested that a response be given to Reidell within five days, and stated that "[i]f no response is given to Mr. Reidell, the Local will pursue all available remedies including the filing of an unfair labor practice complaint against Management and the filing of a formal grievance pursuant to the Agreement." (G.C Exh. 8). Moyer Responded to Harding in a letter dated May 10 (G.C. Exh. 9). The body of that letter follows:

Reference is made to your letter of April 30, 1993, regarding the performance appraisal of Special Agent Robert Reidell. Please be advised that Mr. Farris was on detail out of the District from April 18, 1993 until May 1, 1993. In fact, he was not in the District at the time you composed this insipid request.

Your use of such threatening language, when a simple check of the facts with Mr. Reidell's first line supervisor would have informed you of Mr. Farris' absence, is unprofessional and inconsistent with good labor management relations.

Mr. Farris will respond to Mr. Reidell's request shortly, when he has had an opportunity to review the facts.

This letter was signed by Moyer, although Deputy Director Perryman testified that it was prepared, at Perryman's direction, by the Mr. Farris named in the letter. Farris, the Assistant District Director for Investigations, was not one of supervisors named in Harding's letter as the recipients of Reidell's request for review. In fact, Harding's letter at least implicitly recognized Farris' absence. Thus, Michael Goldstein, a second-line supervisor, had been named in Harding's letter as the Acting Assistant Director for Investigations.

On May 25, Union President Medellin had a meeting with Deputy Director Perryman at which Perryman brought up Harding's April 30 letter to Moyer. Perryman complained about the letter's demeanor and its lack of respect for Moyer. Perryman explained to Medellin that he understood the use of the word, "insipid," in the May 10 response from Moyer, to be "extremely strong language back to the Union on a labor management issue," and that it reflected that management was "becoming very frustrated at the tone of the language, particularly of letters written by Mr. Harding on behalf of the Union." Medellin told Perryman that Harding was not the author of the April 30 letter but had signed it as the

Executive Vice President in the absence of Medellin, who had been away on a detail.

On May 27, a memorandum was issued over Moyer's signature forwarding to the Acting Regional Administrator a list of 47 employees approved by Moyer for performance awards (Resp. Exh. 4). This list represented the fiscal year 1993 approved recommendations for awards in the Chicago District. Harding's name was not on the list. It was Perryman's "understanding" that Harding was among 33 employees who received "outstanding" ratings but did not receive cash awards. However, Perryman did not know whether, aside from Harding, any employees who were rated "outstanding" **and** were recommended by their supervisors for awards did not receive them.

Before approving the list, Moyer had discussed some of the recommendations, including Harding's, with Perryman.<sup>1</sup> According to Perryman, Moyer questioned whether some of the nominees, including Harding, deserved awards. Perryman testified that Moyer stated that Harding's supervisors, Rodriguez, Esbrook, and Piper, had complained about Harding's "uncooperativeness in the performance of his duties as a deportation officer." Moyer also told Perryman that in a number of cases, including Harding's, the supervisors "didn't have the guts to rate some of [the employees granted 'outstanding' ratings] honestly." Perryman testified that he did not know why Moyer disapproved the award for Harding.

When Union President Medellin met with Perryman in May, he had asked Perryman to help him set up a meeting with Moyer, whom Medellin had never met in his capacity as Union president. Such a meeting occurred on June 24. Medellin and Moyer met in Moyer's office for over two hours. Toward the end, according to Medellin's uncontroverted and credited testimony, Moyer brought up the subject of David Harding. Moyer complained to Medellin that Harding was insolent in the demeanor in which he addressed Moyer. Moyer said he thought Harding had no respect for him. Medellin told Moyer that Harding had not written the April 30 letter. At that point, Moyer looked at his clock and ended the meeting by stating that he had another appointment.

As part of INS' case, Rodriguez and Esbrook, Harding's first and second-level supervisors, were called to deny certain conversations that Harding testified were reported to him by Rodriguez concerning management's concern with his union activities. However, neither Rodriguez nor Esbrook was asked to confirm the statement, attributed to Director Moyer

---

1

1/ Moyer's discussion of the recommendations with Perryman presumably occurred no later than May 18. Perryman testified that they also discussed whether Rachel Reidell should get an award. Moyer signed off on Reidell's award on May 18.

by Perryman, that they had complained about Harding's uncooperativeness in the performance of his duties as an employee.

Rodriguez testified credibly that she had noted on her original award recommendation for Harding that his work, which "he had performed in an outstanding manner," had not suffered "despite his involvement with the Union and time spent with the Union." Esbrook returned the recommendation to Rodriguez with instructions to omit the reference to union activities. The revised recommendation submitted on May 5 states that Harding is "highly productive and motivated" and that he "reviews all his cases well in advance and has kept the entire docket in a state of currency throughout this period." Rodriguez also testified, and it is uncontroverted, that in the appraisal year prior to the one in which she rated Harding "outstanding," his overall rating was "excellent," one step down in the five-level rating system.

Supervisory Special Agent Michael Goldstein, who is Chief of the District's Sanctions Unit and a second-line supervisor (although not in Harding's chain of command) testified about the criteria used in his unit for recommending cash awards. He testified credibly that, in his unit, the first-line supervisors "may elect not to write [an employee with an "outstanding" rating] up for cash because it's not a continuing effort on the part of the [employee]." Goldstein explained that employees who appears to work consistently at the "outstanding" level can be expected to continue to perform at that level, and that a cash award is "the only thing we can give them." Goldstein was under the impression that at least two employees from his unit had received "outstanding" ratings but had not been recommended for awards. He was not asked whether any award recommendations by his first-line supervisors were disapproved.

### **Discussion, Additional Findings, and Conclusions**

Section 7116(a)(2) of the Statute makes it an unfair labor practice for an agency "to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment." 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 this chapter." Filing of a **charge** with the Authority is considered the equivalent of filing one of the documents expressly protected under section 7116(a)(4). See *Department of Veterans Affairs Medical Center, Brockton and West Roxbury, Massachusetts*, 43 FLRA 780 (1991) (Brockton).

The familiar analytical framework for resolving cases of alleged section 7116(a)(2) discrimination, established by the Authority in *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*), was recently reaffirmed in *U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky*, 49 FLRA 1020 (1994) (*Frenchburg*), and need not be restated here. The *Letterkenny* analysis is also applicable to section 7116(a)(4) cases. *Brockton, supra*. Here, among the elements of a *prima facie* case of section 7116(a)(2) or (a)(4) discrimination, it is undisputed that Harding engaged in activity protected by each of these subsections and that a decision was made affecting a condition of his employment, namely, whether he should receive an award.<sup>2</sup> The decision not to grant him an award indisputably involved discrimination between Harding and those employees who received awards. The questions remaining concern whether it was lawful discrimination or discrimination based on Harding's protected activities.

I find that the General Counsel has established a *prima facie* case of discrimination under section 7116(a)(2). The record leaves little doubt that, during the time Director Moyer was reviewing the recommendation for Harding's award, he was upset about the manner in which Harding was exercising his right to engage in union activities, particularly his signature on and apparent authorship of the April 30 letter. Moyer signed the May 10 response to Harding, taking strong exception to "your letter of April 30," in which Harding, in the language of the response, "composed this insipid request." Perryman admitted to Medellin that management intended to respond with "very strong language" because it was "becoming very frustrated . . .," particularly at the tone "of letters written by Mr. Harding on behalf of the Union." Moyer himself complained to Medellin about the manner in which Harding addressed him. Medellin did not testify that Moyer explained specifically what he was talking about. However, Medellin's response to Moyer--informing him that Harding had not written the April 30 letter--shows that Medellin interpreted Moyer's remarks as referring at least in part to that letter.

---

2

Numerous Authority decisions have exhibited a recognition, albeit not explicitly, that the opportunity to earn a performance award is a condition of employment. See, e.g., *National Treasury Employees Union and U.S. Department of the Treasury, Customs Service, Washington, D.C.*, 46 FLRA 696, 774-75 (1992); *National Treasury Employees Union, Chapter 245 and Department of Commerce, Patent and Trademark Office*, 30 FLRA 1219 (1988); *Department of the Treasury, Internal Revenue Service, Wichita District, Wichita, Kansas*, 23 FLRA 674, 676 (1986).



It is reasonable to suppose that complaints Moyer made about Harding to the Union president related to Harding's conduct as a Union officer. There was no evidence about what other contacts, Harding had with Moyer. I conclude from all the circumstances, including Moyer's May 10 letter and Perryman's previous comments to Medellin about Harding's letters for the Union, that Medellin's interpretation of Moyer's complaint was correct.

Perryman's testimony about his discussion with Moyer about the recommendations for Harding and others persuades me that Moyer, despite testimony that he left matters of day-to-day operations to Perryman, did take an interest in employee awards. Moyer questioned the recommendations for several employees, but Perryman could think of no other recommendations that Moyer disapproved. INS made a point of the fact that other employees receiving "outstanding" ratings did not receive awards. However, Perryman's inability to state that any other recommendations for awards were disapproved, and the silence of all other INS witnesses on this point, leads me to infer that Moyer approved all of the recommendations except Harding's.<sup>3</sup> This different treatment of Harding, given Moyer's demonstrated annoyance at the way Harding expressed himself in the April 30 letter, amply supports the inference that this letter, perhaps in conjunction with other of Harding's union activities, played a motivating role in the decision to disapprove the award.

Even more difficult to ignore than INS' silence on the issue of disapproval of other award recommendations is its failure to present the only witness who could explain Director Moyer's decision to disapprove Harding's award, Moyer himself. Moyer was unavailable at the time of the hearing because of a medical emergency. In recognition of that emergency, I took what Counsel for the General Counsel accurately calls "the extraordinary step" of inviting INS to file a motion to reopen the record to permit him to testify. The opportunity thus presented was not exercised. INS argues that Moyer's testimony would have been irrelevant because the evidence does not link him with any allegation of discrimination. I simply cannot accept that characterization of the record, for, as found above, Moyer was clearly the responsible decision-maker, and his motivation is central to the case. I draw an adverse

---

3

I draw this inference also because the records that would show the facts directly are within INS' control and because INS raised the issue of disparate treatment by presenting evidence that other "outstanding" employees did not receive awards. I note also that Moyer received these recommendations only after they had been reviewed and approved by at least two supervisors in the chain of command of the initiating first-level supervisors.

inference from Moyer's failure to testify. That inference is that his truthful testimony would have supported a finding that at least some of Harding's union activities entered into Moyer's decision to disapprove the award recommendation. See *Bureau of Engraving and Printing*, 28 FLRA 796, 802 (1987). The result of applying this inference only strengthens the *prima facie* case.

INS makes an argument suggesting that reliance on Harding's sending the April 30 letter in denying him an award was justified. Thus, INS attacks the "absurdity" of Medellin's statements freeing Harding of responsibility for the letter, and attacks the letter itself as exhibiting on Harding's part a "bullheaded approach to the District Director, who had no prior knowledge of the matter" (Brief at 25). The argument goes on to decry Harding's "ham fisted approach," his reaction "much as a petulant child denied a toy." INS asks, "[B]y what authority does Mr. Harding impose time restraints on the District Director, under penalty of grievance and unfair labor practice charges?" (Brief at 26.) On these grounds, the April 30 letter is said to have caused the District Director to believe that Harding had no respect for him or his position.

These objections to the manner in which Harding conducted his union activities do not avail INS because, however such conduct may dismay management, it does not lose its protection under the Statute unless it was so outrageous or insubordinate as to constitute flagrant misconduct. *U.S. Department of the Air Force, Randolph Air Force Base, San Antonio, Texas*, 46 FLRA 978 (1992); *Department of the Navy, Naval Facilities Engineering Command, Western Division San Bruno, California*, 45 FLRA 138, 156 (1992) (*San Bruno*). I find nothing in Harding's conduct to remove his activities from the Statute's protection. The April 30 letter is a request for a response to an employee's request, together with a suggested response time and a statement, not extraordinary in such circumstances, that unless a response is received the Union "will pursue all available remedies" including those that INS found objectionable. The letter's tone is one of impatience with management's failure to respond to the original request. Whether this impatience was reasonable or not, this was not flagrant, outrageous, or insubordinate conduct. See *San Bruno* at 156-57. Moyer evidently took offense but, to the extent that he acted on a subjective belief that Harding had

overreached, he did so at the risk that the Authority would disagree.<sup>4</sup>

INS also argues that no antiunion motivation can be inferred because it treated other Union officials fairly, granting them promotions and, when appropriate, cash awards. I do not find any general antiunion animus here, only hostility to Harding because of what it perceived to be his style of advocacy. Nor does it matter whether the language in the April 30 letter is Harding's or not. Moyer thought it was, or at least held him responsible.

I conclude that Harding's union activity, his participation in the April 30 letter being the precipitating event, was a motivating factor in the disapproval of his award. On the other hand, I find an insufficiently developed link between Harding's filing of unfair labor practice charges and the disapproval to make a *prima facie* case of section 7116 (a)(4) discrimination. If such a link exists at all, it was so emphatically overshadowed by the link with Harding's other union activities, at least on the record presented here, that it is impossible for me to conclude that the section 7116(a)(4) activity was a motivating factor.

INS makes several points in rebuttal to the *prima facie* section 7116(a)(2) case. The first is that Moyer's disapproval of the award was based on reports he had received that Harding was an uncooperative deportation officer and on Moyer's belief that Harding's "outstanding" rating was not an honest appraisal of his performance. I have difficulty in crediting this defense because it relies exclusively on the testimony of Perryman, who did not make the decision and who testified that he did not know why Moyer made the decision. In order to credit the defense I would be required not only to credit Perryman's testimony that Moyer expressed these thoughts to Perryman, but also to accept the implication that Moyer **believed** these things. Moyer's failure to testify, and the consequent lack of opportunity to cross-examine him, makes such acceptance hazardous at best. Nor was the substance of

---

4

Some of INS' arguments focus on Harding's credibility and on his worthiness for the award. I have not found any of Harding's disputed testimony crucial to the outcome of this case. Therefore, the credibility of his version of certain incidents is not dispositive here. Moreover, the proper focus of this case is not whether Harding deserved the award but whether he would have received it but for his protected activities. It is irrelevant that granting of such awards is discretionary. Director Moyer was undoubtedly acting within his authority in disapproving the award. This case is concerned only with whether he exercised his discretion in a manner that is prohibited by the Statute.

the statements Perryman attributed to Moyer corroborated by the next-best available evidence, the testimony of those supervisors who supposedly had expressed their reservations about Harding. Finally, even if Moyer had been influenced by these other factors, I am not persuaded, especially without the benefit of his own explanation, that he would have taken the exceptional step of disapproving the recommendation were it not for the protected activity. I note especially that, according to Perryman, Harding's was not the only recommendation that Moyer questioned before making his decision. In no other case, however, did his reservations result in overruling all the supervisors who had sent the recommendation forward.<sup>5</sup>

INS also points to Goldstein's testimony that his unit operated under a practice where a single annual "outstanding" rating did not necessarily bring an award recommendation. INS reads too much into Goldstein's testimony. He did not say that a repeated "outstanding" rating was a requirement for an award recommendation, but only that "the first-line supervisor may elect not to" recommend an award to an "outstanding" employee who was rated neither "outstanding" nor "excellent" the previous year. Under such a practice (which may or may not have been applicable in Harding's unit) Harding probably would have been recommended for an award. Further, the practice that Goldstein described left to the first-line supervisor the discretion to recommend a first-time "outstanding" employee or not. Presumably, a recommendation that was out of line with existing District policy would have been disapproved by one of the recommending supervisor's superiors before it reached Moyer's level. In fact, at least one of Supervisor Rodriguez's superiors did review the Harding recommendation carefully enough to send it back for editing. I find no merit, therefore, in the argument that Moyer's disapproval was based on Harding's failure to show a multi-year pattern of "outstanding" performance. Nor does this failure, combined with the other factors presented in INS' defense, rebut the *prima facie* showing. I conclude, therefore, that INS violated section 7116(a)(2).

### **The Remedy**

---

5

I find no merit in INS' suggestion that Moyer also relied on a belief that Assistant Deputy Director Piper's endorsement of the recommendation did not reflect what Piper truly believed. The testimony cited by INS in this connection, concerning remarks Piper made to Harding, gives no indication that Moyer was aware of these remarks. Nor does this testimony corroborate Moyer's hearsay statement to Perryman that Piper complained to him about Harding's job performance. Piper did not testify.

In addition to the traditional make-whole remedy for such a violation, Counsel for the General Counsel requests some unusual remedial provisions, which I shall address shortly. With regard to the make-whole remedy, all of the Sustained Superior Performance cash awards sent forward by Moyer on May 27 were in the amount of \$500.00, and the General Counsel requests an order for an award in that amount. However, the available documentation for the Harding recommendation does not include an amount, and other, more complete documentation of \$500.00 awards made to other employees indicates that the underlying recommendations were for the "Maximum Cash Award" of \$500.00. I shall order that INS grant a cash award to Harding, in the amount originally recommended by Supervisor Rodriguez, not to exceed \$500.00, plus interest. In the unlikely event that there is a dispute about the amount of the original recommendation, resolution of such

dispute will require INS to show why the recommendation deviated from the otherwise consistent pattern.

The first of the General Counsel's specialized remedial requests is for an order requiring INS to submit award decisions in the next three rating cycles to some entity outside of the Chicago District Office for review. The reason behind the request is that, since the District Director was personally the "perpetrator" of the unfair labor practice, his signature on a traditional Notice to be posted for employees to read will not give the employees the necessary reassurance that their statutory rights will be recognized by their employer. The General Counsel notes that the District Director previously signed a traditional Notice, "to no apparent effect." The General Counsel also proposes a Notice to all Employees that recites the fact that the Authority has found that the District Director personally committed the unfair labor practice.

I do not share the General Counsel's view that the circumstances of this case warrant the novel remedies he has proposed. The traditional notice-posting remedy will require the District Director to sign a notice promising to refrain from the unfair labor practice found and from interference, restraint, or coercion of employees in any like or related manner. Whatever efficacy such notices usually have, there is no reason to presume that those to be posted here will be less efficacious. The District Director's signature, showing his undertaking on behalf of INS to refrain from certain conduct is at least arguably a stronger indication to employees that their rights will be respected here, where the Director is being compelled to renounce his **own** action, than where his signature was required as the highest-ranking official of the responsible agency.

The suggestion that the Director cannot be trusted to act lawfully in the future because he previously signed a Notice, "to no apparent effect," fails because the previous Notice that I believe is being referenced was signed **after** the disapproval of the award in this case. While, technically, the unfair labor practice has continued as long as the award was not granted, this is different from a situation in which there was a distinct action or omission in violation of the Statute after the Notice was signed.<sup>6</sup> Moreover, I may not treat the Director as a "repeat offender" on the basis of the settlement agreement pursuant to which he signed that Notice. The settlement agreement contained a non-admission clause. In any event, I have no reason to believe that the Director will give the Authority's order in this case less than the respect that the Statute demands.<sup>7</sup>

---

6

I imply here no statement as to whether this should be considered a continuing violation for the purpose of determining the applicability of section 7118(a)(4) of the Statute.

7

Having concluded that the General Counsel has not made an adequate showing of the need for requiring INS to have the District Director's award decisions reviewed by someone outside the Chicago District Office, I do not reach the question of whether such a provision is within the Authority's remedial powers under the Statute. *Cf. U.S. Department of the Air Force, Air Force Flight Test Center, Edwards Air Force Base, California and American Federation of Government Employees, Local 3854*, 48 FLRA 74, 89-90 (1993) (Arbitrator's remedy of requiring future work assignments to grievant to be subject to the approval of higher-level management interferes with management's statutory right to assign work.).

With respect to the General Counsel's request that the Notice recite the fact that the Authority found that Director Moyer engaged in the unlawful discrimination, the only argument that accompanies this request is that, since Moyer personally committed the unlawful action, the Notice must reflect his personal taking of responsibility for it. However, it has not been brought to my attention that the Authority has adopted the principle that the individuals directly responsible for unfair labor practices should have their identities held out for display. The Director is entitled to no greater or less consideration than any other responsible official with respect to the legal consequences of his actions. *Cf. Exodus 23:2* (You shall neither side with the mighty to do wrong . . . nor shall you favor a poor man in his cause.). Such a remedy might be appropriate where there is a either a pattern of misconduct or a particularly egregious violation. I shall not recommend it here.

There may be, lurking in the General Counsel's request for such an attenuated *mea culpa* in the Notice, the argument that notices should state that the Authority has found there was a violation of the Statute. Inclusion of such language is the routine practice of the National Labor Relations Board, but not of the Authority. Whether the Authority should adopt the Board's practice is a policy question best directed to it.

I recommend that the Authority issue the following order:

#### **ORDER**

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, the U.S. Department of Justice, Immigration and Naturalization Service, shall:

1. Cease and desist from:

(a) Discriminating against employees by disapproving recommendations that they receive Sustained Superior Performance cash awards because they engaged in protected activities on behalf of the American Federation of Government Employees, Local 2718, AFL-CIO, the agent of the exclusive representative of its employees.

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

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

(a) Make whole employee David Harding by granting him the Sustained Superior Performance cash award recommended by his supervisor, not to exceed \$500.00, with interest for the period in which his award was improperly denied.

(b) Post at its facilities in Chicago, Illinois, 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 District Director of the Chicago District Office, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulation, notify the Regional Director, Chicago Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply.

Issued, Washington, D.C., January 19, 1995.

---

JESSE ETELSON  
Administrative Law Judge

**NOTICE TO ALL EMPLOYEES**

**AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY**

**AND TO EFFECTUATE THE POLICIES OF THE**

**FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE**

**WE HEREBY NOTIFY OUR EMPLOYEES THAT:**

WE WILL NOT discriminate against employees by disapproving recommendations that they receive Sustained Superior Performance cash awards because they engaged in protected activities on behalf of American Federation of Government



Employees, Local 2718, AFL-CIO, the agent of the exclusive representative of our employees.

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

WE WILL make whole employee David Harding by granting him the Sustained Superior Performance cash award recommended by his supervisor, not to exceed \$500.00, with interest for the period in which his award was improperly denied.

(Agency or Activity)

Date:

By:

(Signature)

(Title)

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Chicago Region, 55 West Monroe, Suite 1150, Chicago, IL 60603-9729, and whose telephone number is: (312) 353-6306.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by JESSE ETELSON, Administrative Law Judge, in Case No. CH-CA-40010, were sent to the following parties in the manner indicated:

**CERTIFIED MAIL:**

Philip T. Roberts, Esquire  
Federal Labor Relations Authority  
55 West Monroe, Suite 1150  
Chicago, IL 60603

Marian M. Luisi  
Immigration and Naturalization  
Service  
Whipple Federal Building, Room 400  
1 Federal Drive  
Fort Snelling, MN 55111-4007

Rodolfo Medellin, President  
American Federation of Government  
Employees, Local 2718  
P.O. Box A3536  
Chicago, IL 60690-3977

**REGULAR MAIL:**

A.D. Moyer, District Director  
U.S. Immigration and Naturalization  
Service, District Office  
10 West Jackson Boulevard  
Chicago, IL 60604

National President  
American Federation of Government  
Employees, AFL-CIO  
80 F Street, NW  
Washington, DC 20001

Dated: January 19, 1995  
Washington, DC