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

DEPARTMENT OF THE AIR FORCE AEROSPACE MAINTENANCE AND REGENERATION CENTER DAVIS MONTHAN AIR FORCE BASE TUCSON, ARIZONA Respondent	
and JOHN PENNINGTON Charging Party	Case No. DE-CA-01-0276

NOTICE OF TRANSMITTAL OF DECISION

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

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

Any such exceptions must be filed on or before **SEPTEMBER 16, 2002**, and addressed to:

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

ELI NASH

Chief Administrative Law Judge

Dated: August 15, 2002
Washington, DC

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

MEMORANDUM DATE: August 15, 2002

TO: The Federal Labor Relations Authority

FROM: ELI NASH
CHIEF ADMINISTRATIVE LAW JUDGE

SUBJECT: DEPARTMENT OF THE AIR FORCE
AEROSPACE MAINTENANCE AND
REGENERATION CENTER
DAVIS MONTHAN AIR FORCE BASE
TUCSON, ARIZONA

Respondent

and Case No. DE-CA-01-0276

JOHN PENNINGTON

Charging Party

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

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ

02-54

WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE AEROSPACE MAINTENANCE AND REGENERATION CENTER DAVIS MONTHAN AIR FORCE BASE TUCSON, ARIZONA Respondent	
and JOHN PENNINGTON Charging Party	Case No. DE-CA-01-0276

Nadia N. Khan, Esquire
For the General Counsel

Major Susan D. K. Jobe
John Burhenn, Esquire
For the Respondent

Before: ELI NASH
Chief Administrative Law Judge

DECISION

Statement of The Case

This proceeding arose under the Federal Service Labor-Management Relations Statute (herein called the Statute), 5 U.S.C. §§ 7101-7135, and the Rules and Regulations of the Authority, 5 C.F.R. §§ 2411-2473. The proceeding was initiated by an unfair labor practice charge filed on January 5, 2001 and amended on May 10, 2001 and June 18, 2001, respectively, against the Department of the Air Force, Aerospace Maintenance and Regeneration Center, Davis-Monthan Air Force Base, Tucson, Arizona (herein called the Respondent or Agency), by John Pennington (herein called Pennington or the Charging Party). The Complaint alleges that Respondent violated section 7116(a)(1) and (2) of the

Statute by issuing bargaining unit employee, Pennington, a Notice of Reprimand, dated September 21, 2000, for walking out of a meeting where the discussion during the meeting constituted protected activity.

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

Findings of Fact

The Respondent or Agency, is an activity and/or component of the Department of the Air Force. The Department of the Air Force is an agency as defined in 5 U.S.C. § 7103(a)(3). The American Federation of Government Employees, Local 2924 (herein called the Union), is a labor organization as defined in 5 U.S.C. § 7103(a)(4) and is the exclusive representative of a unit of employees appropriate for collective bargaining at Respondent's facility. The Union and Respondent are parties to a labor-management relations agreement (contract) effective December 4, 1998.

A. John Pennington's work environment.

At all times pertinent to this case, Pennington has been employed as an Aircraft Mechanic at the Aerospace Maintenance and Regeneration Center (AMARC), Tucson, Arizona. For the past two years, Pennington has also been a member of the Union. At the time of the events giving rise to this case, Pennington was assigned to the flight line (referred to as LARB) under the supervision of James Otten, Aircraft Mechanic Supervisor. The flight line consisted of approximately 21 employees, who along with Otten, were responsible for restoring airplanes. As an Aircraft Mechanic, Pennington's duties included the maintenance, overhaul, repair, and overall servicing of the aircrafts on the flight line and in the hangar. His duties did not involve any interaction with the public. As a result, according to the testimony of Otten and Pennington, it was a common practice for employees to use profanity with each other. The evidence, however, was disputed regarding the use of profanity with and/or by supervisors. While Pennington testified that it was also a common practice for supervisors to use profanity, Otten testified that *he* did not use profanity and Michael Hamblin, Labor Relations Liaison and former Union representative, testified that it

was not common for employees to use profanity and aggressive terms with their supervisors *in formal settings*.[1] The fact that Otten does not use profanity is not relevant to this case. Based on the record testimony, it can only be found that both supervisors (Otten aside) and employees commonly use profanity in their work setting.

B. Pennington issued a Letter of Counseling.

Sometime in January 2000, in preparation for an Inspector General (IG) inspection, Respondent, through its Quality Assurance Department, conducted a task evaluation of the various work teams in order to determine compliance with applicable procedures. On January 21, 2000, Jack Kruger, Quality Assurance Specialist, conducted a task evaluation of the flight line where Pennington was assigned. It was reported to Otten that Pennington made a comment during the evaluation. Thus, on January 24, 2000, Otten met with Pennington and showed him the Quality Assurance (QA) Task Evaluation prepared by Kruger which reflected the comment Pennington allegedly made during the evaluation. The meeting ended shortly after Pennington denied making the statement and informed Otten that he needed union representation.

A couple of days later, Pennington was called into another meeting with Otten. The Union President at that time, David Hubble, was also present. During this meeting, Otten issued Pennington a letter of counseling, dated January 26, 2000, for unprofessional behavior and attitude based on his conduct during the QA Task Evaluation and in spite of Pennington's denial that he made the comment. A Letter of Counseling remains in an employee's record for up to one year. After the meeting, Pennington spoke to Hubble who informed him that he would investigate the matter.

Over the next few months, Pennington met with various management representatives in an attempt to have the letter of counseling rescinded. Pennington had several meetings with Pat Malloy, 3rd Level Supervisor, George Rodriguez, Personnel Specialist, and finally, then Commander Reed Roberts. Commander Roberts told Pennington that the letter of counseling was "water under the bridge" which Pennington assumed meant that the letter would be pulled from his personnel files. When the letter of counseling remained in

[1] At the time of the hearing, Hamblin was employed as a Labor Relations Liaison for Respondent - a position he obtained in April 2001. Prior to that, he was an Aircraft Scheduling Assistant and had also served as a union representative for approximately one year and four months.

his files, Pennington scheduled another meeting with Commander Roberts. During this meeting, in the presence of two other supervisors, Pennington was again told that the matter was "water under the bridge."

When the letter of counseling remained in Pennington's file until September 6, 2000, Pennington met with then Chief Steward Hamblin concerning the letter of counseling as well as his efforts to have the letter rescinded. Pennington also discussed with Hamblin his belief that Otten was maintaining reports about his conduct (supervisory notes) without his knowledge and that he wanted to have the reports removed from his and any other files that were being maintained.[2] Although not mentioned by Pennington, Hamblin testified that Pennington also raised concerns about whether a supervisor had the authority to delegate authority. Pennington informed Hamblin that he wanted to file a grievance alleging harassment and wanted Hamblin to serve as his union representative. Pennington testified that he specifically asked to file a grievance because he recalled that Hamblin stated that the charges would be hard to prove. Pennington then completed a designation of representation form identifying Hamblin as his Union representative.

Hamblin scheduled a meeting with Pennington's supervisor, Otten, to discuss the issues raised by Pennington on September 8, 2000. Pennington was not made aware of this meeting. During the meeting, Otten and Hamblin discussed the letter of counseling issued to Pennington and the circumstances surrounding its issuance. Hamblin obtained Otten's agreement to remove the letter of counseling from Pennington's file since it was issued in January 2000 and he felt that it had served its purpose.[3] Next, Hamblin and Otten discussed Otten's practice of delegating authority to employees and his practice of maintaining supervisory notes.[4] Regarding the latter issue,

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[2] Pennington testified that during his meeting with Commander Roberts in July 2000, Commander Roberts referred to some papers/reports while asking him about an incident. The incident was one that he was not aware of since it was never brought to his attention by management.

[3] Hamblin testified that Otten agreed to remove the letter of counseling prior to its expiration date; however, no date was established. Otten testified that, based on his discussion with Hamblin, he agreed to remove the letter of counseling in December 2000, which he subsequently did.

[4] Supervisory notes are memory joggers reflecting the conduct of employees which is observed by a supervisor.

Hamblin verified that Otten maintained supervisory notes for all employees, not just Pennington, which he found acceptable. After their discussion, Hamblin requested, and Otten agreed, to a meeting with Pennington and Hamblin to answer Pennington's questions. The meeting between these two lasted approximately 30 minutes.

C. Pennington, Hamblin, and Otten meet to discuss Pennington's concerns.

Pennington testified that on September 8, 2000, Hamblin informed him that he had scheduled a meeting with Otten for later that afternoon. Pennington testified that at that time, he asked Hamblin to review the AF Form 971 of other employees under Otten's supervision to determine whether any of them had been disciplined. AF Form 971 "Supervisor's Record of Employee" is a standard form that is maintained by supervisors for each employee. Hamblin, on the other hand, recalled that Pennington asked him whether Otten was maintaining files on other employees. In any event, later that day, Hamblin, in his capacity as Chief Steward, returned to accompany Pennington to the meeting with Otten. Since Otten's office was being redecorated, Otten, Pennington, and Hamblin proceeded to a picnic bench outside of Otten's office. No one else was in the vicinity. The accounts of what took place next varied among the witnesses at the hearing. In view of the inconsistencies contained in the testimony of Respondent's witnesses I credit Pennington.

Pennington testified that once seated and in the presence of Otten, he inquired of Hamblin whether he had reviewed the AF Form 971 of other employees under Otten's supervision. Hamblin told Pennington that he had not reviewed the files, but that Otten told him that there were no entries in any other employees' files. Pennington nevertheless asked Hamblin to review the files so that Hamblin could verify the information provided by Otten. Pennington then told Otten that he needed to pull the letter of counseling because he did not make the comment which was the basis for the counseling. In response, Hamblin stated, "You know, John, there's work that needs to be done here." Pennington testified that based on Hamblin's statement, he did not feel that he was being properly represented so he responded in a calm and controlled voice, "Okay, that's it, I've heard enough," then looked at Otten and at Hamblin, stood up, and left the picnic table. Indeed, Hamblin admits that even though he was Pennington's union representative, he was not going to try to convince Otten to change his way of doing business regarding the maintenance of supervisory notes or his practice of delegating authority. Neither Otten

nor Hamblin said anything further. Pennington emphatically denied using profanity during the meeting. The entire meeting lasted about five (5) minutes.

Hamblin testified that he informed Pennington that he and Otten came to an agreement to remove the letter of counseling. They then proceeded to discuss Otten's practices of delegating authority and maintaining supervisory notes. Although Hamblin testified that Pennington did not use any profanity or aggressive terms during the meeting Hamblin claims, however, that the meeting ended when Pennington stood up and said, "I've heard enough of this crap, I'm out of here" and/or "I've heard enough," and abruptly left. But, Hamblin conceded that it was fair to say that Pennington could have said "I've had enough, that's it. I'm out of here."

Otten said that he informed Pennington that he had discussed the issues with Hamblin and had agreed to pull the letter of counseling. Otten claims that Pennington did not react. Then, Otten informed Pennington that Hamblin agreed that he had the right to take supervisory notes and delegate authority. Otten admitted that his relationship with Pennington was difficult and challenging because Pennington was always raising various issues. Regarding the delegation of authority issue, Otten says that Pennington did not agree with him so he decided to seek union representation. Otten claimed that while using his finger to tap or pound on the table, Pennington allegedly responded, "Nobody has that right. You don't have that right. Nobody does. And you can't keep supervisory notes." Otten testified that they continued to discuss the issues, but the meeting ended abruptly when Pennington realized that he was not going to convince them to change the decision. Otten claimed that while Hamblin was making his presentation, Pennington stated, "That's it," then stood up and as he was walking toward the door to the hangar which was approximately 6 yards away said, "Enough of this shit," or "I've heard enough of this shit." Otten testified that he was surprised when Pennington left and noted that Pennington didn't even say thanks for pulling the letter of counseling. Otten's testimony with regard to how Pennington left the meeting is certainly not consistent with the testimony of Hamblin, Respondent's witness. Furthermore, the reference to Pennington's "shit" admittedly occurred sometime later.

Otten contends that there has to be some level of respect maintained between employees and supervisors and employees and union officials who are trying to represent employees. He acknowledged that an employee has avenues to pursue issues, but stated that an employee doesn't have the "right to act or behave or just up and cut and run because

he doesn't like what's being said or what's being discussed." When questioned regarding the appropriate manner for terminating a meeting, Otten testified that the employee could have said, "I don't agree with this meeting. I'd like to end it and pursue at another level" or, "Well, I disagree with you guys, but thanks for your time and I'm going to pursue it to another level or whatever." Otten further testified that he did not think that the way Pennington ended the meeting was right or appropriate.

Regarding the demeanor of the participants during the meeting, Pennington testified that he used a normal speaking voice while Otten and Hamblin claimed that he was agitated and hostile. With respect to Hamblin and Otten's demeanor, the evidence indicated that they both used normal voices.

D. Notice of reprimand-based conduct during the September 8, 2000, meeting.

On September 13, 2000, Pennington was orally notified by Otten that he was being given a proposed letter of a reprimand based on his conduct during the September 8, 2000, meeting and that he had five (5) days to respond to the proposal. Pennington was asked to sign his AF Form 971 which contained a notation that the proposal was for "discourteous conduct during a meeting with the union rep. and I."[5] Pennington responded by stating, "J.O., you know I don't sign shit like that, just give me the letter." During the hearing, Pennington testified that he made the statement to Otten because he thought that signing the AF Form 971 was an admission of wrongdoing. Pennington then spoke to Cecilia Stutz, President of the Union,[6] who told him to prepare a response to the proposed letter of reprimand.

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According to Otten's testimony, he had two conversations with Pennington. During the first conversation, he notified Pennington of the proposed letter of reprimand. The following day, Otten testified that he asked Pennington to sign the AF Form 971 to acknowledge that he was notified of the proposal.

6
Cecilia Stutz replaced David Hubbell as President of the Union.

On September 21, 2000, Otten issued Pennington a Notice of Reprimand for discourteous conduct.[7] The letter stated that Otten had decided that Pennington should be reprimanded. It read as follows:

> 2. Specifically, on 8 September 2000, I received a call from Union representative, Mike Hamblin. He stated that you had some concerns you wanted to discuss with me. I agreed to meet with you and Mr. Hamblin to discuss the issues. We started to discuss some items you were concerned about. *While Mr. Hamblin was trying to explain some things to you, you stated "That's it!" and turned around and walked out of the meeting*. I consider your actions very unprofessional and discourteous to your own union representative and myself. (Emphasis added)
>
> 3. I am seriously concerned about the nature of this misconduct because we have discussed this type of behavior in the past. You need to be aware that another offense could result in a more severe disciplinary action, up to, and including, removal.

E. Respondent's reasons for issuing the notice of reprimand.

Otten testified that in making the decision to issue the notice of reprimand for discourteous conduct, he considered the following factors: 1) Pennington's demeanor and statements during the meeting; 2) Pennington's previous counseling for attitude and behavior; 3) Stutz' statement that she had encountered a problem with Pennington;[8] 4) the Douglas Factors outlined in Air Force Instruction (AFI) 36-704 and as it relates to compliance with the Joint Statement on Violence and Behavior in the Workplace; 5) input from the Labor Relations Specialist as to the appropriate course of action; and, 6) Pennington's statement when he was given the proposed letter of reprimand to the effect that he didn't sign shit like that. Otten, however, did not rely upon any supervisory notes in making his decision.

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[7] The notice of reprimand was noted in Pennington's AF Form 971 and copies were placed in his Official Personnel Folder (OPF) and Employee Work Folder for two years from the date of the reprimand.

[8] Otten had no personal knowledge of Pennington's conduct.

Otten testified that during his 13 years as a supervisor, he attended several supervisory training programs. He further testified that, consistent with Article 28 (Discipline and Adverse Actions) of the contract, the primary objective of disciplinary action is to correct behavior patterns of employees and not to punish employees. Consistent with this objective and also in compliance with AFI 36-704, Otten testified that it was important to notify employees of the specific charges or reasons upon which a disciplinary action is based. Despite the importance of these requirements, Otten's only explanation for not including Pennington's alleged statement during the September 8, 2000 meeting to the effect of, "Enough of this shit" or "I've heard enough of this shit," in the notice of reprimand was that he was exercising "compassion" and he did not feel that the reprimand was the place to put such language.

During his testimony, Otten also failed to provide an explanation as too why factors he claimed were considered in making the decision to issue the reprimand during the hearing were not reflected in any of the contemporaneous documents he created or in the affidavit he provided to the Authority during the investigation of this case. On cross-examination, Otten admitted that in his May 21, 2001 affidavit, which was provided during the investigation of this case, he stated only that:

> The reprimand was necessary because of Mr. Pennington's unprofessional and discourteous conduct on September 8, 2000. Basically on that date Mr. Pennington asked me to meet with him and his union representative. I agreed to the meeting. However, during the meeting Mr. Pennington interrupted the union representative and walked out.

Otten also acknowledged that the memorandum he created to document the proposal of disciplinary action simply stated that, "Mr. Hamblin was trying to explain to Mr. Pennington. It wasn't what Mr. Pennington wanted to hear. He then got up and stated, 'That's it' and walked off." Another document created by Otten on September 13, 2000, was his supervisory notes. There, Otten only stated that, "I notified Mr. Pennington orally of the proposed letter of reprimand for discourteous conduct during a union meeting on Friday, September 8th." Lastly, Otten also acknowledged that Pennington's AF Form 971 made no reference to the factors he claimed were considered in making the decision to issue the reprimand.

F. Respondents' claim that Pennington had been counseled several times for attitude and behavior.

Pennington testified that aside from receiving the letter of counseling in January 2000, he was never the recipient of any counseling or other disciplinary action. In contrast to Pennington's consistent and specific recollection, Otten claimed that he "unofficially" counseled or had discussions with Pennington on three or four occasions regarding his attitude and behavior. Otten stated that he spoke to Pennington regarding some issues that the work leader raised and was able to reach a resolution to the satisfaction of the work leader. Otten also maintained that he spoke to Pennington regarding his right to delegate authority to the work leader, including the work leader's authority to delegate authority to a member of the crew in his/her absence. These "unofficial" counseling apparently was never documented. Otten acknowledged the requirements of Article 28 (Discipline and Adverse Actions), Section 2 of the parties' contract which addresses counseling of employees. It provides, in part, that "[w]hen a discussion is held regarding an incident which may result in subsequent disciplinary action, a record annotation will be made and the supervisor will advise the employee that an entry is being made on his/her AF Form 971, 'Supervisor's Record of Employee.'"

With respect to official counseling, Otten acknowledged that the first time he officially counseled Pennington was in January 2000, regarding the QA Task Evaluation. Otten asserted that Pennington had been officially counseled more than once, but that the references to the counseling were removed from Pennington's records once they expired. Otten admitted that when the time period for maintaining a counseling expires, it is removed from the AF Form 971 and is no longer relied upon for further action and that the only counseling that remained in Pennington's record at the time he made the decision to issue the reprimand was the counseling in January 2000.

G. Air Force Instruction 36-704.

Regarding AFI 36-704, Otten testified that he applied the factors outlined in Section 32.2 for determining an appropriate penalty. Otten testified that of particular importance was section 32.2.4, which considers: "The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability." He also testified that section 32.2.9, was important. It considers: "The clarity with which the employee was on notice of any rules that were

violated in committing the offense, or had been warned about the conduct in question." Otten testified that he also referred to the Table of Penalties contained in AFI 36-704. Specifically, item 18 which states: "Discourteous conduct. Includes discourteous conduct to the public" and recommends a reprimand to 5-day suspension for a first offense.

H. Joint Statement on Violence and Behavior in the Workplace.

Otten stated that Pennington's conduct during the September 8, 2000 meeting violated the Joint Statement on Violence and Behavior in the Workplace (Workplace Violence Policy), although the policy was not specifically cited in the notice of reprimand as it had been in other disciplinary actions where the basis of the disciplinary action included a breach of the policy. The Workplace Violence Policy outlined the Air Force's policy regarding workplace violence.

The Workplace Violence Policy makes no mention of the use of profanity or discourteous conduct. In an attempt to show that it has enforced the policy, Respondent offered examples of disciplinary actions issued to other employees. Further, Otten testified that after Pennington received the letter of reprimand another employee was issued a letter of reprimand for the same or similar type of behavior. This particular reprimand was not introduced into evidence and the only record of the reprimand was Otten's testimony that an employee was disciplined for stating, during a discussion regarding a loan, "This place is screwed up and you're half the damn problem" and in response to Otten's request to come back, "you want to talk to me, you get me a union rep." There is no evidence showing that this particular employee was engaged in a grievance meeting or any other protected activity. It is noted that six of the sample disciplinary actions introduced by Respondent were issued *after* the letter of reprimand was issued to Pennington. Furthermore, none of the disciplinary actions introduced by Respondent involved a situation where an employee was disciplined for conduct that occurred during a grievance meeting and/or a meeting with a union representative. Finally, only three of the disciplinary actions specifically cited a breach of the Workplace Violence Policy and all were factually distinguishable from Pennington's situation. For example, in October 1998, Respondent issued an employee a letter of reprimand for stating, "I told Col Flyer if I had a gun, I'd kill Lt Col Franklin" which was found to be a breach of the policy. More recently, in March/April 2000, Respondent issued an employee a proposed five-day suspension which was

reduced to a one day suspension for using racial slurs which found to be a breach of the policy. These situations appear to be quite different from Pennington's reprimand and provide little assistance in resolving this matter.

I. Relevant provisions of the collective bargaining agreement between Respondent and the Union.

Article 30 of the parties' contract contains the negotiated grievance procedure. Article 30, Section 2(a) provides the definition of a grievance. It states:

> "A grievance is defined to be any complaint by any employee, the Union, or the Employer concerning:
>
> (1) Any matter relating to the employment of an employee, except as excluded below.[9]
>
> (2) Any claimed violation, misinterpretation, or misapplication of this Agreement, or any supplement to this Agreement, or any law, rule, or regulation affecting conditions of employment."

Also relevant to this case is Article 30, Section 6 which provides, in part, that:

> [m]ost grievances can be settled promptly and satisfactorily on an informal basis at the immediate supervisory level. The Employer and the Union agree that every effort will be made by management and the aggrieved party(s) to settle grievances at the lowest possible level.

Barry Gatcomb, current President of the Union, confirmed during his testimony that the grievance procedure allows employees to pursue informal grievances.[10] Gatcomb testified that employees may approach management or Union representatives regarding any concerns they may have.

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[9] Article 30, Section 2(b) excludes certain matters, not relevant to this case, from being pursued through the negotiated grievance procedure.

[10] Hamblin initially testified that he was not familiar with an informal grievance procedure. He later testified, however, that it was always best to resolve issues informally before it gets to a formal grievance.

Article 30, Section 7 of the agreement is also relevant. It describes the steps for pursuing a grievance. In particular, Section 7, Step 1 provides, in part, that:

> [a]ny grievance shall first be taken up orally or in writing by the concerned employee (and representative or steward, if he/she elects to have one) with the immediate supervisor or the lowest level of management official with authority to render a decision. Grievants will designate their representatives in writing. Grievances must be presented within 15 working days from the date the employee or the Union became aware of the grievance. . . .[11]
>
> Prior to entering the formal process, either party may request that Alternative Dispute Resolution (ADR) techniques, such as mediation, facilitation, and settlement conferences, be utilized to resolve the dispute.

Gatcomb testified that based on his four to five years of experience as a Union official, the Union's practice in complying with the designation requirements of Article 30, Section 7, is to require an employee who seeks Union representation regarding a problem to sign a representation form which identifies the employee's Union representative. According to Gatcomb, the designation form provides notice to management that the employee is represented by the Union.

Hamblin claims that the September 8, 2000 meeting did not pertain to a grievance because a grievance over the issues raised by Pennington would have been untimely. Hamblin, however, acknowledged that the items being pursued by Pennington were not excluded from the definition of a grievance or from being pursued under the negotiated grievance procedure. Hamblin also acknowledged that he scheduled the meeting, was acting as Pennington's union representative, and that the meeting was for the purpose of discussing some concerns that Pennington had with his working conditions. Furthermore, Hamblin admits that he was able to reach an agreement regarding the letter of counseling where Pennington and others had been unable to do so.

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[11] Fifteen (15) workdays was the standard policy for filing a grievances in most matters.

Another relevant provision of the agreement is Article 2 which is entitled "Employee Rights." Specifically, Article 2, Section 5 provides that:

> [t]his Agreement does not preclude any employee, regardless of employee organization membership, from bringing matters of personal concern to the attention of appropriate officials in accordance with applicable law, rule, regulation, or Air Force policy, or from choosing his/her own representative in a grievance or appeal action, except as provided in the negotiated grievance procedure.

According to the evidence adduced during the hearing, Section 5 allows employees to raise any concern they have with representatives of management, including safety concerns and concerns regarding counselings or reprimands issued to employees. While the agreement allows an employee to act on his/her own behalf, it does not preclude the employee from proceeding with the Union's assistance. Although Pennington did not refer to Article 2 in his testimony, he testified that it was his understanding that he could pursue issues up the chain of command, including up to the Commander.

Discussion and Conclusions

A. Analytical framework.

The analytical framework used in resolving complaints of alleged discrimination in violation of section 7116(a)(1) and (2) of the Statute places on the General Counsel the overall burden of establishing by a preponderance of the evidence that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, promotion, or other conditions of employment. See, Letterkenny Army Depot, 35 FLRA 113 (1990) (Letterkenny); Department of the Air Force, Warner Robins Air Logistics Center, Warner Robins Air Force Base, Georgia, 52 FLRA 602, 605 (1996).

Where the General Counsel establishes a *prima facie* case, the burden shifts to the agency. The agency has the burden to establish by a preponderance of the evidence, as an affirmative defense, that: (1) there was a legitimate justification for its action; and (2) the same action would have been taken even in the absence of protected activity. See, Letterkenny, 35 FLRA 113; see also, Indian Health

Service, Crow Hospital, Crow Agency, Montana, 57 FLRA No. 32 (57 FLRA 109) (2001). When the alleged discrimination concerns discipline for conduct occurring when the employee was engaged in protected activity, a necessary part of the agency's defense is that the conduct constitutes flagrant misconduct. See, United States Department of Energy Oak Ridge, Tennessee, 57 FLRA No. 69 (57 FLRA 343) (2001) (Oak Ridge). While Oak Ridge, involved the conduct of a union representative, as is the case in nearly all of the recent cases where flagrant misconduct is examined, in Federal Bureau of Prisons, Office of Internal Affairs, Washington D.C., 53 FLRA 1500, 1515 (1998) (OIA), the Authority specifically stated that flagrant misconduct is a necessary element of any defense when "a respondent's alleged unlawful discrimination
was motivated by the content of protected activity
itself . . . ." It is well settled that an employee's right to engage in protected activity permits some leeway for impulsive behavior which must be balanced against the employer's right to maintain order and respect. See also, Department of Defense, Defense Mapping Agency Aerospace Center, St. Louis, Missouri, 17 FLRA 71, 80 (1985) (Defense Mapping) (an employee attending a grievance meeting as a grievant - - not a union representative - - was disciplined for speech occurring during the meeting, and the Authority held that the discipline was violative of the Statute because the employee had not engaged in flagrant misconduct); and, Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington, 2 FLRA 54 (1979) (interpreting Executive Order 11491).

The Authority's examination of whether an *employee*'s conduct constitutes flagrant misconduct is also consistent with the standards governing the private sector. See for example, Mast Advertising and Publishing, Inc., 304 NLRB 819 (1991) (finding that an employee's conduct while assisting another employee in what was tantamount to the presentation of a grievance was not so flagrant or egregious as to cost her the National Labor Relations Act's protection); and, Thor Power Tool Co., 351 F.2d 584, 587 (7th Cir. 1965), enf. 148 NLRB 1379 (1964).

B. Pennington was engaged in activity protected by the Statute.

It is noted that the General Counsel, as part of its prima facie case, may seek to establish that the reasons asserted by a respondent for its allegedly discriminatory action are pretextual. Additionally, the General Counsel, after presentation of respondent's evidence of lawful

reasons, may seek to establish that those reason are pretextual. Furthermore, an administrative law judge, or the Authority, may conclude that the reasons asserted for taking an action are pretextual, even if those reasons were not asserted to be such during the hearing in the case.

The first element described in Letterkenny, that the employee allegedly discriminated against must have been engaged in protected activity, is satisfied in this case. It is clear that Pennington along with his union representative were in the September 8, 2000 meeting to discuss Pennington's working conditions. In my view, it would be difficult to find a better example of protected activity. Respondent's main argument is that Pennington's conduct did not involve protected activity since he was not a union representative at the time of his alleged misconduct. In spite of an abundance of evidence showing that Pennington was engaged in protected activity, Respondent believes that a different standard should be applied since Pennington, in its opinion, was acting as an individual and not as a union representative. Such an argument misses the mark. Respondent's reliance on Defense Mapping Agency, is certainly misplaced. There the Authority found that the "employee" was engaged in protected activity, but that the flagrant misconduct caused the loss of that protection. Internal Revenue Service, Washington, D.C., 6 FLRA 96 (1981) (IRS) is a case where an employee's behavior during a grievance meeting caused her to lose the protection of the Statute. Indeed this employee was represented by the union, but it was her conduct during the grievance session that was measured and not that of the union representative. These cases clearly teach that it is not only a union representative who has statutory protection during grievance meeting, but the employee being represented has such protection as well. In all the circumstances, it is reasonable to conclude that employee Pennington was entitled to a protected status not just the union representative who was representing him.

Cases holding the pursuit of a grievance constitutes protected activity within the meaning of 5 U.S.C. §7102 are legion. See, U.S. Department of Health and Human Services, Social Security Administration, Baltimore, MD, 42 FLRA 22 (1991); Equal Employment Opportunity Commission, 24 FLRA 851 (1986), affirmed sub nom., Martinez v. FLRA, 833 F.2d 1051 (D.C. Cir. 1987). Furthermore, the Authority has determined that the notion of a "grievance" is to be interpreted in light of its broad definition under 5 U.S.C.

§7103(a)(9).[12] See, Federal Correctional Institution, Bastrop, Texas, 51 FLRA 1339, 1345 (1996) (Bastrop). The instant record reveals that Pennington was issued a letter of counseling in January 2000. It also shows that from January 2000 to September 2000, Pennington doggedly pursued the removal of the letter of counseling from his employment record. Pennington contacted various management officials, including the Commander, and arranged several meetings to discuss and obtain the removal of the letter of counseling. Thus, Pennington's left no stone unturned in pursuit of his grievance. See for example, Veterans Administration Medical Center, Buffalo, New York, 13 FLRA 283 (1983) (VAMC); see also, Department of the Treasury, Internal Revenue Service, Louisville District, 11 FLRA 290, 297-298 (1983). After his efforts to pursue this matter alone proved futile, Pennington sought the assistance of the Union. On September 6, 2000, Pennington completed a designation of representative form naming Hamblin as his union representative. It has long been held that an employee seeking the assistance of the union is an activity protected by the Statute. See, U.S. Department of Navy, Naval Aviation Depot, Naval Air Station Alameda, Alameda, California, 38 FLRA 567 (1990). The record also shows that on September 8, 2000, Hamblin met with Otten in his capacity as a union representative and was able to achieve what Pennington had thus far been unable to accomplish - an agreement to remove the letter of counseling from Pennington's employment record early. After meeting separately with Otten, Hamblin arranged a meeting with himself, Otten, and Pennington to discuss Pennington's work-

[12] 5 U.S.C. §7103(a)(9) defines a grievance as follows:

> "grievance" means any complaint -
>
> (A) by any employee concerning any matter relating to the employment of the employee;
> (B) by any labor organization concerning any matter relating to the employment of any employee; or
> (C) by any employee labor organization, or agency concerning -
> (i) the effect or interpretation, or a claim of breach, or a claim of breach of a collective bargaining agreement; or
> (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

related concerns as well as the agreement that was reached in connection with the letter of counseling. The latter meeting was a grievance meeting within the meaning of §7103 (a)(9) of the Statute. Thus, Pennington's participation in the discussion during the meeting was a right protected by the Statute. See, Defense Mapping, 17 FLRA 71, 80 where it was held that an employee's participation in the presentation of her grievance was a right protected by the Statute.

Contrary to Respondent's argument, it appears that Pennington's "grievance" also satisfied the requirements of the negotiated grievance procedure. Respondent asserts that Pennington was not pursuing a "grievance" under the collective bargaining agreement, but that he was "merely an individual speaking with management about a letter of counseling. . . ." This record offers little support for that claim. Article 30 of the collective bargaining agreement sets forth the negotiated grievance procedure, and it provides that "[a] grievance is defined to be any complaint by any employee, the Union, or the Employer concerning: (1) Any matter relating to the employment of an employee, except as excluded below."[13] Article 30, Section 6 also provides, in part, that:

> [m]ost grievances can be settled promptly and satisfactorily on an informal basis at the immediate supervisory level. The Employer and the Union agree that every effort will be made by management and the aggrieved party(s) to settle grievances at the lowest possible level.

The Authority has consistently held that when an individual employee asserts a right that arises from the collective bargaining agreement, that employee is engaging in protected activity under § 7102 of the Statute of assisting the union that had negotiated the agreement. See, U.S. Department of Labor Employment and Training Administration San Francisco, California, 43 FLRA 1036, 1039 (1992).

Accordingly, it can also reasonably be concluded that Pennington's meeting with Hamblin and Otten on September 8, 2000, involved the exercise of the contractual right to informally resolve grievances. See, Bastrop, 51 FLRA 1339 at 1344 (a meeting between an employee and a supervisor found to be a grievance meeting where the contract required informal attempts be made to resolve a dispute before a formal or written grievance may be filed). Respondent

[13] Exceptions are not applicable to this case.

contends, in essence, that the meeting did not relate to a "grievance" under the contract because the issues pursued by Pennington would have been untimely under the contract. However, the fact that the "grievance" may or may not be timely does not divest Pennington's complaint of its status as a "grievance." See for example, VAMC, 13 FLRA 283 at 292 (the fact that an employee's complaint was initially brought up in the wrong forum or before the wrong representative did not divest the complaint of its status as a grievance under §7103(a)(9)). Furthermore, Hamblin, a witness for Respondent, acknowledged that although he was aware that Pennington's grievance was untimely, he obtained an agreement from Respondent to resolve at least one of Pennington's concerns.

In addition to pursuing a grievance under the negotiated grievance procedure, Pennington was also exercising the collective bargaining agreementual right, pursuant to Article 2, Section 5 of the collective bargaining agreement. Article 2, Section 5 of the collective bargaining agreement provides that employees have the right to raise any concern they have with representatives of Respondent, including concerns regarding counselings or reprimands issued to employees. Although Pennington makes no reference to Article 2, he testified that it was his understanding that he could pursue issues up the chain of command, including up to the Commander. There is certainly more than a trickle of evidence showing that Pennington was pursuing a grievance and was exercising certain collective bargaining agreementual rights when he met with Otten and Hamblin on September 8, 2000 - activities which are all protected by the Statute.

Based on all of the foregoing, it is found that the meeting of September 8, 2000 involved protected activity.

C. Pennington's protected activity was a motivating factor in Respondent's decision to issue him a notice of reprimand.

The second element of Letterkenny, that the protected activity must have been a motivating factor in the agency's of the employee, is also satisfied. The record is clear that "but for" Pennington's conduct on September 8, 2000, he would not have received the notice of reprimand. Indeed, the reprimand issued to Pennington on September 21, 2000, specifically refers to Pennington's protected conduct on September 8, 2000. Pennington's conduct can thus be found to be a motivating factor in Respondent's decision to issue him a notice of reprimand and provides the necessary connection between Pennington's protected activity and the reprimand.

Therefore, it is concluded and found that Pennington's protected activity was a motivating facto in Respondent's decision to issue him a remand.

D. Pennington's conduct during the September 8, 2000, meeting did not constitute flagrant misconduct.

Pennington, Hamblin, and Otten met at a picnic table outside of the hangar and away from the view of other employees or Respondent officials for approximately five minutes. During those five minutes, Pennington recalled only a discussion regarding the letter of counseling while Respondent's witnesses, Hamblin and Otten, claimed that the letter of counseling as well as Otten's right to delegate authority and maintain supervisory notes were discussed. Regardless of the particular subject matter, it is undisputed that the discussion related to concerns that Pennington had regarding his working conditions. Furthermore, it is undisputed that it was while *Hamblin*, Pennington's union representative, was explaining what he and Otten had discussed that Pennington terminated the meeting.

The manner in which Pennington terminated the meeting and his demeanor during the meeting is, however, disputed. Pennington testified that he did not feel that he was being properly represented by Hamblin so he ended the meeting by stating in a calm and controlled voice, "Okay, that's it, I've heard enough." Pennington emphatically denied using any profanity during the meeting which was corroborated by Respondent's witness Hamblin. Indeed, Pennington's version of the events is also corroborated by the letter of reprimand which stated that Pennington said, "'That's it!' and turned around and walked out of the meeting," and made no reference to the use of profanity or other aggressive behavior.

In contrast to Pennington's consistent and specific recollection, Respondent's witnesses gave different accounts of Pennington's conduct. Hamblin initially claimed that Pennington said, "I've heard enough of this crap, I'm out of here," but later conceded that it was fair to say that Pennington could have said "I've had enough, that's it. I'm out of here." Otten, on the other hand, claimed Pennington stated, "Enough of this shit," or "I've heard enough of this shit." In addition to being inconsistent with Hamblin and Pennington's testimony, Otten's testimony is not credible since it differs from the conduct described in the reprimand and was not reflected in any of the

contemporaneous documents created by Otten or the affidavit he provided to the Authority during the investigation of this case.

Accordingly, based primarily on the inconsistencies in the testimony of Respondent's witnesses Pennington's account of what occurred is credited.

Again Respondent seems to think that an employee who is not a union representative has no protection when engaged in protected activity. Respondent suggests that a less strict standard should be applied to an employee who is not a union representative and that it should be allowed to discipline such an employee for "rude or discourteous condition." Once again, I agree with the General Counsel that Pennington was engaged in protected activity. In order to exact discipline Respondent needs to establish that the conduct lost its statutory protection. Since it was not flagrant misconduct it was therefore within the ambit of protected activity.

In deciding whether an employee has engaged in flagrant misconduct, the Authority balances the employee's right to engage in protected activity which "permits leeway for impulsive behavior, . . . against the employers right to maintain order and respect for its supervisory staff on the jobsite." See, Oak Ridge, 57 FLRA No. 69 (57 FLRA 343) (citing Department of the Air Force, Grissom Air Force Base, Indiana, 51 FLRA 7, 11-12 (1995) (Grissom). If flagrant misconduct is established, then the conduct loses its protection under the Statute and can be the basis for discipline. See, OIA, 53 FLRA 1500.

In striking this balance, the Authority considers the following: (1) the place and subject matter of the discussion; (2) whether the employee's outburst was impulsive or designed; (3) whether the outburst was in any way provoked by the employer's conduct; and (4) the nature of the intemperate language and conduct. However, the foregoing factors need not be cited or applied in any particular way in determining whether an action constitutes flagrant misconduct.

When the above factors are applied to this case it can reasonably be concluded that Pennington's conduct during the September 8, 2000 meeting did not constitute flagrant misconduct. At the outset, neither the place nor the subject matter of the discussion lent itself particularly to intruding on Respondent's right to maintain order and jobsite respect for its supervisors. In this regard, the record demonstrated that Pennington's conduct did not occur in front of other employees on the jobsite nor did it

disrupt the work of the unit. See, Oak Ridge; U.S. Department of Defense, Defense Logistics Agency and American Federation of Government Employees, Local 2693, 50 FLRA 212, 216 (1995). Additionally, the subject matter of the meeting was protected activity i.e. Pennington's grievance over the letter of counseling he received as well as other matters involving his working conditions. See, OIA, 53 FLRA 1500.

Continuing on, it does not appear Pennington's statement was pre-planned or otherwise designed. The record confirms that the meeting was brief, lasting approximately five minutes. During this meeting, Otten and Hamblin informed Pennington of their decisions regarding his concerns. Pennington simply ended the meeting when it became clear that his Union representative was not in agreement with him, and did not intend to pursue other matters about which he was concerned.

While the extent to which Pennington's conduct was "provoked" by Respondent is unclear, the record does reveal that Pennington's conduct was the result of his disagreement with Respondent's response to his grievance.

Lastly, Pennington's conduct did not exceed the broad scope of intemperate behavior that remains within the ambit of protected activity. In my opinion, Respondent never established that any intemperate behavior occurred. Initially, it should be noted that the record, including the content of the letter of reprimand itself, fails to support Respondent's claim regarding Pennington's conduct. However, even if Respondent's version of Pennington's conduct is believed, it still would not remove that conduct from the protection of the Statute. Concerning Pennington's alleged use of the word "shit" or "crap," the Authority has found that the use of profanity did not constitute flagrant misconduct in numerous cases. See for example, Grissom, 51 FLRA 7, 20-21; and, American Federation of Government Employees, National Border Patrol Council and U.S. Department of Justice, Immigration and Naturalization Service, El Paso Border Patrol Sector, 44 FLRA 1395 (1992). There are numerous cases holding profane statements to not be of such an outrageous and insubordinate nature where, as in this case, profanity is undeniably a common practice in the work place. See, U.S. Department of Agriculture, Food Safety and Inspection Service, Washington, D.C., 55 FLRA 875 (1999). Moreover, Respondent failed to establish that Pennington did indeed use profanity in ending this meeting.

With respect to the manner in which Pennington's terminated the meeting, the Authority has found similar conduct not to constitute flagrant misconduct. In OIA,

53 FLRA 1500, a union president was suspended because she walked out of a counseling meeting while the Associate Warden was reading the letter of counseling. The Authority rejected the Respondent's assertion in that case that anarchy would result from applying the flagrant misconduct doctrine to allow an employee, such as the Union President, to leave a meeting that the employee deems illegal. While Pennington did not suggest that the meeting was illegal, he testified that he ended the meeting because he wasn't being properly represented by his union steward. The Authority has recognized that employees must be given leeway during grievance meetings. (IRS). Next, Respondent cites Pennington's demeanor during the September 8 meeting which it characterized as, among other things, hostile and angry, in addition to claiming that Pennington pounded on the table during the meeting. I find that Respondent failed to provide evidence supporting this contention.

Thus, the record clearly establishes that Pennington's conduct during the September 8, 2000, meeting did not constitute flagrant misconduct.

E. Did Respondent established a legitimate justification for reprimanding Pennington for "rude and discourteous behavior."

Even if the flagrant misconduct test is inapplicable to the facts of this case, I would adopt the view that Respondent failed to meet its burden of proof because the totality of the evidence confirms that the alleged basis for Respondent's decision to issue Pennington a notice of reprimand was pretextual; consequently, there is no legitimate justification on this record for Respondent's action. Moreover, Respondent chose not to or was unable to demonstrate that it would have taken the same action in the absence of protected activity.

The sole reason provided to Pennington at the time he was given the proposed reprimand, and as reflected in his AF Form 971, was that the reprimand was based on "discourteous conduct" during the September 8, 2000, meeting. Furthermore, the letter of reprimand which was provided to Pennington reflected only that Pennington, stated, "that's it!" and walked out of the meeting while Hamblin was trying to explain some things to him. In contrast to these specific and direct charges, Respondent introduced at the hearing *six* reasons to justify the letter of reprimand. Respondent's attempt to justify its action after the fact is in itself evidence of pretext, however.

A closer look at the reasons asserted by Respondent to justify its action provides ample reason for a finding of pretext. To start with, Respondent's witnesses testified that the notice of reprimand was based on Pennington's conduct during the meeting, which included his demeanor and certain alleged statements. Respondent's witnesses' testimony, however, were riddled with inconsistencies. Otten's testimony is especially questionable. Not only was Otten's testimony regarding the use of profanity by Pennington contradicted by Respondent's own witness Hamblin, but also Otten's testimony was inconsistent with three contemporaneous documents he created (memorandum of the proposed reprimand, AF Form 971, and supervisory notes) and his affidavit to the Authority during the investigation of this case. Otten's claim that he was exercising "compassion" by not including a detailed description of Pennington's alleged conduct is unbelievable and is also rejected. The Authority has said that where an agency fails to overcome the showing of a *prima facie* violation of section 7116(a)(1) and (2) by providing corroborating testimony or documentary evidence to support a supervisor's claim it will reject such self-serving claims. See for example, Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah, 35 FLRA 891, 900 (1990). Here the evidence offered by Respondent appears to contradict it claims about Pennington's conduct. Providing, in my view, even more evidence of pretext.

Similarly, Respondent's claim that the notice of reprimand was issued because Pennington had received previous counselings must be rejected. In this regard, Otten admitted that there was only one official counseling in Pennington's record at the time the decision to reprimand him was made. Furthermore, Otten admitted that the three or four other counselings he testified about were either counselings that had expired and, therefore could no longer be relied upon, or were "unofficial" counselings which he never documented in Pennington's AF Form 971, as the collective bargaining agreement required, to reflect that the alleged incidents may result in subsequent disciplinary action. Given the inconsistencies in Otten's testimony and the lack of corroborating evidence to support his claim of other "unofficial" counselings, the only conclusion that can be drawn is that Respondent's asserted reasons are a pretext. See, Department of Housing and Urban Development, Pennsylvania State Office, Philadelphia, Pennsylvania, 53 FLRA 1635, 1653 (1998) (Pennsylvania State Office).

Additionally, Respondent's assertion that it based the notice of reprimand upon Union President Stutz' statement that she had encountered similar problems with Pennington

must fail. Otten's own testimony that he had no personal knowledge regarding these problems and the fact that no reference was made to these alleged problems in the proposed and final reprimand are sufficient reason to disregard this claim as pretextual.

Respondent also takes the stance that it relied on the Douglas factors which consider whether an employee was on notice of any rules that were violated in committing an offense. In particular, Respondent claims that Pennington violated the Joint Statement on Violence and Behavior in the Workplace (Workplace Violence Policy), the requirements of which he was on notice. There is not one iota of evidence showing that prior to the instant hearing Respondent informed Pennington that his conduct violated the policy. Any reference to a breach of the policy was also noticeably absent from the letter of reprimand. This is of particular significance since, the record does show that on at least three occasions, Respondent specifically cited a breach of the policy in its proposed or final disciplinary actions against other employees. The applicability of the policy to Pennington's situation is equally questionable. The policy makes no reference to the use of profanity or discourteous conduct. Furthermore, the two cases where employees were disciplined for violating the policy related to the use of racial slurs and threats of physical violence - factually distinguishable situations. Accordingly, it is found that Respondent's attempt to rely on the Workplace Violence Policy simply provides further evidence of pretext.

Finally, Respondent claims that the notice of reprimand was based on Pennington's statement at the time he was asked to sign the AF Form 971 on September 12, 2000, to document his receipt of the proposed reprimand to the effect that he did not sign shit like that. Again, Respondent never asserted Pennington's alleged statement of September 12, 2000, as a basis for the reprimand until the hearing in this matter. In addition, Otten admitted that he made the decision to not initiate a separate disciplinary action against Pennington for the statement. Thus, the only conclusion that can be drawn is that Pennington's statement was not considered by Respondent, at the time it occurred, to deserve disciplinary action. Accordingly, Respondent's attempt to throw in Pennington's statement, which occurred *after* the decision to discipline Pennington, appears to be another attempt to find a reason, after the fact, to justify the reprimand. This claim also appears to be an afterthought that supplies more evidence of pretext.

In Pennsylvania State Office, 53 FLRA 1635, the Authority, found a violation of section 7116(a)(1) and (2)

after determining that the reasons and justifications offered by the agency for its actions were pretexts. There it was reasoned that it was appropriate to conclude that the agency because it offered pretexts to justify its action, in fact, had an unlawful reason for its conduct. See, Chadic Denn Mining Corp v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966); Williams Contracting Inc., 309 NLRB 433 (1992). See also, St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511 (1993); 113 S.Ct. 2742 (1993). In this regard, the Supreme Court, in a case arising under Title VII of the Civil Rights Act of 1964, stated as follows:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of a prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "(n)o additional proof of discrimination is required . . . ." Id. at 2749 (emphasis omitted).

This case is akin to Pennsylvania State Office, since the reasons offered by Respondent to justify the notice of reprimand issued to Pennington have been shown to be pretextual and may be set aside. Even assuming that Respondent established a legitimate justification for its action, the evidence in this case fails to show that Respondent would have taken the same action in the absence of protected activity. In support of its contention that Pennington was not treated disparately, Respondent offered examples of disciplinary actions taken against employees for, among other things, discourteous conduct, offensive language, or defiance of authority. These examples, however, do not constitute similarly situated employees since none of the employees were disciplined for statements or conduct occurring during a grievance meeting. In my opinion, Respondent was unsuccessful in its effort to meet its burden of proving, by a preponderance of the evidence, that it had a legitimate reason for the reprimand, and that it would have taken the same action in the absence of Pennington's protected activity. See, Wright Line, 251 NLRB 1083, enforced, 662 F.2d 899 (1st Cir. 1981) cert. denied, 455 U.S. 989(1982) ("The absence of any legitimate basis for an action, of course may form part of the proof of the General Counsel's case.") (citation omitted). As a result, the unlawful basis for its action, as established through the prima facie showing of a violation, is unrebutted.

Accordingly, it is found that Respondent's action in reprimanding Pennington for conduct that was within the ambit of protected activity constitutes a violation of section 7116(a)(1) and (2) of the Statute.

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

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the Department of the Air Force, Aerospace Maintenance and Regeneration Center, Davis-Monthan Air Force Base, Tucson, Arizona, shall:

1. Cease and desist from:

(a) Taking action against any employee represented exclusively by the American Federation of Government Employees, AFL-CIO, Local 2924, by issuing a notice of reprimand because the employee pursued a grievance and sought the assistance of the American Federation of Government Employees, AFL-CIO, Local 2924, in seeking to resolve a previously issued letter of counseling and to discuss other working conditions.

(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 in order to effectuate the purposes and policies of the Statute:

(a) Rescind the notice of reprimand issued to John Pennington on September 21, 2000, and expunge the notice of reprimand from Mr. Pennington's employment record.

(b) Post at its facilities at the Department of the Air Force, Aerospace Maintenance and Regeneration Center, Davis-Monthan Air Force Base, Tucson, Arizona, where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, 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 will be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.41(e) of the Authority's Regulations, notify the Regional Director, Denver Regional Office, 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, DC, August 15, 2002.

_____

ELI NASH

Chief Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of the Air Force, Aerospace Maintenance and Regeneration Center, Davis-Monthan Air Force Base, Tucson, Arizona, violated the Federal Service Labor-Respondent Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT take action against any employee represented exclusively by the American Federation of Government Employees, AFL-CIO, Local 2924, by issuing a notice of reprimand because the employee pursued a grievance and sought the assistance of the Union in seeking to resolve a previously issued letter of counseling and to discuss other working conditions.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce unit employees in the exercise of their rights assured by the Federal Service Labor-Respondent Relations Statute, 5 U.S.C. § 7101, et seq.

WE WILL rescind the notice of reprimand issued to John Pennington on September 21, 2000, and expunge the notice of reprimand from Mr. Pennington's employment record.

_____

_

(Respondent/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 its provisions, they may communicate directly with the Regional Director for the Federal Labor

Relations Authority, whose address is: 1244 Speer Boulevard, Suite 100, Denver, Colorado, 80204, and whose telephone number is: (303) 844-5224.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by ELI NASH, Chief Administrative Law Judge, in Case No. DE-CA-01-0276, were sent to the following parties:

_____

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

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Dated: August 15, 2002
Washington, DC