

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

DEPARTMENT OF THE AIR FORCE 911TH AIRLIFT WING, CORAOPOLIS, PENNSYLVANIA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2316 Charging Party	Case No. BN-CA-02-0555

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been considered by an 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 **JUNE 21, 2004**, and addressed to:

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

ELI NASH
Chief Administrative Law Judge

Dated: May 20, 2004
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
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MEMORANDUM

DATE: May 20, 2004

TO: The Federal Labor Relations Authority

FROM: ELI NASH
Chief Administrative Law Judge

SUBJECT: DEPARTMENT OF THE AIR FORCE
911TH AIRLIFT WING,
CORAOPOLIS, PENNSYLVANIA

Respondent

and

Case No. BN-CA-02-0555

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2316

Charging Party

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

Enclosures

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

DEPARTMENT OF THE AIR FORCE 911TH AIRLIFT WING, CORAOPOLIS, PENNSYLVANIA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2316 Charging Party	Case No. BN-CA-02-0555

Major Douglas Huff, Esq.
Major Marge Overly, Esq.
For the Respondent

Lawrence L. Kuo, Esq.
Philip T. Roberts, Esq.
For the General Counsel

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 Revised Rules and Regulations of the Federal Labor Relations Authority (herein called the Authority), 5 C.F.R. §§ 2411-2473. This proceeding was initiated by an unfair labor practice charge filed on June 19, 2002, against the Department of the Air Force, 911th Airlift Wing, Coraopolis, Pennsylvania (herein called the Respondent) by the American Federation of Government Employees, AFL-CIO, Local 2316 (herein called the Charging Party or Union). The Regional Director for the Boston Region of the Authority issued a Complaint and Notice of Hearing on October 30, 2002. The Complaint alleges that the Respondent violated section 7116(a)(1) and (2) of the Statute on or about May 1, 2002, when it failed to authorize a Performance Award to Robert C. Kepka for the performance rating period covering April 1, 2001 to March 31, 2002

because Kepka was a member of the Charging Party and/or because he engaged in activities protected under the Statute.

A hearing was held on April 17, 2003, in Pittsburgh, Pennsylvania. The Administrative Law Judge who conducted the hearing subsequently became unavailable to issue a decision. The parties were advised of this fact and were offered the opportunity to request a new hearing. Each party has waived the right to a new hearing, and I have made my decision herein based on the record as a whole and the post-hearing briefs submitted by each party.¹

Findings of Fact

The Charging Party is a labor organization representing bargaining unit employees employed by the Respondent. The bargaining unit represented by the Charging Party includes employees employed in the Respondent's Avionics Department. Chris Mason has been the Vice President of the Charging Party for about two years and has also been the Chief Steward of the Charging Party since 1996. At all times relevant to the Complaint, Robert C. Kepka was an employee of the Respondent and a member of the bargaining unit represented by the Charging Party.

A. The Organizational Structure of the Avionics Department

The Respondent's Avionics Department performs maintenance work for the aircraft assigned to the Respondent. Nine to ten C-130 aircraft have been assigned to the Respondent. The Avionics Department employs a total of seven non-supervisory, bargaining unit employees. Currently, there are four sections within the Avionics Department: Guidance and Control, Communications/Navigation (COM/NAV), Electronic Countermeasures (ECM), and Munitions Systems.

The Avionics Flight Chief oversees all of the sections within the Avionics Department and is considered a supervisor. The Avionics Flight Chief reports to the Maintenance Superintendent and the Maintenance Officer. Julian Savage has been the Flight Chief for the Avionics Department for about six years. Prior to becoming the

1

Credibility determinations may be based on a variety of considerations including the consistency of the witness's testimony with other record evidence. Since the undersigned did not have the opportunity to view witnesses' demeanor, the credibility determinations herein are based on my review of the entire record.

Avionics Flight Chief, Savage worked in the Instrument Autopilot Shop and received training from Kepka. Savage's duties as the Avionics Flight Chief generally do not include working directly with Guidance and Control technicians on a regular basis.

B. The Employment History of Robert C. Kepka

Robert Kepka began his employment with the Respondent on December 17, 1973. Kepka began working in the Avionics Department in 1980. He was a dues paying member of the Union for a number of years. Kepka's employment in the Avionics Department included working in a supervisory position from 1986 to 1991. In 1991, Kepka began working in the Guidance and Control section, and Savage became Kepka's second level supervisor. While employed in the Guidance and Control section, Kepka worked as an Electronics Integrated Systems Mechanic, WG-12, Step 5, the highest step at the journeyman level. This is considered an Air Reserve Technician (ART) position, a civil service position. Sometime in 1997 or 1998, Kepka rejoined the Union after having left the Union when he became a supervisor in 1986. On January 3, 2003, Kepka was required by Air Force policy to retire from his civilian ART position with the Respondent upon reaching his high year tenure, the maximum 33 years of service with the Reserves.

C. The Guidance and Control Section of the Avionics Department

The Guidance and Control section of the Avionics Department was formerly known as the Instrument Autopilot Shop. The Guidance and Control section is responsible for maintaining aircraft instruments and gauges, as well as the autopilot and navigation systems.

During the 2001 to 2002 rating period, the Guidance and Control section employed only two non-supervisory employees, Kepka and Bolek Hoszwa. Kepka and Hoszwa began working together in the Guidance and Control section in about 1986.2

Hoszwa continues to be employed in the Guidance and Control section as an Electronics Integrated Systems Mechanic, WG-12, Step 5, the same position that was held by Kepka, and performs the same kinds of work that Kepka did. Hoszwa has not been a dues-paying member of the Union.

Robert Miller began working in the Guidance and Control section in about 1980 and worked together with Kepka throughout this time. In January or February 1998, Miller

2

Hoszwa initially began working at the Respondent as a reservist in 1977, and became an ART in 1987.

became the Shop Chief for the Guidance and Control section. The Shop Chief for the Guidance and Control section serves as the first level supervisor for the employees in the Guidance and Control section and is supervised by the Avionics Flight Chief. As the Guidance and Control Shop Chief, approximately 30% of Miller's time was spent performing aircraft technician work by himself or with Kepka and/or Hoszwa. Miller's Shop Chief responsibilities also included rating Kepka's and Hoszwa's performance, and Avionics Flight Chief Savage reviewed Miller's performance ratings. In March 2002, Miller left his position as the Guidance and Control Shop Chief to become the supervisor for the COM/NAV section. Gregory Gogets subsequently replaced Miller as the Shop Chief for Guidance and Control, but Gogets only served as Kepka's supervisor for a few months.

Civilian Avionics Department employees are given an annual performance rating, also known as a Civilian Rating of Record or AF Form 860A. The performance evaluation program for civilian Air Force employees is described in Air Force Instruction (AFI) 36-1001, dated July 1, 1999. The performance rating period covers a one year period that starts on April 1 and ends on March 31. In addition to receiving a written Civilian Rating of Record, each Avionics supervisor is required to meet with each of his or her employees for a midpoint progress review meeting, normally about six months into the rating period. The purpose of the midpoint review meeting is for the supervisor to identify any performance shortcomings that can be corrected by the employee before the end of the appraisal period. AFI 36-1001, section 1.8.2 mandates that AF Form 860B be used to document the midpoint review. The annual performance rating forms for civilian Avionics Department employees are written by the Avionics employee's Shop Chief and are then reviewed by the Avionics Flight Chief. Performance ratings for the appraisal year are generally given to civilian Avionics employees around the month of May.

In July 1999, the Respondent went from a five-level performance evaluation system to a two-level, pass/fail ("Meets"/"Does Not Meet") performance rating system. The second page of AF Form 860A ("Part F. Civilian Promotion Appraisal") includes an "Appraisal Factors - Manner of Performance" section. This section identifies nine specific Appraisal Factors categories that "represent work behaviors that can be observed in the context of the employee's current position and are considered predictive of performance at the next higher level." Employees are given a numerical rating from 1 ("Very Poor") to 9 ("Outstanding") in each of these nine categories. These Appraisal Factors ratings were formerly used for merit promotion purposes, and

are now intended to provide feedback to the rated employee based on the work performance demonstrated by the employee during the appraisal period.

D. Annual Performance Ratings and Performance Awards at Respondent's Avionics Department

Civilian Avionics employees may be awarded cash Performance Awards (also known as Sustained Superior Performance Awards) at the same time they receive their Civilian Rating of Record. Generally speaking, Performance Awards are granted based on whether an employee performs over and above the required performance elements and performs specific accomplishments in the employee's position. Cash award amounts are based on a percentage of the employee's basic salary, excluding locality pay. Employees who are promoted during the performance appraisal year usually may not receive a Performance Award as well. In July 1993, the Air Force policy requiring a minimum 1% allocation for cash performance awards was rescinded, and cash awards of less than 1% have been allowed thereafter.

During the time that Miller served as the Guidance and Control Shop Chief, he recommended awards for Guidance and Control employees, and his award recommendations were reviewed by Avionics Flight Chief Savage. For the rating periods covering 2000-2001 and 2001-2002, the cash award percentages given to Avionics Department employees ranged between 1% to 2.5%, and included fractional amounts above 1%, such as 1.5% and 1.8%. For the 2000-2001 rating period, every Avionics Department employee received either a Performance Award or a promotion.

From 1991 to 2001, Kepka without exception received annual cash Performance Awards for every year of his employment in the Guidance and Control section of the Avionics Department. Miller and/or Savage served as Kepka's supervisors during this period. During this period, Kepka's cash awards ranged from 1% to 1.7%. Between 1995 and 2001, Kepka received Performance Awards that ranged from 1% to 1.3%.

Starting at the rating period covering April 1, 1999 to March 31, 2000, AF Form 860A was changed to add a written Award Justification section for Performance Awards. For the 1999-2000 rating period, Kepka was given a Performance Award of 1.3%. Kepka was given a Performance Award of 1% for the 2000-2001 rating period. This 2000-2001 Performance Award was justified by Miller and Savage as follows:

- Mr. Kepka continues to be the AGCS PMEL Monitor ensuring that test equipment is serviceable and calibrated by coordinating through MSL for the pick-up and delivery of equipment with the PMEL Lab³

- Mr. Kepka continues to routinely functional check DIFM items received in the shop for reliability assessment and returns them back to supply, helps set the example for the rest of the MXS squadron⁴

- Mr. Kepka consistently volunteers to help other maintenance sections troubleshoot and repair malfunctioning aircraft systems

- Safety wise, Mr. Kepka hasn't had a safety violation in the past seven years

The 1.3% Performance Award that was awarded by Miller and Savage to Kepka for the 1999-2000 rating period was likewise justified, in part, by the fact that Kepka served as the PMEL Monitor, processed LRUs, volunteered to help other maintenance sections and had no safety violations.

E. Compressed Work Schedules at the Guidance and Control Section

Alternative Work Schedules (AWS), including Compressed Work Schedules (CWS), are authorized by Article 11 of the Labor-Management Relations Agreement (Agreement) between the Charging Party and the Respondent. AWS definitions and programs are further described in the negotiated Alternative Work Schedule Plan (AWS Plan), dated January 1, 1999.

Kepka began working a CWS in the early 1990s. Hoszwa also worked the same kind of CWS at this time. Until about August 2000, Kepka and Hoszwa were the only two employees in the Avionics Department who worked a CWS. After other Avionics employees began approaching Kepka with questions about applying for CWS, Kepka and Hoszwa were both removed from their CWS in about August 2000. Shortly after being

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The AGCS PMEL Monitor is responsible for ensuring that testing equipment is periodically sent out for calibration and certification by the Air Force. Kepka has performed this duty since 1980.

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DIFM stands for Due In For Maintenance, and refers to the functional checking of removed aircraft components, Line Replaceable Units (LRUs) and items received from supply.

removed from their CWS, Kepka and Hoszwa each filed grievances under the Agreement requesting that their CWS be restored. These grievances were denied at all three steps of the grievance procedure but were not arbitrated.

F. Kepka Engaged in Protected Activities Throughout the April 1, 2001 to March 31, 2002 Performance Rating Period

On May 10, 2001, in accordance with the procedures described in the negotiated AWS Plan, Kepka submitted a written request to Miller to be put on a CWS. Miller disapproved Kepka's request on May 18, 2001, explaining that the Guidance and Control's primary mission workload did not support Kepka's participation in CWS. On May 31, 2001, Kepka filed a First Step Grievance alleging that Miller's May 18, 2001 denial of his CWS request was contrary to the "adverse agency impact" standard and violated Article 11 of the Agreement. Union Chief Steward Chris Mason served as Kepka's representative for this grievance. Miller denied Kepka's First Step Grievance in writing on June 20, 2001. Thereafter, on June 25, 2001, Kepka filed a Second Step Grievance with Avionics Flight Chief Savage, alleging that Miller's stated reasons for denying his CWS request were not justified under the "adverse agency impact" standard. Savage denied this grievance on July 3, 2001, affirming Miller's decision to deny Kepka's CWS request and writing that he could find "no remotely compelling reasons for Mr. Miller to have approved of the requested work schedule submitted." On July 6, 2001, Kepka filed a Third Step Grievance, again alleging that the stated reasons for excluding him from the CWS were not justified under the "adverse agency impact" standard. Kepka's Third Step Grievance was denied in writing on July 16, 2001, by Maintenance Superintendent Patrick Findlay, who remarked that he supported Miller's and Savage's decisions to deny Kepka's CWS request. During this period, Hoszwa also filed a grievance concerning the denial of his request to work a CWS. Hoszwa's grievance was also denied by the Respondent at all three grievance steps. On July 19, 2001, Chief Steward Mason consolidated Kepka's and Hoszwa's grievances and invoked arbitration in accordance with Article 9 of the Agreement.

During the processing of Kepka's grievance, there were occasions in which Kepka asked Miller for official time so that he could go to the Union office. Chief Steward Mason also periodically went to the Guidance and Control shop to talk with Kepka and left messages for Kepka with Miller. As the Guidance and Control Shop Chief, Miller's desk was located inside the Guidance and Control shop area, where he could view the activities in the shop area. Miller

testified that about 70% of his time was spent at the Guidance and Control shop area performing administrative work. The record further indicates that other Avionics employees viewed Kepka as the point of contact for questions concerning CWS, and they specifically approached Kepka (not Hoszwa, who was not a member of the Union) with such questions. Although Miller denied that he knew the Union membership status of the employees in his section, the evidence amply demonstrates that Kepka's status as a member of the Union was generally known throughout the Avionics Department.

On October 17, 2001, an arbitration hearing was held before Arbitrator Donald W. Jerrell. Kepka testified as the lead witness for the Union during this arbitration hearing. Miller, Savage, Capt. William Kountz (Aircraft Maintenance Manager), and other higher-level management officials also testified as witnesses for the Respondent. During the arbitration hearing, the Respondent's witnesses testified that allowing Kepka and Hoszwa to work a CWS would have adverse impacts on the Avionics Department's ability to meet its mission requirements. On December 4, 2001, Arbitrator Jerrell issued his Award sustaining the Union's grievance and directing the Respondent to approve Kepka's and Hoszwa's requests to work a CWS. Arbitrator Jerrell concluded that the Respondent had failed to demonstrate that allowing Kepka and Hoszwa to work a CWS would adversely affect the mission of the Guidance and Control section. In support of this decision, the Arbitrator specifically found that the Respondent had failed to establish that either Kepka's or Hoszwa's work performance had been deficient during the time that they worked a CWS, as demonstrated by the fact that "each grievant received a performance award and each received good ratings on his annual performance evaluation. None of this testimony was rebutted by Agency witnesses." Arbitrator Jerrell further noted that although Savage and Kountz "expressed their disapproval of the compressed work schedule in general," the Respondent was nevertheless required to comply with the terms of the negotiated AWS Plan.

As ordered by the Arbitrator, the Respondent subsequently returned Kepka and Hoszwa to their previous CWS. After the issuance of the Arbitrator's Award, Miller and Savage were heard on numerous occasions saying that they did not like the Arbitrator's decision. Miller testified that he continued to believe that CWS has a detrimental impact on the mission of the Guidance and Control section. Shortly after the issuance of the arbitration award, a number of Avionics Department technicians asked Kepka what they needed to do to work a CWS, and Kepka responded to

their questions. Only three months after the issuance of the Arbitrator's award (around March 2002), three other Avionics technicians were allowed to work a CWS. Arbitrator Jerrell's December 4, 2002 Award therefore resulted in allowing five of the seven bargaining unit employees in the Avionics Department to work a CWS.

G. In May 2002, Miller and Savage Jointly Decided Not to Give Kepka a Performance Award for the 2001-2002 Performance Rating Period

It is undisputed that Kepka met all of the critical elements of his Position Requirements and received an Acceptable Overall Performance Rating for the 2001-2002 rating period. Furthermore, it is not challenged that for the 2001-2002 rating period, the Respondent made no specific changes to the criteria it used to grant annual performance awards to Avionics Department employees.

On or about February 22, 2002, Civilian Personnel Officer Lisa Kutchenriter issued a Memorandum to all supervisors and managers concerning performance ratings and awards for the 2001-2002 rating period. Kutchenriter did not testify. This Memorandum specified that awards could not exceed 1.5% of the salary (excluding locality pay) of the employees assigned to the unit, but did not specify any minimum award amount. Kutchenriter's Memorandum also identified Norman Van Epps as the point of contact for questions.

On or about May 1, 2002, Miller met with Savage to discuss Kepka's and Hoszwa's performance appraisals. Savage could not recall the specific date of this discussion. According to Miller, this entire discussion lasted no more than 15 to 20 minutes. Prior to this meeting, Miller had prepared a written justification for a 1% Performance Award for Kepka. Savage could not recall the award justification verbiage that Miller presented to him, but felt that Miller's award justification was not adequate and that Kepka had not earned a 1% award. Respondent neglected to produce of a copy of Miller's original 1% Award Justification. However, Miller acknowledged that the award justification verbiage he had drafted was similar to that used to justify the 1% Performance Award that Kepka received for the 2000-2001 rating period. Savage then reminded Miller of various incidents that he felt negated a 1% Performance Award to Kepka. Miller conceded that he never annotated any of these alleged performance issues in Kepka's official personnel folder, also known as a 971 file.

Miller's and Savage's descriptions of what was discussed during this meeting contain significant factual inconsistencies. According to Savage, he reminded Miller of an incident concerning the work that Kepka had performed on a control column for a Time Compliance Technical Order (TCTO). Savage testified that he was called by the Quality Assurance (QA) Inspectors, who showed the soldering work to both him and Miller. Savage described the soldering work as "astounding" and that he was "very amazed" to see such substandard quality of work by such a "very skilled individual." Miller, however, never testified that Savage was with him when QA Inspector Jerry Matson showed him this soldering work. QA Inspector Matson was not called by the Respondent to testify at the hearing, and it is undisputed that Kepka was on leave for a doctor's appointment on the day that these alleged events occurred. Savage stated that he also reminded Miller of a "very significant" autopilot incident in which Kepka had served as the point of contact for the Guidance and Control section. Miller instead testified that Savage first reminded him of issues relating to Kepka's work on the autopilot and rudder yaw damper systems on C-130 aircraft number 86-0412 (hereinafter "Aircraft 412"). Miller testified that after this subject was discussed with Savage, Miller remembered that there had been "serious work deficiencies" in Kepka's work on the control column for TCTO Number 1710.

Miller also testified about other matters concerning Kepka's performance that he discussed with Savage, but Savage never mentioned any of these matters during his testimony. According to Miller, there were numerous occasions, Kepka neglected to put on his safety shoes and that Miller needed to remind Kepka to put on his safety shoes. Miller also recalled that there were three or four occasions in which Kepka told Miller that it was not his job to follow up on parts that have already been ordered by calling the Material Supply Liaison (MSL). Miller did not identify the dates when any of these occurrences took place and the record indicates that none of these occurrences were ever recorded in Kepka's 971 file. With respect to the wearing of his safety shoes, Kepka testified that he wore pull-on safety boots. Kepka said that during the 2001-2002 appraisal period, there were two or three instances in which he needed to be reminded to put on his safety boots, but these instances were no more than in previous years and never resulted in a crew arriving late to an aircraft. Concerning the ordering of replacement parts, Kepka said it was his view that it was not his responsibility to call supply after receiving confirmation that an ordered part was on its way. Kepka testified that he had expressed his view on this subject for his entire career and that Miller had

never counseled him on this matter. Miller further stated that Kepka had a "rough" type of personality.

Miller recalled that after he discussed these topics with Savage, Savage felt that Kepka had not done what he was supposed to do or had performed "shoddy maintenance." Savage also stated that he didn't agree with Miller's "philosophy" of giving an award to Kepka "arbitrarily" because he was retiring and it was his last year in service. Savage pointed out that Kepka "had done a good job for many, many years," but that "over the last few years," there had been incidents concerning "his performance or ability to get the job done." These problems notwithstanding, Savage told Miller that he would approve of a ½% award for Kepka, and Miller agreed. No one else was consulted concerning this award decision. The record indicates that Miller and Savage never discussed lowering any of Kepka's nine Appraisal Factor ratings on Part F of Kepka's AF Form 860A.

Miller and Savage testified that sometime after this meeting, the Performance Award paperwork for the Avionics Department was sent to the Aircraft Maintenance Superintendent, Harvey Nelson, for review by the Maintenance Squadron Commander, Major Kountz. Major Kountz did not testify and Respondent did not proffer a copy of the ½% Performance Award paperwork that Miller and Savage had submitted for Kepka. Several days later, Nelson called Savage and told him that Major Kountz had said that Kepka either has to get 1% or nothing, he could not be given ½%. At the time, Nelson had only worked as the Aircraft Maintenance Superintendent for a few months, beginning in January 2002. Nelson acknowledged that he did not consult with Van Epps or Kutchenriter of the Civilian Personnel Office before he called Savage. Savage responded that he thought that ½% awards were allowed, but Nelson replied no, it was either 1% or nothing. Miller and Savage then conferred and Savage agreed with Miller's decision that Kepka did not deserve a Performance Award for the rating period. Savage then told Nelson that Kepka deserved nothing. The record indicates that neither Miller nor Savage sent a revised AF Form 860A or other Performance Award paperwork to Nelson or Kountz at this time.

According to Miller, he originally wrote Kepka's Appraisal Factor ratings (Part F of AF Form 860A) when he wrote the 1% Performance Award Justification for Kepka. Sometime after he and Savage decided not to give Kepka a Performance Award, Savage went on temporary duty (TDY) status, and Kepka worked a 3:00 p.m. to 11:00 p.m. night shift. Miller testified that the following morning, Kepka called him at home and told him that Nelson said that he

needed the performance appraisal forms by 9:00 a.m. that day. Miller then returned to work to retrieve the performance appraisal information from his computer. Miller testified that at this time, he removed the Performance Award amount and Award Justification sections from Kepka's performance appraisal, but claimed that he neglected to lower the numbers that he had already entered in the Appraisal Factors page of the form as he had intended to.⁵

On or about May 10, 2002, Kepka received his Civilian Rating of Record for the April 1, 2001 to March 31, 2002 rating period, his final performance rating before his retirement from the Respondent. For the first time, Kepka did not receive a Performance Award from Miller and Savage. Furthermore, Kepka was the only Avionics Department employee who did not receive a Performance Award during this rating period.⁶

5

Miller's uncorroborated testimony concerning these events and the record as a whole leads me to conclude that there is a lack of credibility. In this regard Miller's testimony is inconsistent with other record evidence. Thus, Nelson provided no testimony confirming Miller's claim that Nelson needed the performance appraisal forms submitted to him by the morning of a specific date and Major Kountz did not testify at the hearing. Moreover, Kepka's performance appraisal form was signed and dated by both Miller and Savage on May 1, 2002. Savage presumably, reviewed Kepka's entire, completed AF Form 860A before he signed it. However, Miller testified that he did not remove the Performance Award and Award Justification sections from Kepka's AF Form 860A until the day that he retrieved it from his computer and submitted it to Nelson. If Savage was indeed on TDY, he could not have signed Kepka's revised performance appraisal form on the same day that Miller supposedly submitted it to Nelson. Likewise, it would have been unnecessary for Miller to change Kepka's Appraisal Factor ratings if these Appraisal Factor ratings are unrelated to Performance Awards, as the Respondent seemingly believes. Thus, it is reasonable to conclude that the Appraisal Factor ratings recorded by Miller correctly reflected Kepka's actual work performance during the 2001-2002 rating period.

6

Avionics employee Daniel Loeffert also did not receive a Performance Award for the 2001-2002 rating period, but the record establishes that Loeffert was promoted from a WG-11, Step 2 position to a WG-12, Step 3 position during the rating period, and therefore, was not eligible to receive a Performance Award.

Conclusions

The analytical framework for alleged violations of section 7116(a)(2) of the Statute is found in *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*). The Authority held that in such cases the General Counsel bears the burden of proving, 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, tenure, promotion or other condition of employment. *Id.* at 118. Once a *prima facie* case is established, a respondent will not be found to have violated section 7116(a)(2) only if it can demonstrate by a preponderance of the evidence that there was a legitimate justification for its actions and the same action would have been taken in the absence of the protected activity. *Department of Health and Human Services, Regional Personnel Office, Seattle, Washington* *Department of Health and Human Services*, 47 FLRA 1338, 1342 (1993); *U.S. Air Force Academy, Colorado Springs, Colorado*, 52 FLRA 874, 878-89 (1997). The General Counsel may seek to establish that the respondent's proffered reasons are pretextual.

A. Kepka's Work Performance from 2001 to 2002 Merited a Performance Award

1. Kepka's performance during the 2001-2002 rating period was substantially the same as his performance that justified Performance Awards in 2000 and 2001.

It is undisputed that the Respondent did not specify any changes to the criteria it used to grant Performance Awards to Avionics Department employees for the 2001-2002 rating period. Furthermore, it is uncontested that during the April 1, 2001 to March 31, 2002 rating period, the Respondent was aware that Kepka performed the same accomplishments that were used by Miller and Savage to justify his 1% Performance Award for the 2000-2001 rating period. Specifically, Kepka continued to perform AGCS PMEL Monitor duties, routinely function checked DIFM items, volunteered to help other maintenance sections, and did not have any recorded safety violations. The Award Justification written and approved by Miller and Savage for the 1.3% Performance Award given to Kepka for the 1999-2000 rating period was substantially the same. The record also demonstrates that the Respondent recognized that Kepka's contributions in these areas during the 2001-2002 appraisal period were significant. Savage conceded that for the 2001-2002 rating period, he gave a Performance Award to

Miller, the Shop Chief ultimately responsible for the work performed by the technicians in the Guidance and Control section. Savage confirmed that this award to Miller was justified, in part, because the Guidance and Control section continued to be a "benchmark" for other Avionics duty sections. In explaining why he considered the Guidance and Control section, then comprised of Miller, Kepka and Hoszwa, as a "benchmark," Savage testified that Miller "kept test equipment at optimum performance, always within calibration." Savage therefore considered the proper calibration of test equipment to be important and significant in his overall evaluation of Guidance and Control and other Avionics sections. It can be concluded that the optimum performance of the test equipment in the Guidance and Control shop directly resulted from Kepka's continuing work as the AGCS PMEL Monitor, an accomplishment used by Miller and Savage to justify Kepka's prior Performance Awards.

2. Kepka's work performance during the 2001-2002 appraisal period was superior to his work performance during the 2000-2001 appraisal period.

The quality of Kepka's actual work performance during the 2001-2002 appraisal period is documented by the Appraisal Factors ratings (Part F of AF Form 860A) given to him by Miller and approved by Savage. For the 2001-2002 rating period, Kepka was given higher Appraisal Factors ratings than those he received for 2000-2001, when Kepka was given a 1% Performance Award. Kepka received higher Appraisal Factor ratings in the following four areas: Working Relationships, Work Productivity, Self-Sufficiency,

and Work Management.⁷ Furthermore, Kepka was not given lower ratings in any of his five remaining Appraisal Factors and received ratings of 9 ("Outstanding," the highest possible rating) in the following four categories: Adaptability to Work, Self-Sufficiency, Skill in Work, and Work Management.⁸

Respondent insists that the "Appraisal Factors - Manner of Performance" section of AF Form 860A relates only to an employee's potential to perform at a higher level and has no relationship to whether an employee receives a Performance Award. Nevertheless, Kepka's Appraisal Factors ratings must have been based on Miller's and Savage's observations and evaluations of Kepka's work performance during the 2001-2002 rating period. Human Resources Officer Christine Jenkins, the Respondent's subject matter expert on the Respondent's civilian performance appraisal program, appreciated that the

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"Working Relationships" is defined on AF Form 860A as "Sensitive to the behavior of fellow workers, supervisors and subordinates; maintains effective working relationships with others." (R Ex 3.)

"Work Productivity" is defined on AF Form 860A as "Productive during work time; completes his/her work projects, duties and tasks in a timely manner." (R Ex 3.)

"Self-Sufficiency" is defined on AF Form 860A as "Works independently with little need for additional supervision or help; follows through well; accomplishes all tasks required to complete a job on his/her own." (R Ex 3.)

"Work Management" is defined on AF Form 860A as "Effectively plans and organizes work; properly follows or implements management procedures, directives, regulations, or technical orders; ability to direct or evaluate or substitute for absent supervisor." (R Ex 3.)

⁸
"Adaptability to Work" is defined on AF Form 860A as "Picks up new ideas and procedures quickly; is easy to instruct; can adapt to the demands of new situations; understands and carries out oral or written instructions." (R Ex 3.)

"Skill in Work" is defined on AF Form 860A as "Performs job-associated tasks well, whether they require physical, technical, professional, supervisory or managerial skills, is considered very skillful on the job." (R Ex 3.) (Emphasis added.)

Appraisal Factors ratings are based on a supervisor's evaluation of an employee's performance during the rating period and, therefore, do have a relationship to the likelihood of an employee receiving a Performance Award. Moreover, the fact that Kepka's 2001-2002 Appraisal Factors ratings differed from those that Miller and Savage gave to Kepka for the 2000-2001 rating period shows that they made a calculated evaluation of Kepka's actual, demonstrated work performance during the 2001-2002 appraisal period and had not merely carried over Kepka's ratings from the previous year. It is undisputed that the Respondent never changed or adjusted Kepka's 2001-2002 Appraisal Factor ratings, however.

The record also clearly reveals that Kepka did not receive any written performance counseling during the 2001-2002 performance rating period. Further, there is no record evidence that either Miller or Savage ever told Kepka that his performance was lacking or in need of improvement. In addition, Respondent failed to produce a copy of the AF Form 860B documenting Kepka's midpoint review, as mandated by AFI 36-1001, section 1.8.2. It is therefore unchallenged that during the 2001-2002 rating period, no negative annotations concerning work problems or safety issues were ever recorded in Kepka's 971 file. Kepka's testimony confirms that no work performance issues were brought to his attention during his midpoint review, which would have taken place around September 2001. Finally, neither Miller nor Savage gave any testimony relating to Kepka's midpoint review. In these circumstances, it is reasonable to conclude that the Respondent did not discuss any performance deficiencies with Kepka during his midpoint review meeting because there were none.

B. The Respondent's Decision to Deny Kepka a Performance Award for the 2001-2002 Rating Period Was Motivated Solely by Kepka's Protected Union Activities.

It is well settled that the timing of management's actions may be significant in determining whether an employee's protected activity was a motivating factor, within the meaning of *Letterkenny*, in an agency's decision to take action against employees. *U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky*, 49 FLRA 1020 (1994); *U.S. Department of Veterans Affairs Medical Center, Northampton, Massachusetts*, 51 FLRA 1520, 1528 (1996). Besides, the element of discriminatory motivation needed to establish a violation of section 7116(a)(2) may be demonstrated by circumstantial, as well as direct evidence. See *Department*

of the Treasury, United States Customs Service, Region IV, Miami, Florida, 19 FLRA 956, 970 (1985).

The evidence established that Kepka engaged in protected activities throughout the April 1, 2001 to March 31, 2002 appraisal period, Kepka's final rating period before his retirement. Additionally, the record demonstrates that the Respondent was well aware of Kepka's protected activities throughout the appraisal period and that Kepka's protected activities were the motivating factor in the Respondent's decision to deny him a Performance Award in May 2002.

1. The Respondent knew that Kepka was a member of the Union and Kepka openly engaged in protected activities.

Respondent argues that the General Counsel did not establish protected activity beyond Kepka's having filed a grievance regarding denial of CWS, testified at the arbitration hearing, and occasionally met with Mason at the shop or union office by way of official time. Miller and Savage's testimony that they did not know Kepka's Union membership status lacks credibility. Kepka's protected activity is displayed by his requests for official time to Miller and by visits and calls by Union Steward Mason to the Guidance and Control shop, where Miller's desk was located. Even assuming that Miller and Savage did not know that Kepka was a member of the Union, the record reveals that during the 2001-2002 appraisal period, Kepka was generally associated with the Union and more actively and openly demonstrated his Union activities than did Hoszwa, who was not a member of the Union. The evidence further shows that Kepka was perceived by other Avionics Department technicians as the employee to contact for questions concerning the negotiated AWS Plan. These employees specifically approached Kepka, not Hoszwa, and asked Kepka questions about applying for a CWS after the issuance of the December 4, 2001 Arbitrator's Award.

2. As a direct result of Kepka's protected activities, the Respondent was required to approve CWS for Avionics Department employees.

It is abundantly clear from the record that the Respondent has been opposed to allowing Avionics employees to work CWS since about August 2000, when it removed Kepka and Hoszwa from their CWS. Kepka engaged in protected union activities during the 2001-2002 appraisal period beginning on or about May 31, 2001, when he filed his First Step Grievance with Miller. With the assistance of Chief Steward

Mason, Kepka pursued his grievance through all three steps, and the Union invoked arbitration on July 19, 2001.

Although Hoszwa testified at the October 17, 2001 arbitration hearing, Kepka was the lead witness for the Union. Moreover, the Arbitrator's decision indicates that several high-ranking management officials, including Savage and Kountz, attended the hearing and expressed their general opposition to CWS and their belief that CWS was incompatible with the mission requirements of the Respondent.

Additionally, Miller testified that he continued to believe that CWS has had a detrimental impact on the mission of the Guidance and Control section. While Savage testified that his view on this subject had changed, the record established that he was heard on numerous occasions stating that he did not like the Arbitrator's decision. Savage's actual opinion of CWS is shown in his own testimony concerning discussions and meetings he had with Avionics employees concerning CWS prior to the filing of the grievance. When asked how many Avionics employees requested CWS after the issuance of the Arbitrator's Award, Savage stated that based on these prior discussions, he expected that "just about every one of the individuals in the Avionics section . . . would take a 10-hour work week or take some form of the alternative work schedule" and that he "expected the worst." Although he minimized the impact of the Arbitrator's Award, it is clear that within a few months of the issuance of the Arbitrator's December 4, 2001 Award, the Respondent was required to allow five of the seven Avionics bargaining unit employees to work a CWS.

It is worthy of note, that the Arbitrator supported his finding that the Respondent failed to demonstrate evidence of adverse mission impact, by specifically finding that the Respondent had failed to show that either Kepka's or Hoszwa's work performance had been deficient during the time that they worked a CWS. The Arbitrator considered it important enough that Kepka and Hoszwa each "received a performance award and each received good ratings on his annual performance evaluation." Savage testified that he read the Arbitrator's decision and understood it to mean that the Respondent could not justify denying CWS to any employee unless it could prove documented mission degradation. In light of the Arbitrator's conclusions and the evidence demonstrating the Respondent's continuing opposition to CWS, it can reasonably be concluded that the Respondent had an additional motive for denying a Performance Award to Kepka in the event that it needed to present documented justifications for removing CWS from the employees of the Avionics Department.

The record reveals that Kepka's work accomplishments during the 2001-2002 rating period were no different than those of previous years, when he was given Performance Awards of 1% or higher. In addition, the record makes it quite clear that the Respondent was aware that Kepka had engaged in significant protected activities throughout the 2001-2002 appraisal period, and that his protected activities resulted in an arbitration hearing that ultimately required the Respondent to allow five of the seven bargaining unit Avionics Department employees to work a CWS around March 2002. Under these circumstances, it can reasonably be concluded that Kepka's protected activities were a motivating factor in the Respondent's May 2002 decision to deny him a Performance Award for the 2001-2002 appraisal period. Accordingly, it is concluded that the General Counsel has made a *prima facie* showing of discrimination for protected activities in this matter.

C. The Respondent's Asserted Justifications for Not Granting Kepka a Performance Award Are Pretextual and Therefore Rejected.

The Respondent claims that it did not give Kepka a Performance Award in May 2002 because he had significant performance problems during the 2001-2002 appraisal period. Both Miller and Savage identified two instances of allegedly deficient work performance by Kepka during this rating period: (1) the soldering work performed by Kepka on an elevator trim tab switch pursuant to a TCTO, and (2) Kepka's work when performing wiring troubleshooting pursuant to the impoundment of Aircraft 412, specifically his alleged failure to discover a crossed wire and a pushed back pin. Additionally, Miller described other performance-related reasons justifying his decision not to give Kepka a Performance Award that Savage did not identify during his testimony. For reasons set out below, I reject the Respondent's asserted justifications as meeting its burden of demonstrating by a preponderance of the evidence that it had legitimate justifications for its decision to deny Kepka a Performance Award for the 2001-2002 rating period.

1. Kepka's May 2001 soldering work on an elevator trim tab switch.

The record disclosed that Kepka performed and completed soldering work on an elevator trim tab switch pursuant to a TCTO in May of 2001, one month after the start of the 2001-2002 appraisal period and about five months before the date that he would have received a midpoint review.

Without doubt Kepka is a highly experienced Avionics technician and I credit his testimony concerning the soldering work. Kepka stated that on the day before Matson's inspection, he had tack soldered the wires to temporarily hold them in place, and that this type of soldering was never intended to be permanent. Kepka later explained to Matson that he had not completed this job and it should not have been inspected that day.

There is no dispute that Kepka was on leave for a doctor's appointment on the day that his soldering was inspected by QA Inspector Matson, and that Matson only brought this work to Miller's attention because Kepka was out that day. Miller further admitted that he knew that the TCTO job had not yet been completed when it was inspected by Matson and that Kepka had never told him that this job had been completed.

Notwithstanding that the job had not been completed, Miller described this incident as a "serious work deficiency," and Savage claimed that he was "very amazed" by the substandard quality of Kepka's workmanship. Miller and Savage's testimony on this subject, in my opinion, lacks credibility. In the first place, it is unchallenged on the record, that no annotation concerning Kepka's allegedly deficient soldering work was ever made in Kepka's 971 file, and the evidence indicates that this incident was never discussed with Kepka during his midpoint review. The fact that the Respondent produced no documentation concerning this incident reveals the true nature of this event: that it was no more than a trivial instance that resulted from a minor misunderstanding. Second, the fact that Miller and Savage still rated Kepka "Outstanding," the highest possible rating (9), under the Appraisal Factors category "Skill in Work" despite this so-called deficiency makes the claim even more doubtful.

2. Kepka's wire troubleshooting work on C-130 Aircraft 412.

a. Background.

On or about November 8, 2001, Aircraft 412 was impounded in order to fix a slight rudder kick problem that was felt during flight after disengagement of the aircraft's autopilot system. The evidence indicates that Aircraft 412 had been experiencing this problem on an intermittent basis ever since it was manufactured by Lockheed-Martin and assigned to the Respondent in 1986 or 1987. Savage's testimony confirms that this same problem had been occurring with this aircraft for at least two years before November 2001. Aircraft 412 was impounded again on November 26, November 29, and December 13, 2001, because it continued to exhibit this rudder kick problem after the aircraft's rudder yaw damper (YD) system was disengaged.

Savage was designated as the Impoundment Officer by Respondent's Commander. As the Impoundment Officer, Savage was responsible for coordinating the efforts of all the aircraft maintenance shops that were working on this problem, but he did not perform any of the physical technician labor. The record establishes that during the time that this aircraft was impounded, about 25 to 30 technicians from Guidance and Control and three to four other aircraft maintenance shops concurrently worked on troubleshooting this problem. The evidence also established that Hoszwa was involved in this work when Aircraft 412 was impounded on November 8 and November 26, 2001, and he assisted Kepka in checking the grounds for the autopilot system. During the month of December, Hoszwa left to go on TDY to Puerto Rico. Hoszwa then continued to work on Aircraft 412 after he returned to the Respondent, and then again in January 2002, after he returned from Christmas vacation.

The record reveals that sometime after the second impoundment of Aircraft 412 on November 26, 2001, Savage designated Kepka to be the point of contact for the Guidance and Control section for Aircraft 412. Savage then tasked Kepka with troubleshooting the entire autopilot system. Savage recognized that this task involved meticulous and time consuming work and also assigned David Riley, a Technician from the COM/NAV section, to assist Kepka. For the 2001-2002 appraisal period, Riley received a 1.5% Performance Award that was reviewed and approved by Savage. Toward the end of November 2001, Kepka provided Savage with a copy of handwritten notes concerning wiring that had been checked, in order to facilitate Savage's understanding of

the wiring checks that had been performed. Savage also maintained his own maintenance log to help him keep track of the work that was being performed by the various shop technicians during the impoundments of Aircraft 412.

Savage acknowledged that by the time Aircraft 412 was impounded a fourth time on December 13, 2001, enough had been learned about the aircraft's in-flight behavior so that the autopilot system was eliminated as the cause of the rudder kick problem. By this time, additional work had been performed by other technicians, including replacing the rudder servo motor and the rudder servo mount, which required plugging and replugging the rudder servo motor Cannon plug. Savage said that nothing significant had been found and that Aircraft 412 was due for scheduled modifications by the Lockheed-Martin contract field team. Savage also testified that he then asked the Lockheed-Martin contract field team to recheck the autopilot system while the aircraft was torn apart during modifications.

Savage testified that several days into the modification process, he heard that the Lockheed contract field team had found crossed wires on Aircraft 412. According to Savage, he then called Gary Little, the Lead Man for the Lockheed contract field team, and Little stated that they had found crossed wires at the back of the rudder servo motor, and a pushed back pin in the rudder servo motor Cannon plug. These findings were further described by Savage in his aircraft maintenance log entry dated January 17, 2002.

b. The Respondent's assertion that Kepka performed deficient wire troubleshooting work during the impoundments of Aircraft 412 does not withstand scrutiny.

The Respondent's reliance on these alleged events as a basis for denying Kepka a Performance Award in May 2002 misses the mark. Savage's testimony that he considered it "very significant" and "highly unusual" that Kepka had not discovered the crossed wire or pushed back pin lacks credibility. As already noted, Kepka did not receive any written performance counselings during the 2001-2002 performance rating period, and it remains undisputed that no document or written entry concerning these "serious" problems was ever put in Kepka's 971 file. Moreover, these supposedly "serious" problems did not prevent Miller and Savage from giving Kepka a rating of "Outstanding" (9) in the "Skill in Work" category of Part F of Kepka's 2001-2002 AF Form 860A, further demonstrating that Miller and Savage never even considered Kepka's work on Aircraft 412 at the

time that they decided not to give Kepka a Performance Award.

With regard to the pushed back pin that was discovered on the rudder servo motor Cannon plug, Savage's own testimony revealed that after the time that Kepka checked this Cannon plug, other shop technicians had unplugged and replugged this Cannon plug numerous times in order to change the rudder servo motor and rudder servo mount. Furthermore, Kepka's testimony establishes that it was very possible that the act of unplugging and replugging a Cannon plug could result in a pin being pushed back. Thus, the pushed back pin could have been caused at the time the rudder servo motor and mount were replaced, which was after the time that Kepka had checked this Cannon plug. The Respondent's witnesses did not dispute this testimony. Given these undisputed factual circumstances, it was unreasonable for Miller and Savage to have attributed the pushed back pin discovered in January 2002 to the work performed by Kepka in November 2001.

The record shows that although the definitive cause of the rudder kick problem was never identified, Miller and Savage still testified that the cause of this problem was the crossed wires and/or pushed back pin that Kepka apparently failed to discover. The credible evidence presented during the hearing indicates that in fact, neither of these discrepancies actually caused Aircraft 412's intermittent rudder kick problem.

During his testimony, Miller recognized that Hoszwa was the most knowledgeable electronics person in the Avionics Department. At the hearing, Hoszwa, a disinterested witness, testified that even if the suspect pin was pushed back, it was likely that there was enough length remaining on the pin that it would still be able to make contact with its mate. On the other hand, if the pin was completely pushed out so that no contact was made, an intermittent problem would not be demonstrated because the rudder motor would either continually drive or not drive at all. Hoszwa further stated that the wires that were crossed carry an AC signal. Accordingly, whether these wires were crossed would have no effect, since it would be like installing batteries backwards in a flashlight--the flashlight (to my surprise) would still work. Moreover, even if the crossed wires caused a problem, it can be concluded such a problem would not have been of an intermittent nature, as had been exhibited by Aircraft 412. The inconsequential effect of the crossed wires is further shown by the fact that Savage's own aircraft maintenance log recognized that Aircraft 412 could have come from the factory with crossed wires. Still,

this problem was not identified until January 2002 and Aircraft 412 had been assigned to and operating at the Respondent since 1986 or 1987. Hoszwa further testified that no one really knew what the cause of the problem was, since so much work had been done on Aircraft 412, but he believed that the rudder kick problem was more likely caused by a bad thrust bearing on the rudder, a mechanical problem. Savage's aircraft maintenance log indicates that the thrust bearing at the rudder base was changed sometime after January 9, 2002. Hoszwa further explained that if the problem was electrical, it would have been almost instantaneous in nature, whereas there was a couple of seconds of delay in the movement of the rudder when the autopilot was engaged on Aircraft 412. Accordingly, Miller's and Savage's testimony regarding the purported significance of the crossed wires and pushed back pin are rejected as pretextual in nature.

3. The other performance issues attributed to Kepka demonstrates that Miller's decision to deny Kepka a Performance Award was motivated solely by Kepka's protected activities.

In *Department of Veterans Affairs Medical Center, Brockton and West Roxbury, Massachusetts*, 43 FLRA 780 (1991) (VA Brockton), the Authority agreed with the ALJ's finding that the timing of the respondent's decision to initiate disciplinary action shortly after the discriminatee filed a unfair labor practice charge warranted the inference that the filing of the unfair labor practice charge was a motivating factor in the respondent's decision to impose discipline. *Id.* at 787. The ALJ rejected the Respondent's claim that it would have taken the disciplinary action anyway because it took the respondent "almost three weeks before taking any positive steps even to initiate disciplinary action. . . . One normally does not wait so long." *Id.* at 788.

The ALJ's findings in *VA Brockton* appear to be applicable to this case. Miller testified that he did not agree to a Performance Award for Kepka partially because of there had been instances in which he needed to remind Kepka to wear his safety shoes, had disagreements with Kepka concerning whether he was responsible for calling supply to find out the status of ordered parts, and felt that Kepka had a "rough" personality. It remains undisputed that Kepka was never counseled concerning these considerations and no negative entry concerning these matters were ever entered into Kepka's 971 file, however. The record clearly demonstrates that all of these considerations by Miller involved conduct that Kepka had engaged in throughout his

career at the Respondent, including the time that Miller and Savage served as his supervisors. Furthermore, none of the conduct that Miller purportedly charged to Kepka had prevented Miller and Savage from giving Kepka Performance Awards in the past. The fact that Miller testified that he used these considerations to justify his decision not to give Kepka an award, in my opinion, bolsters the conclusion that Kepka was not given a Performance Award because of the protected activities that he engaged in during the 2001-2002 appraisal period.

Based on the record as a whole, it is concluded that a legitimate basis for the denial of a Performance Award for 2001-2002 has not been established on this record, and therefore, the Respondent has not met its burden of demonstrating that the denial was based on lawful considerations. In view of the timing of the denial, Kepka's having filed a grievance regarding denial of CWS, testified at the arbitration hearing, and his meeting with Mason at the shop or union office by way of official time, it can reasonably be concluded that Kepka's protected activity was the sole reason for the denial of the Performance Award. Furthermore, the witnesses proffered by the Respondent failed to corroborate critical testimony and the Respondent did not offer documentary evidence to support its alleged justifications for not granting the 2001-2002 Performance Award to Kepka. *Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah, 35 FLRA 891 (1990).*

In light of the foregoing, it is concluded that the General Counsel established by a preponderance of the evidence that the denial of a Performance Award for 2001-2002 to Kepka was motivated solely by his protected activity. Accordingly, it is found that Respondent's proffered reason for its actions was pretextual. Therefore, it is found that the Respondent violated section 7116(a)(1) and (2) of the Statute.

The Remedy

Having found that the Respondent violated section 7116 (a)(1) and (2) of the Statute, it further concluded that the Respondent should grant Robert C. Kepka a Performance Award for the 2001-2002 rating period that is equivalent to that which he received for the performance appraisal period that preceded his protected activities (1% of his base salary). The Authority will order a make-whole remedy where there is discrimination in connection with conditions of employment based on unlawful consideration of protected union activity and the Respondent has not shown that it would have taken

the same action in the absence of such consideration. *Department of the Army, Headquarters, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina*, 43 FLRA 1414, 1418 (1992). The payment of a Performance Award to Kepka as a remedy for the unfair labor practice is authorized under the Back Pay Act, 5 U.S.C. § 5596. See *Federal Aviation Administration*, 55 FLRA 1271, 1277 (2000) (relying on the Back Pay Act for paying performance awards when awards improperly withheld due to unwarranted or unjustified personnel action); *U.S. Department of Health and Human Services, Social Security Administration, Area II, New York Region*, 48 FLRA 370, 378 (1993) (upholding award pursuant to the Back Pay Act granting the grievant a performance award due to unwarranted personnel action). A lesser remedy requiring Respondent to merely reevaluate whether Kepka deserved a performance award for the rating period April 1, 2001 to March 31, 2002, without taking into account his protected union activity, in my opinion, would be vacuous and not a deterrent to future violative conduct by the Respondent.

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

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Federal Labor Relations Authority, 5 C.F.R. § 2423.41 (c), and § 18 of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7118, the Department of the Air Force, 911th Airlift Wing, Coraopolis, Pennsylvania, shall:

1. Cease and desist from:

(a) Discriminating against Robert C. Kepka, or any other employee in the bargaining unit represented by the American Federation of Government Employees, AFL-CIO, Local 2316, by failing to a grant him a Performance Award because he exercised his right to engage in protected activities under section 7102 of the Federal Service Labor-Management Relations Statute.

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

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

(a) Make whole Robert C. Kepka by granting him a Performance Award of 1% of his base salary for the appraisal period covering April 1, 2001 to March 31, 2002.

(b) Post at the Department of the Air Force, 911th Airlift Wing, Coraopolis, Pennsylvania, where bargaining-unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, 911th Airlift Wing, Coraopolis, Pennsylvania, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

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

Issued, Washington, DC, May 20, 2004.

—

ELI NASH
Administrative Law Judge

Street, Suite 1500, Boston, MA 02110-1200, and telephone number is: 617-424-5730.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by ELI NASH, Chief Administrative Law Judge, in Case No. BN-CA-02-0555, were sent to the following parties in the manner indicated:

—

CERTIFIED MAIL AND RETURN RECEIPT

CERTIFIED NOS:

Lawrence L. Kuo, Esq.

7000 1670 0000 1175

3956

Philip T. Roberts, Esq.
Federal Labor Relations Authority
99 Summer Street, Suite 1500
Boston, MA 02110-1200

Major Douglas Huff, Esq.

7000 1670 0000 1175 3963

Major Marge Overly, Esq.
AFLSA-JACL-CLLO
1501 Wilson Boulevard, 7th Floor
Arlington, VA 22209-2043

REGULAR MAIL:

Chris Mason, Chief Steward
911th Airlift Wing, AFGE, Local 2316
2375 Hercules Court
Pittsburgh IAP-ARS
Coraopolis, PA 15108-4403

President
AFGE
80 F Street, NW
Washington, DC 20001

Dated: May 20, 2004
Washington, DC