

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

MEMORANDUM

DATE: September 3, 2010

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN  
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE AIR FORCE  
DAVIS-MONTHAN AIR FORCE BASE  
TUCSON, ARIZONA

RESPONDENT

AND

Case No. DE-CA-08-0247

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES  
(AFL-CIO), LOCAL 2924

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

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

DEPARTMENT OF THE AIR FORCE  
DAVIS-MONTHAN AIR FORCE BASE  
TUCSON, ARIZONA

RESPONDENT

Case No. DE-CA-08-0247

AND

AMERICAN FEDERATION OF GOVERNMENT  
(AFL-CIO), LOCAL 2924

CHARGING PARTY

**NOTICE OF TRANSMITTAL OF DECISION**

The above-entitled case having been heard by the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves her 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. §§2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **OCTOBER 4, 2010**, and addressed to:

Office of Case Intake & Publication  
Federal Labor Relations Authority  
1400 K Street, NW., 2<sup>nd</sup> Floor  
Washington, DC 20424-0001

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SUSAN E. JELEN  
Administrative Law Judge

Dated: September 3, 2010  
Washington, D.C.

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

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DEPARTMENT OF THE AIR FORCE  
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AND

Case No. DE-CA-08-0247

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES (AFL-CIO), LOCAL 2924  
CHARGING PARTY

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Sue T. Kilgore, Esq.  
For the General Counsel

Phillip G. Tidmore, Esq.  
Thomas F. Burhenn, Esq.  
For the Respondent

John Pennington  
For the Charging Party

Before: SUSAN E. JELEN  
Administrative Law Judge

**DECISION**

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §7101, *et. seq.* (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority/FLRA), 5 C.F.R. Part 2423.

On June 4, 2008, the American Federation of Government Employees (AFL-CIO), Local 2924 (Charging Party/Union) filed an unfair labor practice charge with the Denver Region of the Authority against the Department of the Air Force, Davis-Monthan Air Force Base, Tucson, Arizona (Respondent). (G.C. Ex. 1(a)) On January 12, 2010, the Regional Director of the Denver Region of the Authority issued a Complaint and Notice of Hearing, which alleged that the Respondent violated section 7116(a)(1) and (2) of the Statute by

lowering the 2007-2008 performance appraisal of bargaining unit employee Pratt Bruce

Payne on five out of nine appraisal factors, compared to the scores he received on his appraisal from the previous year. (G.C. Ex. 1(b)) On January 28, 2010, the Respondent filed an Answer to the complaint, in which it admitted certain allegations while denying the substantive allegations of the complaint. (G.C. Ex. 1(c)).

A hearing was held in Tucson, Arizona on March 17, 2010, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. The General Counsel and the Respondent filed timely post-hearing briefs, which have been fully considered.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

### **STATEMENT OF THE FACTS**

The Respondent is an agency within the meaning of section 7103(a)(3) of the Statute. (G.C. Ex. 1(b), (c)). The Aerospace Maintenance and Regeneration Group (AMARG) is responsible for storing and reclaiming aircraft as well as depot maintenance for several types of aircraft. (Tr. 125) Tony Bangart is the flight chief, or second line supervisor, for employees in the AID wing branch, which includes the machinist shop. (Tr. 126) Jeffrey Gamel is the supervisor in the machinist shop, which has machinists, welders and sheet metal workers. (Tr. 82) At all times material to this matter, Bangart and Gamel have been supervisors and/or management officials within the meaning of section 7103(a)(10) and (11) of the Statute. (G.C. Ex. 1(b), (c)).

The Union is a labor organization within the meaning of section 7103(a)(4) of the Statute. Donald Child is vice president of AFGE Local 2924. (Tr. 18) Pratt Bruce Payne is a bargaining unit employee and works as a machinist. (Tr. 43). Payne previously worked in the machinist shop as a contractor and returned in May 2006. Gamel has been his first level supervisor since May 2006. (Tr. 43-44).

#### **Payne's 2006-2007 performance appraisal**

On May 15, 2007, Payne signed for his performance appraisal from Gamel for the period April 1, 2006 through March 31, 2007. He was rated as meeting the standards on all his critical element and received a performance award. Gamel further noted on the appraisal that Payne was an "innovative highly qualified machinist; thrives on new challenges." The appraisal lists eight appraisal factors: work effort; adaptability to work; problem solving; working relationships; communication; work productivity; self-sufficiency; skill in work; and work management. Payne received 5 ratings of "8" and 3 ratings of "9" (for work effort; problem solving; and skill in work) (8 meaning Far Above Fully Successful; 9 meaning Outstanding). (Jt. Ex. 1; Tr. 44-45).

#### **Payne's protected activity**

According to Payne, in January 2006, Tom Picard, a work leader from another shop, was made the lead in the machinist's shop. A grievance was filed by two other employees (not Payne) and, as a result, Picard was sent back to the wing shop. (Tr. 46) On May 29,

2007, Payne sent an e-mail to Gamel, asking about Picard coming back to the shop as lead, and requesting the written authority for this action. (Jt. Ex. 2; Tr. 45-46).

Tony Bangart replied by e-mail on May 30, 2007, stating that Picard was not in a permanent position and that there had been a need to relocate him due to the reduction of the second shift. (Jt. Ex. 3; Tr. 47).

Apparently Picard was assigned to the shop around May 30, 2007, and was assigned some clerical work and assisting with the daily operations of the shop. (Tr. 48-49) Soon after, Payne objected to the manner in which Picard handed him a leave and earnings statement and filed a grievance over what he considered a Privacy Act violation. Payne was represented by Child in the processing of this grievance. (Jt. Ex. 4; Tr. 19, 49) The grievance was denied by Gamel at the first step; Bangart at the second step; and Col. Hoxie, the commander, at the third step. (Jt. Exs. 5, 6, 7, 8 & 9; Tr. 20-24) The third step decision is undated but was issued sometime in late July 2007. (Jt. Ex. 9; Tr. 24, 25) The grievance was not pursued beyond the third step denial. (Tr. 24).

On July 19, 2007, Payne and another bargaining unit employee in the shop Michael Balbi, filed a grievance alleging that the detail of Picard to the work leader position was unfair. Child was the Union representative on this grievance. (Jt. Ex. 10; Tr. 25-26) Child filed the grievance with Gamel, who denied the grievance asserting that it was a reassignment and not a detail. (Jt. Ex. 11; Tr. 27-28) The grievance was elevated to the second step and denied by Bangart. (Jt. Ex. 12 and 13; Tr. 29-30) The grievance was then elevated to the third step and a meeting was held on August 24, 2007 with Col. Hoxie, Bangart, Bea Clifton, Labor Relations Specialist; Child; Balbi and Payne. (Jt. Ex. 14) Sometime after the meeting, Col. Hoxie issued an undated decision, denying the grievance. (Jt. Ex. 15; Tr. 30) The grievance was not pursued beyond the third step denial. (Tr. 31).

On August 10, 2007, Gamel issued Payne a Notice of Proposed Reprimand, for falling asleep on duty on July 24, 2007. (Jt. Ex. 16; Tr. 54) Payne responded (Jt. Ex. 17; Tr. 55), but Gamel issued a Notice of Reprimand on September 11, 2007. (Jt. Ex. 18; Tr. 55-56) On October 2, 2007, Payne filed a first step grievance regarding the Reprimand. He was represented by Debra McKeever, Union steward, in this grievance. (Jt. Ex. 19; Tr. 56) The grievance was denied at the first step. (Jt. Ex. 20; Tr. 56) The grievance was elevated to the second step but denied by Bangart. (Jt. Ex. 21, 22; Tr. 57) On October 24, 2007, the grievance was elevated to the third step and a meeting was held with Col. Hoxie on

October 29, 2007. (Jt. Ex. 23; Tr. 57) On November 7, 2007, Col. Hoxie issued his

grievance decision in which he agreed to remove the Letter of Reprimand from Payne's 971 file. However, he also requested that an entry to Payne's 971 file be made regarding this subject matter. (Jt. Ex. 24; Tr. 57) On November 29, 2007, Gamel added the following comment to Payne's 971 file: "Reprimand for sleeping in the work area is removed this date as a result of 3<sup>rd</sup> step Grievance Decision from Col. Hoxie. You are still reminded however, we do not tolerate sleeping on duty, sleeping in Production areas, or taking unauthorized breaks or deviating from established schedules." (Jt. Ex. 25; Tr. 57-58).

On January 16, 2008, Bangart sent a memorandum that was posted on the doors of the shop. The memorandum stated that Picard was there on a temporary basis and that the work leader was in charge in the absence of the supervisor. (Jt. Ex. 27; Tr. 62).

The memorandum states:

It has come to my attention, that there may still be some confusion as to current job assignments within Mr. Gamel's RCC and areas of supervision.

Mr. Tom Picard has been temporarily assigned to this RCC, acting as the Work Lead for this RCC. There are three different skills within this RCC, and no one can be expected to be an expert in all different aspects of all the varied aspects of maintenance with which we deal with on a daily basis.

Fortunately, all of the mechanics in all three skills currently in this RCC are already at the Journeyman level. Any job specific training and advice should be somewhat limited and/or unnecessary from the Work Leader.

The Work Leaders role is not limited to job specific training or advice. There are literally dozens of scheduled, unscheduled and re-occurring training requirements that must be fulfilled. The scheduling of this training, and searching availability for ongoing training to further our workforce's skill and knowledge is also a large portion of the Work Leaders responsibility. In addition, the Work leader will normally be in charge of the area in the absence of the Supervisor, or at other times deemed necessary by the supervisor.

For the purpose of this memo, Mr. Tom Picard is in the position of Work Leader for Mr. Jeff Gamel in MXDPCA, and any direction, requests or requirements should be treated as though they came from the Supervisor personally, or those appointed over him. This will not be limited to one job skill, but for any and all skills assigned to that RCC. Mr. Picard will also act as alternate Supervisor in the absence of Mr. Gamel, and in that event, will be in charge of all three skills.

If it becomes necessary in the future to change any of the above assignments, all will be notified accordingly.

(Jt. Ex. 27; Tr. 62).

On February 4, 2008, Payne and Balbi filed a grievance regarding Bangart's memorandum that authorized Picard to act as alternate supervisor. Child was the Union representative on this grievance. (Jt. Ex. 28; Tr. 31-32, 62-63) Child filed the grievance with Gamel, who denied the grievance. (Jt. Ex. 29; Tr. 33) The grievance was elevated to the third step (Jt. Ex. 31) and a meeting was held with Col. Hoxie, Bangart, Clifton, Child, Balbi and Payne. Col. Hoxie denied the grievance on March 19, 2008. (Jt. Ex. 32; Tr. 34) The grievance was not pursued beyond the third step denial. (Tr. 34).

On April 7, 2008, Payne and Balbi filed a grievance alleging a hostile work environment as a result of Gamel telling them they could not attend a pizza party in the A-10 Wing Shop. The grievance also stated that employees at the pizza party were allowed an extra 29 minutes for lunch that day, which Payne and Balbi were not allowed. (Jt. Ex. 33; Tr. 64-65) Gamel admitted that he had told them they were not invited to the pizza party but later apologized to them (before the grievance had been filed) because of his confusion over the invitation. Gamel asserts that he told others in his shop that they were not invited as well. (Tr. 106) The grievants agreed to accept Gamel’s apology and the grievance was closed out at step two. (Jt. Exs. 34, 35 & 36; Tr. 65-66).

**Mid-term performance appraisal**

On December 11, 2007, Payne signed for his semi-annual progress report, which was prepared by Gamel. (Jt. Ex. 26; Tr. 58-59) Payne liked his progress report, except for the ratings on elements 2, cooperation, and 4, communication. (Tr. 59) Although no specific numbers were assigned to these elements, they were in the mid rather than high range of ratings. Gamel told Payne that he had received these ratings because he was hesitant about taking direction from Picard and checking jobs with Gamel. According to Payne, “most of the time when I questioned the job was that for, one, there was no personnel action putting him [Picard] in our chain of command.” (Tr. 59) Payne testified that there were problems with Picard’s assignments and a lot of the jobs were not ready yet. (Tr. 59, 60) At some point Payne had asked Gamel if they could check with him if there was a questionable job assignment, which Gamel agreed to. (Tr. 60).

**2007-2008 performance appraisal**

Payne was given his performance appraisal for the April 1, 2007 through March 31, 2008 period by Gamel on May 16, 2008. He was rated as meets on all elements. However, with regard to 9 appraisal factors, his rating was dropped in several areas:

<b>Appraisal Factors</b>	<b>2007 appraisal</b>	<b>2008 appraisal</b>
Work Effort	9	8
Adaptability to Work	8	7
Problem Solving	9	9
Working Relationships	8	7
Communication	8	8
Work Productivity	8	8
Self-Sufficiency	8	9
Skill in Work	9	8
Work Management	8	7
<b>Total</b>	<b>75</b>	<b>71</b>

In reviewing the appraisal factors, three factors remained the same, five factors were decreased by one, and one factor was raised by one. ( Jt. Exs. 1 & 37).



During this meeting, Gamel told him that he had been hurt by Balbi and Payne not accepting his apology about the pizza party. He also stated that they had beaten him up quite a bit over the last year and hopefully it would be better next year. (Tr. 67).

## **POSITIONS OF THE PARTIES**

### **General Counsel**

The General Counsel (GC) alleges the Respondent's actions in lowering Payne's 2007-2008 performance appraisal was in retaliation for his protected activity and in violation of section 7116(a)(1) and (2) of the Statute. The GC contends that under the applicable analytical framework, set forth in *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*), it has established a prima facie case that the lowered performance appraisal constituted discrimination against Payne, which was motivated by his Union activity. In this regard, the GC maintains that Payne filed several grievances during the course of the appraisal year (either as an individual or with another bargaining unit employee) that directly challenged the actions of the immediate supervisor and other management officials within the unit. The GC also asserts that the timing of several events, coming immediately after specific grievances, was motivated by Payne's Union activity. The GC further contends there is credible evidence provided by Payne that establishes that the supervisor was disturbed and hurt by Payne's activity and confirms the motivation for the lowered appraisal was Payne's protected activity.

Citing the *Letterkenny* framework, the GC argues that once a prima facie case of discrimination against Payne has been established, the burden shifts to the Respondent to show it had a non-discriminatory justification for its action and the Respondent has failed to meet its burden. In particular, the GC contends the supervisor's explanation of his appraisal process lacks credibility and can only be seen as pretextual.

As a remedy the GC seeks an order requiring the Respondent to cease and desist, to post a notice to employees, and to conduct a new evaluation of Payne's performance for the 2007-2008 performance year without considering his protected activity. In the event the performance factors are raised, the Respondent should be directed to provide Payne with a performance award commensurate with the new performance factors.

### **Respondent**

The Respondent asserts that the GC failed to establish an inference of a discriminatory motive with regard to Payne's appraisal. The Respondent asserts that Payne received the appraisal factors that he earned during the rating cycle. Further, Payne had certain problem areas that Gamel had appropriately addressed with him as his supervisor. Although Payne did file grievances during the rating cycle, Gamel was told that the grievances were not directed against him, but against higher-level management officials. The Respondent asserts that neither Gamel nor Bangart allowed Payne's protected activity to impact on the actual rating of the appraisal factors.

## **DISCUSSION AND ANALYSIS**

In *Letterkenny*, the Authority articulated its analytical framework for addressing

allegations of discrimination claimed to violate section 7116(a)(2) of the Statute. Under that framework, the General Counsel has the burden to establish by 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 connection with hiring, tenure, promotion or other conditions of employment. *United States Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Elkton, Ohio*, 61 FLRA 515, 519 (2006) (*FCI Elkton*); *Letterkenny*, 35 FLRA at 118. Once the General Counsel makes the required prima facie showing, the respondent may seek to establish the affirmative defense that: (1) there was a legitimate justification for the action; and (2) the same action would have been taken in the absence of protected activity. *FCI Elkton*, 61 FLRA at 519; *Letterkenny*, 35 FLRA at 118. The General Counsel may seek to establish the respondent's reasons for taking the action were pretextual. *FCI Elkton*, 61 FLRA at 519.

### **Was Payne engaged in protected activity?**

Under the first prong of *Letterkenny*, the GC must establish that the employee against whom the alleged discriminatory action was taken was engaged in protected activity. In this matter, the record evidence establishes that prior to May 2007, Payne had not filed any grievances under the parties' negotiated grievance procedure. From June 2007 through April 2008, Payne filed five grievances. Three of the grievances were filed with Balbi, a machinist who works in the shop with Payne, and the other two were individual grievances filed by Payne. Payne was represented by either the Union vice president or the Union steward in the processing of these grievances. Three of the grievances directly related to some aspect of the

reassignment of Tom Picard as the work leader in the shop: the first grievance, filed in June 2007, related to alleged violations of the Privacy Act; the second grievance, filed in July 2007, related to the actual assignment of Picard as work leader; and the third grievance, filed in January 2008, related to Bangart's January memorandum informing the shop that Picard had supervisory authority when the actual supervisor was absent. These three grievances were filed by both Payne and Balbi and were denied at the third step by the Commander. The Union did not elevate these grievances to arbitration. The fourth grievance, filed August 2007, concerned a reprimand Payne received for sleeping on the job. The reprimand was removed at the third step by the Commander, although a note was placed in Payne's 971 file. The fifth grievance, also filed by Payne and Balbi, was filed in May 2008 and concerned their supervisor telling them they were not invited to a pizza party in the wing shop and the employees getting extra time for the party.

The record evidence, therefore, clearly establishes that during the time frame from May 2007 through May 2008, Payne was engaged in protected activity by the filing of these grievances.

### **Was such activity a motivating factor?**

The more difficult question is whether this protected activity was actually a motivating factor in the lowering of Payne's performance appraisal for the period of April 1, 2007 through March 31, 2008.

The GC relies on the Respondent's responses to the grievances, the timing of those responses and statements Gamel made suggesting his displeasure with the grievances. Specifically, the GC cites to the testimony of Child regarding Gamel's conduct when he delivered the grievances. With the first grievance, the two of them (Gamel and Child) chatted amicably. However, Child was not so well received when he delivered the second grievance (the detail grievance) to Gamel. According to Child, Gamel was agitated and impatient and said he did not have time for such things. (Tr. 28) The other evidence related to the third step grievance meetings involving the first two grievances. During these meetings, Bangart was very adamant about management's rights to assign work. And at one point, Bangart was apparently silenced by Clifton, who reminded him that what he said could be used against the Respondent in arbitration. (Tr. 30, 34 & 52).

The GC thus asserts that Gamel and Bangart were frustrated after dealing with just two grievances, citing to the ALJ decision in *United States Dep't of the Air Force, Eglin AFB, Eglin AFB, Fla.*, 60 FLRA 620, 632 (2005)(ALJ decision reversed by Authority) In reviewing their conduct as a whole, however, I do not find the actions of either Gamel or Bangart sufficient to assign illegal motivation for their subsequent conduct. In particular, I do not find Gamel's impatience establishes illegal motivation. Nor do I find Bangart's behavior in the third step grievance meetings to be anything but a robust defense of the Respondent's actions with regard to the reassignment of Picard as the work leader.

Next the GC argues that the record contains numerous examples of Respondent's actions against Payne that were taken close in time to his grievance activity.

First, the detail grievance was filed on July 19, and only weeks later, on August 10, Gamel issued Payne a notice of proposed reprimand for sleeping on the job. Gamel did not accept Payne's arguments in his defense and issued the reprimand on September 11. Despite the fact that Payne had never been disciplined before, Gamel imposed the full penalty. The GC argues that Gamel's decision, and the fact that the decision was issued shortly after the filing of Payne's second grievance, support a finding of animus against Payne for his protected activity. Further, Gamel denied the grievance over the reprimand. At the third step Col. Hoxie reversed Gamel's decision and ordered the reprimand removed. On November 29, Gamel was forced to replace the reprimand with a note in Payne's personnel file, acknowledging Col. Hoxie's third step decision.

Second, two weeks later, the GC asserts that Gamel's frustration with Payne's protected activity surfaced at the mid-term review (on December 11). Although Gamel was positive about Payne's work performance, he gave Payne lower marks in the areas of cooperation/responsiveness and communication, saying Payne was hesitant about taking direction from Picard, the work leader. Payne testified that Picard sometimes made incorrect assignments so he believed it was necessary to confirm these tasks with Gamel. Gamel did not contradict this testimony and admitted that, once he explained the assignments, Payne did not argue with him. Also once Payne was told to start a task, he did so immediately. Overall, these misunderstandings occurred only once or twice a month. The GC argues that the closeness in time between Col. Hoxie's decision regarding the reprimand and the mid-term review indicates that Gamel was motivated to reduce Payne's mid-term ratings less by Payne's work place behavior than by his protected activity.

Third, the GC notes that only days after Col. Hoxie denied the grievance concerning the Bangart memo (March 19), Gamel informed Payne and Balbi that they were not invited to the Wing Shop's pizza lunch. Although Gamel apologized about the incident a few days later, the Union filed the pizza grievance on April 7. At that time, Payne and Balbi informed Gamel that they were filing the grievance to create a paper trail, apparently anticipating some action by Gamel against Payne. The GC asserts that Gamel's explanation of his actions at the hearing was not consistent with his written response to the grievance and is additional evidence of Gamel's frustration with Payne's protected activity.

Finally, the GC refers to the meeting between Gamel and Payne to discuss the 2008 annual appraisal. Gamel gave Payne high ratings for work effort, problem solving, work productivity and other appraisal factors related to Payne's ability to do his job. In the categories of adaptability to work, working relationships and work management, however, Gamel rated Payne at 7, a lower score than he had received on any appraisal factor the year before. During the meeting, according to Payne and not contradicted by Gamel, Gamel said that he was hurt that the Union filed a grievance against him and had not accepted his

apology over the pizza lunch. And he said that Payne and Balbi "had beaten him up" over the year, apparently referring to the pizza lunch and, according to the GC, the grievances Payne had filed over the year. The GC asserts that Gamel himself linked Payne's performance appraisal with his protected activity.

Essentially the GC argues that during the performance year, the Respondent took several actions against Payne that were close in time to Payne's grievance activities, and that otherwise cannot be explained adequately. The Authority has held that timing of agency actions may be significant in determining whether an employee's protected activity was a motivating factor, within the meaning of *Letterkenny*, in the agency's decision to take action against an employee. *United States Dep't of Transp., Fed. Aviation Admin., El Paso, Tex.*, 39 FLRA 1542, 1552 (1991); *see also, U.S. Dep't of Agric., U.S. Forest Serv., Frenchburg Job Corps, Mariba, Ky.*, 49 FLRA 1020, 1032 (1994); *Department of the Air Force, Ogden Air Logistics Ctr., Hill AFB, Utah*, 35 FLRA 891, 900 (1990).

In reviewing the evidence as a whole, I do not find that the General Counsel has established that Payne's protected activity was a motivating factor in his performance appraisal for 2007-2008. It is clear that Payne engaged in protected activity throughout the appraisal period. However, although the GC argues that the timing of subsequent events is related to the timing of the grievances and their processing, I do not find the evidence sufficient.

With regard to the reprimand Payne received for sleeping on the job, the GC relates the timing of the reprimand to the second grievance, which was filed on July 19 (Jt. Ex. 10) and eventually denied at the third step by Col. Hoxie sometime after August 24 (Jt. Ex. 15). The notice of proposed reprimand was issued on August 10 for conduct that occurred on July 24. (Jt. Ex. 16) It is clear that the timing of the proposed reprimand is directly related to Payne's conduct in being caught sleeping on the job, rather than the grievance activity. Payne, although he raises defenses in his response to the proposed reprimand and later in the grievance, does not deny that he was asleep or that he was found that way by a supervisor from another shop.

With regard to the mid-term appraisal, the timing of that event is directly related to the midterm appraisal period (from 5/1/2007 through 11/1/2007) and is unrelated to the grievance or to Col. Hoxie's response to the reprimand. There was no evidence that Gamel was concerned in any way about the grievance decision and the GC's speculation on this point is without foundation.

Finally, the GC ignores the fact that Payne admits that he did not believe that Picard should be the work leader, and, despite the grievances on this issue being denied and not taken to arbitration, continued to believe that the agency had never adequately justified Picard's reassignment or placing him in the machinist's chain of command. (Tr. 59) Further Payne admitted that he did not always follow Picard's assignments and that he was reluctant

to take Picard's directions. (Tr. 73) Payne would go to Gamel for confirmation of work assignments. Even if Gamel had agreed to this, it was not out of line to mention this conduct in a midterm performance review. There was no reference to Payne's protected activity during the meeting.

With regard to the actual appraisal, I find that Gamel's explanation of his ratings are consistent and in response to Payne's actual behavior and performance during the rating period, rather than his protected activity. Gamel lowered Payne's ratings in five factors: work effort, adaptability to work; working relationships, skill in work, and work management. With regard to work effort, Gamel testified that Payne worked hard and he gave him an 8 because he did a good job. Gamel lowered the appraisal factors in areas of adaptability and working relationships because there had been problems with Payne's acceptance of Picard as the work leader during the appraisal period. While Payne did file grievances during the appraisal period relating to Picard's position as work leader, all three of the grievances were denied by the Respondent and the Union did not elevate them to arbitration. Payne, however, continued to insist that the Respondent had not adequately explained Picard's reassignment and admits that he did not always follow Picard's directions. The fact that Payne would eventually follow Picard's directions after being told to do so does not mitigate this behavior. In this regard, I find that Gamel was able to justify his rating of Payne. Rather than Payne's protected activity, the rating adequately reflects a concern regarding his behavior toward Picard throughout the rating period. With regard to the other lowered factors: work effort, adaptability to work, skill in work and work management, I also find Gamel's explanations to be sufficient. Gamel was quick to praise the quality of Payne's work and his abilities. I also note that Gamel changed appraisal ratings for most of his employees, raising some employees and lowering others. There is no guarantee that an employee will receive the same appraisal rating every year.

I am aware that during the May meeting, Gamel told Payne that he was hurt by Balbi and Payne not accepting his apology about the pizza party and that they had beaten him up quite a bit over the last year and hopefully it would be better the next year. While these comments relate directly to Payne's protected activity, I do not find them sufficient to overcome my finding that the appraisal itself was not made in retaliation for Payne's protected activity.

In conclusion, I find that the General Counsel has failed to show by a preponderance

of the evidence that Payne's protected activity was a motivating factor in Gamel's performance appraisal rating. Thus, the General Counsel has failed to establish a prima facie case as required under the first part of the *Letterkenny* framework and it is unnecessary to discuss the second part of that framework.

The General Counsel has failed to establish that Respondent violated section 7116(a) (1) and (2) of the Statute as alleged. Accordingly, I recommend that the Authority adopt the following Order:

**ORDER**

It is ordered that the complaint be, and hereby is, dismissed.

Issued, Washington, D.C. September 3, 2010

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SUSAN E. JELEN  
ADMINISTRATIVE LAW JUDGE

**CERTIFICATE OF SERVICE**

I hereby certify that copies of this **DECISION**, issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. DE-CA-08-0247, were sent to the following parties:

**CERTIFIED MAIL & RETURN RECEIPT**

**CERTIFIED NOS:**

**Sue T. Kilgore  
7004-1350-0003-5175-3925  
Counsel for the General Counsel  
Federal Labor Relations Authority  
1244 Speer Boulevard, Suite 100  
Denver, CO 80204**

**Phillip G. Tidmore  
Litigation Attorney  
Labor Relations Branch, LFSC  
AFLOA/JACL  
1501 Wilson Boulevard, 7<sup>th</sup> Flr.  
Arlington, VA 22209**

**7004-1350-0003-5175-3932**

**John Pennington  
President, AFGE Local 2924  
P.O. Box 15039  
Tucson, AZ 85708**

**7004-1350-0003-5175-3949**

**REGULAR MAIL:**

President  
AFGE, AFL-CIO  
80 F Street, N.W.  
Washington, DC 20001

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Catherine Turner  
Office of Administrative Law Judges  
Federal Labor Relations Authority

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Washington, DC