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

OGDEN AIR LOGISTICS CENTER HILL AIR FORCE BASE, UTAH Respondent and	Case No. DE-CA-80545
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1592, AFL-CIO Charging Party	

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 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 2, 1999**, and addressed to:

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

ELI NASH, JR.
Administrative Law Judge

Dated: May 3, 1999
Washington, DC

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

MEMORANDUM DATE: May 3, 1999

TO: THE FEDERAL LABOR RELATIONS AUTHORITY

FROM: ELI NASH, JR.
ADMINISTRATIVE LAW JUDGE

SUBJECT: OGDEN AIR LOGISTICS CENTER
HILL AIR FORCE BASE, UTAH

Respondent

and Case No. DE-CA-80545

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 1592, AFL-CIO
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 transmittal sheet sent to the parties and the service sheet. Also enclosed are the transcript, exhibits and briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ

99-26

WASHINGTON, D.C.

OGDEN AIR LOGISTICS CENTER HILL AIR FORCE BASE, UTAH Respondent	Case No. DE-CA-80545
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1592, AFL-CIO Charging Party	

Jon W. Jepperson
For the Respondent

Daniel Minahan
For the Charging Party

Matthew L. Jarvinen
For the General Counsel

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

On November 25, 1998, the Regional Director for the Denver Region of the Federal Labor Relations Authority (the Authority), pursuant to a charge filed on April 13, 1998, by the American Federation of Government Employees, Local 1592 (the Union), issued a Complaint and Notice of Hearing alleging that the Ogden Air Logistics Center, Hill Air Force Base, Ogden, Utah (Respondent/Hill AFB) violated section 7116(a)(1), (2) and (4) of the Federal Service Labor-Management Relations Statute (the Statute), by issuing bargaining unit employee Robert Sarlo a "Notice of Separation by Disqualification During Trial Period" on April

2, 1998, because of Sarlo's protected representational and unfair labor practice activities.

On February 2, 1999, a hearing was held in Salt Lake City, Utah, at which time all parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.[1] All parties filed timely post-hearing briefs which have been carefully considered.[2]

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

Findings of Fact

At all times material, Respondent has been an agency within the meaning of section 7103(a)(3) of the Statute. At all times material, the Union has been a labor organization within the meaning of section 7103(a)(4) of the Statute. Accordingly, the Authority has jurisdiction in this matter pursuant to section 7118 of the Statute.

A. *Jurisdiction*

Robert Sarlo was employed by Respondent from May 9, 1997 until April 2, 1998, as an Aircraft Worker Helper, GS-5. Sarlo was hired for a term not to exceed 4 years, but was separated prior to the completion of his one-year trial period. Prior to his employment with Hill AFB, Sarlo was employed as a Packer with the Defense Logistics Agency, Defense Depot Ogden, Utah (DDOU), performing duties related to the shipping of hazardous materials throughout the United States. At Hill AFB, Sarlo worked in an area known as "Bead-Blast" (or LAOSAB) under the immediate supervision of Aircraft Mechanic Supervisor Francis (Frank) Valdez. Benjamin (Bennie) Martinez served as the Alternate Supervisor during Valdez's absence. Sarlo's second-line supervisor was Jack Kite. His third-level supervisor was Garland McCoy.

Sarlo's duties as an Aircraft Worker Helper included pulling engines from aircraft (A/C), applying chemicals and strippers, using high-powered hoses to blast small plastic

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[1] The General Counsel's uncontested motion to correct the transcript is granted.

[2] The General Counsel's motion to strike portions of Respondent's brief is denied.

beads, removing paint from the A/C, and preparing the A/C for painting.

Sarlo's first act was to appeal his April 2, 1998, separation before the Merit Systems Protection Board (MSPB), but the MSPB declined jurisdiction, relying on the provisions of 5 C.F.R. § 315.802(b), which provides that Sarlo's previous service at DDOU could count toward completion of his trial (or probationary) period at Hill AFB only if it was shown that such prior service: 1) is in the same agency; 2) is in the same line of work as determined by the employee's actual duties and responsibilities; and 3) there is no break in service exceeding 30 calendar days. Since Sarlo's prior service was not in the same agency (DLA versus the Department of Air Force), and was not time in the same line of work (a Packer versus an Aircraft Worker Helper), the MSPB declined jurisdiction.

Respondent does not contest the Authority's jurisdiction, and Authority precedent establishes that where the MSPB lacks jurisdiction, there is no bar to the Authority's assertion of jurisdiction. See Wildberger, Jr. v. FLRA, 132 F.3d 784 (D.C. Cir. 1998)(Wildberger). Initially, Respondent claims that Sarlo was among several term employees separated from Hill AFB during the first year of employment. Because Sarlo was a term employee in a probationary period, there is no question that he enjoyed only limited rights. Citing 5 C.F.R. § 315.804, Respondent maintains that Sarlo's notice of termination could contain conclusionary statements as to the separatee's inadequacies of performance or conduct. Respondent also contends that such separations while the employee is in a probationary period "may be based on deficiencies in job performance, lack of aptitude for the job or cooperativeness, or undesirable suitability characteristics . . ." either on or off the job. It has long been settled that federal employees' basic right to engage in protected activity extends to probationary employees. See U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 42 FLRA 22, 51-55 (1991). (Application of 5 C.F.R. § 315.800 discussed by Judge Arrigo in finding probationary employee rights under Statute not curtailed.)

The Authority's jurisdiction to consider Sarlo's separation is also established under Wildberger. In this regard, Judge Kasic found that DDOU and Hill AFB are not the same agency, and Sarlo's previous duties as a Packer at DDOU were different from his position at Hill AFB. Thus, under 5 C.F.R. § 315.802(b), Sarlo's prior federal service at DDOU did not count toward completion of his probationary period. Under that regulation, prior federal service counts toward

the completion of probation only when the service: "1) is in the same agency, e.g., Department of the Army; 2) is in the same line of work (determined by the employee's actual duties and responsibilities); and 3) contains or is followed by no more than a single break in service that does not exceed 30 calendar days."

In sum, the MSPB lacked jurisdiction over Sarlo's separation, and the separation could not properly be raised in a statutory appeal procedure; therefore, the Authority retains jurisdiction. See 410th Combat Support Group, K.I. Sawyer Air Force Base, Michigan, 45 FLRA 755 (1992)(adopting ALJ finding of jurisdiction over removal of probationary employee, but finding no violation on merits).

Accordingly, it is found that the Authority retains jurisdiction in this matter.

B. *Sarlo's Initial Protected Activity and Performance Evaluation*

Sarlo was a member of the bargaining unit represented by the Union. Around September 29, 1997, Sarlo was appointed the Union's LAOSAB Steward. Prior to Sarlo's appointment as a Steward, there had been no Steward in the Bead-Blast area for several years. Sarlo remained a Steward until his separation on April 2, 1998. Sometime around October 2, 1997, Valdez presented Sarlo with an initial 90-day performance appraisal covering his first 3 months on the job, rating Sarlo's performance as fully successful with ratings of "met" for each performance element, but without any narrative description. When Sarlo asked how he could improve his ratings, the only guidance provided by Valdez was to tell Sarlo to work harder.

1. The EPS grievance

Sarlo's first contact with the Union was when he sought assistance concerning his non-selection for an Environmental Protection Specialist (EPS) position, a position for which he was rated ineligible by Hill AFB. Union Steward Ernie Magana arranged a meeting with Kay Watanabe in the Personnel Office in September 1997 at which Sarlo reviewed his application and requested that his application be re-evaluated. As a result, Sarlo was later informed that he should have been rated eligible for the position. When Respondent refused to select Sarlo for an EPS position, he and the Union filed a grievance over his non-selection. The Union also filed an unfair labor practice charge concerning

the non-selection. At the time of the instant hearing Sarlo's EPS grievance remained pending arbitration.

2. Sarlo's use of official time

After his appointment as a steward, Sarlo first used official time on October 6, 1997, to attend Union training. In all, Sarlo used approximately 200 hours of official time to perform representational duties.

It is uncontested that all of Sarlo's absences from work, including those to perform representational functions, were approved by Valdez (or Martinez serving as alternate supervisor). In order to receive official time, a steward must complete an AFMC Form 949, "Union/Employee Official Time Permit," and obtain approval from a supervisor. At first, Valdez delayed his responses to Sarlo's requests for official time. Then at the end of October 1997, Martinez, Valdez, and Kite all spoke to Sarlo about the amount of official time he was using. Subsequently, on October 28 or 29, Martinez told Sarlo he was using too much Union time. Martinez explained that he had spoken with Judy Lutz, the LA Directorate Labor-Management Liaison, who criticized Sarlo for abusing official time and taking advantage of the system. Sarlo responded by suggesting that if Martinez had a problem with Sarlo's use of official time, he should discuss the matter further with Valdez. Later the same day, Sarlo was called to Kite's office,[3] at which time Kite also cautioned Sarlo to "tone down" his use of official time and told Sarlo that he was needed more on the job. Kite also expressed concern about the accuracy of Sarlo's "tracker sheets."

The following day, Valdez called Sarlo into his office and reiterated the warnings from Kite and Martinez, that Sarlo was using too much time for Union business, that Sarlo should keep his official time down, and that Sarlo was needed more on the job. Union Steward Josh Ortiz' uncontroverted testimony was that he had numerous conversations with both Valdez and Kite concerning the amount of official time Sarlo needed. Particularly with reference to the amount of official time needed to handle grievances, Ortiz explained to Valdez and Kite that no two grievances were the same, and no two Union stewards worked at the same pace in preparing grievances. Ortiz also explained to them how Valdez and Kite were in error in attempting to limit Sarlo to one hour for handling Step 1 grievances. Ortiz pointed to the MLA provisions which

[3] Prior to this occasion, Sarlo had never been called to Kite's office.

allowed Stewards not just 1 hour, but a "reasonable amount" of official time to prepare step 1 grievances. Similarly, Union President Troy Tingey testified without contradiction that he had several conversations, particularly with Kite, concerning Respondent's efforts to curb Sarlo's use of official time. Tingey testified that when Kite first questioned Tingey informally about Sarlo's use of official time, Tingey suggested that Kite review Sarlo's 949 Forms to see who was approving the official time. Valdez later informed Sarlo that he had reviewed the tracker sheets and squared away any discrepancies.

3. The noncompetitive promotion issue

During the same meeting with Valdez at the end of October 1997, Sarlo raised the issue of his upcoming noncompetitive 6 month promotion to the WG-8 level by asking Valdez if his PAC records were in order. At this time, Sarlo handed Valdez a copy of the MLA, pointing out Section 12.17 concerning noncompetitive promotions, but Valdez said he didn't need to read it--he knew what it said. Later that same day, Sarlo used official time to initiate the filing of an unfair labor practice charge in Case No. DE-CA-80157 concerning, among other things, the comments made to him about his use of official time. Although Valdez told Sarlo not to worry about it--that he would get promoted, Sarlo was required to follow up on the promotion issue several times not just with Valdez, but also by involving Ortiz. When Ortiz' intervention failed to result in the promotion of Sarlo and other recently hired term employees, Sarlo drafted and filed a step 3 grievance with the Personnel Office on November 13, 1997. This issue was later resolved when Ortiz prevailed upon Kite around Christmas 1997 to provide a list of employees scheduled to receive the noncompetitive promotions.

4. Rotation of the alternate supervisor

Sometime in November 1997, Sarlo pursued an issue with Valdez concerning Valdez' failure to rotate the alternate supervisor position. Although Martinez had occupied the "alternate" position from the time Valdez became a supervisor in mid-1996, it appears that guidance from the LA directorate level fixed a policy of rotating alternate supervisor positions each year. Sarlo presented a draft grievance and copies of the two most recent LA directorate level guidance letters concerning the policy on rotation of alternate supervisors to Valdez. Valdez became excited at first, but then said that he would take care of it. Ortiz also discussed the issue with Valdez and was told by Valdez that it wouldn't be necessary to file a grievance, but that

he would take care of it when the crews were realigned. Based on Valdez's assurances, the Union never filed the draft grievance.

C. Threatened AWOL in November

On November 17, 1997, Sarlo was released on official time for most of the day, among other things to attend a labor-management meeting. On November 18, Sarlo was again released on official time for approximately 4 hours from 7:00 a.m. to 11:00 a.m. During that time, Sarlo attended a meeting at the Union office where labor and management representatives discussed the conversion of term employees to permanent status with representatives from the offices of Senator Hatch, Senator Bennett, and Congressman Hansen. This was the so-called "terms to perms" issue on which Sarlo would later spend a substantial amount of approved official time. When Sarlo returned to work following this meeting, he was called into Kite's office where Kite proceeded to question Sarlo concerning his whereabouts that day. Valdez was also present, but said little during the meeting. Sarlo responded that he had been attending Union meetings. When Kite suggested that Sarlo could have been downtown drinking, Sarlo stated that he did not drink. Kite then said that Sarlo could have been out playing pool, and there was no way for management to know where he had gone. Sarlo suggested that if they had concerns, why didn't they call the Union office to verify his whereabouts. Kite then threatened an AWOL charge by telling Valdez to give Sarlo 2 or 3 hours of AWOL because they had no idea where he was. When Sarlo left Kite's office, he told Ortiz what had happened. Sarlo then returned to the work area, where he overheard Valdez and another supervisor, Ron Williams, talking about term employees. Sarlo asked what Williams meant when he said that term employees could be released at any time depending on the workload. Williams explained that Sarlo could be released anytime before his 4-year term appointment was up depending on the amount of work. Valdez agreed with Williams and told Sarlo that being a Union Steward and a term employee was not going to get Sarlo anywhere since, depending on the workload, he could be released anytime they wanted to do so.

It is uncontradicted that Tingey met with Kite and McCoy on November 18, 1997, to discuss their concerns about Sarlo's use of official time on November 17 and 18. While Tingey agreed to talk to Sarlo about his official time, Tingey also pointed out to Kite and McCoy that it was Sarlo's supervisor who had approved the official time for those days and that they knew where Sarlo was. Tingey told Kite and McCoy that he was tired of them complaining about

Sarlo's official time when their supervisor was cutting their own throats by signing the 949 and sending Sarlo off on Union business. Tingey also cautioned that if they turned around and tried to get Sarlo, the Union would be all over management.

Following that meeting, Tingey met with Sarlo to relate management's concerns about his use of official time, but also asked Sarlo to describe his use of official time on November 17 because his managers had been talking about a possible AWOL. Based on the information provided by Sarlo, Tingey then sent a memorandum dated November 18 to Valdez describing exactly what Sarlo had been doing with his official time and reminding Valdez that it was his responsibility under MLA Article 4 as Sarlo's supervisor to review Sarlo's use of official time.

Thereafter, on November 19, Sarlo described the threatened AWOL incident to Union Vice President Wayne Tate, who intervened by scheduling an 8:00 a.m. meeting with Thomas Browning, LA Deputy Directorate Chief. When Tate explained that Sarlo's attendance at the meeting with Congressional representatives had been approved official time, Browning telephoned McCoy to ensure that management dropped the threatened AWOL charge against Sarlo. Despite Browning's actions, Sarlo filed both a ULP charge (Case No. DE-CA-80401)4 and a grievance to challenge the threatened AWOL.

D. Official Time Representational Matters

1. Documentation required in sarlo's form 949s

After Sarlo submitted a Form 949 requesting official time on January 5, 1998, Valdez told him that more detail was required to justify the 949, including the grievance number and the area where the grievance was filed. Although Section 4.10 of the MLA addresses the amount of detail required to substantiate an official time request, neither item had previously been required of Sarlo, and neither Ortiz nor Paint Shop Steward Shawn Kilgore had been required to include such additional information to support their 949s. Ortiz also discussed the detail required in Sarlo's 949s with Valdez on several occasions.

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4 The ULP charge was subsequently withdrawn, but in the meantime Sarlo experienced difficulty with Valdez in obtaining his 971 file to ascertain that there was no AWOL in his record dating from November 1997.

2. Representation of Earl Thedell responding to proposed suspension issued by valdez

Sarlo represented unit employee Earl Thedell regarding a proposed 3-day suspension issued by Valdez on January 6, 1998. Sarlo's written response to the proposed suspension apparently succeeded, since Valdez reduced the discipline to a one-day suspension.

E. Sarlo's On-the-job Shoulder Injury

On January 21, 1998, soon after his return to work at 2:30 p.m. from 2 hours of official time, Sarlo suffered a work-related shoulder injury. Upon his return to work the next morning, Sarlo told Valdez how he had been injured the previous afternoon. Valdez assisted Sarlo in filling out OWCP Form CA-1, "Traumatic Injury and Claim for Continuation of Pay," and then sent Sarlo to the Dispensary where he was examined by a Dr. Burst. Dr. Burst tentatively diagnosed a torn rotator cuff and sent Sarlo home with a recommendation that he see his own physician. Subsequently, on January 23, Sarlo was examined by his personal physician, took x-rays and was prescribed medications. His doctor also told Sarlo to stay away from work for the next 10-14 days. It is undisputed that Sarlo kept Valdez informed of all his regularly scheduled medical appointments at the VA clinic in Salt Lake City. When Sarlo returned to work on February 2 or 3, he furnished Valdez copies of his doctor's slips excusing his absence and limiting him to light duty. Due to the injury, Sarlo was unable to work on aircraft, but was instead limited to such tasks as cleaning tables and sweeping floors. Sarlo was not at work on February 4, but returned on February 5. On that date, Sarlo contacted Gaylene Brown, a personnel specialist in worker compensation matters, because Valdez had been charging him with annual leave (AL) for his absence due to injury rather than counting his absence as continuation-of-pay (COP) without charge to his AL. When Sarlo explained the situation to Brown and provided his medical documentation, Brown indicated that she would call Valdez and draft a letter explaining to Valdez that Sarlo's absence following the injury should be considered COP without charge to leave.

F. Tingey's Arrangements for Sarlo to be Released for Two Weeks of Official Time to Work on "Terms to Perms"

When Tingey learned of Sarlo's injury and of his inability to work on aircraft due to light duty restrictions by his doctor, Tingey sought to arrange for Sarlo's release on a block of official time, among other things, to work on

the already mentioned "terms to perms" issue. Tingey sent an E-mail message to Valdez (with copies to Kite and Browning) requesting that Sarlo be released on official time for one week to work on the "terms to perms" issue.5 When Tingey did not hear from Valdez, he spoke with Kite the following Monday about his request for Sarlo to be released on official time. Kite told Tingey he had seen Tingey's E-mail message, but hadn't yet had a chance to discuss it with Valdez. Kite called Tingey later to advise him that Valdez needed Sarlo at work. Tingey argued the point by asking what they needed Sarlo for since he could only sweep floors anyway, and by telling Kite that even Browning wanted Sarlo to work on the terms to perms issue since it would also benefit Hill AFB, but Kite would not give in. Tingey then went over Valdez's and Kite's heads by speaking directly with Browning concerning his request that Sarlo be released on a block of official time. Browning asked what the Union wanted Sarlo for and what Sarlo was doing. Tingey explained Sarlo's light duty situation and how Sarlo would be working on the terms to perms issue, among other things. Browning then said that he would take care of it. When Sarlo learned that arrangements had been made for him to be released for two weeks of official time, he presented a Form 949 to Valdez dated February 17 noting that he was released for two weeks to the Union office "Per Union President Troy." Subsequently, Ortiz arranged for Valdez to sign a 949 covering Sarlo's entire two-week block of official time to avoid the need for Sarlo to return to the shop each morning to obtain Valdez's signature on a 949 Form.

G. February 17, 1998 Annual and Sick Leave Counseling Memoranda

After Sarlo reported to the Union office to begin his two week block of official time, Sarlo received a call from Valdez asking him to return to the work area to sign "some paperwork." When Sarlo arrived at the work area, Valdez presented him with two counseling memoranda, one for alleged AL abuse and one for alleged sick leave (SL) abuse. The AL counseling memoranda cited Sarlo for a "minus annual leave balance." Sarlo obtained representation from Ortiz, who argued to Valdez that Sarlo's AL would be restored since his recent absences should be considered COP with no charge to his AL. Sarlo also explained to Valdez that he was in the process of obtaining a letter from Gaylene Brown concerning restoration of his AL, but to no avail. Valdez refused to remove the AL counseling letter. On either February 18 or 19, Sarlo obtained the letter from Brown directing

5 Valdez acknowledged receiving Tingey's February 13 E-mail message, but could not recall whether he responded.

restoration of Sarlo's AL by using COP instead of AL. Although Sarlo gave Valdez a copy of Brown's letter the same day, Valdez refused to rescind the AL counseling letter.

Afterward, Sarlo filed a grievance and a ULP charge over the AL and SL counseling letters. When Ortiz met with Valdez to discuss the grievance, Ortiz pointed out that Sarlo had gone out of his way to keep Valdez informed of his low SL balance, and argued that it made no sense to counsel someone who was already aware that his SL balance was low. Ortiz renewed his argument that Sarlo should not be counseled when his COP had been restored as AL. Although Valdez had already re-credited Sarlo's AL per the directive from Brown, Valdez apparently was uninterested in the Union's argument and was steadfast in his refusal to remove the counseling memoranda from Sarlo's file, stating that he had to have "these write-ups" in Sarlo's file. Valdez denied the grievance in writing on March 17.[6]

Valdez testified that it was his job to monitor employees' leave usage. He also admitted that he approved every absence and use of leave by Sarlo, that he complied with Brown's directive to restore upwards of two weeks of Sarlo's AL, and that he refused to rescind the AL counseling. Valdez explained that he had problems with Sarlo's AL usage even before Sarlo suffered his on-the-job injury, but failed to explain why, if it was important enough to warrant a counseling letter, he waited until February 17 to counsel Sarlo regarding his AL usage.

H. March 11 AWOL Counseling

Upon returning to work in early March 1999 following his two week assignment on official time, Sarlo was still unable to perform his bead blasting duties. However, he was able to meet with an FLRA Investigator concerning previously-filed ULP charges.

Subsequently, on March 10, Sarlo left work at his usual departure time of 3:30 p.m. Sarlo testified that when he left work that day, other employees were also in the process of leaving. The following day, however, Supervisor Ron Williams issued Sarlo a counseling letter charging him with 15 minutes of AWOL based on Sarlo's allegedly leaving early on March 10. The counseling letter alleged that Kite and McCoy saw him driving away from work at 3:20 p.m. On the

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6 The Union pursued the grievance, which was denied at step 2. Ultimately, the grievance was resolved by Respondent's agreement to remove the AL and SL counselings from Sarlo's file.

advice of Ortiz, Sarlo obtained signed statements from four co-workers to the effect that Sarlo was in the break room as of 3:25 p.m. on March 10.[7]

Sarlo filed a grievance and a ULP charge contesting the AWOL charge. Ortiz represented Sarlo concerning the AWOL grievance and met at step 1 with Williams on March 27 without Sarlo present. Williams indicated that he was unable to resolve the grievance, and the meeting lasted only about five minutes because Williams indicated that he had been directed by Kite to issue the AWOL to Sarlo.[8]

The following Monday, Ortiz discussed the AWOL charge with Kite. Ortiz asked Kite to remove the AWOL "write-up" from Sarlo's records, explaining that he didn't see how Respondent could charge Sarlo with AWOL when other employees were leaving the building at the same time. There is no evidence that any of the employees who were leaving at the same time as Sarlo were charged AWOL. Ortiz also told Kite that he had statements from four employees to verify that Sarlo was in the break room as late as 3:25 p.m. At that point, Kite said that he wanted to see the statements. Ortiz then showed Kite a "sanitized" version of the 4 statements which Ortiz had typed verbatim from the four co-worker statements, but which deleted any personal identifiers. Kite demanded to know who the employees were because he wanted to talk to them. Ortiz told Kite he would not provide the employees' names because they feared reprisal. When Kite again demanded the names, Ortiz stated that he would not turn them over. Kite threatened to get the JAG (Judge Advocate General) office attorneys to get them, but Ortiz responded that he would turn the statements over to the Union so that the attorneys could work it out. The matter ended with Kite accusing Ortiz and Sarlo of challenging his integrity and then telling Ortiz to get out. Ortiz described Kite as "very angry" during this exchange, noting that Kite was red in the face and raised his voice.

I. The March 30 James Dowdle Incident and the April 2 Separation Notice

Also on March 30, 1999, co-worker James Dowdle exploded in the break room, violently tipping tables over, throwing things and slamming the wall lockers with his fists

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[7] Gasser testified how the clocks in the building (220) were not all set to the same time.

[8] Ortiz's pursuit of this grievance on Sarlo's behalf ultimately resulted in a settlement in which management agreed to remove the AWOL from Sarlo's record.

following closely behind Sarlo.[9] Following this incident, several co-workers asked Sarlo to do something about Dowdle's violence in the work area. Because Sarlo also felt that management had not done enough to prevent Dowdle's outbursts, Sarlo's uncontested testimony indicates that he then approached Valdez and stated that, as a Union Steward, he needed to go to Social Actions to do something about Dowdle's outbursts. Sarlo stated he would make an appointment with Connie Haney (in Social Actions) because the outbursts had been going on too long. Although Valdez offered to make the appointment, Sarlo was insistent that he make the appointment himself. Thereafter, Sarlo scheduled an appointment and proceeded to meet with Haney on March 31 at 1:30 p.m. When Sarlo returned to the work area following his meeting with Haney, Valdez called him to the phone to speak with Kite. Kite asked if he had cleared the appointment through Valdez. When Sarlo confirmed that he had, Kite said that was not what Valdez had told him. Sarlo insisted that he had cleared the appointment through Valdez. At that point, Kite asked if Sarlo didn't think they could handle their own problems in house. Sarlo said he wasn't sure, but noted that Dowdle's outbursts had been going on for a long time. Kite then told Sarlo that he hadn't seen any problems yet and hung up.

J. Issuance of the Separation Notice

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[9] This was not the first time Dowdle displayed violent and unsafe behavior at the work-site. Several employees testified concerning his previous outbursts, including an incident in which Dowdle threw a sharp putty knife across the work area within 5 to 10 feet of co-workers, and threw such things as bicycles and push brooms around the work area. Sarlo and Gasser testified that they met with Valdez (with Sarlo present as a Steward and at Gasser's request) to address Gasser's concerns about the unsafe work environment caused by Dowdle's most recent outburst. Although Valdez stated that he would take care of it, the outbursts continued. Kent Mildon also described employees approaching Sarlo as a Steward to address the Dowdle situation.

Two days later, on April 2, 1998, Sarlo was issued the Separation Notice.[10] Council Vice President Scott Blanch accompanied Sarlo to Kite's office where McCoy, Kite and Valdez were waiting for Sarlo. McCoy, who did all the talking for Respondent, gave the Separation Notice to Sarlo and explained that Sarlo was being removed during his trial period. McCoy said that he knew Sarlo had an injury, but this would not affect his OWCP claim. When Sarlo asked what this was all about, McCoy said that it was all there in the letter. When McCoy described what Sarlo needed to do to "process" off the base that afternoon, Blanch argued that Sarlo couldn't possibly clear the base in the 2 hours remaining in the work day.

The April 2 separation letter stated that the separation was issued based on Sarlo's alleged failure to qualify during his trial period. It continued as follows:

> a. You were hired 9 May 97, as an Aircraft Worker Helper, WG 8852-05, under a term appointment which requires you to serve a one year trial period. The purpose of the trial period is to allow the agency an opportunity to assess, on the job, an employee's overall qualifications, suitability, apptitude [sic], cooperativeness, performance and conduct.
>
> b. After evaluating all of the above considerations, reviewing your attendance record, and your lack of work initiative, it is our determination that you lack some of the desirable suitability characteristics we look for in a permanent employee.

Blanch called McCoy at home that evening and arranged a meeting at 1:30 p.m. the next day (even though it was a "down day" on their 5-4-9 schedule) to try to sit down and work something out. However, when Blanch and Tingey showed up for the meeting, McCoy was nowhere to be found.

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[10] Tingey spoke with Valdez when Valdez called the Union office at about 1:30 p.m. on April 2, asking Tingey to send Sarlo back to the work area to sign some papers. Tingey then telephoned Kite to ask why Respondent needed Sarlo so close to the end of the day. Kite was initially evasive, but then confirmed Tingey's surmise that they were going to fire Sarlo. Tingey accused Respondent of being "chicken shit" for removing Sarlo late in the afternoon before "down Friday," but then asked what he could do to help. Tingey offered to take Sarlo off the official time, but Kite said only that they had tried to work it out, but it was too late.

Blanch, who has been a Union official in various capacities for approximately 14 years, testified that the Separation Notice issued to Sarlo was unusually vague since it lacked specific reasons for the separation. In Blanch's experience, other removal and separation letters, including two "probationary" separations issued within the LA Directorate as recently as October 1997, described the specific basis (with supporting examples) for the actions. Thus, by contrast to the lack of specificity in Sarlo's Separation Notice, the separation notice issued to David L. Sawyer on October 28, 1997, identified Sawyer's failure to disclose a misdemeanor theft charge on his employment application as the basis for separation during his probationary period. In addition, the separation notice issued to Donald E. Luff on October 16, 1997, supported its allegation that Luff failed to qualify during his trial period with a detailed description of his failure to meet PAC certification requirements in several identified areas despite being provided a 45-day notice period within which to bring his performance up to an acceptable level.

Regarding the merits of the separation notice, Sarlo denied that at any time during his employment at Hill AFB anyone from Respondent ever counseled him or otherwise indicated that there were any problems with his aptitude, performance, conduct, work initiative or cooperativeness. Indeed Valdez and several other witnesses recognized that Sarlo had the aptitude for the job. Furthermore, it appears from the evidence that Sarlo was never disrespectful to his managers or co-workers. While Valdez claimed to have used an "informal verbal counseling type thing" to talk to Sarlo "on many occasions" about his work performance, Valdez was vague about how many times he did so and failed to provide any kind of meaningful description of what he said to Sarlo on those "occasions." Valdez also testified that his opinion of Sarlo's performance was "very low," but was unable to explain why he apparently never believed Sarlo's alleged performance deficiencies were of sufficient magnitude to warrant any type of written counseling. Thus, there were no performance-related entries whatsoever in Sarlo's 971 file. While Valdez acknowledged that the purpose of the "Supervisor's Employee Brief" (971 file) was to document significant events in an employee's work history, his only attempt at explaining the absence of documentation concerning Sarlo's alleged performance shortcomings was to state his feeling that talking to Sarlo would be the best approach.

Respondent's Employee Relations Specialist for LA, Nancy Valenski, testified that she prepared Sarlo's separation

notice based on input provided by Valdez. While Valenski testified that Valdez first complained to her about Sarlo's performance in October 1997 (indicating her impression that it "had been going on for a couple of months"), Valenski also explained with respect to Sarlo's 90-day performance review that management would not ordinarily expect employees to have the full range of skills after only 3 months on the job. Valenski acknowledged that she felt uncomfortable that Sarlo's 971 file lacked any performance-related entries, but asserted that such entries were not required in order to separate employees in their probationary periods. Valenski conceded that this ran counter to Section 15.02(f) of the MLA (a provision which Valenski was sure Valdez read), which provides that supervisors are to meet with employees periodically in the appraisal cycle to discuss the employee's performance and that "such discussions will be annotated in the employee 971 file," but suggested that the regulations governing the separation of probationary employees meant there was no requirement to annotate the employee's 971 file.

With respect to his attendance record, Sarlo acknowledged that he received the AL and SL counseling memoranda and the AWOL counseling, but noted, as confirmed by Valdez, that he had never been away from work without Respondent's approval. Thus, each time Sarlo used official time or leave, it was approved by his supervisor. Sarlo was also consistent in providing Valdez with advance notices concerning all of his regularly scheduled appointments at the VA clinic in Salt Lake City. Valdez admitted that every time Sarlo used official time, he "validated" the official time. With regard to the March 1998 AWOL charge, in addition to noting that the clocks were set at different times throughout the building, Sarlo mentioned that other employees often left early from work, in part to avoid traffic (in what is sometimes referred to by employees as the "Mormon 500") leaving Hill AFB.

In their testimony, neither Valdez nor Kite offered differing accounts of Sarlo's protected representational, grievance and ULP activity as set out by the General Counsel's witnesses. Valdez and Kite both denied that Sarlo's activities as a steward played any role in the decision to terminate him. Valdez claimed that the reason Sarlo was separated was an "accumulation of events," but failed to specify those events other than that "a lot of it involved his performance. . . ."

As already noted, several witnesses, including Valdez, agreed that Sarlo had the aptitude for the job, but Valdez claimed that Sarlo's performance was not as good as others

he supervised. While the testimony of Sarlo's co-workers regarding the quality of Sarlo's work differed, the point of departure clearly involved Sarlo's absence from the job--absences which, on this record, can be contributed only to Sarlo's protected activity. Richard Gasser described Sarlo's performance as "average." Gasser testified the work was physically demanding, but not mentally demanding, since one "can only get so much water out of a hose." Sarlo's co-workers who were called to testify by the Respondent uniformly attributed Sarlo's alleged shortcomings to his absence on Union duties. Thus, alternate supervisor Bennie Martinez stated that Sarlo was "not suitable" for the job because after he got official time into the Union, "we didn't see too much of him." Additionally, Melvin Miller asserted that he would not have lasted on active duty in the Air Force if he had performed like Sarlo, and testified that Sarlo's performance never progressed because he was gone on Union business "day after day after day." Kite testified that his understanding from Valdez was that Sarlo had attendance problems and was not a team player, but he attributed this to Valdez "having a hard time keeping him on the job, keeping him working." Valdez echoed a similar refrain when he described the concerns of Martinez and Miller that Sarlo "was never there . . . he had left the area."[11] Valdez admitted that the complaints regarding Sarlo's absences were based on Sarlo's absences on official time, all of which he had already conceded were approved by him. Valdez' also testified that Sarlo always tried to challenge him as a manager. An example of Sarlo's challenges given by Valdez was challenging him on the promotion issue. Kent Mildon, who described Sarlo's separation notice as "bullshit," also stated that the only problem he ever saw with Sarlo "was management didn't like him being away on union business so much." Additionally, Ortiz testified about remarks made to him by Kite about a month prior to Sarlo's separation, which show the pivotal role that Sarlo's representational and ULP activity played in Respondent's decision to separate Sarlo during his probationary period. Thus, Ortiz stated that Kite told him that management didn't need a guy like Sarlo around because he was never at work but was either injured or gone doing Union business. On another occasion, also within the month prior to Sarlo's separation, when Ortiz and Kite were discussing a grievance, Kite remarked that, "he was tired of Bob Sarlo because every time he turned around, he'd filed

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[11] While Valdez testified that employees had, on several occasions, complained to Kite about Sarlo and that Kite told Valdez to deal with it, Kite denied that any team members had ever complained directly to him about Sarlo.

another ULP against him." These statements attributed to Kite are undenied on the record.

Discussion and Conclusions

The Respondent violated 5 U.S.C. § 7116(a)(1), (2) and (4) by separating Robert Sarlo on April 2, 1998, in retaliation for his protected representational and unfair labor practice activities.

The instant matter must be analyzed under established guidelines set out in Letterkenny Army Depot, 35 FLRA 113 (1990)(Letterkenny).[12] The criterion to be applied to cases alleging violations of section 7116(a)(4) as well as those alleging violations of section 7116(a)(2) is clearly set out in that case. Federal Emergency Management Agency, 52 FLRA 486 (1996); Department of Veterans Affairs Medical Center, Brockton and West Roxbury, Massachusetts, 43 FLRA 780 (1991) (VAMC). Under Letterkenny, the General Counsel has to establish a prima facie case of discrimination by showing that an employee was engaged in protected activity and that the protected activity was a motivating factor in his treatment. In determining whether a prima facie case is established, the entire record must be reviewed.

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12 Respondent asserts, in essence, that there is no violation in this case since most of Sarlo's unfair labor practices and grievances were "either settled or withdrawn" or no complaint was issued by the Authority after investigating these matter. Respondent argues the resolution of those matters by settlement or failure of the Authority to issue complaints resolved those matters and bars further proceedings. I disagree with this novel position for several reasons. In the first place none of the materials offered by Respondent contains a waiver of Sarlo's right to proceed on the matter. In fact, the settlement agreement specifically says that no rights were waived by the Settlement. Secondly, Sarlo's protected activity covers more than the matters Respondent alleges were resolved. Finally, the gravamen of the instant complaint is that Sarlo was "engaged in" protected activity. In my view, the successful resolution of a matter is irrelevant to the issue of whether or not an employee actually "engaged in" protected activity. Assuming that the outcome of those matters is relevant, it is my opinion that none of the actions pointed to by Respondent bars proceeding on the General Counsel's theory that Sarlo "engaged in" protected activities or that his protected activity was a motivating factor in his separation.

Essentially, Respondent claims that there was no showing that Sarlo's protected activity was a motivating factor leading to his separation on April 2, 1998. Of course, the burden of proof is on the General Counsel. If the General Counsel makes the required prima facie showing, the Respondent may seek to establish, by a preponderance of the evidence, that there was a legitimate justification for its action and that the same action would have been taken even in the absence of the consideration of protected activity. Respondent submits that there was a legitimate reason for separating Sarlo and that the same action would have been taken against him even if he was not a Union steward or a member of the bargaining unit.

Where the General Counsel fails to make the required prima facie showing, the case ends without further inquiry. Id. See also U.S. Department of Treasury, Internal Revenue Service, Washington, DC, et al., 41 FLRA 1212, 1213-14 (1991).

1. Was There a Prima Facie Showing that Sarlo's Protected Representational and Unfair Labor Practice Activities Were a Motivating Factor in Respondent's Issuance of the April 2, 1998, "Notice of Separation by Disqualification During Trial Period?"

The record reveals that Sarlo's protected activity was extensive and continuous from the time of his appointment as a Steward on September 29, 1997, until his separation on April 2, 1998. Sarlo's official time records indicates that he used approximately 200 hours of official time during that period. Further, the record discloses that all of Sarlo's official time was approved in advance by his supervisor or the supervisor's alternate. It is well settled that approved use of official time is protected conduct under the Statute. See, e.g., U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky, 49 FLRA 1020, 1031 (1994)(Forest Service)(official time protected).

A significant amount of Sarlo's representational time was spent working on issues directly challenging Valdez and Kite. Sarlo disagreed with Valdez and Kite regarding the non-competitive promotion issue; he contested Valdez regarding his failure to alternate supervisors; submitted a response to Valdez's issuance of a proposed 3-day suspension to Thedell; and grieved the AL, SL and AWOL counseling entries issued by Valdez and Kite (through Williams). Furthermore, the evidence indicates that Sarlo initiated the

filing of several ULP charges against Valdez and Kite. Thereafter, Kite remarked to steward Ortiz words to the effect that he was getting tired of Sarlo because every time Kite turned around, Sarlo was filing another ULP charge.

This is not a case in which an accommodation is required between the competing demands of representational and work-related responsibilities. See, for example, Forest Service, 49 FLRA at 1034-35 (coercive statement regarding official time not an accommodation). The record reveals that Sarlo used approximately 28 hours of official time from November 3 through November 18. Respondent's vexation with his protected activity is illustrated by the unrelenting efforts of Valdez and Kite to limit Sarlo's use of official time. When their efforts to persuade Sarlo at the end of October 1997, to restrict his use of official time failed to produce results, Kite apparently directed Valdez to cite Sarlo for 2 or 3 hours of AWOL on November 18 even though Sarlo's absence from work on official time had previously been approved by Valdez. This threatened AWOL was addressed quickly and effectively by the Union. In this regard, Union President Tingey met with Kite and McCoy to discuss Sarlo's use of official time. Tingey also sent a memorandum to Valdez accounting for Sarlo's use of official time on November 17 and 18. In a similar effort, Union Vice President Wayne Tate intervened with the LA Deputy Directorate Chief Browning on November 19 to ensure that nothing came of Kite's threat of AWOL.

During this same period, Valdez again demonstrated his hostility toward Sarlo's representational status when on November 18, 1997, he associated Sarlo's status as a steward with losing his job. Thus, after Sarlo returned to work from Kite's office following the threatened AWOL, he overheard Valdez and Williams talking about term employees. Later in this same period of time, Valdez told Sarlo that, being a Union steward and a term employee was not going to get Sarlo anywhere since, depending on the workload, he could be released at any time. Agency hostility to protected activity may be used to support a prima facie showing. For example, in United States Department of Transportation, Federal Aviation Administration, El Paso, Texas, 39 FLRA 1542, 1551 (1991), the Authority relied on a supervisor's animus toward the union in general, the union representative, and the particular grievance filed by the union representative, in finding that the agency discriminated against a union representative by terminating his administrative duties assignment.

In the circumstances, it can only be found that Respondent evinced hostility toward Sarlo, based in part on these protected activities.

Respondent contends that there is no evidence of disparate treatment in this matter. However, the Authority recently found that a showing of disparate treatment is not always a necessary element of a discrimination case. 305th Air Mobility Wing, McGuire Air Force Base, New Jersey, 54 FLRA 1243, 1245, n.2 (1998). In any event, Respondent's claim that there was no disparate treatment in this case is worthy of consideration. The record disclosed that Valdez required Sarlo to place specific information on his 949 Forms in support of his official time requests. Ortiz and Kilgore, who are also stewards, testified that they were not required by their respective supervisors to supply such information. Thus, Respondent placed an impediment on Sarlo's ability to be granted official time that other stewards did not have to undergo. More significantly, however, as described by Blanch, Sarlo's separation notice was unusually vague in that it lacked specific reasons for the separation. The only other "separation notice" introduced at the hearing demonstrates this point. The separation notice issued to probationary employees Sawyer and Luff both describe the specific basis (with supporting examples) for their terminations.

The timing of Sarlo's separation is also important in establishing that a prima facie case has been established. Timing of agency action following protected activity is sufficient evidence to establish a prima facie showing that the protected activity was a motivating factor for the retaliatory action. In U.S. Department of Commerce, NOAA, NOS, Coast and Geodetic Survey, Aeronautical Charting Division, Washington, DC, 54 FLRA 987 (1998), the Authority specifically cited the timing of a change to the union vice president's lunch period close on the heels of significant protected activity as sufficient to establish that the vice president's union activity was a motivating factor in the change. See also U.S. Department of Veterans Affairs Medical Center, Northampton, Massachusetts, 51 FLRA 1520, 1528 (1996); VAMC, 43 FLRA at 780. In this regard, it appears that Valdez was definitely quick to react to the Union's refusal to accept his and Kite's denial of Tingey's request that Sarlo be released for a block of official time to work on the so-called "terms to perms issue." This was the same issue that Sarlo was working on when Kite threatened him with AWOL in November 1997. Tingey's E-mail to Valdez resulted only in Kite's refusal to release Sarlo because he was "needed" at work. Sarlo's shoulder injury limited his ability to work on the aircraft, however.

Tingey asked Kite why Sarlo was so "needed" since he was only sweeping floors anyway, but Kite remained adamant. Tingey, therefore, went to Browning and made arrangements for Sarlo's release for two weeks of official time beginning February 17. Valdez responded to the two-week release immediately by calling Sarlo back to work from the Union office after lunch, to issue him annual and sick leave counseling memoranda. Valdez never explained why it was so imperative that he issue the memoranda just as Sarlo received permission to work in the Union office for two weeks. Valdez admitted that it was his supervisory responsibility to monitor his employees' use of leave, and that he had approved all of Sarlo's absences from work. Valdez also admitted that he had been directed to re-credit something like two weeks of Sarlo's AL since he had erroneously charged Sarlo's COP as AL. Despite all of these matters being pointed out by Sarlo and Ortiz, Valdez still refused to rescind the AL counseling which cited Sarlo for a "minus annual leave balance." The sick leave counseling is equally suspect. Sarlo testified without contradiction that he went out of his way to advise Valdez about all his regularly scheduled appointments at the VA clinic. Even though Sarlo had a low SL balance, again, each of his absences on SL was approved by Valdez. Accordingly, it appears that Respondent's reasoning was pretextual.

The record also discloses Kite's anger at Sarlo's protected activity in mid and late March 1998. Initially, Sarlo filed a grievance challenging the March AWOL counseling issued to him by Williams. Kite's role in Williams' issuance of the AWOL cannot be contested. The counseling letter specifically refers to Kite as a witness to Sarlo's alleged early departure on the afternoon of March 10. Moreover, during the step 1 grievance meeting with Ortiz, Williams acknowledged that he had been directed by Kite to issue the AWOL. When Ortiz then met with Kite on March 30 to ask that Kite rescind the AWOL, he showed Kite his sanitized, typed account of statements which had been obtained from four of Sarlo's co-workers attesting to Sarlo's presence at work 5 minutes <u>after</u> Kite said Sarlo had departed. Kite demanded to know the identities of the employees who had submitted statements in support of Sarlo so that he could question them in his office. Ortiz denied Kite's demand for the names, telling Kite that they feared reprisal. When a second demand by Kite for the names failed to change Ortiz's mind, Kite threatened to get the Respondent's JAG attorneys involved. Ortiz still refused, telling Kite that he would simply turn the statements over to the Union's attorneys. Kite terminated the meeting, accusing Ortiz and Sarlo of challenging his integrity and then telling Ortiz to get out.

Sarlo "challenged" Kite again on March 30 by making his own arrangements, as a Union steward, to meet with Connie Haney in Social Actions to address concerns regarding James Dowdle's frequent and violent outbursts. When Sarlo returned from his meeting with Haney on the afternoon of March 31, Kite confronted Sarlo on the telephone, demanding to know if Sarlo didn't think they (Valdez and Kite) could handle their own problems in house. When Sarlo innocently responded that he wasn't sure, noting that Dowdle's outbursts had been going on for a long time, Kite told Sarlo that he hadn't seen any problems yet and hung up. The separation notice followed in less than 2 days.

Respondent offered no evidence to rebut the General Counsel's showing that it was motivated by Sarlo's protected activity, but instead relied solely on Valdez and Kite simply denying that Sarlo's protected activity was involved in the separation decision. Where there is no documentary evidence or corroborating testimony to support justification for the action taken against an individual, the Authority looks disapprovingly at the action. See, for example, Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah, 35 FLRA 891 (1990). Here, Sarlo was rated "fully successful" by Valdez only a few months before his separation and there is no evidence to show a change in that performance level. Furthermore, the documentation surrounding Sarlo's attendance record is highly suspect.

The General Counsel established, in my opinion, the required prima facie case under Letterkenny, i.e., that Sarlo's protected representational and ULP activities were motivating factors in the Respondent's decision to issue the separation notice. Thus, there is no question that much of Sarlo's protected activity was directed against Valdez and Kite, his first and second-line supervisors. It was also shown that Kite and Valdez were frustrated by Sarlo's protected activity. Furthermore, many of the actions taken against Sarlo for his protected activities were overruled after Union intervention. Thus, Browning after Union intervention overruled Valdez's and Kite's refusal to grant Tingey's request that Sarlo be released for a block of official time in February 1998. Sarlo's protected activity in March infuriated Kite, and his reaction to those events which occurred only a few days before Sarlo's separation, is especially revealing. First, Ortiz, representing Sarlo, refused to disclose the names of employees who had witnessed Sarlo's presence at work at a time when Kite claimed Sarlo was AWOL. Second, concerning Sarlo's scheduling his own appointment to meet with Connie Haney in Social Actions, as

a steward, to address safety concerns associated with Dowdle's outbursts, Kite asked if Sarlo didn't think they could handle their own problems in house. Kite then told Sarlo that he hadn't seen any problems yet and hung up. Add to this list Kite's remark to Ortiz that "he was tired of Bob Sarlo because every time he turned around, he'd filed another ULP against him," a convincing case of discriminatory motivation appears. This remark by Kite certainly tends to connect his dislike for Sarlo to his protected activities.

Finally, Valdez' hostility to Sarlo's representational activities is shown by his statement to Sarlo about his status as a Union steward and then telling Sarlo that Respondent could easily remove a term employee for lack of work. Valdez' statement provides, in my opinion, a direct connection between Sarlo's protected activities and his separation. Accordingly, it is concluded that the General Counsel has made a prima facie showing that the motivating factors in Respondent's separation of Sarlo was his protected activities.

Based on all of the foregoing, it is found that the General Counsel established a prima facie showing that Sarlo's April 2, 1998, separation was motivated by Sarlo's protected activites and, therefore, for discriminatory reasons.

2. Did Respondent Establish that it Would Have Separated Sarlo Even in the Absence of His Protected Representational and Unfair Labor Practice Activity?

Where it is established that protected activity was a motivating factor in a discriminatory action, as in this case, the Respondent has an opportunity to show by a preponderance of the evidence that it had a legitimate justification for the action and that it would have taken the action even in the absence of protected activity. Letterkenny, 35 FLRA at 118.

Respondent submits that Sarlo was unsuitable for his job at Hill AFB because he lacked the requisite aptitude, cooperativeness, and work initiative for the job, and his performance, conduct and attendance record were deficient. Respondent's position does not withstand close scrutiny. Although there was conflicting testimony with regard to Sarlo's ability to perform his job at Hill AFB, none of that testimony disqualified Sarlo from his position. In the first place, none of the witnesses, including Valdez, doubted Sarlo's "aptitude" or failed to recognize that Sarlo had the aptitude for the job. Only one witness, alternate

supervisor Martinez, who was asked about Sarlo's "suitability" for the job, opined that Sarlo was not suitable after he got into the Union because "we didn't see too much of him." Similarly, Valdez associated Sarlo's alleged lack of "cooperativeness" with the fact that Sarlo challenged him as a manager about matters such as the noncompetitive promotion issue-an issue which Sarlo pursued in his capacity as a Union representative.

Respondent blamed Sarlo's separation on his poor work performance. However, Respondent's witnesses Valdez, Martinez and Miller all drew a direct connection between protected activity and Sarlo's alleged performance problems. Thus, Respondent claims that even before Sarlo became a steward and engaged in official activities, his work was substandard; that Sarlo himself did not feel he was suited for the job; that he left work to be completed by co-workers on many occasions. Additionally, it is contended that Sarlo's unscheduled leave habits made it difficult to plan work and scheduling around him. Although the testimony concerning Sarlo's work initiative and his performance might be conflicting, there is an absence of any record evidence that Sarlo was counseled concerning either of these matters at any time during his brief employment at Hill AFB. Sarlo's 90-day performance appraisal reveals that his performance was "fully successful" at that time. Although Valdez maintains that he used an "informal verbal counseling" approach to address Sarlo's alleged performance deficiencies, he fails to explain why, if the alleged deficiencies were of such magnitude to require Sarlo's removal, there was never any record made until the AL and SL counseling of March 1997. Further, those entries in Sarlo's 971 file are of doubtful validity. Likewise, Respondent argues that Sarlo lacked work initiative. In this regard, two employees who worked with Sarlo, Mildon and Gasser, testified that there was nothing wrong with Sarlo's work initiative. While Miller was quite vocal in denouncing Sarlo's initiative, Valdez never mentioned Sarlo's work initiative as a reason for separating Sarlo. Nor was there any challenge to Sarlo's testimony that he was never counseled concerning his work initiative. Thus, Sarlo's 971 file, which should contain records, had no entries concerning his lack of initiative.

Finally, as mentioned above, there is Sarlo's attendance record. The evidence indicated that Sarlo's alleged "minus annual leave balance" was an illusion based on Valdez's error in charging Sarlo AL instead of counting his injury-related absence as COP. Despite this, Valdez insisted on keeping the counseling memoranda in Sarlo's record, telling Ortiz that he had to have "these write-ups" in Sarlo's file.

In view of the timing of the AL and SL counseling memoranda following so closely on the heels of Sarlo's receipt of two weeks of official time to work on the "terms to perms" issue, at the union hall and away from the job, it is clear that those counseling memoranda could only have been prepared as a pretext to help justify Sarlo's separation. The March AWOL charge for Sarlo's allegedly leaving work early was also a pretext to supply additional reasons for Sarlo's separation. Thus, it was shown that other employees were leaving work at the same time that Sarlo left. Moreover, several co-workers vouched for Sarlo's presence at work during the time he was allegedly AWOL.

It is concluded that the General Counsel's prima facie case clearly outweighs Respondent's attempt to establish that it had legitimate reasons for separating Sarlo or that the same action would have been taken even in the absence of the consideration of protected activity. Although Sarlo's attendance problems were documented in his 971 file, none of the official time counselings he was alleged to have been given by Valdez appear there. With regard to the attendance problems, Valdez admitted he approved every one of Sarlo's absences from the work area, whether on annual leave, sick leave or official time. Sarlo also kept Valdez informed regarding his regularly scheduled visits to the VA clinic after his injury, and his annual leave counseling was based on Valdez' error in charging Sarlo's absence following his injury to annual leave instead of continuation-of-pay. Furthermore, the March AWOL was groundless since there were four co-workers willing to attest to Sarlo's presence at the work site a full 5 minutes after Respondent claims he left. Consequently, Respondent's documentation of Sarlo's attendance problems is unconvincing.

Absent pertinent documentation in Sarlo's 971 file, Respondent relied on Valdez' claim that he conducted "informal verbal counselings" regarding Sarlo's alleged performance deficiencies. The alleged performance problems clearly did not prevent Valdez from either rating Sarlo fully successful" on his 90-day appraisal or granting Sarlo's 6-month noncompetitive promotion. Nor were these alleged performance deficiencies significant enough to warrant 971 entries as contemplated by the parties' Master Labor Agreement. Finally, the reasons asserted by Respondent appear to be a pretextual explanation for Sarlo's separation. Where the reasons advanced in support of a discriminatory action are pretextual, it can be found that submission of false reasons to justify an action is itself evidence of unlawful motivation. In any event, it is found that Respondent presented no persuasive reason for separating Sarlo.

Accordingly, it is found that the General Counsel has established that Sarlo's separation was motivated by his protected representational activity. Further, it is found that Respondent did not establish by a preponderance of the evidence that it had a legitimate justification for separating Sarlo or that it would have taken the same action even in the absence of the consideration of his protected activity.

Consequently, it is found and concluded that Respondent violated section 7116(a)(1), (2) and (4) of the Statute by separating Robert G. Sarlo during his one-year trial period because he engaged in protected representational and unfair labor practice activity.

The Remedy

The General Counsel seeks a remedy including an offer of full reinstatement with back pay for Sarlo together with a requirement to post the attached notice to employees.

Make whole relief is warranted since any loss of pay and benefits by Sarlo resulted directly from the Respondent's unlawful and unwarranted personnel action, i.e., its separation of Sarlo prior to the completion of his one-year trial period because of his protected activities. See U.S. Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah, ALJ Decision Report No. 94, Case No. 7-CA-00008 (1990)(remedy for removal of employee prior to completion of probationary period). The Authority has repeatedly recognized that remedies should be designed to "restore, so far as possible, the status quo that would have obtained but for the wrongful act." Department of Defense Dependents Schools, 54 FLRA 259, 269 (1998).

The charging party has requested interim relief under 5 U.S.C. § 7701(b)(2) which would require Respondent to reinstate Sarlo immediately upon the issuance of this decision rather than await the outcome of any exceptions thereto. As the charging party recognizes, section 7701(b)(2) applies exclusively to proceedings before the MSPB. There is no similar provision contained in the Statute which governs proceedings before the Authority. In my view, the existence of such a provision in Title II of the Civil Service Reform Act which governs MSPB proceedings and the absence of a similar provision in Title VII of the CSRA indicates that the interim relief sought by the charging party is unavailable in Authority proceedings.

Consequently, the charging party's requested relief is denied

Accordingly, it is found that a make whole remedy is appropriate in the instant matter. Therefore, it is recommended that the Authority issue the following:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Ogden Air Logistics Center, Hill Air Force Base, Utah, shall:

1. Cease and desist from:

(a) Separating Robert G. Sarlo during his one-year trial period because he engaged in protected representational and unfair labor practice activity by serving as a Steward for the American Federation of Government Employees, Local 1592, by representing it in dealings with Hill Air Force Base, by filing and pursuing grievances, and by filing and pursuing unfair labor practice charges.

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

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

(a) Offer to reinstate employee Robert G. Sarlo to the position of Wage Grade 8 (WG-8) Aircraft Worker Helper, reimburse him for any loss of pay he may have suffered by reason of his separation on April 2, 1998, due to his protected representational and unfair labor practice activities, and restore to him any rights and privileges he may have lost by such action.

(b) Post at its facilities where bargaining unit employees are represented by the American Federation of Government Employees, Local 1592, 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, Ogden Air Logistics Center, Hill Air Force Base, Utah, 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, Denver Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply.

Issued, Washington, DC, May 3, 1999.

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ELI NASH, JR.
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Ogden Air Logistics Center, Hill Air Force Base Utah, has violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL Not separate term employee Robert G. Sarlo during his one-year trial period because he engaged in protected representational and unfair labor practice activity by serving as a Steward for the American Federation of Government Employees, Local 1592 and by representing it in dealings with Hill Air Force Base, by filing and pursuing grievances, and by filing and pursuing unfair labor practice charges.

WE WILL Not in any like or related manner, interfere with, restrain, or coerce employees in the exercise of rights assured them by the Statute.

WE WILL offer to reinstate employee Robert G. Sarlo to the position of Wage Grade 8 (WG-8) Aircraft Worker Helper, reimburse him for any loss of pay he may have suffered by reason of his separation on April 2, 1998, due to his protected representational and unfair labor practice activities, and restore to him any rights and privileges he may have lost by such action.

_____

(Agency)

Dated: _____ By: _____

(Signature)

____

(Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Denver Regional Office, Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 100, Denver, CO 80204, and whose telephone number is: (303)844-5226.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by ELI NASH, JR., Administrative Law Judge, in Case No. DE-CA-80545, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT	**CERTIFIED NOS**:
Matthew Jarvinen, Esquire Federal Labor Relations Authority 1244 Speer Blvd, Suite 100 Denver, CO 80204	P168-059-641
Jon Jepperson, Chief Labor Law Branch Hill AFB, Bldg. 1278 6026 Cedar Lane Hill AFB, UT 84056	P168-059-642
Daniel Minahan, Esquire Minahan & Shapiro, PC 165 S. Union Blvd, Suite 366 Lakewood, CO 80228	P168-059-643

REGULAR MAIL:

Bobby Harnage, President
AFGE, AFL-CIO
80 F Street, NW.
Washington, DC 20001

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CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: MAY 3, 1999
WASHINGTON, DC