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

OALJ 13-18

DEPARTMENT OF HOMELAND SECURITY U.S. CUSTOMS AND BORDER PROTECTION EL PASO, TEXAS RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, LOCAL 1929, AFL-CIO And DEPARTMENT OF HOMELAND SECURITY U.S. CUSTOMS AND BORDER PROTECTION OFFICE OF INTERNAL AFFAIRS DALLAS, TEXAS RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, LOCAL 1929, AFL-CIO CHARGING PARTY	Case No. DA-CA-12-0084 Case No. DA-CA-12-0121

Charlotte A. Dye
For the General Counsel

Aaron J. Messer
For the Respondent

Stuart L. Harris
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 revised Rules and Regulations of the Federal Labor Relations Authority (the Authority/FLRA), 5 C.F.R. part 2423.

In Case No. DA-CA-12-0084, the American Federation of Government Employees, National Border Patrol Council, Local 1929, AFL-CIO (Charging Party/Union) filed an unfair labor practice (ULP) charge on November 29, 2011, against the Department of Homeland Security, U.S. Customs and Border Protection (Agency). The Regional Director of the Dallas Region of the FLRA issued a Complaint and Notice of Hearing in that case on August 10, 2012, alleging that the Department of Homeland Security, U.S. Customs and Border Protection, El Paso, Texas, (Respondent-CBP, El Paso/CBP, El Paso) violated section 7116(a)(1) of the Statute by conducting an investigation of Stuart Harris, Union representative, on or about August 19, 2011, and requiring him to disclose information he acquired in his capacity as a Union representative.

In Case No. DA-CA-12-0121, the American Federation of Government Employees, National Border Patrol Council, Local 1929, AFL-CIO (Charging Party/Union) filed an ULP charge on December 29, 2011, against the Department of Homeland Security, U.S. Customs and Border Protection (Agency). The Regional Director of the Dallas Region of the FLRA issued a Complaint and Notice of Hearing in that case on August 10, 2012, alleging that the Department of Homeland Security, U.S. Customs and Border Protection, Office of Internal Affairs, Dallas, Texas, (Respondent-CBP, OIA/CPB,OIA) violated section 7116(a)(1) of the Statute by conducting an investigation of Stuart Harris on or about October 16, 2011, and requiring him to disclose information he acquired in his capacity as a Union representative.

On August 30, 2012, each Respondent filed an Answer to the complaint relevant to it, in which it admitted some facts but denied others, and denied that it violated the Statute. Both Respondents asserted as affirmative defenses that: (1) the information sought from Harris during the investigation was not confidential; and (2) any right to maintain confidentiality was outweighed by the Respondents' need for the information.

In response to an agreement by the parties to enter into a joint stipulation of facts, the undersigned issued an order dated November 5, 2012, that cancelled the hearing scheduled in the two cases. In the stipulation, the parties agreed that the charges, the complaints and notices of hearing, Respondent's answers, all pleadings and orders in this matter, the stipulation and exhibits, and the parties' post-stipulation briefs constituted the entire record in these cases and that no oral testimony is necessary or desired by any party as no material issue of facts exists. The parties further agreed to waive their right to a hearing before the Administrative Law Judge (ALJ). The General Counsel and Respondents subsequently filed timely briefs that have been fully considered.

Based upon the stipulation of facts and exhibits, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The parties agreed to the following stipulation of facts:

1. The Department of Homeland Security, U.S. Customs and Border Protection, El Paso, Texas (Respondent), is an Agency under 5 U.S.C. § 7103(a)(3). The

Department of Homeland Security, U.S. Customs and Border Protection, Office on Internal Affairs, Dallas, Texas (Respondent), is an Agency under 5 U.S.C. § 7103(a)(3).

2. The American Federation of Government Employees, AFL-CIO, National Border Patrol Council (Council) is a labor organization under 5 U.S.C. § 7103(a)(4) and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Department of Homeland Security, U.S. Customs and Border Protection (CBP).

3. The American Federation of Government Employees, National Border Patrol Council, Local 1929 (Union or Local 1929) is an agent of the Council for the purpose of representing employees of the CBP El Paso Sector.

4. The charge in Case No. DA-CA-12-0084 was filed by the Union with the Dallas Regional Director on November 29, 2011. The charge in Case No. DA-CA-12-0121 was filed by the Union with the Dallas Regional Director on December 29, 2011. Copies of the charges were served on the Respondents.

5. At all times material to the Complaints, the persons listed below occupied the positions opposite their names:

Jorge Salas	Management Inquiry Team Investigator for the El Paso Sector
William I. Davis	Office of Internal Affairs Investigator for the Dallas Region

6. At all times material to the Complaints, Salas and Davis were supervisors and/or management officials or agents of supervisors and/or management officials under 5 U.S. C. § 7103(a)(10) and (11) at the Respondents.

7. At all times material to the Complaints, Salas and Davis were acting on behalf of the Respondents.

8. Stuart L. Harris is an employee under 5 U.S.C. § 7103(a)(2), is in the bargaining unit described in paragraph 3, and is the Vice President and the Health and Safety Officer for Local 1929. Harris represents bargaining unit employees of the El Paso Sector, including those who are stationed in Deming, New Mexico. Stuart Burleson is an employee under 5 U.S.C. § 7103(a)(2), is in the bargaining unit described in paragraph 3, and is a Local 1929 Steward for the Deming, New Mexico, Station.

9. The mission of CBP is to protect the United States from threats related to terrorism, illegal border crossings, contraband, to patrol the borders for any other threats, foreign or domestic, that may arise, and to facilitate legitimate travel and commerce. The Border Patrol is a component of CBP. The Border Patrol is divided into geographic sectors. One of these is the El Paso sector,

which covers west Texas and all of New Mexico. There are over 2000 bargaining unit members in the sector, almost all of whom are Border Patrol Agents (BPAs) and over 500 supervisors. There are twelve stations within the sector. Harris represents bargaining unit employees in the El Paso Sector, including BPAs of the Deming, New Mexico, Station.

10. The Deming, New Mexico, Station is situated 35 miles north of the United States-Mexico international border. As part of the Deming Station, a Forward Operating Base (FOB) opened near Antelope Wells, New Mexico, on July 5, 2011 (Camp Bounds), just 50 feet north of the international border. The camp is comprised of camper trailers surrounded by metal shipping containers set up around the camp. The camp vehicles are situated outside of the camp perimeter. The FOB is staffed by employees from the Deming Station who are detailed to the FOB for five or more days at a time. While at the FOB, employees do not return to their homes after their shifts have ended. Rather, the employees live and stay at the FOB during their detail. During the summer of 2011, the Union and Respondent were negotiating over the establishment and staffing of the Antelope Wells FOB. Harris was the Chief Negotiator for the Union over the FOB.

11. Just prior to the FOB opening, the Mexican military stationed a unit of soldiers about 50 feet from the international border, directly south of the FOB. The Mexican soldiers live and work out of this base, patrol the Mexican side of the international border, and are generally armed with rifles.

12. Burleson was first assigned to work at the FOB on August 4, 2011, for a five-day detail. During his first week at the FOB, Burleson heard that members of the Mexican military may have crossed the border and surreptitiously loosened lug nuts on Border Patrol vehicles. On or before August 17, 2011, Burleson contacted Harris and told him what he had heard about the potential incursion. Burleson and Harris both believed that members of management were aware of the incursion.

13. On August 18, 2011, a Health and Safety Committee meeting was held regarding conditions at the FOB. Present for management at the meeting were Donald Oliver, Safety and Occupational Health Specialist, and Supervisory Border Patrol Agent Scott Newman with the workforce liaison unit. Harris attended as the Health and Safety Officer and Chief Negotiator over the FOB for Local 1929. After the meeting, Harris told Oliver and Newman that members of the Mexican military may have entered the United States on one or more occasions and sabotaged Border Patrol vehicles – by loosening their lug nuts – that had been parked at the FOB. No further discussion, between Harris and Oliver or Newman took place regarding the possible sabotage of Border Patrol vehicles. Sometime after the meeting, Oliver notified Border Patrol management officials of the possible sabotage of Border Patrol vehicles by members of the Mexican military.

14. On August 19, 2011, Harris received a notice to appear for an interview by the Management Inquiry Team (MIT – a sector investigatory arm), Case No. EPT-11-150. The notice to appear indicated that Harris was the subject of the investigation into alleged employee misconduct. The notice to appear stated that Harris' failure to provide sworn testimony may be construed as insubordination and could result in disciplinary action against him, up to and including dismissal from the Border Patrol. At the time of the interview, Salas provided Harris "Warning and Assurances to Employee Required to Provide Information," which stated that he had a duty to reply to questions posed to him and disciplinary action, including dismissal, may be undertaken if he refused to answer or failed to reply fully and truthfully. During the interview, Salas informed Harris that he was the subject of an investigation into his failure to report a possible incursion into the U.S. by the Mexican military – that members of the Mexican military had loosened lug nuts on Border Patrol vehicles. When asked how he came to have the information, Harris told Salas that he came across the information during his activities as a Union representative. Harris explained that the information about the incursion was given to him while he was acting as a Union representative and, as such, he believed it to be confidential. Harris further informed Salas that he would answer questions if ordered to do so. Salas informed Harris that he was being compelled to answer the questions and Harris then answered Salas' questions. During the questioning about the lug nuts incursion, Harris also informed Salas about an incursion by the Mexican military over the international border to retrieve a soccer ball. Once Harris brought up the soccer ball incident, Salas asked Harris questions about it. Harris objected to Salas' questioning of him as the subject of the investigation, one of the bases of his objection was that he had no first-hand knowledge of the possible incursions. Harris did not waive the Union's right to keep the information and its source confidential.

15. On October 6, 2011, Harris received a notice to appear from Davis ordering him to appear at 9:00 a.m. on October 13, 2012, for an interview by the Office of Internal Affairs (OIA – a Regional investigative arm). The notice to appear indicated that Harris was the subject of the investigation into alleged failure to report. The notice to appear stated that Harris' failure to provide sworn testimony may be construed as insubordination and could result in disciplinary action against him, up to and including removal. At the time of the interview, Davis provided Harris "Warning and Assurances to Employee Required to Provide Information," which stated that he had a duty to reply to questions posed to him and disciplinary action, including dismissal, may be undertaken if he refused to answer or failed to reply fully and truthfully. During the interview, Harris was told that he was the subject of the investigation, and he was asked to provide information about an incursion that he reported to Donald Oliver on August 18, 2011, in which members of the Mexican military purportedly crossed into the United States. Prior to answering any questions, Harris asserted his right to keep the communications he had with bargaining unit employees about the incidents and the source of

the communications confidential. Harris told Davis that he had heard about two incursions – one by the Mexican military to retrieve a soccer ball and one involving the possible loosening of lug nuts on Border Patrol vehicles. Harris informed Davis that he reported the soccer ball incursion during negotiations over the permanent FOB and reported the lug nuts incident to Oliver. Harris objected to Davis' questioning of him as the subject of the investigation, one of the bases of his objection was that he had no first-hand knowledge of the possible incursions. Harris did not waive the Union's right to keep the information and its source confidential.

Among the exhibits included in the parties' joint stipulation of facts was a compact disc (CD) containing audio recordings of the interviews the Respondents conducted with Harris. Review of those audio recordings shows that the questions asked by the investigators for Respondent-CPB, El Paso and Respondent-CPB, OIA were limited to how, what and when Harris learned of the alleged "incursions" by the Mexican military and what Harris did with respect to reporting the alleged incidents. (Jt. Ex. 7). Evidence submitted shows that one or both of the Respondents also conducted interviews with some of the management officials whom Harris identified as: (1) those he informed of the soccer ball or lug nuts incidents; or (2) otherwise aware of the incidents. (Jt. Exs. 1-7). By letter dated March 8, 2012, the Agency informed Harris that: the investigation did not disclose any misconduct on his part; the matter was closed; and no record of the investigation would be placed in Harris' Official Personnel Folder (OPF). (Jt. Ex. 8).

ISSUES

The parties agreed to the following stipulation of issues:

Whether the communications between Burleson and Harris about the possible sabotage of Border Patrol vehicles by the Mexican military were protected activity?

If so:

Whether the Respondent El Paso Sector violated section 7116(a)(1) of the Statute by requiring that confidential communications between two Union representatives made during the course of representation be disclosed under threat of discipline?

Whether, given the nature of the information, Respondent El Paso Sector's need to know about the alleged incursions overrode the Union's right to maintain confidentiality?

Whether Respondent El Paso Sector violated section 7116(a)(1) of the Statute by initiating the investigation by MIT into Harris' actions after he reported an incursion into the United States by the Mexican military in which Border Patrol vehicles were sabotaged?

Whether Respondent Dallas Region violated section 7116(a)(1) of the Statute by requiring that confidential communications between two union representatives made during the course of representation be disclosed under threat of discipline?

Whether, given the nature of the information, Respondent Dallas Region's need to know about the alleged incursions overrode the Union's right to maintain confidentiality?

Whether Respondent Dallas Region' violated section 7116(a)(1) of the Statute by initiating the investigation by IA into Harris' actions after he reported an incursion into the United States by the Mexican military in which Border Patrol vehicles were sabotaged?

POSITIONS OF THE PARTIES

General Counsel

The General Counsel alleges that Respondent-CBP, El Paso and Respondent-CBP, OIA both violated § 7116(a)(1) of the Statute when each investigated the Vice President of the Union because of his protected activity and threatened him with disciplinary action if he did not disclose information pertaining to a confidential communication he had in his capacity as Vice President. In support of its allegation, the General Counsel relies on the right of employees under § 7102 of the Statute to form, join, or assist a labor organization and engage in such activity without fear of penalty or reprisal. Citing a number of Authority decisions, the General Counsel maintains that § 7102 rights and the protection it affords, extends to activities union officials undertake in conjunction with representing bargaining unit employees in matters concerning conditions of employment. The General Counsel asserts that when the conversation occurred in which Burleson informed Harris about the possibility of the Mexican military loosening the lug nuts on Border Patrol vehicles, the former was serving as a Union steward for employees at the FOB and the latter was serving in multiple roles as a Union representative -- specifically, Vice President, chief negotiator in negotiations over the establishment of the FOB, and health and safety officer. The General Counsel contends "there is nothing in the record to indicate that Burleson's contact with Harris was anything but a contact between a local steward and the Union Vice President regarding conditions of employment of bargaining unit employees[.]" (GC Br. at 9). The General Counsel argues that the communication between Burleson and Harris about the lug-nuts incident(s) constituted protected activity and was confidential.

The General Counsel contends the Union had the right under the Statute to maintain the confidentiality of the communications between Burleson and Harris unless either the Union waived that right or the Agency had an overriding need for information about the communications. The General Counsel asserts that neither exception is established in this case. As to the first exception, the General Counsel avers Harris specifically informed the investigators that the information came to him in his capacity as a union representative from another union representative, and he did not waive his right to keep the communications confidential. As to the second exception, the General Counsel maintains that although a border crossing by the Mexican military was unquestionably a matter of legitimate concern, once Harris informed the Respondents that he lacked direct knowledge of the matter and

identified supervisors who allegedly did have such knowledge, the investigators should have sought information from the supervisors rather than questioning Harris further about the matter. The General Counsel argues that Respondents' actions in making Harris the subject of an investigation about the communication he had with Burleson and requiring him to reveal Burleson's identity violated § 7116(a)(1) of the Statute.

As remedy, the General Counsel requests that the Respondents be ordered to cease and desist. The General Counsel also requests that each Respondent be ordered to post a separate notice to employees, signed on behalf of Respondent-CPB, El Paso by the Chief Patrol Agent, Department of Homeland Security, U.S. Customs and Border Protection, El Paso, Texas, and on behalf of Respondent-CPB, OIA by the Special Agent-In-Charge, Internal Affairs, Department of Homeland Security, U.S. Customs and Border Protection, Dallas, Texas. The notices would be posted in the El Paso Sector and disseminated electronically to all bargaining unit employees in the El Paso sector. With respect to its request for electronic dissemination, the General Counsel cites *U.S. DHS, U.S. Customs & Border Prot., El Paso, Tex.*, 67 FLRA 46, 51 n.4 (2012), and asserts that the Authority recently found that the primary means Respondent-CBP, El Paso uses to communicate with employees is through its computer systems and e-mail distribution of the notices would effectuate the policies of the Statute.

Respondents

The Respondents deny they violated the Statute as alleged and urge that the complaints be dismissed.

The Respondents argue that under the Statute, any right to confidentiality pertaining to communications between employees and Union officials exists only in very narrow circumstances; that is, only when an employee facing discipline, who is represented by a union official, confides in the union official regarding the discipline during the course of that representation. The Respondents further assert that any right to confidentiality in that narrow circumstance is trumped if the agency involved has a "need to know" the information sought. (Resp. Br. at 2-3).

The Respondents contend that Harris' claim that the Mexican military possibly crossed into U.S. territory and sabotaged Border Patrol vehicles involved conduct of such a serious nature that the Respondents' need for further information overrode any right to confidentiality the communication about the matter between Harris and his informant might otherwise have enjoyed. The Respondents maintain, however, that even in the absence of an overriding need to know, the communication between Harris and Burleson was not entitled to confidentiality because it was not between an employee facing disciplinary action and his designated Union representative.

The Respondents state that at the outset of the investigation, the only information available to them was that Harris had disclosed for the first time at the Health and Safety meeting that he was aware of an incursion by the Mexican military that reportedly involved sabotage of vehicles. The Respondents assert that in the absence of any further details, Harris was the logical subject of the investigation that ensued from his disclosure. The Respondents maintain that the investigation was of limited scope and conducted in a manner consistent with their investigative practices, and Harris was treated no differently than others

interviewed in terms of being required to provide information under threat of discipline. Moreover, the Respondents contend that no harm befell Harris as a consequence of being identified as the "subject" of the investigation rather than a "witness."

DISCUSSION AND ANALYSIS

The Respondents Did Not Violate Section 7106(a)(1) by Investigating Harris in Response to His Report that the Mexican Military Might Have Sabotaged Border Patrol Vehicles

As written, the complaints in these cases allege that the Respondents' violated § 7116(a)(1) of the Statute by: (1) conducting an investigation of Harris; and (2) requiring him to reveal information about his communications concerning claims that the Mexican military might have loosened the lug nuts on the wheels of Border Patrol vehicles. Focusing on the first allegation, the question presented is whether the Respondents' actions in telling Harris that he was the subject of investigation for failure to report the lug nuts incidents violated the Statute. The standard for determining whether the investigation of Harris violated § 7116(a)(1) is whether, when viewed objectively, Respondents' actions would tend to interfere with, restrain, or coerce employees in the exercise of rights protected under the Statute. *See, e.g., Fed. BOP, Office of Internal Affairs, Wash., D.C.*, 53 FLRA 1500, 1508 (1998) (*FBOP*). Although surrounding circumstances are taken into consideration, the standard is not based on the subjective perceptions of the employee or the intent of the employer. *See*, e.g., *U.S. Dep't of the Air Force, AFMC, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 66 FLRA 589, 591 (2012) (*Warner Robins*).

The investigation of Harris was triggered when he informed two management representatives following a Health and Safety Committee meeting he attended in his Union capacity that members of the Mexican military may have crossed the border and loosened the lug nuts on the wheels of Border Patrol vehicles. One of the two management representatives reported this information to other Border Patrol officials and the investigation ensued. Given the potentially serious nature of the incidents Harris reported, it was entirely reasonable for Border Patrol to investigate the matter in an effort to obtain the facts about what if anything happened, when it happened, who knew about it, and what they did about it. Although Harris believed that one or more supervisors already knew of the lug nuts incidents, there is no evidence that the Border Patrol channels to whom the information Harris provided was relayed had previously heard any reports of the incidents or, even if they had, should have assumed that Harris' information involved the same incidents they may have already heard about from other sources. As Harris was the known source of the report that sparked the particular investigation that is the subject of the complaints in this case, he was the logical starting point for that investigation. Also, it was not unreasonable that a significant focus of the investigation was on determining whether one or more Border Patrol employees who knew about a potentially serious incident had reported it in an appropriate and timely manner. *Cf. FBOP*, 53 FLRA at 1510 (In finding that an investigation into an incident of an alleged threat of physical violence by a union officer at a union meeting did not violate the Statute, the Authority noted it would have been irresponsible not to investigate the charges.); *Def. Prop. Disposal Region, Ogden, Utah & Def. Prop. Disposal Office (DPDO), Camp Pendleton, Oceanside, Cal.*, 24 FLRA 653, 657 (1986) (The Authority found that although a union official was engaged in protected activity when he took photographs on a military installation, the agency did not violate the Statute when

military police monitored his activities based on legitimate security considerations.) The Respondents' questions to Harris were confined to what he heard about the alleged border incursions, who he heard it from, when he heard it, and what he did about reporting it. The evidence does not show that the scope of the Respondents' inquiries exceeded what was necessary and prudent to ensure that any security threat was appropriately addressed. Under the circumstances, I do not find that Respondents' action in naming Harris as the subject of the investigation would reasonably tend to interfere with, restrain, or coerce him in the exercise of his rights under that Statute. Respondents did not violate § 7116(a)(1) by their actions in investigating Harris.

Even if the Communication Between Harris and Burleson Was Confidential, the Respondents Had an Overriding Need to Know the Details and Source of the Information

Turning to the second allegation in the complaints, claims that an agency violated § 7116(a)(1) of the Statute by requiring a union representative to disclose information about communications that occurred in his/her capacity as union representative have been discussed in various Authority decisions. In prior decisions, the Authority applied the same basic standard as discussed immediately above. That is, the standard for determining whether an agency's conduct in requiring a union representative to disclose information about such communications violates § 7116(a)(1) is an objective one. *See, e.g., U.S. Dep't of Veterans Affairs*, 56 FLRA 696, 697 (2000) (*VA*). The question is whether the conduct would tend to coerce or intimidate the employee, or whether the employee reasonably could have drawn a coercive inference from the statement. *VA*, 56 FLRA at 697. There are circumstances, however, in which the Authority has not found a violation even though conduct would have been characterized as coercive or intimidating in nature. In a recent decision in which it made such an exception to its general rule, the Authority explained as follows:

> Applying this standard, the Authority has held that a respondent violates § 7116(a)(1) by requiring a union representative to disclose, under threat of disciplinary action, privileged communications made by an employee to that union representative in the course of representing the employee in a disciplinary proceeding. *See, e.g., VA*, 56 FLRA at 697; *U.S. Dep't of the Treasury, Customs Serv., Wash., D.C.*, 38 FLRA 1300, 1308 (1991) (*Customs Serv.*). . . . *Long Beach Naval Shipyard, Long Beach, Cal.*, 44 FLRA 1021, 1037 (1992) (*Long Beach*). However, the Authority has found no violation of § 7116(a)(1) when the right to maintain the confidentiality of the conversations was waived or some overriding need for the information was established. *E.g., U.S. Dep't of Treasury, U.S. Customs Serv., Customs Mgmt. Ctr., Ariz.*, 57 FLRA 319, 324 (2001) (*Customs Mgmt. Ctr.*) (Member Wasserman dissenting); *Long Beach*, 44 FLRA at 1037-38.

Warner Robins, 66 FLRA at 591-92.

In the cases before me, although both the Respondents and General Counsel accept that this analytical approach is applicable in this case, they advance differing views about the boundaries that should apply in determining whether communications involving a union representative constitutes "privileged" or "confidential" communications. The General Counsel advocates treating any activity or communication that qualifies as "protected" under

§ 7102 as privileged. The Respondents espouse a far more limited approach -- to wit, only those communications that occur in the context of a union representative's defense of an employee faced with discipline should be entitled to confidentiality. Indeed, the analytical approach described above originated in cases in which the underlying facts involved a union official representing an employee who was facing disciplinary action and the manner in which it is stated reflects that context. *See Long Beach*, 44 FLRA at 1021, and *Customs Serv.*, 38 FLRA at 1300. Although the Authority has not defined the boundaries of what constitutes a privileged communication between a union representative and another employee, it has not ruled out that this analytical approach applies in circumstances that involved the investigation or questioning of a union official about communications that occurred in a context different from disciplinary action. *See Warner Robins*, 66 FLRA at 591-92. This indicates that the right to privilege and confidentiality may be broader than what the Respondents advocate. I am also dubious that the right extends as broadly as the General Counsel advocates. In any event, it is not necessary to the disposition of this case to define where the boundaries of privilege and confidentiality lie. Based on the seriousness of the allegations involved in this case -- i.e., that someone was jeopardizing the safety of Border Patrol vehicles, I find that the Respondents had an overriding need to know about the content of the conversation between Harris and Burleson as well as Burleson's identity. Thus, even assuming that the communication between Harris and Burleson was confidential or privileged, I find that the Respondents had an overriding need to know the details and the source of the information that Harris disclosed. *See, e.g, id.*

Under the circumstances, the Respondents did not violate § 7116(a)(1) by requiring Harris to reveal information about his communications concerning claims that the Mexican military might have loosened the lug nuts on the wheels of Border Patrol vehicles.

CONCLUSION

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

ORDER

It is ordered that the complaints be, and hereby are, dismissed.

Issued Washington, D.C., June 14, 2013

Susan E. Jelen

SUSAN E. JELEN
Administrative Law Judge