

71 FLRA No. 208

DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
LAREDO, TEXAS
(Respondent/Agency)

and

NATIONAL BORDER PATROL COUNCIL
AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2455, AFL-CIO
(Charging Party/Union)

DA-CA-17-0068

DECISION AND ORDER

November 6, 2020

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Member Abbott dissenting)

I. Statement of the Case

The Agency has filed exceptions to the attached decision by Administrative Law Judge Richard A. Pearson (the Judge), who found that the Agency committed an unfair labor practice (ULP) under § 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (the Statute)¹ when a supervisor retaliated against a bargaining-unit employee for engaging in protected activity.

For the following reasons, we find that the Judge correctly applied Authority precedent in finding that: (1) § 7116(d) of the Statute does not bar the ULP charge; (2) the General Counsel (GC) met its burden of establishing a prima facie case of retaliation under § 7116(a)(2); and (3) the Agency failed to rebut the GC's prima facie case.

II. Background and Judge's Decision

We summarize the relevant facts briefly, as they are set out in more detail in the Judge's decision.

The main dispute in this case arises from a series of incidents between a border patrol agent (the agent) and his supervisor (the supervisor), both of whom were

assigned to a border patrol station on the U.S.-Mexico border.

The first incident occurred in August 2016 when the supervisor informed the agent, in front of other agents, that he would be interviewed by the Agency's Office of Inspector General the next day. The agent – unaware as to why he was being interviewed – consulted with a Union representative and, together, they went to meet with the Agency's Patrol Agent in Charge (PAIC) to get more information. While the agent was waiting outside of the PAIC's office, the supervisor walked by "and the two made eye contact."² A short time later, the supervisor allegedly called the agent on his cell phone and accused him of jumping the chain of command, saying, in Spanish, the equivalent of "Why the f[---] are you jumping over me?"³

As a result of that incident, the Union steward filed a formal step-one grievance on the agent's behalf (the cell-phone-incident grievance) with the PAIC, alleging that the supervisor had engaged in harassing and unprofessional conduct toward the agent. The PAIC denied the grievance, and the Union did not pursue the matter further. Shortly thereafter, the supervisor sent an email to the Agency's Joint Intake Center, which receives reports of criminal activity and serious misconduct. In the email, the supervisor alleged that the Union steward was "'unfairly and maliciously target[ing]' him by filing grievances against him."⁴

The second incident occurred on September 17, 2016, when the agent was working the midnight shift. At that time, the supervisor was acting as the watch commander while another supervisory agent served as an intermediate supervisor. The agent and his partner were assigned to pursue, on foot, a group of suspected undocumented aliens. During the search, the two agents made multiple requests for assistance. Eventually, another agent answered but responded that he could not help because management had directed that he and his partner stay in their assigned area. After a few hours, the intermediate supervisor picked up the agent and his partner by vehicle. The agent asked the intermediate supervisor why management did not send backup in response to the requests for assistance. The agent testified that the intermediate supervisor responded, "After what happened between you and [the supervisor,] he is keeping everyone in their area."⁵ The agent concluded that the supervisor's actions constituted an illegitimate denial of assistance, and he contacted the Union steward.

² Judge's Decision (Decision) at 4.

³ *Id.* at 5 n.3.

⁴ *Id.* at 6; GC's Ex. 14 at 12-13; Resp't's Ex. 9 at 109.

⁵ Decision at 7.

¹ 5 U.S.C. § 7116(a)(1), (2).

Later, the Union steward sent an email to the PAIC, expressing concern that the agent did not receive assistance during the September 17 shift. The agent and his partner submitted written statements to the PAIC, asserting that the supervisor should have sent backup. The supervisor also submitted a statement, in which he denied hearing the agents' multiple requests. The supervisor also contacted the Joint Intake Center, again alleging that the Union steward was "targeting" him.⁶ In an email, the supervisor accused the agent and his partner of displaying a lack of candor in reporting the September 17 incident. In response, the Joint Intake Center opened cases against both the agent and his partner, and the Agency's Sector Evidence Team placed both under investigation for lack of candor. During the time that the two agents were under investigation, Agency policy dictated that they could not be promoted, detailed, or transferred.

On October 5, the Union steward officially filed a step-one grievance concerning the events of the September 17 shift (the denial-of-assistance grievance). The PAIC denied the grievance, finding that the Union's allegations were unfounded.

On October 12, the agent received a notice to appear before the Sector Evidence Team to be interviewed about the lack-of-candor charges. The following day, the Union steward sent the PAIC an email, with the subject heading "Union Discrimination/Retaliation" (the retaliation email), in which he alleged that the notice to appear was the result of retaliation for protected union activity – namely, the agent's written statement to the PAIC concerning the September 17 incident.⁷ The Union steward did not identify the email as a grievance, and the record contains no evidence that the Agency responded to the email.

In mid-November 2016, the Sector Evidence Team completed its investigation into the lack-of-candor allegation against the agent. Based on the Sector Evidence Team's report, the Agency decided to close the case without charges against anyone.

On November 23, 2016, the Union filed a ULP charge against the Agency, and, on March 23, 2017, the GC issued a Complaint and Notice of Hearing, alleging that the Agency violated § 7116(a)(1) and (2) of the Statute by subjecting the agent to a misconduct investigation in response to his protected activity. The Agency filed an answer to the complaint, denying that it violated the Statute and arguing that the ULP charge is barred under § 7116(d) of the Statute.

On September 28, 2018, following a hearing, the Judge issued a decision finding that: (1) § 7116(d) did not bar the Union's ULP complaint; (2) the GC established a prima facie case of retaliation under § 7116(a)(2); and (3) the Agency failed to rebut the prima facie case.

The Agency filed exceptions to the decision on October 29, 2018, and the GC filed an opposition to the exceptions on November 19, 2018.

III. Analysis and Conclusions

A. The Judge did not err in concluding that § 7116(d) of the Statute does not bar the ULP charge.

The Agency argues that, contrary to the Judge's decision, § 7116(d) of the Statute bars the Union's ULP charge.⁸ Section 7116(d) provides that issues may be raised under a negotiated grievance procedure or under the statutory ULP procedure, but not under both procedures.⁹ In order for an earlier-filed grievance to bar a ULP charge under § 7116(d), the following elements, as relevant here, must be satisfied: (1) the issue that is the subject of the grievance must be the same as the issue that is the subject of the ULP; and (2) such issue must have been raised earlier under the grievance procedure.¹⁰

Here, the Agency contends that the ULP charge is barred because the retaliation email from the Union steward to the PAIC constitutes an earlier-filed grievance.¹¹ It is undisputed that the first element of the test is satisfied, as both the retaliation email and the subsequent ULP charge alleged that the supervisor unlawfully retaliated against the agent for his protected activity by filing charges against him with the Joint Intake Center.¹² However, the GC argues that the second element of the test is not satisfied, because the email was an informal letter of protest and did not

⁸ Exceptions at 5-7.

⁹ 5 U.S.C. § 7116(d).

¹⁰ *U.S. DHS, ICE, L.A., Cal.*, 68 FLRA 302, 304 (2015) (*ICE*) (citing *U.S. Dep't of the Air Force, 62nd Airlift Wing, McChord Air Force Base, Wash.*, 63 FLRA 677, 679 (2009)).

¹¹ Exceptions at 4-7.

¹² In evaluating whether the issues involved in a ULP charge and a grievance are the same, the Authority examines whether: (1) the ULP charge and the grievance arose from the same set of factual circumstances, and (2) the theories advanced in support of the ULP charge and the grievance are substantially similar. *U.S. Dep't of Educ.*, 71 FLRA 516, 518 (2020) (*Educ.*) (Member DuBester concurring) (citing *U.S. Dep't of the Navy, Navy Region Mid-Atlantic, Norfolk, Va.*, 70 FLRA 512, 514 (2018) (*Navy Mid-Atlantic*) (Member DuBester dissenting)).

⁶ GC's Ex. 14 at 15-16; Resp't's Ex. 9 at 107-08.

⁷ GC's Ex. 9.

constitute a binding election to pursue the retaliation claim under the grievance procedure.¹³

For the retaliation email to constitute an election of remedies under § 7116(d), the filing must be a grievance invoked pursuant to the parties' negotiated grievance procedure.¹⁴ The Authority has specifically found that a letter of protest – that does not invoke or comply with the requirements of a negotiated grievance procedure – does not bar a subsequent ULP charge.¹⁵

Here, we agree with the Judge that the retaliation email was an informal complaint that does not bear the indicia of a formal grievance that would serve to bar a subsequent ULP charge. For example, unlike the cell-phone-incident grievance and the denial-of-assistance grievance, the retaliation email does not: (1) refer to step one, or to any other step, of the grievance process; (2) refer to any provision of the CBA; (3) specifically identify the agent as a "grievant"; or (4) identify a Union representative handling the matter.¹⁶ In addition, as the Judge found, the Union steward testified that he sent the email as a means of expressing disbelief and anger, and not as an invocation of the parties' negotiated grievance procedure.¹⁷ Finally, there is nothing in the record to indicate that the Agency understood the email as a grievance. Indeed, as noted above, there is no evidence that the PAIC or anyone else at the Agency even responded to it.¹⁸ Thus, we find that the Judge did not err in concluding that the email was not a grievance filed pursuant to the terms of the parties' negotiated grievance procedure. Accordingly, § 7116(d) does not bar the ULP charge.¹⁹

¹³ GC's Opp'n at 9-16.

¹⁴ See *Norfolk Naval Shipyard*, 9 FLRA 458, 471-72 (1982) (*Naval Shipyard*) (finding that a letter from a union official that did not invoke the negotiated grievance procedure or comply with its requirements did not bar a subsequent ULP charge); see also *IRS, Chicago, Ill.*, 3 FLRA 478, 486 (1980) (analogizing the language of § 7116(d) to that of § 7121(e)(1), which provides that "[a]n employee shall be deemed to have exercised his option . . . under the negotiated grievance procedure at such time as the employee . . . timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure").

¹⁵ See *Naval Shipyard*, 9 FLRA at 471-72.

¹⁶ Compare GC's Ex. 9 (retaliation email), with GC's Ex. 2 (cell-phone-incident grievance), and Resp't's Ex. 1 (denial-of-assistance grievance)

¹⁷ Decision at 27; Tr. at 310-11.

¹⁸ Decision at 11.

¹⁹ We note that the Agency also argues that the Judge erred in finding that the agent was not the aggrieved party in the retaliation email. Exceptions at 5-7; see *ICE*, 68 FLRA at 304 (holding that, in order for an earlier grievance to bar a ULP charge under § 7116(d), the aggrieved party in both actions must be the same). The Judge did not make such a finding, however, and, in light of our finding that the retaliation

The dissent questions why we, or the Judge, would analyze whether the Union's email constituted an earlier-filed grievance.²⁰ There are two simple reasons for doing so. First, the plain wording of § 7116(d) grants employees the "option of using *the negotiated grievance procedure* or [the ULP] appeals procedure."²¹ Thus, if the Union's email does not constitute an invocation of the parties' "negotiated grievance procedure" within the meaning of that section,²² then the email cannot bar a subsequent ULP charge under § 7116(d).²³ Second, the Agency – as the party challenging the Judge's decision – *asked the Authority to resolve that very issue*.²⁴ In fact, the Agency devoted its *entire* § 7116(d) exception to arguing that the Union's retaliation email barred the subsequent ULP filing.²⁵ As the dissent appears to acknowledge,²⁶ the evidence supports the Judge's conclusion that the email did not constitute an invocation of the parties' negotiated grievance procedure within the meaning of § 7116(d).

Regarding the dissent's conclusion that § 7116(d) bars the Union's ULP, the dissent fails to support that conclusion with any measured rationale. To the extent that the dissent would find that either grievance precludes the ULP charge, even the Agency seemingly recognized that such a conclusion is unsupportable. The Agency *never* contended that either the cell-phone-incident grievance or the denial-of-assistance grievance barred the Union's ULP under § 7116(d)²⁷ – implicitly acknowledging that the factual circumstances underlying both of those grievances are factually distinct from the circumstances underlying the ULP.²⁸

Moreover, in stating that § 7116(d) bars the Union's ULP charge, the dissent neglects the applicable legal standard. The Authority has repeatedly stated, including in *U.S. Department of the Navy, Navy Region Mid-Atlantic, Norfolk, Virginia (Navy Mid-Atlantic)*, that to determine whether the issues involved in a ULP charge and a grievance are the same, the Authority examines whether: (1) the ULP charge and the grievance arose from the same set of factual circumstances, *and* (2) the

email was not filed under the negotiated grievance procedure, it is unnecessary to resolve this exception.

²⁰ Dissent at 15 (calling the email "quite irrelevant").

²¹ 5 U.S.C. § 7116(d) (emphasis added).

²² *Id.*

²³ See *Naval Shipyard*, 9 FLRA at 471-72.

²⁴ Exceptions at 5-7.

²⁵ *Id.*

²⁶ Dissent at 15 ("The email is not a grievance, nor is it a ULP charge.").

²⁷ See Decision at 16 (noting that the only basis for the Agency's claim that § 7116(d) bars the Union's ULP charge was the email); see also Exceptions at 5-7.

²⁸ See 5 C.F.R. § 2423.40(d) ("Any exception not specifically argued shall be deemed to have been waived.").

theories advanced in support of the ULP charge and the grievance were substantially similar.²⁹ Aside from noting some similarities between the grievances' and ULP's legal theories,³⁰ the dissent is unable to articulate how the grievances and the ULP charge arose *from the same set of factual circumstances*.³¹ Both requirements must be met for § 7116(d) to bar the ULP, and the establishment of one does not prove the other.³² No matter how many times the dissent uses the phrase "artful pleading,"³³ that does not demonstrate that the grievances and the ULP charge were based on the same set of factual circumstances.³⁴

²⁹ See 70 FLRA at 514; see also *U.S. Dep't of Educ.*, 71 FLRA 516, 518 (2020) (*Educ.*) (Member DuBester concurring).

³⁰ This dissent's § 7116(d) analysis is as follows: "[B]oth grievances allege ongoing harassment, discriminatory harassment, union retaliation, and retaliation from Lopez towards Rodriguez because of several grievances he filed between August 30 and October 5. Similarly, the ULP charge, filed on November 23, and complaint allege that Lopez 'has been discriminating' and 'retaliat[ing]' against Rodriguez since the filing of the September grievance." Dissent at 15 (citations omitted). That analysis focuses almost exclusively on the filings' legal theories, and it in no way proves that the filings were based on similar *factual* circumstances. Also, the dissent fails to recognize that the Judge denied the FLRA Office of General Counsel's motion to amend the complaint. GC's Ex. 10. Thus, there was no "amended complaint," and the dissent's repeated reliance on it has no probative value. Dissent at 15-16.

³¹ Chairman Kiko notes that *Navy Mid-Atlantic* clarified when legal theories are substantially similar for purposes of the § 7116(d) bar. See *Educ.*, 71 FLRA at 518 ("In *Navy [Mid-Atlantic]*, the Authority made clear that it does not require the theories advanced in an earlier-filed ULP charge be 'identical' to those advanced in a later-filed grievance, just 'substantially similar.'"). The Authority did not eliminate the requirement that a grievance and a later-filed ULP charge must arise from the same factual circumstances. Nor did the Authority merge or otherwise conflate, as the dissent does here, that element with the substantially-similar-legal-theories requirement. Unlike the dissent, the Chairman refuses to undermine *Navy Mid-Atlantic*.

³² The dissent erroneously states that the ULP charge and complaint refer to events that formed the basis for the cell-phone-incident grievance and the denial-of-assistance grievance. Dissent at 14. As established above, the cell-phone-incident grievance was based on an event that occurred in August 2016, and the denial-of-assistance grievance was based on an event that occurred on September 17, 2016. Neither the charge nor the complaint reference any events occurring before September 18. See GC's Ex. 1A, ULP Charge at 1 (alleging that the supervisor retaliated against the agent for seeking Union assistance with filing a grievance by reporting the agent to the Joint Intake Center on October 12, 2016); GC's Ex. 1C, Complaint at 2 (same).

³³ Dissent at 13-14.

³⁴ The dissent takes the position that some forms of communication between agencies and unions, such as emails, are "tactic[s]" to avoid the § 7116(d) bar. Dissent at 16. To the extent that the dissent would "preclud[e]" or deter parties from

B. The Judge did not err when he found that the GC established a prima facie case of retaliation under § 7116(a)(2) of the Statute.

The Agency contests the Judge's finding that the GC established a prima facie case of retaliation under § 7116(a)(2), based on the supervisor reporting the agent to the Joint Intake Center for lack of candor.³⁵ Under § 7116(a)(2) of the Statute, it is a ULP "to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment."³⁶ In *Letterkenny Army Depot (Letterkenny)*,³⁷ the Authority established the analytical framework for determining whether an agency action violates this provision of the Statute.³⁸ First, the GC must show by preponderant evidence: (1) that the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) that such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment.³⁹ If the GC proves these elements, then it has established a prima facie case of retaliation.⁴⁰ However, even if the GC makes the required prima facie showing, the Agency will not be found to have violated § 7116(a)(2) if it can demonstrate, by a preponderance of the evidence, that: (1) there was a legitimate justification for its action; and (2) the same action would have been taken even in the absence of protected activity.⁴¹

Here, the Judge found, and the Agency does not dispute, that the agent was engaged in protected activity when he reported to the PAIC – after retaining the Union steward as his representative in the matter – that the supervisor had denied him assistance during the September 17 shift.⁴² In addition, the Judge found, and the Agency does not dispute, that the agent's protected activity motivated the supervisor's report to the

communicating about workplace disputes outside of the formal grievance procedure, *id.*, we find that position inconsistent with the Statute's emphasis on "facilitat[ing] and encourag[ing] the amicable settlements of disputes." 5 U.S.C. § 7101(a)(1)(C).

³⁵ Exceptions at 5, 7-8.

³⁶ 5 U.S.C. § 7116(a)(2).

³⁷ 35 FLRA 113 (1990).

³⁸ *Id.* at 117-18.

³⁹ *Id.* at 118.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See GC's Ex. 4 (agent's statement to PAIC concerning denial-of-assistance incident); Decision at 28; see also *U.S. Dep't of the Navy, Naval Aviation Depot, Naval Air Station Alameda, Alameda, Cal.*, 38 FLRA 567, 569 (1990) (stating that seeking union assistance is a "protected activity" under the Statute).

Joint Intake Center.⁴³ However, the Agency argues that the prima facie case has not been established because the supervisor's report to the Joint Intake Center, and the subsequent investigation of the agent, did not affect a condition of the agent's employment.⁴⁴

As stated above, § 7116(a)(2) prohibits retaliation for protected union activity "in connection with hiring, tenure, promotion, or other conditions of employment[.]"⁴⁵ Here, the record reflects that the agent was barred from receiving any promotion or being hired into a different position pending the results of the investigation into his alleged lack of candor.⁴⁶ Moreover, the investigation subjected the agent to possible discipline or termination.⁴⁷ Hence, the supervisor's retaliatory conduct was connected to specifically identified conditions of employment in § 7116(a)(2).⁴⁸ Accordingly, we find that the GC has established its prima facie case, and we deny the exception.

- C. The Judge did not err in finding that the Agency failed to rebut the General Counsel's prima facie case of retaliation under § 7116(a)(2).

The Agency further contends that the Judge erred in finding that the Agency failed to rebut the GC's prima facie case.⁴⁹ As noted above, when the GC establishes a prima facie case of retaliation – as it has done here – the burden is on the agency to demonstrate, by a preponderance of the evidence, that: (1) there was a legitimate justification for its action; and (2) that the same action would have been taken even in the absence of protected activity.⁵⁰ If the Agency cannot make such a

showing, then it will be found to have committed a ULP.⁵¹

The Agency argues that there was a legitimate justification for its action because the supervisor followed Agency policy in filing his report with the Joint Intake Center.⁵² However, even if that the supervisor acted in accordance with Agency policy, the Agency still must show that it would have taken the same action *in the absence* of the agent's protected activity.⁵³ The Agency is unable to make that showing because the supervisor's report to the Joint Intake Center, in which he accused the agent of lack of candor, was based only on statements that the agent made *in the course of* his protected activity – his written statement to the PAIC alleging that the supervisor improperly denied him and his partner backup.⁵⁴

Moreover, in a case such as this one, where the alleged retaliation concerns potential discipline for conduct occurring during protected activity, "a necessary part of the respondent's defense" is that the conduct: (1) constituted flagrant misconduct; or (2) otherwise exceeded the boundaries of protected activity.⁵⁵ The Authority has held that while an employee can lose protection under the Statute for making false statements, "[i]t is only those statements which are knowingly false and uttered with reckless abandon which lose the protection of the Statute."⁵⁶ While the Agency contends that the supervisor had reason to believe that the agent's report was false,⁵⁷ the record does not establish that the agent's statement was knowingly false or uttered with reckless abandon.⁵⁸ Indeed, the Agency even declined to pursue a lack of candor charge, finding instead that the incident was the result of miscommunication by everyone concerned.⁵⁹

⁴³ Decision at 29-30.

⁴⁴ Exceptions at 5, 7-8.

⁴⁵ 5 U.S.C. § 7116(a)(2).

⁴⁶ See Decision at 2 ("While the investigation was pending he could not be promoted, detailed, or transferred.")

⁴⁷ *Id.* at 30 (citing Tr. at 182).

⁴⁸ See 5 U.S.C. § 7102 ("Each employee shall have the right to form, join, or assist any labor organization . . . without fear of penalty or reprisal" (emphasis added)); see also *IRS & Brooklyn Dist. Office*, 6 FLRA 642, 655 (1981) ("It is both elemental and firmly settled that protected activity flowing from exclusive representation by a labor organization includes the processing of grievances and that any interference with the right to file grievances constitutes an unfair labor practice in violation of . . . § 7116(a)(1) of the Statute."); *id.* at 657-59 (finding that supervisor's threat to conduct in-depth work reviews because an employee filed a grievance constituted a violation of § 7116(a)(2), and noting that "proof of conduct which is inherently destructive of a basic right guaranteed under the [Statute] . . . is sufficient to support a violation of" § 7116(a)(2)).

⁴⁹ Exceptions at 5, 10-11.

⁵⁰ *Letterkenny*, 35 FLRA at 118.

⁵¹ *Id.*

⁵² Exceptions at 5, 9, 11.

⁵³ See *Letterkenny*, 35 FLRA at 118.

⁵⁴ Cf. *U.S. DOD, U.S. Air Force 325th Fighter Wing, Tyndall Air Force Base, Fla.*, 66 FLRA 256, 262 (2011) (finding that, even if the GC established a prima facie case under *Letterkenny*, the agency met its burden by showing that it would have suspended the employee based on performance and disciplinary issues *unrelated* to her protected activity).

⁵⁵ *U.S. Dep't of the Air Force, Aerospace Maint. & Regeneration Ctr., Davis Monthan Air Force Base, Tucson, Ariz.*, 58 FLRA 636, 636 (2003) (citing *Dep't of the Air Force, 315th Airlift Wing v. FLRA*, 294 F.3d 192 (D.C. Cir. 2002)).

⁵⁶ *U.S. Forces Korea, 8th U.S. Army*, 17 FLRA 718, 728 (1985).

⁵⁷ Exceptions at 9-10.

⁵⁸ Decision at 30-31.

⁵⁹ *Id.* at 12.

Accordingly, we find that the Agency failed to establish its defense,⁶⁰ and we deny its exceptions.

The dissent propounds that § 7116(a)(2) of the Statute protects only union representatives and, because the agent was not a Union representative, we should set aside the award.⁶¹ As stated above, § 7116(a)(2) states that an agency commits a ULP when it “encourage[s] or discourage[s] membership in any labor organization by discriminat[ing] in connection with hiring, tenure, promotion, or other conditions of employment.”⁶² Nothing in that section limits its application to union representatives, as the dissent asserts.⁶³ Moreover, such an interpretation is inconsistent with the plain terms of § 7116(a)(2) and the practicalities of union “membership,” as that term is used in that section. In this regard, employees, *including* union representatives, make up the “membership [of a] labor organization.”⁶⁴ Had Congress intended for § 7116(a)(2) to protect only union representatives, then it would have explicitly used the term “representative,” as it did in §§ 7102(1), 7111(e), 7114(b)(2), and 7131(d)(1) of the Statute.⁶⁵ In short, our response to the dissent is: Congress did not write the Statute that way.⁶⁶ Unlike the dissent, we decline to interpret the Statute in a fashion that is unsupported by its plain wording. And although the dissent declares that

⁶⁰ The Agency also alleges that the Judge improperly considered hearsay evidence concerning the intermediate supervisor’s statements on the night of September 17. Exceptions at 3 n.4. The Statute provides that, in ULP proceedings, “the parties shall not be bound by rules of evidence, whether statutory, common law, or adopted by a court.” 5 U.S.C. § 7118(a)(6). In addition, the Authority’s regulations state that, in ULP proceedings, the “[r]ules of evidence shall not be strictly followed.” 5 C.F.R. § 2423.31(b). Accordingly, we find no merit to the Agency’s argument, and we deny it. *See Indian Health Serv., Winslow Serv. Unit, Winslow, Ariz.*, 54 FLRA 126, 126-27 (1998) (rejecting contention that an administrative law judge erred by permitting evidence that was allegedly hearsay).

⁶¹ Dissent at 17-18.

⁶² 5 U.S.C. § 7116(a)(2).

⁶³ Dissent at 15.

⁶⁴ 5 U.S.C. § 7116(a)(2); *see also id.* § 7101(a)(1) (noting that “employees . . . participate through labor organizations”).

⁶⁵ *See* 5 U.S.C. § 7102(1) (stating “to act for a labor organization in the capacity of a *representative*” (emphasis added)), § 7111(e) (referencing “labor organization[s] . . . officers and *representatives*” (emphasis added)), § 7114(b)(2) (noting the duty of a union “to be represented at the negotiations by duly authorized *representatives*” (emphasis added)); *see also id.* § 7131(d) (referring to “any employee *representing* an exclusive representative” (emphasis added)).

⁶⁶ *See Russello v. United States*, 464 U.S. 16, 23 (1983) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same [law], it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” (citation omitted)).

Congress “inten[ded]” § 7116(a)(2) to apply only to union representatives,⁶⁷ the dissent does not support that declaration with legislative history and any other indicia of congressional intent.

IV. Order

Pursuant to § 2423.41(c) of the Authority’s Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Department of Homeland Security, U.S. Customs and Border Protection, Laredo, Texas, shall:

1. Cease and desist from:

(a) Discriminating against Eulalio Rodriguez, or any other bargaining-unit employee, by subjecting them to investigations in reprisal for engaging in activities protected under § 7102 of the Statute.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining-unit employees in the exercise of their rights under the Statute.

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

(a) Post at its facilities where bargaining unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Chief Patrol Officer, Laredo Sector, and shall be posted and maintained for sixty (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.

⁶⁷ Dissent at 16 (suggesting, without support, that the “intent” and “purpose” of § 7116(a)(2) demand a different interpretation). We also note that the dissent’s logic is, at best, inconsistent. It asserts, without support, that unless § 7116(a)(2) is interpreted in the manner advanced by the dissent, § 7116(a)(4) is “meaningless” because “there could be no violation of the latter without a concomitant violation of the former.” Dissent at 17-18. Yet, the dissent itself recognizes the Congress purposely included “catch-all” statutory provisions that are “typically not charged alone but [are] *part and parcel* of [other violation[s] set forth in the other sections” of the Statute. Dissent at 17 (emphasis added) (referring to § 7116(a)(1)). Thus, under the dissent’s logic, two of the eight statutory subsections that define what constitutes an “[unfair labor practice] for an agency,” 5 U.S.C. § 7116(a)(1)-(8), are “superfluous.” Dissent at 17-18.

(b) In addition to physical posting of paper notices, the Notice shall be distributed electronically to all bargaining-unit employees, on the same day as the physical posting, through email, posting on an intranet or internet site, or other electronic means used to communicate with employees.

(c) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Denver Region, Federal Labor Relations Authority, in writing, within thirty (30) days from the date of this Order, as to what compliance actions have been taken.

**NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY**

The Federal Labor Relations Authority has found that the Department of Homeland Security, U.S. Customs and Border Protection, Laredo, Texas, violated the Federal Service Labor-Management Relations Statute (the Statute) and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT discriminate against Eulalio Rodriguez, or any other bargaining-unit employee, by subjecting him to investigations in reprisal for engaging in activities protected under § 7102 of the Statute.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce bargaining-unit employees in the exercise of the rights assured by the Statute.

(Agency)

Date: _____ By: _____
(Signature) (Title)

This Notice must remain posted for sixty (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 Region, Federal Labor Relations Authority, whose address is: 1244 Speer Blvd., Suite 446, Denver, CO 80204, and whose telephone number is: (303) 844-5224.

Member Abbott, dissenting:

Two years ago, in *U.S. Department of the Navy, Navy Region Mid-Atlantic, Norfolk, Virginia (Navy Mid-Atlantic)*,¹ we clarified the meaning of § 7116(d). To make that clarification, we returned “to the plain meaning of the Statute.”² We emphasized that the Authority’s prior interpretations of §§ 7116(d) and 7121(d) permitted parties to use the tactics of “technical hairsplitting and artful pleading” to avoid the statutory and jurisdictional bars imposed by those provisions.³ We also observed that such tactics amounted to nothing more than a “manipulat[ion of] Title V.”⁴

Navy Mid-Atlantic reinforced the fundamental purpose of election-of-forum provisions – to prevent parties from parsing into separate actions issues that stem from the same set of factual circumstances and advance “substantially similar” legal theories⁵ to those that have been filed previously as formal grievances or charges.⁶ This approach, not only reinforced the purposes of the bar, but also was easy to understand by laypersons, union representatives, and attorneys. Additionally, it cured the “latent ambiguity,” bemoaned by arbitrators and parties, in how the Authority previously had applied § 7116(d) and § 7121(d).⁷

¹ 70 FLRA 512 (2018) (Member DuBester dissenting).

² *Id.* at 514.

³ *Id.* at 514-15; see *U.S. Dep’t of VA, Waco Reg’l Office, Waco, Tex.*, 70 FLRA 92, 95 (2016) (*VA, Waco*) (Concurring Opinion of Member Pizzella); *AFGE, Local 919*, 68 FLRA 573, 578 (2015) (*Local 919*) (Dissenting Opinion of Member Pizzella) (“And the majority demonstrates once again that they are entirely comfortable permitting a union ‘to parse, into separate grievances and complaints, those issues or matters – that involve the same parties, the same collective-bargaining agreement (CBA), and involve issues or matters that easily could have been consolidated into a single action.’”); *U.S. Dep’t of the Navy, Marine Corps, Combat Dev. Command, Marine Corps Base, Quantico, Va.*, 67 FLRA 542, 545 (2014) (Dissenting Opinion of Member Pizzella) (“My colleagues conclude, nonetheless, that the 2011 grievance is not barred under § 7116(d) because the 2010 ULP charge and the 2011 grievance are based on different legal theories even though the Union concedes, implicitly and explicitly, not once, but four times that the grievance and the earlier-filed ULP charge raised the same issues.”).

⁴ *Navy Mid-Atlantic*, 70 FLRA at 515 n.28.

⁵ *Id.* at 517.

⁶ *Id.* at 516; see also *U.S. Dep’t of the Air Force, Warner Robins Air Logistics Ctr.*, 71 FLRA 758, 759-60 (2020) (*Warner Robins*) (Member DuBester dissenting) (finding the grievance regarding a suspension for comments made during an EEO investigation was barred by the earlier-filed EEO complaint because both would require the factfinder to address the same underlying issue).

⁷ *VA, Waco, 70 FLRA at 95* (Concurring Opinion of Member Pizzella)

The order of events at issue here may be categorized in any number of ways. Viewed pragmatically, however, the events and circumstances that underpin the grievances and the complaint *all* concern continuing allegations of harassment, retaliation, and discrimination by Rodriquez’s supervisor (Lopez) towards Rodriquez and countercharges by Lopez against Rodriquez’s union representative (Gonzales) and, although ongoing, were confined to a time period of just over two months.

As discussed below, if *Navy Mid-Atlantic* is applied correctly, there is but one reasonable conclusion—the attempt by the Union to parse the later-filed ULP complaint into a separate issue amounts to nothing more than an exercise in artful pleading and technical hair-splitting designed to avoid the bar imposed by § 7116(d). That the majority ignores these machinations is predictable and surprising at the same time. Member DuBester has been consistent in his view that *Navy Mid-Atlantic* was wrongly decided and in subsequent cases that applied that approach. But Chairman Kiko’s about-face is confounding.

Without a doubt, parties have a statutory “option” to use a negotiated grievance procedure *or* ULP appeals procedure,⁸ but they are not afforded a statutory option to use *both*.⁹ Rather, choice-of-forum provisions such as § 7116(d) preclude a grieving party from litigating similar matters in multiple forums.¹⁰

The majority is not satisfied to undermine *Navy Mid-Atlantic*. Instead, they toss it to the junkyard of precedential obscurity and signal a plethora of entirely new machinations for parties to use to avoid the bar imposed by § 7116(d). The ruling provides a roadmap and instructions on how to employ these new tactics. Put another way, today’s decision strangles § 7116(d) even more tightly than it was constrained before *Navy Mid-Atlantic*.

During the course of about seven weeks (between August 30 and October 19, 2016), Gonzales (the recently-transferred Union representative) filed several grievances on behalf of Rodriquez (the grievant) against Lopez (the grievant’s supervisor) alleging harassment, retaliation, and discrimination that he suffered because he had filed an earlier grievance which resulted in an investigation that he believed was

(stating that “as [the arbitrator] noted in his award, the [Authority] has created a ‘latent ambiguity’ in the manner it applies §§ 7116(d) and 7121(d).”)

⁸ Majority at 4 n.14.

⁹ *Local 919, 68 FLRA at 578* (Dissenting Opinion of Member Pizzella).

¹⁰ *Navy, Mid-Atlantic, 70 FLRA at 515; see also U.S. Dep’t of VA, 71 FLRA 785, 786-87 (2020) (VA).*

unwarranted. Specifically, Gonzales filed first-step grievances on September 4, 2016 (alleging “discriminatory harassment” and “harassment”)¹¹ and October 5, 2016 (alleging “union retaliation” for filing the September 4 grievance)¹² and elevated the October 5 grievance to a second-step grievance on October 19 (alleging union “retaliation” for the earlier grievance and additional incidents of “harassment” on October 12, 13, and 19).¹³ On October 13, Gonzales sent an email to the patrol agent in charge (Lopez’s supervisor), which again alleged “Union [r]etaliation” for the “[r]etaliation” and “Union [d]iscrimination [and] [r]etaliation” arguments that concerned Rodriguez and were the subject of the September 4 and October 5 grievance.¹⁴ In the email, Gonzales alleged ongoing harassment violated not only violate the CBA, but also § 7116(A)(1) and (2).¹⁵ On September 8, Lopez, complained that the ongoing grievances were intended to “unfairly and maliciously target him.”¹⁶

It is difficult to miss how interrelated the factual circumstances underlying the grievances and the ULP are. The majority nonetheless concludes that the earlier-filed grievances and the later-filed ULP do not arise “from the same set of factual circumstances.”¹⁷ It is worth noting that *both* grievances allege ongoing harassment, discriminatory harassment, union retaliation, and retaliation from Lopez towards Rodriguez *because of several grievances he filed between August 30 and October 5*. Similarly, the ULP charge, filed on November 23,¹⁸ and complaint allege that Lopez “has been discriminating” and “retaliat[ing]” against Rodriguez *since the filing of the September grievance*.¹⁹ It is quite obvious that the matters addressed in the grievances and ULP “ar[is]e from the same set of factual

circumstances” and advanced substantially similar legal theories.²⁰

The arguments proffered by the parties concerning the purported significance of the October 13 email are quite irrelevant. That Judge Pearson and the majority spend such time and accord such significance to that email is perplexing because the Authority has long looked only to documents that have been filed as formal grievances or formal ULP charges to determine whether the later-filed matter is barred by § 7116(d) or § 7121(d).²¹

The email is not a grievance, nor is it a ULP charge. Therefore, the only relevant inquiry is whether the November 23 ULP charge and complaint arise out of the same factual circumstances and advance substantially similar legal theories as the grievances filed on September 4 and October 5. Whatever arguments the parties made regarding the email, they have no bearing on that determination. Whether the November 23 ULP charge is barred by the September 4 and October 5 grievances is a question of jurisdiction that must be addressed regardless of whatever relevance the parties attempt to accord to the email and whether or not the Agency explicitly addressed it.²² As discussed above, it is quite obvious that the grievances and the charge all arise out of the same time frame, the same parties, and the same ongoing dispute. In other words, they arise out

¹¹ GC Ex. 2 at 1-3 (emphasis added); *see also* Judge’s Decision at 5.

¹² Resp. Ex. 1 at 1 (emphasis added); *see also* Judge’s Decision at 9.

¹³ Resp. Ex. 2 (emphasis added); *see also* Judge’s Decision at 11.

¹⁴ Judge’s Decision at 11 (emphasis added).

¹⁵ *Id.*; 5 U.S.C. § 7116.

¹⁶ Judge’s Decision at 6. My colleagues ignore this fact entirely even though Lopez provided a reliable report that indicated several months earlier, prior to transferring to the Zapata workstation (where Gonzales and Lopez work), Gonzales had announced “that he was going to attempt to ‘set [Lopez] straight’” once he was transferred. GC Ex. 14 at 14; Resp. Ex. 8 at 5, 7.

¹⁷ Majority at 6.

¹⁸ GC Ex. 1A.

¹⁹ GC Ex. 1C (emphasis added); GC Ex. 1A (emphasis added).

²⁰ *Navy Mid-Atlantic*, 70 FLRA at 514.

²¹ VA, 71 FLRA at 786 n.19 (finding that a grievance and an earlier-filed ULP arose from the set of factual circumstances after comparing the language of the charge and the grievance); *U.S. Dep’t of the Air Force, Minot Air Force Base, N.D.*, 70 FLRA 867, 868 n.16 (2018) (Member DuBester dissenting) (finding that a grievance was barred under 7116(d) after comparing the language of an earlier-filed ULP charge and a grievance); *Local 919*, 68 FLRA at 575 (analyzing whether a grievance was barred under § 7116(d) of the Statute and concluding that the arbitrator erred by finding that it was based “on the content of the [Regional Director’s] dismissal letter instead of the content of the ULP charge itself” and stating that the arbitrator should have “analyze[d] . . . the ULP charge . . . as articulated by the Union in the charge itself”); *U.S. DOJ, Fed. BOP, Metro. Corr. Ctr., N.Y.C., N.Y.*, 67 FLRA 442, 445 (2014) (Member Pizzella dissenting) (stating that “the determination of whether § 7116(d) applies to the portion of the grievance before the [a]rbitrator depends on the content of the [u]nion’s earlier-filed ULP charge – and *not* on any subsequent analysis of the charge,” such as that in a regional office dismissal letter statement).

²² *U.S. DOJ, Fed. BOP, Fed. Med. Ctr. Carswell, Fort Worth, Tex.*, 70 FLRA 890, 891 (2018) (Member DuBester dissenting) (jurisdictional issues are to be considered *sua sponte*).

of the same factual circumstances.²³ Further, the amended complaint advances substantially similar legal theories as the grievance – harassment and retaliation for engaging in protected activity.²⁴

Sadly, this ill-advised decision effectively undermines the clarity which *Navy Mid-Atlantic* brought to the application of § 7116(d). It not only provides a new tactic that parties will use to avoid a § 7116(d) bar, but it includes a roadmap and instructions on how to parse similar matters arising out of the same set of circumstances into separate grievances and complaints:

- first, file any number of grievances on any ongoing matter;
- second, discuss or send any number of emails or texts to various agency officials;
- third, in those discussions, emails, or texts avoid using words such as “grievance”, “step one”, or “step two” or any other reference to the CBA; but
- fourth, make certain to include one or more references to the Statute (preferably § 7116(a)) and complain about the same matters you have already grieved.

This is just the sort of “artful pleading” and “manipulat[ion of] Title V” that *Navy Mid-Atlantic* precluded.²⁵ Whereas *Navy Mid-Atlantic* brought clarity and simplicity to the 7116(d) analysis, the majority’s decision puts a stranglehold around the neck of § 7116(d) that is even more constraining than the confusing and ambiguous approaches used prior to *Navy Mid-Atlantic*.

For the reasons discussed above, I would conclude that the complaint is barred by § 7116(d). It is, therefore, unnecessary to address whether a charge of retaliation under § 7116(a)(2) has been proved.

This case also demonstrates why a wholesale reconsideration of what activities are prohibited by § 7116(a)(1), (2), and (4) is past due. With respect to these important provisions, the General Counsel has advanced complaints, and the Authority and its judges have issued decisions far too often which conflate and confuse their purpose, intent, and meaning. As a consequence, the *Letterkenny* framework²⁶ has been applied improperly to many complaints where it did not

belong. This case is a perfect example. Therefore, as explained below, I do not agree that § 7116(a)(2) is properly charged or that the *Letterkenny* framework applies at all to the circumstances of this case.

The term “protected activity” is not a term that is found in the Statute, nor in the National Labor Relations Act (NLRA). Section 7116(a) describes eight circumstances under which an agency may not take certain actions. Three sections—7116(a)(1), (2), and (4)—in specific contexts protect a union official or employee when they engage in certain types of activity.²⁷ These activities have historically been termed “protected activity” in both the private and federal sectors.²⁸ What actions are protected has been the subject of much litigation and debate before the FLRA and the NLRB.

Section 7116(a)(1) of the Statute generically describes that bargaining-unit employees and union representatives should be able to exercise rights under the Statute without interference or restraint—“it shall be an [ULP] for an agency to interfere with, restrain, or coerce *any employee* in the exercise *by the employee* of *any right* under this chapter.”²⁹ One might describe it as a catch-all clause which is typically not charged alone but is part and parcel of another violation set forth in the other sections. Section 7116(a)(2), more specifically and as addressed in *Letterkenny*, provides that it shall be an ULP for an agency “to encourage or discourage *membership in any labor organization* by discrimination in connection with hiring, tenure, promotion, or other conditions of employment.”³⁰ Section 7116(a)(4), although not at issue in this case, is nonetheless relevant to a contextual examination of the types of actions that are prohibited by § 7116(a)(1) and (2). Section 7116(a)(4) states, even more specifically, that it shall be an ULP for an agency “to *discipline* or otherwise *discriminate* against *an employee* because the *employee* has filed a *complaint, affidavit, or petition*, or has given any information or testimony under this chapter.”³¹

In *Letterkenny*, the Authority held that the agency violated § 7116(a)(1) and (2) when it failed to

²³ The majority claims they are unclear which grievance bars the ULP charge. Majority at 6. The answer is simple – both or either one.

²⁴ Compare GC Ex. 1A; GC Ex. 1B with Agency Ex. 1; Agency Ex. 2.

²⁵ 70 FLRA at 515 & n.28.

²⁶ *Letterkenny Army Depot*, 35 FLRA 113, 117-23 (1990) (*Letterkenny*).

²⁷ 5 U.S.C. § 7116(a)(1), (2) and (4).

²⁸ *U.S. Capitol Police v. Office of Compliance*, 878 F.3d 1355, 1361 (Fed. Cir. 2018) (finding that the portion of the Officer’s email protesting his own personal holdover constitutes as protected activity); see also *Bureau of Indian Affairs, Isleta Elementary Sch., Pueblo of Isleta, N.M.*, 54 FLRA 1428, 1435 (1998) (finding that an Agency’s interference with an employee’s right to designate their respective representatives while they are fulfilling their responsibilities is a violation of § 7116(a)(1)).

²⁹ 5 U.S.C. § 7116(a)(1) (emphasis added).

³⁰ *Id.* § 7116(a)(2) (emphasis added).

³¹ *Id.* § 7116(a)(4) (emphasis added).

select the union president for a promotion because of his “protected activity” on behalf of the union,³² and established an analytical framework that was to be applied in cases alleging violations of § 7116(a)(2)—when a *union* official is engaged in protected activity on behalf of the union.³³ Here, Rodriguez complains that the investigation was not warranted and could lead to discipline but there is no evidence in the record that he served as an official, representative, or officer of the Union or acted in any official capacity on behalf of the bargaining unit. If the majority intends to apply *Letterkenny*, then under these circumstances, the complaint should have been raised as a violation of § 7116(a)(4), not § 7116(a)(2).

The majority’s presumptive interpretation of § 7116(a)(2), which is not supported by *Letterkenny*, renders § 7116(a)(4) superfluous. Consequently, there could be no violation of the latter without a concomitant violation of the former. Section 7116(a)(4) thus becomes meaningless. I do not agree that is the case. Section 7116(a)(1) is a generic protection that applies to *any employee* when they exercise *any right* under the Statute; § 7116(a)(2), *as interpreted and applied in Letterkenny*, protects a *union representative* who engages in representational duties, acting on behalf of the bargaining unit, or in another role for the union.³⁴ Section 7116(a)(4), on the other hand, protects *any employee* from discipline or the threat of discipline because she has filed or has participated in a complaint.

The National Labor Relations Board has recognized the need to reconsider what actions constitute protected activity under the NLRA.³⁵ In this vein, the NLRB recently reversed decades of contrary precedent when it held that § 8(a)(1) of the NLRA, which guards the right of an employee to act on behalf of a group of employees, applies only when the employee advances a “truly group complaint,” as opposed to a purely personal grievance.”³⁶ It is time that we act similarly and reexamine the *Letterkenny* framework. As I noted earlier, we should not continue to apply precedent that is based on sloppy pleadings and inconsistent Authority determinations which have confused and conflated the purpose, intent, and meaning of § 7116(a)(1), (2), and (4).

Rather, it is imperative that we reexamine Authority precedent when it is not consistent with the plain language of the Statute.³⁷

Although I would conclude that the complaint is barred by § 7116(d), I would also conclude that the alleged misconduct of the Agency should have been charged under § 7116(a)(4), not § 7116(a)(2). Therefore, the complaint is deficient and should be dismissed.

³² *Letterkenny*, 35 FLRA at 113.

³³ *Id.* at 117 (emphasis added).

³⁴ *Id.* at 113. My colleagues again mischaracterize my argument. The majority states that “the dissent declares that Congress ‘intend[ed] § 7116(a)(2) to apply only to union representatives.” Majority at 10. I make no such assertion. It is *Letterkenny* that gives § 7116(a)(2) that meaning and the majority fully embraces *Letterkenny*. Instead, I have asked for a reexamination of *Letterkenny* and give our own clear and unambiguous interpretation to § 7116(a)(2).

³⁵ *General Motors, LLC*, 368 NLRB No. 68, 2 (2019).

³⁶ *Alstate Maintenance, LLC*, 367 NLRB No. 68, 3 (2019).

³⁷ *U.S. Dep’t of VA, Med. Ctr., Orlando, Fla.*, 71 FLRA 13, 13 n.6 (2019) (Member Abbott dissenting).

DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
LAREDO, TEXAS

RESPONDENT

AND

NATIONAL BORDER PATROL COUNCIL,
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2455, AFL-CIO

CHARGING PARTY

Case No. DA-CA-17-0068

Zachary Wooley
Michael A. Quintanilla
For the General Counsel

Jennifer M. Sims
Jesus Ybaraa
For the Respondent

Sergio Moreno
Jared Gonzales
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

This case follows the fraught work relationship between a border patrol agent and one of his supervisors. The events of the case unfolded in the weeks between late August and October of 2016, beginning with the agent filing an informal grievance against the supervisor, and leading to a series of actions by the supervisor that the agent perceived as retaliation. Employees are entitled, under federal law, to consult with their union representatives and file grievances (both formal and informal) to correct problems, and agencies are correspondingly prohibited from retaliating against employees for doing so. On the other hand, agencies are entitled to discipline employees who engage in misconduct. This case illustrates the friction between these two principles.

After Border Patrol Agent Eulalio Rodriguez was told by a supervisor, Rudy Lopez, that he would be interviewed the next day by someone from the Office of Inspector General, Rodriguez and a Union steward

approached the station's Patrol Agent in Charge (PAIC) to find out more about the interview. A few minutes later, as Rodriguez drove out into the field, he received an angry telephone call from Lopez, who ordered him to come back to the station. Rodriguez felt that Lopez acted in a rude and unprofessional manner, prompting him and a second Union official to meet informally with the PAIC and to file a formal grievance a few days later over the incident. Shortly thereafter, Lopez filed an internal administrative complaint with the Agency's Joint Intake Center (JIC) against the Union official for "targeting" him. Although the parties were subsequently able to resolve this grievance, an incident occurred a couple of weeks later, in which Rodriguez and his partner radioed into the station, asking for backup assistance as they were tracking a group of suspected border-crossers. When they did not receive the assistance they expected, Rodriguez and his partner discussed the matter with the Union and filed a second grievance against Lopez, who was the Watch Commander that night. This grievance was initially raised informally with the PAIC and later formally, at the first and second steps of the negotiated grievance procedure. A few days after the informal grievance was raised, Lopez again went to the JIC and expanded his administrative complaint to include Rodriguez and his partner for lying about him in the informal grievance.

As a result of Lopez's JIC complaint, Rodriguez was summoned to be interviewed by Agency investigators about his alleged "lack of candor," an allegation which could result in disciplinary action, up to and including termination, against him. While the investigation was pending he could not be promoted, detailed, or transferred. When he realized that Lopez had filed this complaint against him, Rodriguez and his Union representative emailed the PAIC, objecting to Lopez's new act of retaliation, but they did not file a formal grievance regarding this. Instead, they filed the unfair labor practice charge pending before us now.

The primary, substantive issue presented here is whether Lopez (and by extension the Agency) retaliated against Rodriguez because of the most recent grievance he had filed against Lopez. Since Lopez essentially admitted that he filed his "lack of candor" complaint against Rodriguez because Rodriguez had complained to management about his conduct, it is clear that Lopez was motivated by Rodriguez's protected activity. This is further demonstrated by the timing of Lopez's JIC complaint and by his manner of responding to other examples of protected activity engaged in by Rodriguez and the Union. The Agency's defense – that Rodriguez committed flagrant misconduct by lying about Lopez – is contradicted by the evidence that Rodriguez did not engage in any deliberate, conscious

deception. Therefore, the Agency violated § 7116 (a)(1) and (2) in its treatment of Rodriguez.

The case also presents a threshold jurisdictional issue: was the unfair labor practice charge (ULP) barred by the earlier filing of any of the informal or formal grievances? Because the two formal grievances involved different events and factual predicates than the ULP charge, the answer is that they do not bar the charge. And because the informal email protest raised by the Union concerning Lopez's filing of the JIC complaint against Rodriguez was not a grievance filed under the parties' negotiated grievance procedure, it also did not bar the filing of a ULP charge.

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. part 2423.

On November 23, 2016, the National Border Patrol Council, American Federation of Government Employees, Local 2455, AFL-CIO (the Union) filed a ULP charge against the Department of Homeland Security, U.S. Customs and Border Protection, Laredo, Texas (the Agency or Respondent). GC Ex. 1(a). After investigating the charge, the Acting Regional Director of the FLRA's Dallas Region issued a Complaint and Notice of Hearing on March 23, 2017, on behalf of the General Counsel (GC), alleging that the Agency violated § 7116(a)(1) and (2) of the Statute by subjecting an employee to a misconduct investigation in response to the employee's protected activity. GC Ex. 1(c). The Respondent filed its Answer to the Complaint on April 17, 2017, denying that it violated the Statute and asserting that the ULP charge is barred by § 7116(d) of the Statute. GC Ex. 1(d).

A hearing in this matter was initially scheduled for June 27, 2017, but it was postponed at the Respondent's request, due to the pendency of a related criminal proceeding. GC Exs. 1(e) – 1(i). Upon the resolution of the criminal case, a hearing was held in this matter on February 7-9, 2018, in Laredo, Texas. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The GC and the Respondent filed post-hearing briefs, which I have fully considered. Based on the entire record, including my observations of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent, an activity within the Department of Homeland Security, U.S. Customs and Border Protection (CBP), is an agency within the meaning of § 7103(a)(3) of the Statute. The National Border Patrol Council, American Federation of Government Employees, AFL-CIO (AFGE), a labor organization within the meaning of § 7103(a)(4) of the Statute, is the certified exclusive representative of a nationwide unit of CBP employees. The Union, Local 2455, is an agent of AFGE for the purpose of representing the Respondent's bargaining unit employees. GC Ex. 1(c); Tr. 8-9.

I begin with some background about the parties' negotiated grievance procedures and the Agency's procedures for reporting misconduct. The Agency and the Union operate under a collective bargaining agreement (CBA). *See* Tr. 166, 270. Although the CBA was not entered into evidence, it is apparent that Article 33 of the CBA pertains to the parties' grievance procedure. *See* GC Ex. 2 at 3; Resp. Ex. 1 at 3; Resp. Ex. 2 at 1; Resp. Ex. 3 at 1. The Agency and the Union often try to resolve problems informally, with an exchange of emails, a conversation, or a meeting. Tr. 274. Sometimes these complaints, referred to as informal grievances, lead management to conduct an inquiry into the problem. *See* Tr. 486. These informal complaints are made prior to the filing of a grievance under the parties' negotiated grievance procedure. *See* Tr. 274, 486. Step 1 of the parties' negotiated grievance procedure is the point at which a grievance is actually filed. If a matter is not resolved there, the grievance can be appealed to Step 2, Step 3, and arbitration. *See* Tr. 166, 274-75, 319.

CBP personnel are obligated to report misconduct of other employees or officials, either to the JIC or to their supervisors, who are themselves obligated to forward the allegations to the JIC. Tr. 148, 150-51; GC Ex. 15; Resp. Ex. 4.¹ An employee can be disciplined for failing to report misconduct. Tr. 148. On the other hand, the Agency's Guidance for Reporting Employee Misconduct cautions that "[f]ederal laws and regulations prohibit retaliation against employees for reporting misconduct[]" and counsels employees to use a "common-sense approach . . . about reporting less-serious misconduct." GC Ex. 15 at 1, 2.

The people involved in this dispute work at the Zapata Station, which is one of nine stations within the Laredo Sector. Tr. 26, 147, 237. The station's area of responsibility includes a fifty-two mile stretch of the

¹ Respondent Exhibit 4 is, essentially, the second page of the two-page GC Exhibit 15.

U.S.-Mexico border. Tr. 424. The main dispute in the case arose from a series of conflicts between Eulalio Rodriguez, a border patrol agent (BPA), and Rudy Lopez, a supervisory border patrol agent (SBPA) with over ten years of supervisory experience. Tr. 25-26, 412, 419.

Although Rodriguez and Lopez had both worked at Zapata Station since 2011, the first sign of conflict between them occurred on August 30, 2016.² That morning, in a room at the station where the start-of-shift muster was to begin, Lopez approached Rodriguez and told him, in front of other agents, that he would be interviewed the following day by investigators from the Agency's Office of Inspector General (OIG). Tr. 30-31. Rodriguez was embarrassed to be advised of this in front of his coworkers, since such news was usually delivered privately. Tr. 31.

When the muster ended, Rodriguez consulted his Union representative, Cesar Gomez, who offered to talk to the station's Patrol Agent in Charge, Charles Arsuaga, to get more information about the OIG interview. Tr. 32. While Rodriguez was waiting outside Arsuaga's office, Lopez walked past him in the hallway, and the two made eye contact. Tr. 33. Gomez came out of Arsuaga's office shortly thereafter and told Rodriguez that the IG wanted to interview him as a witness in an investigation of another agent. Tr. 32-34.

Immediately afterward, Rodriguez and his partner left the station and began driving to their assigned location, when Lopez called Rodriguez on his cell phone. Rodriguez testified that Lopez asked him (in Spanish) "what happened, and why the fuck did I jump in, and has he ever fucking done anything wrong to me?" Tr. 34.³ Rodriguez understood "jump in" to mean why did he "jump the chain of command" to talk to Arsuaga. *Id.* Rodriguez told Lopez he didn't appreciate being talked to like that, and Lopez said, "you know what, just come to my office right now." Tr. 35.

Back at the station, Rodriguez found Gomez, who agreed to serve as his Union representative, and the two went to Lopez's office. Tr. 35-36. There, Rodriguez stated that he did not like how Lopez had spoken to him and, Rodriguez testified, Lopez "denied everything." Shortly thereafter, the meeting ended. Tr. 36-37.

Later that day, Gomez put Rodriguez in touch with Jared Gonzales, a union steward and BPA who had transferred to Zapata from another station in the Laredo Sector a couple of months earlier. Tr. 28-29,

269-70; Resp. Ex. 9 at 108-10. Gonzales met with Rodriguez to discuss the incident with Lopez, and later that day they met with Arsuaga and Acting Deputy Patrol Agent in Charge Nick Maszatics to discuss it.⁴ Tr. 38-39. Arsuaga told Gonzales that he would look into the incident, and that he would have Rodriguez and Lopez submit statements about what took place. Tr. 39-40, 282.

On September 4, Gonzales filed a Step 1 grievance (the Cell Phone Incident Grievance) on Rodriguez's behalf with Arsuaga. Tr. 41-42; GC Ex. 2 at 1. The letter outlining the grievance began: "Border Patrol Agent Eulalio Rodriguez . . . has requested the assistance of the National Border Patrol Council Local 2455 in preparing and presenting a STEP 1 grievance . . ." GC Ex. 2 at 1. It then described Lopez's actions in detail and asserted that Lopez had violated various Agency policies. Specifically:

The [CBP] Officers Handbook addresses the topic of Officer Conduct and professionalism. Both of which were blatantly disregarded by (A)WC [Acting Watch Commander] Lopez.
. . . .

Furthermore, [CBP] Policy Prohibiting Discriminatory Harassment . . . states in pertinent part, "It is CBP's policy to treat all individuals in a non-discriminatory manner." "More specifically, CBP Policy prohibits discriminatory harassment against coworkers, subordinates." CBP Directive 51735-013A Standards of Conduct . . . states in pertinent part, "Employees will be professional in their contact with their supervisors, subordinates, co-workers and members of the public."

Id. at 2-3 (emphasis omitted).

² All dates are in 2016, unless otherwise noted.

³ In the Step 1 grievance that was later filed, the Union steward translated this as, "Why the fuck are you jumping over me?" GC Ex. 2 at 1.

⁴ In Gonzalez's recollection of this meeting, Maszatics did not attend. Tr. 280-82.

With regard to next steps, Gonzales wrote:

Now, in accordance to Article 33 of the [CBA], [BPA] Eulalio Rodriguez with the assistance of Union Local 2455 . . . ask that the actions of (A)WC Lopez be addressed and corrected. Furthermore, that any future harassment and public innuendoes by station management toward Agent Rodriguez or any other employee cease immediately. . . .

Id. at 3.

The grievance contained a five-paragraph list of proposed remedies, asking (among other things) that Lopez attend sensitivity training; that the Agency acknowledge that the CBP Table of Offenses prohibits “[i]nterfering with employees[’] rights or taking reprisal against employees for exercising their rights, to file or participate in grievance or appeal, or for their affiliation or non-affiliation in labor unions”; and that the Patrol Agent in Charge address the Agency policy against harassment at muster, with Lopez present. *Id.* at 3-4. The grievance did not allege a violation of the Statute.

A few days after the Cell Phone Incident Grievance was filed, Arsuaga and Maszatics met with Rodriguez and Gonzales about it.⁵ Tr. 42-43, 283. Arsuaga said that he would not tolerate unprofessional conduct or harassment, and that he would make this clear to employees, but he denied the grievance because it was a “he said/she said deal,” and because the remedies were “inappropriate.” Tr. 43-44, 283-84, 483. After the grievance meeting, Arsuaga sent an email to employees at the station, reminding them of the importance of acting and speaking in a professional manner. *Id.* The Union was satisfied with this and did not pursue the grievance further. Tr. 285; *see also* Resp. Ex. 9 at 2.

Around this time, on September 8, Lopez sent an email to the Joint Intake Center with the subject heading “Targeting by BPA Jared Gonzalez.” GC Ex. 14 at 12; Resp. Ex. 9 at 109. Lopez asserted that Gonzales was “unfairly and maliciously target[ing]” him by filing grievances against him. GC Ex. 14 at 12; Resp. Ex. 9 at 109; Tr. 434-36. He cited a report, sent to him on September 1 by a supervisor at the Laredo South Station, that Gonzales had made remarks while stationed at Laredo South, that he was going to “set [Lopez] straight” once he was transferred to Zapata. GC Ex. 14 at 12-13; Resp. Ex. 9 at 109-10.

The next conflict between Rodriguez and Lopez occurred on the September 17 midnight shift, which

actually began at 10:00 p.m. on September 16. Tr. 45, 49. Lopez was the shift’s Watch Commander. Tr. 240. At muster, Rodriguez was assigned to follow or “track” a group believed to be made up of aliens (referred to as “subjects”) who had crossed the border illegally. Tr. 47, 101. After muster, Rodriguez drove to his assigned location, met up with Rafael Garza, another border patrol agent, and the two agents then drove to a ranch. They left their vehicle there and walked, following the footprints left by the subjects. Tr. 48-49, 52, 101, 266-67.

At some point in the night, probably around 1:00 a.m., Rodriguez radioed for assistance, hoping that additional border patrol agents would join him and Garza to provide backup. *See* Tr. 50, 102, 104-06, 245. Asked to explain why he requested assistance, Rodriguez testified:

We’re walking in the middle of the night We’re outnumbered. It’s myself and Mr. Garza. . . . We’re walking in creeks. It’s a dangerous area and we never know who we’re going to come across. We know there’s, for sure, 10 to 15 people in this group just by agent experience.

Tr. 54. The agents did not hear back from anyone, even though requests for assistance are usually responded to immediately. About fifteen minutes later, Rodriguez again radioed for assistance, but no one responded. Tr. 50-52, 126-27, 129. Rodriguez thought that something might be wrong with his radio, so Garza used his own radio to request assistance. Tr. 53. BPA Jason Wells heard Garza’s request and radioed back. Tr. 51. Wells advised Rodriguez and Garza that he and his partner, Carlos Narvaez, had been directed by Supervisory Border Patrol Agent Osbaldo Luera to stay in their area by the highway and monitor motion-activated sensors that are placed along the border. Therefore, Wells and Narvaez could not come over to provide assistance to Rodriguez and Garza. Tr. 51, 53, 56, 110, 240, 242. Wells’s response was especially disappointing for Rodriguez and Garza because, Garza testified, “there was no other traffic going on” at the time. Tr. 264. In this regard, Rodriguez and Garza both testified that they did not hear any sensors going off on their radios at that time. Tr. 109, 267-68.

Later that night, Luera announced over the radio that he would be tracking the subjects Rodriguez and Garza were following by “cutting ahead,” meaning that Luera would try to intercept the subjects a mile or two further down their projected path. Tr. 104, 126-27, 427; Resp. Ex. 9 at 65, 75. Eventually, Rodriguez and Garza reached a point where the tracks stopped, indicating that the subjects had been picked up and driven away, so the

⁵ According to Gonzalez, Lopez also attended this meeting. Tr. 283.

search for the subjects was called off. Tr. 55. Luera drove over to pick up Rodriguez and Garza and drive them back to their vehicles. Tr. 54-57, 127; Resp. Ex. 5, Resp. Ex. 9 at 76.

During the ride, Rodriguez asked Luera why Wells and Narvaez were not permitted to provide assistance to him and Garza. See Tr. 137, 247. According to Rodriguez, Luera replied, "After what happened between you and Rudy he is keeping everyone in their area." Tr. 137. Garza testified that Luera told them that assistance was not provided because "Lopez didn't like for any agents to leave their assigned areas."⁶ Tr. 247. Luera's response gave Rodriguez the impression that Lopez "knew exactly what was going on out in the field and he still kept their agents in their respective area not to go assist us." Tr. 137. Asked whether it was only Luera's comment that gave him this impression, Rodriguez answered: "No. I could read between the lines before he told me that. Not getting help from any agent was not common at all . . ." Tr. 139.

Back at the station, at the end of the shift, Rodriguez met up with Wells and Narvaez, who told him they were sorry they couldn't provide assistance during the shift. Tr. 57. Narvaez showed Rodriguez a text Luera had sent at the beginning of the shift advising Narvaez and Wells to stay in their position and answer sensors and respond to traffic while Rodriguez and Garza tracked the subjects. See GC Ex. 13; Tr. 57, 59-61, 114.

After talking with Wells and Narvaez, Rodriguez was sure that management's decision to keep Wells and Narvaez by the highway constituted an illegitimate "denial of assistance." Later that morning, he retained Gonzales as his Union representative to look into the matter. Tr. 65, 287-88. Gonzales spoke to Garza, Wells, and Narvaez about the events of the previous night. Tr. 288; Resp. Ex. 5. Then, on September 19, Gonzales sent Arsuaga an email, with copies to Rodriguez and Garza, titled "Concern on WC Rudy Lopez." Resp. Ex. 5. Gonzales described the events of the September 17 shift⁷ and asserted that the Union did not understand why Rodriguez and Garza had been "denied assistance"; he further asserted that Rodriguez "feels like this is Union Retaliation" for having filed the Cell Phone Incident Grievance. *Id.* at 2.

⁶ Rodriguez and Garza both testified that Luera referred to Lopez when explaining why assistance was not provided, and I credit their consistent testimony on this point over Luera's claim that he did not mention Lopez. See Resp. Ex. 9 at 40, 44, 76.

⁷ Gonzales's description of what took place is mostly consistent with the descriptions provided by Rodriguez and Garza. To the extent there are discrepancies, I credit the accounts of Rodriguez and Garza, since they experienced the events first-hand.

Arsuaga spoke to Lopez later in the day on September 19, advised him that Rodriguez and Garza were upset that they had not received assistance, and instructed him to submit a memorandum describing the events of the September 17 shift. Tr. 443-44. Lopez wrote that he did not recall hearing the agents request assistance over the radio, and he asserted that the agents did not attempt to contact him. Resp. Ex. 9 at 36. Rodriguez and Garza also submitted written accounts of the events, reiterating their earlier complaints that supervisors on the September 17 shift should have sent agents to assist them. GC Exs. 3 & 4; Resp. Ex. 9 at 65-66, 68.

Meanwhile, Lopez sent another email to the JIC on September 20, elaborating on the allegations he had made in his September 8th email that Gonzales had been planning to "put [Lopez] in [his] place" even before he was assigned to Zapata Station. GC Ex. 14 at 12; Resp. Ex. 9 at 108. And on September 24, Lopez emailed the JIC again, this time accusing Rodriguez and Garza of "lack of candor," an offense punishable by termination, in their complaints about him to Arsuaga. Tr. 182, 414-15. In the September 24 email, Lopez described the events of the September 17 shift and then wrote:

Patrol Agent in Charge (PAIC) Charles E. Arsuaga . . . informed me that Union Steward Jared Gonzales had reported to him that BPA Rodriguez and BPA Garza had reported not receiving assistance when they requested it

BPA Rodriguez and BPA Garza are purposely displaying a lack of candor with this report as there were additional agents in the area from the off going shift, an air support unit and SBPA Luera. Steward Gonzales is taking advantage of this situation to continue targeting me.

GC Ex. 14 at 15; Resp. Ex. 9 at 107. Lopez's emails of September 8, 20, and 24 were all sent under the subject heading of "Targeting by BPA Jared Gonzalez," and Lopez testified that he intended the September 24 email to be a "continuation" of his earlier messages to the JIC. Tr. 436.

At the hearing, Lopez elaborated on why he reported Rodriguez and Garza to the JIC. Lopez acknowledged that "the basis" for his action was the complaint filed by Rodriguez and Garza against him. Tr. 437. Asked to explain if there was something that occurred after meeting with Arsuaga on September 19

that led him to report Rodriguez and Garza to the JIC, Lopez testified: “I can’t remember if he [Arsuaga] showed me the Step 1. I don’t know when they filed the grievance for this incident. So I’m guessing I might have seen the grievance itself and then also based on the conversation that I had with Mr. Arsuaga.” Tr. 446-47.

Once Lopez’s report was submitted to the JIC, it was seen by the OIG and by the CBP’s Office of Professional Responsibility (OPR). Neither entity pursued the matter, so the report was sent back to the Laredo Sector. There, the Professional Standards office initiated an investigation, which was carried out by the Sector Evidence Team (SET Team). Tr. 149, 152-53. In cases where the Professional Standards office finds a violation, it initiates the disciplinary process by proposing discipline for the offense. Tr. 155.

On September 30, Arsuaga sent Rodriguez an email stating that his inquiry had concluded, and that he could not verify Rodriguez’s allegations that Lopez had denied him assistance on September 17, coerced supervisors, or retaliated against him for filing a grievance. Resp. Ex. 6.

On October 5, Gonzales filed with Arsuaga a Step 1 grievance by email on Rodriguez’s behalf regarding the events of the September 17 shift (the Denial of Assistance Grievance). Resp. Ex. 1.⁸ The grievance begins:

Border Patrol Agent Eulalio Rodriguez of the Zapata Station, Laredo Sector has requested the assistance of the National Border Patrol Council Local 2455 in preparing and presenting a STEP 1 grievance on an incident that occurred on September 17. . . . The following information is being presented to your office in order to report and document the unprofessional actions, Dereliction of duty, coercing of Supervisors and Union Retaliation taken by . . . Rudy Lopez

Id. at 1.

⁸ Abbreviated versions of this grievance were admitted as Respondent Exhibits 7 and 9 (pages 85-86), but I will refer to the full document, Respondent Exhibit 1. In the date, “September” is crossed out and “October” is written by hand. While Gonzales did not make the correction himself, he testified that October 5 was the date he filed the grievance. Tr. 296-97.

The grievance: (1) described what Rodriguez and Garza experienced during the September 17 shift; (2) noted that Gonzales had interviewed Garza, Wells, and Narvaez about what took place that night; (3) asserted that “BPA Rodriguez and BPA Garza felt like requesting assistance was the right thing to do,” as their situation presented an “officer safety issue”; (4) noted that Rodriguez “feels like this is Union Retaliation due to the fact he filed a Step 1” in the Cell Phone Incident Grievance; and (5) requested that “Mr. Lopez not deny request for assistance when agents ask for help.” *Id.* at 1-2.

The grievance further alleged that Lopez’s actions violated CBP policies, including the policy against discriminatory harassment, using much the same language as in the Cell Phone Incident Grievance. It continued:

Now, in accordance to Article 33 of the [CBA] . . . [BPA] Rodriguez with the assistance of Union Local 2455 now come to you to ask that the actions of (A) WC Lopez be addressed and corrected. . . .

We would like to address and remedy this issue at the lowest possible level in accordance with the [CBA] and believe that this Step 1 grievance can be remedied as such. We will not be requesting any type of meeting with Patrol Agent in Charge Arsuaga and would request a response via email.

Id. at 3-4.

Under the heading “Remedies,” Gonzales submitted a five-paragraph list that is virtually identical to the remedies sought in the Cell Phone Incident Grievance. *Id.* at 4. The grievance did not allege that the Agency had violated the Statute. *Id.* at 2-4.

Asked why he filed the Step 1 grievance, Rodriguez testified: “To make it official, and we felt none of the remedies or our concerns were important to him. We felt that we weren’t being met . . . in trying to resolve this at the lowest level, so we made an official – a grievance.” Tr. 74-75. Rodriguez and Gonzales met with Arsuaga and Maszatics to discuss the Step 1 grievance, but the problem remained unresolved. *See* Tr. 297-98. On October 11, Arsuaga denied the grievance, finding that the Union’s allegations were unfounded. Resp. Ex. 2 at 1; *see also* Tr. 76, 472.

On October 12, Rodriguez received a Notice to Appear before an official of the SET Team to answer

questions as the “subject” of an allegation of “general misconduct.” GC Ex. 8. On about the same date, Garza received a similar Notice to Appear. Rodriguez was advised by someone on the SET Team that his alleged misconduct was based on a “lack of candor” charge stemming from his own claims about the events of September 17. GC Ex. 9.

The next day, October 13, Gonzales sent Arsuaga an email, with the subject heading “Union Discrimination/Retaliation,” protesting the Notice to Appear given to Rodriguez. GC Ex. 9. Gonzales wrote that the SET Team was planning to interview Rodriguez to answer “lack of candor” charges filed against him “regarding the incident we are currently in the Grievance Process with.” *Id.* The email continued:

[Rodriguez] had a private meeting with you and . . . he wanted to make sure there was no Union Retaliation for filing the Grievance on Supervisor Rudy Lopez. He asked he not be reported to the Joint Intake Center for false allegations simply to try to Retaliate or Reprimand him. You assured him he would not be held to any Union Retaliation or Discrimination for Union protected activity. This is clearly going on with BPA Rodriguez also clearly going on with myself as we are both receiving Notice to Appear after Grievances or Union Activity is taking place. We have several Unfair Labor Practice issues with Union Discrimination and Retaliation. We ask that all management respect the LAW and you speak or send email to all management to discuss the . . . seriousness of Union Discrimination, Retaliation and false complaints for revenge.
Section 7116(A)(2) Discrimination For Protected Activity.
Section 7116(A)(1) Interference.

Id. When asked about this letter at the hearing, Gonzales could not recall whether Arsuaga responded to it. Tr. 311. There is no evidence in the record that anyone at the Agency responded to it.

On October 19, Gonzales and the Union filed a Step 2 appeal of the Denial of Assistance Grievance. Resp. Ex. 2. The Step 2 appeal reiterated the arguments Gonzales had raised at Step 1, to the effect that Lopez had refused to send assistance to Rodriguez and Garza because Rodriguez had filed the Cell Phone Incident Grievance. But in support of the retaliation claim, the

Step 2 appeal also cited three “stare down” incidents, on October 12, 13, and 19, in which Lopez allegedly tried to intimidate Rodriguez, and an allegedly unprofessional comment Lopez had made during muster on October 18. *Id.* at 3-4. The Step 2 letter did not refer to the “lack of candor” charges filed by Lopez against Rodriguez, Garza, and Gonzales. A meeting on the Step 2 grievance was conducted on November 16 by the Laredo Sector’s Chief Patrol Agent, Mario Martinez, who denied the grievance on December 12. Tr. 87, 315-16; Resp. Ex. 3. The Union did not pursue the grievance further. Tr. 319.

After some changes in scheduling, Rodriguez was interviewed by two officers of the SET Team on November 7, and Garza was interviewed on November 8.⁹ Tr. 320, 378-80; GC Exs. 8, 11 and 12; Resp. Ex. 9 at 15, 25, Resp. Ex. 10. The interviewers told Rodriguez that it was Lopez who had filed the complaint against him with the JIC. Tr. 80. The interviews focused on whether Rodriguez and Garza displayed a lack of candor in filing a grievance against Lopez concerning the events of September 17. Tr. 397, 400-02.

During the time that Rodriguez and Garza were subjects of the investigation, Agency policy dictated that they could not be promoted, detailed or transferred. Tr. 81, 256. As Rodriguez put it, when an agent is under investigation, “You can’t move laterally. . . . You can’t even do a detail within the station. . . . You’re basically frozen.” Tr. 81.

On November 16, the SET team presented its findings to Chief Patrol Agent Martinez. Resp. Ex. 9 at 1. Ultimately, the SET team’s report of investigation was forwarded to Edwin Torres, Assistant Chief of Professional Standards, who reviewed it with labor relations officials. Tr. 144, 157-60. They determined that “it was more of a miscommunication between everybody involved.” Tr. 160. Accordingly, sector management decided to close the case without any charges against anyone, and Rodriguez and Garza were notified of this on December 14. Tr. 160, 393.

Additional Issues Explored at the Hearing

At the hearing, the parties submitted into evidence a Department of Homeland Security policy guidance describing the types of matters appropriately reportable to the JIC. Resp. Ex. 4; GC Ex. 15; Tr. 234.

⁹ While Rodriguez testified that he was interviewed twice by the SET Team, on October 18 and November 7 (Tr. 79, 83), it appears more likely that he was interviewed only on November 7 (Tr. 253-55, 378-80; Resp. Ex. 10). The discrepancy is not material, in any case.

The policy guidance provides examples of misconduct that must be reported, specifically:

1. Criminal activity: conduct that would violate state or federal criminal laws including all employee arrests. Examples of criminal activity include, but are not limited to: bribery, theft or misuse of funds, smuggling, drug possession, perjury, civil rights violations such as mistreatment of aliens, etc.

2. Serious misconduct: substantive misconduct that could jeopardize the agency's mission. Examples of serious misconduct include, but are not limited to: misuse of TECS [the Treasury Enforcement Communications System], falsification, abuse of official position for private gain, workplace violence or harassment, improper association, willful misuse of government vehicle or property, etc.

Resp. Ex. 4; GC Ex. 15 at 2. As for other types of misconduct, the policy guidance states:

A common-sense approach should be used about reporting less-serious misconduct. Rather than being reported to the Joint Intake Center or to a CBP-IA Field Office, these matters are best handled directly by supervisors and managers or are more appropriately remedied through other avenues that are specifically established for reviewing employee concerns, such as the grievance or complaint process.

Id.

In addition, the policy guidance provides examples of misconduct that "should not be reported to the Joint Intake Center." *Id.* (capitalization altered). This includes leave issues; performance-related issues, such as insubordination; workplace atmosphere issues, such as personality conflicts and disruptive conduct; and rude or unprofessional conduct, such as the use of profanity or other discourteous language, demeanor, or gestures. *Id.*

Jessica Samuel oversees the JIC and testified about the policy guidance generally. Tr. 192. Asked what it means by "should not report," she answered: "It's just a guidance thing that it could be handled by supervisors and managers. That does not mean that they cannot report it, because we get those kind of reports

quite often." Tr. 235. Samuel was unaware of employees being disciplined for having reported a matter to the JIC. She testified that it would "hurt the process[]" if employees feared discipline for reporting misconduct to the JIC. Tr. 215. In addition, Samuel testified that "lack of candor" is a type of conduct that is reportable to the JIC. Tr. 192, 210. Gonzales himself testified that he had reported allegations of "unprofessional conduct" to the JIC, explaining that he felt the report was appropriate "[f]or that situation . . ." Tr. 342.

Lopez defended his decision to report Rodriguez and Garza to the JIC. In this regard, Lopez asserted that he would have reported the matter to the JIC, even if Rodriguez and Garza had reported it directly to Arsuaga, without the involvement of Gonzales and the Union, because Rodriguez and Garza had "misrepresented what happened that night." Tr. 415. Lopez elaborated: "[T]he agents said that I refused to send them backup, when I didn't. I didn't refuse to send them backup because the backup was never requested." Tr. 445. Lopez believed that Rodriguez and Garza were lying because there were in fact "assets out there to help them out." Tr. 449. Specifically, Lopez testified, there were other agents in the field when Rodriguez started his shift, and there was air cover until midnight. Tr. 448-49. Asked to elaborate on why he felt it was appropriate to report Rodriguez's and Garza's conduct to the JIC, Lopez answered: "Just again, they're lies. They lied about it. They shouldn't have lied about it." Tr. 453.

At the same time, Lopez acknowledged that it was possible Rodriguez did radio for assistance, and that he and Duty Supervisor Richard Lopez did not hear it. Tr. 422, 445. Similarly, Lopez acknowledged that while Rodriguez might have been mistaken about being denied assistance, that did not necessarily mean that Rodriguez's allegations were lies. Tr. 448.

In contrast to Lopez, Arsuaga testified that when Gonzales sent him the September 19 email, asserting that Lopez had improperly failed to assist Rodrigues and Garza, he did not believe those claims merited a JIC complaint, because the agents' claims were based on "miscommunication" and not on a lack of candor. Tr. 473. Arsuaga stated that the best way to address what happened on the September 17 shift was to "have a management inquiry into the incident[.]" which is what he in fact conducted. Tr. 474. He did not view the competing allegations as "an integrity[-]based issue[.]" because Rodriguez and Garza "were basing their report on something that the supervisor had said, Luera. . . . I could see how the agents might have . . . interpreted it differently to make it seem like, yeah, he's - you know, Rudy's got it out for them. So it just seemed like a miscommunication." Tr. 479.

Torres similarly explained his conclusion that the events of September 17 were “more of a miscommunication between everybody involved.” Tr. 160. He testified:

I think that the failure in communications were where [Rodriguez] felt that his request was denied because one agent said that he was assigned to work the highway so he couldn't leave that area. And then even though somebody else was sent to the area to assist, I felt the supervisor did a poor job in relaying that information that, no, this agent can't go and help you out because he's already assigned another area, but there is somebody else coming your way. So I think that's where the communications unraveled between both sides.

Tr. 163-64.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel argues that Lopez unlawfully discriminated against Rodriguez when he reported Rodriguez to the JIC because of his protected activity. GC Br. at 11. Applying the analytical framework articulated by the Authority in *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*), for such cases, the GC insists that Lopez's conduct violated § 7116(a)(1) and (2) of the Statute.

The GC asserts that Rodriguez was continuously engaged in protected activities from August 30 to (and beyond) September 24, the date that Lopez filed his JIC complaint against Rodriguez: he sought out a union representative on August 30 to help him find out why he'd received a Notice to Appear; later that same day he consulted with Gonzales about Lopez's language in the cell phone call; he and Gonzales met with Arsuaga about Lopez's allegedly unprofessional conduct and then filed the Cell Phone Incident Grievance on September 4; and on September 19 Gonzales sent an email to PAIC Arsuaga, relating Rodriguez's and Garza's objections to Lopez's conduct during the September 17 shift, which triggered an internal investigation by sector management. GC Br. at 13. Both Rodriguez and Garza continued to engage in protected activity in the weeks thereafter, as the Union filed and pursued the Denial of Assistance Grievance on their behalf. The GC cites *NTEU, Chapter 284*, 60 FLRA 230, 231 (2004), among other cases, for the proposition that protected activity includes the filing of a grievance and attending grievance

meetings. Moreover, the GC states that Lopez knew that Rodriguez was pursuing these grievances with the Union. GC Br. at 14-15.

Next, the General Counsel contends that Rodriguez's protected activity was a motivating factor in Lopez's decision to report Rodriguez to the JIC. GC Br. at 13-15. In this regard, the GC argues that Lopez admitted – through his own emails and his hearing testimony – that he filed the JIC complaint against Rodriguez because Rodriguez sought the Union's aid in pursuing his denial of assistance claim against Lopez. *Id.* at 15. That Lopez viewed Rodriguez's complaints as part of Gonzales's “targeting” of Lopez is, the GC argues, further evidence that Lopez was motivated by protected activity. *Id.* at 14-15. Lopez made his motivation clear in his September 24 email to the JIC, when he stated that Rodriguez and Garza were “purposely displaying a lack of candor with this report [i.e. their complaint to Gonzalez, which was referred to Arsuaga]” GC Ex. 14 at 15. This was reinforced by Lopez's testimony explaining his email. Tr. 415. The Authority has consistently considered the timing of a management action significant in determining whether there was unlawful motivation. *See, e.g., U.S. Dep't of Def., U.S. Air Force, 325th Fighter Wing, Tyndall AFB, Fla.*, 66 FLRA 256, 261 (2011) (*Tyndall AFB*). When the timing of Lopez's JIC report is considered along with Lopez's own explanations, the GC contends that his unlawful motivation is clear. GC Br. at 15-16.

The General Counsel adds that the filing of the JIC complaint affected Rodriguez's conditions of employment, because it directly initiated a SET Team investigation of Rodriguez for lack of candor, an offense for which employees can and are disciplined, even terminated. And during the course of the investigation, Rodriguez could not be promoted, transferred, or detailed. *Id.* at 14.

Turning to the next step in the analytical framework, the General Counsel argues that there was no legitimate justification for Lopez's actions, and that the Agency's justifications for Lopez's actions are pretextual. *Id.* at 17-18. The GC submits that there was no reason for Lopez to report Rodriguez to the JIC, because: (1) Arsuaga was already investigating the underlying incident that Lopez raised to the JIC; (2) the matter was not appropriately reportable to the JIC, under the CBP's own policy guidance; and (3) Rodriguez did not engage in any misconduct. *Id.* at 21-22.

The GC rejects the Agency's assertion that the importance of the JIC complaint process justifies Lopez's use of that process. The GC cites an ALJ decision on this point, *U.S. Dep't of Homeland Sec., ICE, DA-CA-14-0436, ALJD No. 16-23* (April 29, 2016), in

which the judge found that a supervisor unlawfully filed a JIC complaint against a union official for his allegedly false testimony at an unfair labor practice hearing. While staff must be free to utilize the JIC complaint process, the GC insists that does not justify its use as a retaliatory weapon by supervisors. GC Br. at 19-20. Similarly, while it is important that staff report suspected employee misconduct, PAIC Arsuaga was already investigating the events of September 17 and the alleged denial of assistance, and Lopez had already explained his position to Arsuaga that Rodriguez and Garza were misrepresenting his actions. The dispute between Lopez, Rodriguez, and Garza was simply a personality dispute over a series of miscommunications, and it was not appropriate for a JIC complaint. *Id.* at 20-22.

Whether this case is viewed as a “pretext” or a “mixed motive” case, the GC argues that the Agency cannot demonstrate that Lopez would have taken his action (reporting Rodriguez to the JIC) even if Rodriguez had not pursued a grievance against him. It is impossible, in the GC’s view, to separate Rodriguez’s protected activity (pursuing a grievance) from Lopez’s filing of his JIC complaint. *Id.* at 24-25. Lopez admitted this in the language of his complaint to the JIC and in his testimony at the hearing.

When alleged discrimination concerns discipline imposed solely for conduct occurring during protected activity, an agency must show that the employee engaged in flagrant misconduct. *Fed. Bureau of Prisons, Office of Internal Affairs, Wash., D.C.*, 53 FLRA 1500, 1514 (1998) (*Internal Affairs*). The GC insists that the Respondent has failed to meet this burden. GC Br. at 25. Citing the Authority’s decision in *U.S. Dep’t of Veterans Affairs, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 58 FLRA 44, 47, 56 (2002) (*Johnson Med. Ctr.*), the GC states that in order for a false statement made during the grievance process to constitute flagrant misconduct, an agency must demonstrate that the statement was a deliberate, conscious deception on the part of the employee. GC Br. at 25-26. Here, the Agency’s own investigators and managers determined that Rodriguez did not lie, and that the dispute between Lopez and Rodriguez regarding the events of September 17 were simply a series of miscommunications; accordingly, Lopez’s use of the JIC complaint process was unjustified.

Finally, the General Counsel argues that the Union’s ULP charge is not barred under § 7116(d) of the Statute. Looking specifically at the Cell Phone Incident Grievance and the Denial of Assistance Grievance, the GC argues that those grievances pertained to incidents and events that occurred prior to the action that constitutes the basis of the ULP charge (Lopez reporting Rodriguez to the JIC). Because the grievances and

ULP charge are based on separate and distinct factual circumstances, § 7116(d) is not a bar. *Id.* at 27-28.

As a remedy, the General Counsel requests, among other things, that the Respondent cease discriminating against Rodriguez. *Id.* at 28.

Respondent

The Respondent asserts that this ULP proceeding is barred under § 7116(d) of the Statute by an earlier-filed grievance. But rather than citing the Cell Phone Incident Grievance or the Denial of Assistance Grievance as the basis for its claim (as the GC obviously anticipated), it cites the email Gonzales wrote to Arsuaga on October 13. Resp. Br. at 6 (citing GC Ex. 9). The Respondent argues that the October 13 email is a grievance within the meaning of § 7103(a)(9) of the Statute because it is a complaint concerning conditions of employment; no degree of formality is required, by either § 7116(d) or § 7103(a)(9). *Id.* Furthermore, the Respondent argues that the October 13 email was “presented through the grievance procedure” and was part of an “informal grievance process.” *Id.* The issue cited by Gonzales in the October 13 email (retaliation by Lopez in filing a complaint at the JIC) is the same legal issue, and arises from the same set of facts as the ULP charge filed on November 23; therefore, the charge is barred. *Id.* at 7.

Turning to the substance of the complaint, Respondent acknowledges that the September 19 email (Resp. Ex. 5), sent by Gonzales on behalf of Rodriguez and Garza regarding the events of September 17, constituted protected activity. Resp. Br. at 8. (Respondent does not acknowledge the discussions and grievance filed earlier on the Cell Phone Incident Grievance.) But while an employee may have the statutory right to file grievances, the employee loses the protection of the Statute if he engages in flagrant misconduct or similar improper behavior. *Id.* at 8-9. *U.S. Dep’t of Def., Def. Contract Mgmt. Agency, Orlando, Fla.*, 59 FLRA 223, 226 (2003). Respondent argues that the statements made by Rodriguez and Gonzales in support of the Denial of Assistance Grievance were so recklessly and intentionally inaccurate that they were not protected. Resp. Br. at 9-10.

Specifically, the Respondent asserts in this regard that Rodriguez falsely accused Lopez of coercing supervisors into denying assistance without considering the possibility that his requests for assistance had not been successfully transmitted to his supervisors. *Id.* at 9. The Respondent also asserts that Rodriguez was “recklessly inaccurate” in: (1) alleging there was a denial of assistance, when in fact Luera provided assistance;

(2) claiming that no sensors were going off and, thus, implying that Wells was lying when he said he had to stay and monitor the sensors; and (3) maintaining that Lopez's desire to do things "by the book" meant that Lopez wanted to act in an improper manner. *Id.* at 9-10. In support of its argument, the Respondent cites *U.S. Forces Korea/Eighth U.S. Army*, 17 FLRA 718, 728 (1985) (*U.S. Forces Korea*), as an example of how defamatory or false statements lose their protected status when made with knowledge of their falsity or with reckless disregard for their veracity.

Additionally, Respondent asserts that the filing of the JIC complaint against Rodriguez actually affected the conditions of his employment. Resp. Br. at 11-12. An investigation of the JIC complaint was conducted and determined that while Rodriguez's statements were not completely accurate, there was no evidence of misconduct. Rodriguez suffered no disciplinary action or other adverse effects, and while there was "general testimony regarding limitations" on his ability to transfer or be promoted, there was no evidence that Rodriguez was actually denied a promotion or transfer. *Id.*

The Respondent submits that in reporting Rodriguez to the JIC, Lopez was not motivated by Rodriguez's protected activity. As evidence of this, Respondent notes that Lopez similarly reported Garza to the JIC, "even though BPA Garza had not reported his concerns through the Union or engaged in other protected activity." *Id.* at 12. Moreover, even if Lopez had not filed his JIC complaint, there was evidence that the incident in dispute would have been referred to the JIC anyway. *Id.* at 14 (citing Tr. 149-51).

Finally, the Respondent argues that there was a legitimate justification for Lopez's conduct and that Lopez would have taken the same action in the absence of any protected activity. In this regard, the Respondent insists that Lopez acted in accordance with the "Agency practice of referring integrity related issues to the Joint Intake Center." *Id.* at 14. The Respondent urges that Lopez believed that the denial of assistance claims against him were "serious in nature" and "demonstrably false." *Id.* at 14-15.

ANALYSIS AND CONCLUSIONS

The ULP Charge Is Not Barred Under §7116(d) of the Statute

The second sentence of § 7116(d) of the Statute provides:

Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures."

Citing the legal standard that has long been applied,¹⁰ the Authority stated in *U.S. Dep't of the Air Force, 62nd Airlift Wing, McChord AFB, Wash.*, 63 FLRA 677, 679 (2009) (*McChord AFB*):

In order for a ULP charge to be barred under § 7116(d) by an earlier-filed grievance: (1) the issue that is the subject of the grievance must be the same as the issue that is the subject of the ULP; (2) such issue must have been raised earlier under the grievance procedure; and (3) the aggrieved party in both actions must be the same.

Each prong of the test must be met for the ULP to be barred. The sequential analysis required by § 7116(d) is perhaps best demonstrated in *Dep't of Def., Def. Logistics Agency, Def. Depot Memphis, Memphis, Tenn.*, 40 FLRA 334, 338-39 (1991) (*DLA*), where the Authority remanded the case to the arbitrator for additional findings on all the elements required under the Statute. The Authority has also noted that the test is substantively the same, regardless of whether a grievance predates a ULP charge, or vice versa. In either case, the earlier filing bars the later one. *Olam Sw. Air Def. Sector (TAC), Point Arena Air Force Station, Point Arena, Cal.*, 51 FLRA 797, 801 n.5 (1996) (*Point Arena*).

In evaluating whether the first prong of the test is met, the Authority has explained that it "looks at whether the ULP charge arose from the same set of factual circumstances as the grievance and

¹⁰ This same standard, with virtually identical language, can be traced at least as far back as *Dep't of Def. Dependents Schools, Pacific Region*, 17 FLRA 1001, 1002 (1985).

[whether] the theory advanced in support of the ULP charge and the grievance are substantially similar.” *U.S. Dep’t of the Army, Army Fin. & Accounting Ctr., Indianapolis, Ind.*, 38 FLRA 1345, 1351 (1991) (*Army Finance*). The theories raised do not need to be identical, but rather to be substantially similar. *U.S. Dep’t of the Navy, Navy Region Mid-Atl., Norfolk, Va.*, 70 FLRA 512, 517 (2018) (*Navy*). As the court stated when it affirmed the *Army Finance* decision, the question is whether the grievances and the ULP charge were based on “different factual and legal predicates.” *AFGE, AFL-CIO, Local 1411 v. FLRA*, 960 F.2d 176, 178 (D.C. Cir. 1992).

When a grievance and a ULP charge involve substantially similar legal theories, but different factual circumstances, the later-filed action is not barred by § 7116(d). See *DLA*, 40 FLRA at 338. For instance, in *Equal Emp’t Opportunity Comm’n*, 48 FLRA 822 (1993), the Authority held that different factual circumstances were involved in grievances objecting to the improper implementation of a performance appraisal plan that had been present in ULP charges objecting to the agency’s conduct during negotiations of that plan. In *Overseas Education Ass’n v. FLRA*, 824 F.2d 61, 71-72 (D.C. Cir. 1987) (*Overseas Educ.*), the court held that the Authority erred in refusing to accept the arbitrator’s finding that a ULP charge objecting to the elimination of a teacher’s position in late 1981 involved different factual circumstances than his later grievance objecting to his dismissal in 1982. As the court explained, “the situation facing Schussel, and the corresponding actions being taken against him, were quite different when he filed the grievance than was the case when the unfair labor practice charge was filed.” *Id.* at 72. And in *U.S. Dep’t of the Air Force*, 61 FLRA 797, 799 (2006), the Authority held that a charge objecting to the agency’s bargaining conduct in proposing a RIF involved different factual circumstances than a subsequent grievance objecting to how the RIF was implemented, even though the union claimed in both actions that the agency violated the same articles of the CBA.

Controversy regarding the first prong arises most often on the question of whether the grievance and charge are based on the same (or substantially similar) legal theories. In *Dep’t of the Treasury, U.S. Customs Serv., Region VIII, S.F., Cal.*, 13 FLRA 631 (1994) (*Customs*), the Authority held that a ULP charge, alleging that the agency’s refusal to furnish its crediting plans violated § 7114(b)(4) of the Statute, was barred by an earlier grievance that alleged the refusal to furnish the crediting plans violated the parties’ CBA. Despite the purported difference between a CBA violation and a statutory violation, the Authority stated that the issue in both cases was whether the agency could refuse to furnish the crediting plans, and therefore § 7116(d)

applied. *Id.* at 634. In *U.S. Dep’t of Def., Marine Corps Logistics Base, Albany, Ga.*, 37 FLRA 1268 (1990), the Authority found that some of the claims in a grievance were barred by an earlier ULP charge, but that other claims were not. Both the grievance and the charge involved the suspension of an employee, and in both forums the union argued that the agency had cancelled and reissued the suspension in an untimely manner, in violation of the CBA. Accordingly, that issue could not be raised in the grievance. *Id.* at 1272-73. But since the union alleged that the agency lacked good cause to suspend the employee only in the grievance, the arbitrator could address that claim. *Id.* at 1274-75.

Perhaps this principle is best illustrated by two decisions issued within a few weeks of each other: *Dep’t of Justice, Bureau of Prisons, FCI Butner, N.C.*, 18 FLRA 831 (1985), and *Fed. Bureau of Prisons*, 18 FLRA 314 (1985). In the first case, the Authority ruled that a ULP charge alleging that the agency interfered with an employee’s ability to question witnesses related to his disciplinary action involved a different issue than a grievance alleging that the employee was suspended without just cause under the CBA. 18 FLRA at 832. But in the second case, the Authority ruled that a grievance alleging that an employee’s discipline violated the CBA because it was done to harass the employee for his union activity involved the same issue as a ULP charge alleging that the employee’s discipline for union activity violated § 7116(a)(1) and (2) of the Statute. 18 FLRA at 315. Even though the grievance cited a violation of the contract and the charge cited a violation of the Statute, the underlying issue in both forums was whether the employee was disciplined for union activity.

In its *Point Arena* decision, the Authority made an additional point concerning an aggrieved party’s choice of using the grievance procedure or the ULP process for pursuing its claims. The agency argued that because the union could have raised both its contractual and statutory claims in the grievance procedure, it was barred by § 7116(d) from pursuing its ULP charge. The Authority rejected this, stating:

[U]nlike the first sentence in section 7116(d), which precludes adjudication in a ULP proceeding of issues which “can properly be raised under an appeals procedure,” whether or not they are in fact raised, the second sentence of section 7116(d) . . . states a different rule. It plainly precludes only subsequent litigation of issues that, in the discretion of the aggrieved party, were raised earlier.

51 FLRA at 806-07 (footnote omitted). This same conclusion was reached by the Authority in *Immigration & Naturalization Serv., U.S. Dep't of Justice*, 18 FLRA 412, 414 n.3 (1985) (*INS*).

In its recent *Navy* decision, the Authority announced that it intended to “re-evaluate our interpretation of § 7116(d) and to return to the original intent of Congress.” 70 FLRA at 512. Based on the “plain language” of the Statute, the Authority said that “Congress clearly intended to discourage forum shopping, or the classic ‘two bites at the apple.’” 70 FLRA at 515. The majority believed that in recent years the application of this principle “has become an exercise in technical hair-splitting and artful pleading.” *Id.* at 514-15.

In *Navy*, the union had filed several ULP charges protesting the implementation of a policy that required certain employees to pass a physical agility test; the charges alleged that the new policy changed employees’ conditions of employment without adequately negotiating. When the policy was implemented at another location, the union filed a grievance instead of a ULP charge, alleging that the policy changed conditions of employment, in violation of the CBA. The Authority held that the grievance was barred by the earlier charges. “While the Union’s earlier-filed ULP charges make no mention of contractual bargaining rights, the issues are nonetheless substantially similar to the alleged violation of the parties’ agreement.” *Id.* at 516 (citing *Army Finance*, 38 FLRA at 1351). The dissent argued that case law interpreting § 7116(d) has recognized that ULP charges alleging statutory violations raise different issues than grievances alleging CBA violations.¹¹ But the majority found that the union’s contractual claim in that case was “no different in any meaningful respect” from the claims made in the ULP charges, “because the contractual claim is a derivative of the statutory claim.” 70 FLRA at 516. Otherwise, aggrieved parties could evade the legislative intent (of requiring parties to choose one forum or the other) by artfully pleading their claims to obtain two decisions on the same issue. *Id.*

In determining whether the second prong of the test is met, the Authority looks at whether the issue was raised first in the grievance procedure or in the ULP charge. In this regard, “an issue is ‘raised’ within the meaning of § 7116(d) at the time of the filing of a grievance or a ULP charge, even if the grievance or ULP charge is subsequently withdrawn and not adjudicated on the merits.” *U.S. Dep't of the Navy, Naval Air Eng'g Station, Lakehurst, N.J.*, 64 FLRA 1110,

1112 (2010) (*Navy, Lakehurst*); *Headquarters, Space Division, L.A. Air Force Station, Cal.*, 17 FLRA 969, 970 (1985). However, for a filing prior to a ULP charge to constitute an election of remedies under this section, the filing must truly be a grievance invoking the parties’ negotiated grievance procedure, rather than a letter of protest that falls outside the parties’ negotiated procedure. *Norfolk Naval Shipyard*, 9 FLRA 458, 471-72 (1982) (*Naval Shipyard*). As the Authority stated in *Customs*, “the Union’s prior invocation of the grievance procedure under the parties’ negotiated agreement . . . constituted an election of that procedure under section 7116(d)” 13 FLRA at 634. *See also Internal Revenue Serv., Chicago, Ill.*, 3 FLRA 478, 486 (1980) (*IRS*), where the judge related the language of 7116(d) to that of 7121(e)(1): “An employee shall be deemed to have exercised his option . . . under the negotiated grievance procedure at such time as the employee . . . timely files a grievance in writing in accordance with the provisions of the parties’ negotiated grievance procedure. . . .”

With regard to the third prong of the test, the Authority does not look at the precise identity of the party filing the charge and grievance, but rather at whether the choice of forum was made “in the discretion of the aggrieved party.” *Army Finance*, 38 FLRA at 1353-54. Furthermore, the Authority stated that if a union files a ULP charge in its representational capacity, alleging harm to an employee, it will infer that the charge was filed in the employee’s discretion, unless there is evidence that the employee had attempted to prevent the union from filing. *Id.* at 1354. The circuit court found that such an inference may be reasonable as a general matter, but it might not be reasonable if the evidence showed that the employee was unaware of the first action filed by the union. 960 F.2d at 180. On the other hand, a union may have its own institutional interests that motivate it to file a charge or grievance, and those interests may be separate from those of the individual grievant for purposes of 7116(d). *See McChord AFB*, 63 FLRA at 679-80, where the employee was the aggrieved party in a grievance challenging the grounds for his discipline, but the union was the aggrieved party for a subsequent ULP charge objecting to anti-union comments made by a supervisor to the employee.

As I noted earlier, both the Respondent and the GC addressed the applicability of 7116(d) in their briefs, but they looked at different grievances as the basis for the alleged bar.¹² The Respondent affirmatively alleged that Gonzales’s October 13 email to Arsuaga barred the subsequent ULP charge. Resp. Br. at 6. The GC, who

¹¹ Dissenting opinion of Member DuBester, 70 FLRA at 518 (citing *Overseas Educ.*, 824 F.2d at 72).

¹² The Respondent cited § 7116(d) in its Answer to the Complaint (GC Ex. 1(d) at 4), but it did not specify what “grievance” barred the charge, nor did it address the issue at the hearing.

argued against a bar, speculated (incorrectly, it turns out) that the Respondent was basing its defense on the Cell Phone Incident and Denial of Assistance Grievances. GC Br. at 27-28. Normally I would address only the defense articulated by the Respondent, but since 7116(d) affects the Authority's jurisdiction to hear the case, I will address all possible grounds for barring the ULP charge.¹³ In this regard, a brief recap of the chronology of the case is in order.

Rodriguez and Lopez first had angry words on August 30. Rodriguez and Gonzales met with Arsuaga that same day to register their objection to Lopez's conduct, and on September 4 Gonzales filed the Cell Phone Incident Grievance, accusing Lopez of unprofessional conduct (GC Ex. 2). That grievance was not pursued further. On September 19, Gonzales sent Arsuaga an email (Resp. Ex. 5) outlining the events of September 17, protesting the failure of Lopez to send assistance to Rodriguez and Garza in the field, and citing Rodriguez's view that Lopez had retaliated against him for filing the Cell Phone Incident Grievance. After Arsuaga indicated that he did not think Lopez did anything wrong on September 17 (Resp. Ex. 6), Gonzales filed the Denial of Assistance Grievance (Resp. Ex. 1) on October 5, reiterating the same allegations he had made in his September 19 email. On October 12, Rodriguez was given a Notice to Appear to be interviewed by the SET Team (GC Ex. 8). This was the first time Rodriguez realized that Lopez had charged him with misconduct and that he was under investigation. The next day, October 13, Gonzales emailed Arsuaga, advised the PAIC that both he and Rodriguez had been given notices to appear to respond to charges of "lack of candor," and asked Arsuaga to intervene to stop Lopez from discriminating and retaliating against them for their union activity (GC Ex. 9). On November 23, Gonzalez and the Union filed the instant ULP charge, alleging that Lopez had abused the JIC complaint process to retaliate against Rodriguez for union activity (GC Ex. 1(a)).

It is evident, therefore, that the Cell Phone Incident Grievance, the Denial of Assistance Grievance, and the October 13 email were all submitted to Arsuaga prior to the filing of the ULP charge. Accordingly, the time element of the second prong of the 7116(d) analysis is satisfied.

The Cell Phone Incident Grievance and the Denial of Assistance Grievance

The General Counsel argues that the ULP charge is based on a different factual and legal predicate than the Cell Phone Incident and the Denial of

Assistance Grievances. The Respondent does not dispute this argument, as it did not identify or discuss either of these grievances as a basis for barring the charge.¹⁴ And after examining the two grievances in accordance with the principles outlined above, I agree with the GC that they arise from different factual circumstances than the ULP charge. Therefore, the first prong of the test has not been met, and § 7116(d) does not bar the charge.¹⁵

The Cell Phone Incident Grievance was filed on September 4, shortly after Lopez had confronted Rodriguez and allegedly behaved unprofessionally in doing so. The grievance primarily alleged that Lopez had violated Agency standards of conduct, but also referred to Agency policy against union-related harassment. GC Ex. 2. The Denial of Assistance Grievance was filed pursuant to Step 1 of the grievance procedure on October 5, after Rodriguez and the Union had previously sent a letter to Arsuaga informally protesting Lopez's actions during the September 17 shift. After describing Lopez's actions on the night in question, the grievance stated that Rodriguez "feels like this is Union Retaliation due to the fact he filed a Step 1." Resp. Ex. 1 at 2. It is apparent, therefore, that these two grievances were specifically based on separate events that occurred on August 30 and September 17, respectively. The ULP charge, filed on November 23, alleged that Lopez "used the Joint Intake Center to make a frivolous allegation against [Rodriguez] as retaliation for the grievance." GC Ex. 1(a). The use of the JIC, cited in the charge, was Lopez's filing of the JIC complaint on September 24, which Rodriguez didn't learn about until he was served with a Notice to Appear before the SET Team on October 12. The charge, therefore, was based on alleged retaliation by Lopez that occurred on September 24.

These facts show that while Rodriguez consistently alleged that Lopez was retaliating against

¹³ See *U.S. Dep't of Homeland Sec., ICE, L.A., Cal.*, 68 FLRA 302, 304 (2015).

¹⁴ Although the Authority has made it clear that it will address jurisdictional issues regardless of whether they were previously raised by a party, it is also true that a party raising an affirmative defense has the burden of proof on that issue. 5 C.F.R. § 2423.32. Therefore, to the degree that there is any lack of clarity on any of the § 7116(d) issues, the Respondent here must be held accountable for the lack of evidence. Respondent has raised a separate ground for the charge being barred by § 7116(d), which I will address later; but it consciously decided that the Cell Phone Incident Grievance and the Denial of Assistance Grievance were not jurisdictional bars to the ULP charge. I believe that is at least a tacit agreement with the GC that these grievances do not represent a legitimate jurisdictional basis for dismissal.

¹⁵ While the third prong, and the time element of the second prong, of the 7116(d) test are satisfied with regard to the Cell Phone Incident Grievance and the Denial of Assistance Grievance, all three prongs must be met in order to bar the ULP charge.

him for exercising his right to consult a union representative and file a grievance, he was asserting three separate and distinct acts of retaliation. The first occurred (at least in Rodriguez's view) when Lopez chewed him out on August 30; the second occurred on September 17, when Lopez failed to send him assistance; and the third occurred on September 24, when Lopez filed a JIC complaint against him. Rodriguez and the Union chose to fight the first two incidents of retaliation through the contractual grievance procedure, but they chose to fight the third incident of retaliation through the FLRA and its ULP procedure.

While Rodriguez certainly could have incorporated his JIC-related allegations into his Denial of Assistance Grievance, the Statute does not require him to do so. Rather, it allows him to choose which forum to utilize, and he exercised that choice by going to the FLRA to remedy the third act of alleged retaliation. As the Authority noted in its *INS* and *Point Arena* decisions, the second sentence of § 7116(d) does not require an aggrieved party to raise all possible issues in one forum, even though such a requirement might promote a more effective and efficient government. *Point Arena*, 51 FLRA at 806-07; *INS*, 18 FLRA at 414 n.3. By filing a ULP charge to remedy the third incident, Rodriguez is not getting a third bite at the apple, any more than his Denial of Assistance Grievance gave him a second bite. He alleges that Lopez engaged in three separate and distinct acts of retaliation, and resolving those allegations requires an examination of three separate sets of factual circumstances.

Additionally, the allegations of the ULP charge involve a different type of facts than the allegations in the two grievances. The grievances each involved workplace incidents: the August 30 confrontation during and immediately after the cell phone conversation between Lopez and Rodriguez; and the events of September 17, when Lopez did (or did not) provide his agents with adequate assistance. The ULP charge, however, is based on Lopez's decision to file a JIC complaint against Rodriguez and Garza. Even though Rodriguez believed each of Lopez's disputed actions constituted retaliation (and thus involved similar legal theories), the JIC complaint addressed in the ULP charge is a different type of retaliation – a fact that reinforces my conclusion that the charge is based on a different factual predicate than the grievances.

Therefore, I agree with the GC's uncontested argument that the Cell Phone Incident and the Denial of Assistance Grievances do not bar the ULP charge under § 7116(d) of the Statute.

The October 13 Email

The Respondent argues that Gonzales's October 13 email to Arsuaga (GC Ex. 9) constitutes an earlier-filed grievance, involving the same facts and issues raised in the ULP charge, and that the charge is therefore barred by § 7116(d).

I agree with Respondent that the first prong of the test has been satisfied. Gonzales sent the October 13 email to Arsuaga immediately after Rodriguez told him that Lopez had gone to the JIC and charged him with lack of candor. Both the facts and legal theories raised by Gonzales in the email were direct precursors of the subsequent ULP charge. *Compare* GC Ex. 1(a) with GC Ex. 9. The act that was complained about in the email was the filing of charges against him at the JIC, just as this was the focus of the ULP charge; and in both instances the Union alleged that Lopez was unlawfully retaliating against Rodriguez for his protected activity. But it is much less clear that the other two prongs of the test have been satisfied.¹⁶

The second prong of the test requires a determination of whether the issue was raised earlier under the grievance procedure. In determining when an issue is "raised" within the meaning of § 7116(d), the Authority has stated that this occurs "at the time of the filing of a grievance or a ULP charge." *Navy, Lakehurst*, 64 FLRA at 1112.

The word "grievance" must be understood in the full context of § 7116(d). As I noted above, the second sentence of the subsection (the sentence applicable to our case) first refers to "the negotiated grievance procedure" and then twice refers simply to the "grievance procedure." From this, I infer that the subsequent references to "grievance procedure" incorporated the initial phrase: the "grievance procedure" that an aggrieved party may elect is "the negotiated grievance procedure." This meaning is reflected in our case law.

¹⁶ Of course, we have no counter-arguments from the General Counsel on these points, and this highlights a problem with the current case law, which requires ALJs and the Authority to rule on issues that have not been adequately fleshed out, either at trial or in the pleadings. *See* footnotes 13 and 14 above. As illustrated in our case, we have the GC trying to refute an argument that the Respondent was not actually making, and we have the Respondent pursuing an argument that the GC had no opportunity to refute. I am in the odd position of a boxing referee who must judge a "fight" in which only one of the boxers was given the chance to throw a punch. At some point, a party must accept the adverse consequences of its conscious litigation decisions, even on jurisdictional issues.

In the early *IRS* case, 3 FLRA at 485-86, the ALJ cited (with the Authority's approval) the language of § 7121(e)(1) to shed light on the meaning of 7116(d). In pertinent part, § 7121(e)(1) states, "An employee shall be deemed to have exercised his option . . . under the negotiated grievance procedure at such time as the employee . . . timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure. . . ." The important words, with regard to our case, are "the parties' negotiated grievance procedure," not simply "grievance."

This distinction is important, because the Respondent makes the valid point that "grievance" is broadly defined in § 7103(a)(9) as "any complaint" by an employee "concerning any matter relating to the employment of the employee" (among other things). And the Authority has applied this broad definition of grievance in a variety of statutory situations. *U.S. Dep't of VA, VAMC, Richmond, Va.*, 68 FLRA 882, 884 (2015); see also *Nat'l Treasury Emp. Union v. FLRA*, 774 F.2d 1181, 1185-89 (D.C. Cir. 1985). So in the broad sense, Gonzales's October 13 email was a grievance. But was it a grievance filed "in writing in accordance with the provisions of the parties' negotiated grievance procedure," as required by § 7121(e)(1) and 7116(d)? Clearly not.

In assessing whether a grievance was filed within the meaning of 7116(d), the Authority has considered a variety of factors: whether the requirements for filing a grievance under the parties' collective bargaining agreement were met;¹⁷ whether there was an "invocation" of the grievance procedure under the parties' negotiated agreement;¹⁸ whether there was an intent to initiate the grievance process;¹⁹ and whether the document claimed to be a grievance had the requisite amount of "formality."²⁰ These factors are consistent with the concept of the verb "file," which suggests a level of procedural formality. See "File," *Black's Law Dictionary* (10th ed. 2014) ("To deliver a legal document to the court clerk or record custodian for placement in the official record"; "To commence a lawsuit"; "To record or deposit something in an organized retention system or container for preservation and future reference").

Thus, the Authority has indicated that the mere existence of a grievance is not enough to find that an election of forums has been made under § 7116(d) of the Statute. Rather, that conclusion must be supported by a finding that the grievance was filed under the parties' negotiated grievance procedure. This principle is best

illustrated by the facts and decision in the *Naval Shipyard* case. The union filed a ULP charge alleging that an agency representative had used intimidating tactics and violated § 7116(a)(1) and (8) in questioning an employee. Previously, however, the union had written a letter to an agency HR official, complaining about the agency's investigatory procedures and requesting that a union-management meeting be held to discuss the problem. The parties' CBA contained an article titled "employee-council meetings" and a separate article titled "grievance procedures." 9 FLRA at 468. The judge and the Authority held that while the union's request for a meeting was in writing, it was not filed under the CBA's grievance procedure and did not constitute an election of forums under § 7116(d).

In applying these principles to the facts of our case, I start by considering how the parties' negotiated grievance procedure defines a filing. While neither party submitted the CBA into evidence, testimony at the hearing shed some light on the matter. Witnesses described both an informal and a formal grievance process, with the formal process beginning when a "Step 1 grievance" is submitted; prior to that time, informal discussions of problems that would fit the § 7103(a)(9) definition of grievance are frequently held. In this regard, Arsuaga testified that informal complaints are brought to management before a grievance is formally filed. Tr. 486. This is consistent with Gonzales's statements, when he filed the Cell Phone Incident Grievance and the Denial of Assistance Grievance at Step 1, that he was seeking "to address and remedy the issue at the lowest possible level in accordance with the Collective Bargaining Agreement . . ." ²¹ GC Ex. 2 at 3; Resp. Ex. 1 at 4. As a grievance is first "filed" at Step 1, we must consider whether the October 13 email was a grievance filed at Step 1 (or later), or whether it was an informal complaint submitted prior to the filing of a grievance under the parties' negotiated grievance procedure.

The evidence clearly shows that the October 13 email was an informal complaint and not a grievance filed under the parties' negotiated grievance procedure. I look next at the text of the October 13 email, which lacks key attributes of a Step 1 filing. Unlike the Step 1 filings in the record, the October 13 email: (1) does not refer to "Step 1," or to any other step in the grievance process;

¹⁷ *Naval Shipyard*, 9 FLRA at 471-72.

¹⁸ *Customs*, 13 FLRA at 634.

¹⁹ *Internal Revenue Serv., W. Region, S.F., Cal.*, 11 FLRA 655, 664-65 (1983).

²⁰ *Naval Shipyard*, 9 FLRA at 472.

²¹ Because Gonzales is a Union steward who has utilized the parties' grievance procedures over a period of years, I credit his characterization of Step 1 as the lowest level of the parties' negotiated grievance process over Rodriguez's statement (Tr. 74-75) suggesting that the informal resolution attempts that precede a Step 1 filing are the "lowest level" of the parties' negotiated grievance process. See Tr. 74-75. Gonzales's account is also in accordance with Arsuaga's.

(2) does not refer to Article 33, which sets forth the parties' grievance procedures, or to any other provision of the CBA; (3) does not specifically identify individuals as grievants (and does not refer to the matter as an institutional grievance); (4) does not identify a Union representative handling the matter; and (5) does not expressly seek to "address and remedy" the matter through further meetings or discussions. *Compare* GC Ex. 9 with GC Ex. 2 & Resp. Ex. 1. That so many key attributes of a Step 1 filing are missing from the October 13 email strongly supports a conclusion that the October 13 email is not a grievance filed under the parties' negotiated grievance procedure.

Moreover, the assertions in the October 13 email are less specific, less complete, and less formal than the claims seen in the Step 1 filings in the record. Unlike the allegations in the Step 1 filings in the record, the October 13 email does not expressly identify a management figure claimed to be behind the alleged violation and does not provide a detailed description of the Agency's actions or its alleged violations. Further, while the October 13 email asks that management respect the law and that Arsuaga notify supervisors of the seriousness of the problem, the email does not use the term "remedy," as the Step 1 grievances do. The fact that the language used in the October 13 email is less specific, less complete, and less formal than the Step 1 filings in the record is further evidence that the October 13 email is not a grievance filed under the parties' negotiated grievance procedure.

Looking beyond the text, there is no sign that Gonzales intended the October 13 email to constitute a Step 1 grievance. Rather, Gonzales testified that he sent the October 13 email as a means of expressing disbelief and anger (he and Rodriguez were "speechless" that Rodriguez was now being investigated). At the hearing, Gonzales did not characterize the email as a "grievance" and said nothing to indicate that the email was intended to bring about formal meetings or discussions. Tr. 310-11. That the Union did not intend the October 13 email to initiate the grievance process is strong evidence that it was not a grievance filed under the parties' negotiated grievance procedure.

Likewise, there is no sign that the Agency understood the October 13 email to be a grievance filed under the parties' negotiated grievance procedure (at least not until the Agency filed its post-hearing brief). In this regard, Arsuaga did not testify about the October 13 email, nor did he indicate (at the hearing or elsewhere) that the email was a grievance filed under the parties' negotiated grievance procedure. Moreover, if the Agency had understood the October 13 email to be a grievance, one would expect to see a response, or at least an acknowledgement of receipt, from the Agency; but there

is no such evidence in the record. *See* Tr. 311. Instead, it is apparent that the Agency itself did not view the October 13 email as a grievance under the negotiated grievance procedure. This is yet another sign that the October 13 email did not constitute an election of remedies under § 7116(d) of the Statute. Accordingly, it does not bar the later-filed ULP charge in our case.

Finally, while it is unnecessary to determine whether the third prong (that the aggrieved party in both actions must be the same) is met regarding the October 13 email, I believe it is worth noting the inadequacy of the record to fully address this issue. This email was sent by Gonzales a few hours after Rodriguez had advised him that Lopez had filed a JIC complaint against him. The Authority stated in *Army Finance* that when a union files a charge or a grievance alleging harm to an employee, it will conclude that the action was filed on the employee's behalf and in the employee's discretion, unless there is evidence that the employee attempted to prevent the union from filing. 38 FLRA at 1353-54. Certainly, the October 13 email was sent by Gonzales at least partly on behalf of Rodriguez, and we have no explicit testimony that Rodriguez disapproved of sending the email, but it is also true that Lopez had previously filed JIC complaints against Gonzales for "targeting," and Gonzales cited this fact in the October 13 email. GC Ex. 14, GC Ex. 9. The record is unclear as to whether Rodriguez even knew about the email until long after the fact, or whether he approved of it as an election of remedies that would bar a subsequent ULP. In other words, while Rodriguez may certainly have agreed with the substance of what Gonzales was saying in the email, it is not at all clear that he was choosing to pursue a grievance and to foreclose filing a ULP charge. But since neither Rodriguez, Gonzales, nor the Agency understood the October 13 email to be a grievance under the CBA, it was not an election of remedies, and we do not need to speculate about Rodriguez's role in sending it.

The Agency Violated § 7116(a)(1) and (2) of the Statute

Under § 7116(a)(2) of the Statute, it is a ULP "to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment[.]" In *Letterkenny*, 35 FLRA at 117-18, the Authority established the analytical framework for determining whether an agency action violates this provision. The GC always bears the burden of establishing, by a preponderance of the evidence, that a ULP was committed. *Id.* at 118. First, the GC must show: (1) that the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) that such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of

employment. *Id.* If the GC proves these elements, it has established a prima facie case of discrimination. The existence of a prima facie case is determined by considering the evidence in the record as a whole, not just the evidence presented by the GC. *Tyndall AFB*, 66 FLRA at 261.

If the GC establishes a prima facie case, then the burden shifts to the agency to demonstrate, by a preponderance of the evidence: (1) that there was a legitimate justification for its action; and (2) that the same action would have been taken even in the absence of protected activity. *Id.* If the agency fails to meet this burden, it will be found to have committed a ULP. *U.S. Dep't of the Air Force, Aerospace Maintenance & Regeneration Ctr., Davis Monthan AFB, Tucson, Ariz.*, 58 FLRA 636, 637 & n.2 (2003) (*Davis Monthan AFB*).

*The General Counsel Has Established a Prima Facie
Case of Discrimination*

I first consider whether Rodriguez was engaged in protected activity. It is well settled that the pursuit of a grievance, including the filing of a grievance and attendance at grievance meetings, constitutes protected activity within the meaning of § 7102. *See, e.g., Equal Emp't Opportunity Comm'n*, 24 FLRA 851, 855 (1985). In this context, protected activity includes not only the filing and pursuit of a formal grievance but informal investigative activity and discussions with management prior to the filing of a formal grievance. *Davis Monthan AFB*, 58 FLRA at 645.

Applying these principles to our case, it is clear that Rodriguez was engaged in protected activity. He first enlisted a Union representative (Gomez) to assist him in speaking to Arsuaga on August 30, and when that appeared to make Lopez angry, Rodriguez consulted with Gonzales and filed a Step 1 grievance on September 4; he consulted Gonzales again on September 17, after the events of the previous night's shift, prompting Gonzales to file an informal complaint on his behalf, which was later pursued as a formal Step 1 and Step 2 grievance.²² As I will further explain later, Rodriguez did not engage in flagrant misconduct or do anything else that would cause him to lose the protection of the Statute.

The next question is whether Rodriguez's protected activity was a motivating factor in Lopez's decision to report him (and Garza) to the JIC. The analysis may include considerations such as the timing of

an action,²³ the words and conduct of supervisors,²⁴ and the disparate treatment of an employee.²⁵ In addition, the absence of any legitimate basis for an action may form part of the proof of the GC's prima facie case. *See Davis Monthan AFB*, 58 FLRA at 650. And a supervisor's anti-union animus can also shed light on the supervisor's motivation concerning his action. *See U.S. Dep't of Transp., FAA, El Paso, Tex.*, 39 FLRA 1542, 1552-53 (1991).

At the hearing, Lopez essentially admitted that Rodriguez's protected activity was what motivated him to report Rodriguez to the JIC. Specifically, Lopez testified that Rodriguez and Garza made complaints about Lopez's conduct during the September 17 shift; Rodriguez and Garza brought their complaints to Gonzales, their union representative; Gonzales forwarded those complaints, or informal grievances, to Arsuaga; and those complaints served as "the basis" of Lopez's decision to report Rodriguez and Garza to the JIC. Tr. 415, 437, 446-47; *see also* GC Ex. 14 at 15. Lopez's testimony alone is enough to show that Rodriguez's protected activity was a motivating factor in his decision to report Rodriguez to the JIC.

Additional factors confirm what Lopez admitted. The timing suggests an unlawful motivation, as Lopez reported Rodriguez to the JIC within days of Rodriguez complaining to Arsuaga about the events of September 17. The suspicious timing of the JIC complaint is compounded by Lopez's general hostility to being questioned by subordinates, an attitude which he demonstrated repeatedly from August 30 onward. The cause of the August 30 Lopez-Rodriguez confrontation was, by itself, somewhat ambiguous, but it was clarified by the events that came immediately afterward. Lopez certainly was angry with Rodriguez for speaking to Arsuaga, and his language about "jumping over me" could be construed in different ways, but at the hearing Lopez never addressed this incident, leaving un rebutted Rodriguez's testimony that Lopez objected to him going to the PAIC with a problem (i.e., he objected to Rodriguez engaging in protected activity). This conclusion is borne out by Lopez's action in filing a JIC complaint against Gonzales on September 8 for "targeting" him, four days after Gonzales filed the Cell Phone Incident Grievance at Step 1. Gonzales testified that he had heard about labor relations problems at Zapata before he transferred there, and that he intended to address those problems once he got there, but it is perfectly appropriate for a union official to pursue this type of protected activity. The fact that Lopez perceived Gonzales's actions as "targeting" demonstrates a

²² Even if I focus simply on the events beginning on September 17 or 18, as cited in ¶ 7 of the Complaint (GC Ex. 1(c)), it is clear that Rodriguez was engaged in protected activity as he pursued his allegation that Lopez had retaliated against him on September 17.

²³ *U.S. Dep't of Transp., FAA*, 64 FLRA 365, 368 (2009).

²⁴ *Id.* at 369.

²⁵ *Dep't of the Air Force, AFMC, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 55 FLRA 1201, 1205 (2000).

particularly thin skin and lack of tolerance toward protected activity, all of which cast Lopez's actions after September 17 in a particularly bad light. Again, Lopez did not seek to ameliorate these suspicions in his hearing testimony. Looking at these events together, Lopez's filing of the JIC complaint against Rodriguez and Garza on September 24 was actually a continuation of the ongoing dispute he had with Gonzales, and the JIC complaint he had previously filed against Gonzales. Lopez admitted as much at the hearing. Tr. 433-35. In its totality, the evidence demonstrates that Lopez did not take kindly to employees filing grievances focused on his behavior, and that his preferred mode of response was retaliation. Or, as he was fond of saying, "You be cocky and arrogant, even when you're getting beat. That's the secret." GC Ex. 14 at 12, 16; Resp. Ex. 9 at 101, 102, 108. To put it in terms of our Statute, Lopez was clearly motivated to file his series of JIC complaints by the protected activities of Rodriguez, Garza, and Gonzales.

Finally, it is clear that Lopez's filing of a JIC complaint affected Rodriguez with respect to hiring, tenure, promotion, or other conditions of employment. By reporting Rodriguez to the JIC, Lopez triggered an investigation, during which Rodriguez could not be promoted, detailed, or transferred. Tr. 81, 256. While Respondent denied this allegation in its brief (Resp. Br. at 11-12), it did not actually offer any evidence to the contrary, even though several management officials testified at the hearing. Moreover, the JIC complaint subjected Rodriguez to the risk of being disciplined, even terminated. Tr. 182. The potential for disciplinary action is perhaps the most significant factor here. Even though the JIC investigation ultimately found that Rodriguez committed no misconduct, this did not alter the peril that he faced while the investigation was pending. Putting aside the administrative complexities of the JIC process, Lopez's report to the JIC was no different than a supervisor's filing of disciplinary charges against an employee through the chain of command. Regardless of whether an accused employee is ultimately disciplined, the filing of charges against him certainly affects his hiring, tenure, promotion, or other conditions of employment. Cf., *U.S. Dep't of Justice, U.S. INS, El Paso Dist. Office*, 34 FLRA 1035, 1044-45 (1990) (agency changed conditions of employment by expanding list of offenses that are subject to discipline).

Based on the foregoing, I find that Rodriguez's protected activity was a motivating factor in Lopez's decision to report Rodriguez to the JIC, and that Lopez's action affected Rodriguez's conditions of employment. Accordingly, I find that the General Counsel has established a prima facie case of discrimination.

The Respondent Has Failed to Rebut the General Counsel's Prima Facie Case

The Respondent contends that there was a legitimate justification for Lopez's action against Rodriguez, and that Lopez would have taken the same action in the absence of any protected activity, but its arguments are unconvincing.

First, Respondent contends that Rodriguez engaged in flagrant misconduct, or otherwise exceeded the boundaries of protected activity, by making "false statements" regarding the September 17 shift. See Resp. Br. at 10. This is crucial to the Respondent's case, because when (as here) alleged discrimination concerns discipline for conduct occurring during protected activity, a necessary part of an agency's defense is that the conduct constituted flagrant misconduct or otherwise exceeded the boundaries of protected activity. *Davis Monthan AFB*, 58 FLRA at 636. If indeed Rodriguez engaged in flagrant misconduct by virtue of his grievance allegations against Lopez, then his conduct loses its protection under the Statute and can be the basis for discipline. *Johnson Med. Ctr.*, 58 FLRA at 47 (citing *Internal Affairs*, 53 FLRA at 1514-15), which traced the rule back to the days of Executive Order 11491).

In *U.S. Forces Korea*, 17 FLRA at 728, the Authority stated that an employee can lose protection under the Statute for making false statements, but "[i]t is only those statements which are knowingly false and uttered with reckless abandon which lose the protection of the Statute."²⁶ Similarly, in *Johnson Med. Ctr.*, 58 FLRA at 47, 56, the Authority agreed with the ALJ that with respect to an allegedly false statement made in the course of processing a grievance, an agency must show that the statement was a "deliberate, conscious deception" on the part of the employee in order to prove that the statement constituted flagrant misconduct.

The Respondent asserts that Rodriguez made a number of false statements, but it has failed to show that those statements were knowingly false or deliberately deceptive. With respect to Rodriguez's claim that Lopez denied assistance to Rodriguez and Garza during the September 17 shift, that claim was based on factors that Rodriguez reasonably believed to be true: that there was no immediate response to Rodriguez's two radio requests for help; that Wells told Garza he could not provide assistance; that Rodriguez could not hear sensors and

²⁶ Ultimately, the Authority found that the employee's statements were not protected, not because the statements were false, but because the statements attacked the credibility of U.S. government officials in a foreign country and had no reasonable connection to labor relations problems. *U.S. Forces Korea*, 17 FLRA at 729.

therefore questioned whether it was correct for Wells to continue monitoring sensors instead of coming to help them; and that Luera did not immediately respond to Rodriguez's and Garza's requests. Moreover, given the fact that Rodriguez had recently filed a grievance against Lopez, and given Luera's comment indicating that it was Lopez who was responsible for the lack of assistance, it was understandable that Rodriguez would be suspicious of Lopez. In light of these factors, it is similarly understandable that Rodriguez would interpret Luera's statement that Lopez liked doing things "by the book" to mean, essentially, that Lopez used the rules as a pretext for failing to provide assistance to Rodriguez and Garza. *See* Tr. 136. Moreover, Lopez himself acknowledged that Rodriguez's denial-of-assistance claim could have been based on a mistaken belief on Rodriguez's part, and that Rodriguez's claim might not have been based on a lie. Tr. 448. In sum, while Rodriguez may have failed to take alternative explanations into account, there is no indication that his claim was knowingly false.²⁷

I am not alone in reaching the conclusion that Rodriguez did not deliberately lie to Agency officials in complaining about Lopez. After making their own reviews of the disputed allegations, both PAIC Arsuaga and Assistant Chief Patrol Agent Torres determined that Rodriguez's allegations did not constitute a lack of candor or any other type of misconduct. *See* Tr. 160, 163-64, 177, 473, 479. Indeed, Arsuaga testified that he "could see how the agents might have . . . interpreted it differently to make it seem like . . . Rudy's got it out for them." Tr. 479. As Torres summarized, "it was more of a miscommunication between everybody involved. Tr. 160; *see also* Tr. 163-64.

The Respondent's related claims are similarly unavailing. The Respondent argues that it was inaccurate for Rodriguez to assert that he was denied assistance because Luera eventually provided assistance. But Rodriguez's assertion was not inaccurate. First, Luera did not provide assistance until sometime after Wells stated he and Narvaez could not provide assistance. Second, the assistance Luera provided was not the type of assistance Rodriguez (or Garza) had requested. Rather, Rodriguez wanted Wells and Narvaez to come to their area to provide a type of backup support that Luera was not providing. Third, Luera understood that Rodriguez was specifically requesting backup assistance from Wells and Narvaez. When Rodriguez asked Luera why he hadn't received assistance, Luera did not say he was providing the type of assistance that Rodriguez had requested. Rather, Luera explained why Wells and Narvaez could not assist, and in doing so Luera

demonstrated that he understood that Rodriguez was specifically seeking assistance from Wells and Narvaez. These facts illustrate the reasonableness of Rodriguez's assertion that he did not receive the assistance he requested, and Arsuaga and Torres both understood Rodriguez's claim to be reasonable, even though Luera had assisted Rodriguez and Garza by cutting ahead of them. *See* Tr. 160, 479. As such, and as Rodriguez's assertion was not in any way a deliberate deception, the Respondent's claim that Rodriguez was making a false statement in this regard falls short.

The Respondent also argues that Rodriguez testified that he did not hear any sensors going off and thus improperly implied that Wells was lying when he told Rodriguez that he had to monitor sensors. But Rodriguez was testifying accurately. Specifically, Rodriguez testified that Wells told him he had to respond to "sensor activity or something like that" (Tr. 51), and this is consistent with corroborating evidence indicating that Wells had been directed to stay put and monitor sensors. *See* GC Ex. 13; Tr. 57, 59-61, 114. Moreover, there is nothing contradicting Rodriguez's statement that he did not hear sensors going off. Indeed, Garza confirmed Rodriguez's testimony on that point. Tr. 109, 267-68. Since Rodriguez testified truthfully, I must reject the Respondent's defense that the statements Rodriguez made in his grievance were not protected by the Statute.

The Respondent additionally argues that there was a legitimate reason for Lopez's conduct. These arguments, however, are unpersuasive. The Respondent contends that Lopez was acting in accordance with Agency policy when he reported Rodriguez to the JIC. But if that were true, Arsuaga would have reported Rodriguez to the JIC when he first received conflicting accounts of the events of September 17. Moreover, a review of the Agency's policy and guidance on reporting misconduct suggests that the Lopez-Rodriguez dispute was not the sort of incident that should have been reported to the JIC. *See* GC Ex. 15 at 2; Resp. Ex. 4. Rather, it was the sort of "less-serious misconduct . . . best handled directly by supervisors and managers . . ." *Id.* Indeed, the dispute was already being investigated by PAIC Arsuaga. Lopez was fully aware of that fact, as he and the other protagonists had already been asked to provide statements regarding the events of September 17. While I fully agree with the Respondent that the JIC is an important safeguard to enable the Agency to learn about incidents of possible misconduct, and that employees should not be discouraged from reporting their suspicions to the JIC, the events of September 17 were in no danger of going unreported. On the contrary, Lopez went to the JIC specifically because Rodriguez had already complained to the PAIC about the events of that night. To the degree that Lopez felt that Rodriguez was lying about him, he already had a forum for presenting his

²⁷ I emphasize here that I am not expressing any opinion as to whether Lopez did anything wrong on the night of September 17. That is not the issue before me.

views: directly to Arsuaga. Thus, the conclusion remains that Lopez used the JIC to subject Rodriguez (as well as Gonzales and Garza) to the burdens and pressures of a JIC investigation, with the additional potential for disciplinary action.²⁸ For these reasons, the Respondent has failed to demonstrate that there was a legitimate reason for Lopez's conduct.

Because the Respondent has failed to meet its burden of proving the first essential element of its defense, it is unnecessary to consider the second element (i.e., whether Lopez would have reported Rodriguez to the JIC even if Rodriguez had not engaged in any protected activity). *See Davis Monthan AFB*, 58 FLRA at 636-37 & n.2. But in any event, the Respondent's arguments on this point are unconvincing.

First, the Respondent cites Lopez's reporting of Garza to the JIC as proof that Lopez would have reported Rodriguez even if he hadn't engaged in protected activity. But this argument erroneously assumes that Garza did not engage in protected activity. Contrary to Respondent's claim, Garza did engage in protected activity when he submitted a statement (GC Ex. 3), written with Gonzales's assistance, complaining about the Agency's failure to provide assistance during the September 17 shift. *See Patent Office Prof'l Ass'n*, 41 FLRA 795, 826-27 (1991) ("[T]he right guaranteed employees by section 7102 encompasses the right of employees to appear as a witness in arbitration proceedings and give testimony supporting or opposing the Union's interest in that proceeding." (footnote omitted)). Garza also engaged in protected activity when Gonzales named him as well as Rodriguez in the informal grievance submitted to Arsuaga on September 19 (GC Ex. 7; Resp. Ex. 5). And Lopez acknowledged that he reported Garza to the JIC based in part on Garza's complaint. *See Tr.* 415, 437. In other words, this evidence does not help Respondent's case.

Next, Respondent points to Lopez's testimony that he would have reported Rodriguez's "complaints" to the JIC regardless of how they were raised. Resp. Br. at 12. But complaints about conditions of employment are protected by § 7102 of the Statute, regardless of whether they are filed under a negotiated grievance procedure. Accordingly, by arguing that Lopez was reporting Rodriguez to the JIC in response to Rodriguez's complaints, the Respondent essentially concedes that Lopez was motivated by Rodriguez's

²⁸ While the 2016 ALJ decision cited by the GC in its brief, ALJD No. 16-23, is not binding precedent, I do find its reasoning persuasive, insofar as the utilization of the JIC process may constitute unlawful retaliation. *See also U.S. Dep't of Justice, Fed. BOP, FCI Florence, Colo.*, 59 FLRA 165, 173 (2003) (*FCI Florence*), cited by the judge with regard to a similar type of retaliation.

protected activity. Moreover, the Respondent does not point to any conduct outside of Rodriguez's and Garza's protected activity as motivating Lopez to report Rodriguez and Garza to the JIC. Respondent like Lopez, argues that Lopez's JIC complaint was legitimate, and that he would have filed it regardless of the Union's involvement, but this is simply another way of arguing that Rodriguez was guilty of flagrant misconduct and thus his actions were not protected; I have already explained why that argument fails. *See FCI Florence*, 59 FLRA at 173. I must, therefore, reject the Respondent's argument.

Third, the Respondent argues that if Lopez had reported Rodriguez to a supervisor, then the supervisor would have reported Rodriguez to the JIC. But this assertion is refuted by Arsuaga's own actions. When Arsuaga was presented with the allegations of Rodriguez, Garza, and Gonzales that Lopez had acted improperly on September 17, he initiated his own investigation of the incident, including a statement from Lopez contradicting the employees' allegations, but he found no reason to report the matter to the JIC. Rather, he continued his own investigation and then handled the Union's grievance under the negotiated grievance procedure. Accordingly, this contention by the Respondent is also misplaced.

Summary

Based on the foregoing, I find that the General Counsel has established a prima facie case of discrimination that the Respondent has failed to rebut. Accordingly, I find that the Respondent violated § 7116(a)(1) and (2) of the Statute as alleged, and I recommend that the Authority adopt the following order:

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Department of Homeland Security, U.S. Customs and Border Protection, Laredo, Texas, shall:

1. Cease and desist from:

(a) Discriminating against Eulalio Rodriguez, or any other bargaining unit employee, by subjecting them to investigations in reprisal for engaging in activities protected under § 7102 of the Statute.

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

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

(a) Post at its facilities where bargaining unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Chief Patrol Officer, Laredo Sector, and shall be posted and maintained for sixty (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.

(b) In addition to the physical posting of paper notices, the Notice shall be distributed electronically to all bargaining unit employees on the same day, as the physical posting, through email, posting on an intranet or internet sit, or other electronic means, customarily used to communicate with employees.

(c) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Denver Region, Federal Labor Relations Authority, in writing, within thirty (30) days of the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., September 28, 2018

RICHARD A. PEARSON
Administrative Law Judge

**NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY**

The Federal Labor Relations Authority has found that the Department of Homeland Security, U.S. Customs and Border Protection, Laredo, Texas, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discriminate against Eulalio Rodriguez, or any other bargaining unit employee, by subjecting him to investigations in reprisal for engaging in activities protected under § 7102 of the Statute.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured by the Statute.

(Agency)

Date: _____ By: _____
(Signature) (Title)

This Notice must remain posted for sixty (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 Region, Federal Labor Relations Authority, whose address is: 1244 Speer Blvd., Suite 446, Denver, CO 80204, and whose telephone number is: (303) 844-5224.