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

OALJ 24-08

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
NATIONAL PERSONNEL RECORDS CENTER
ST. LOUIS, MISSOURI

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 104, AFL-CIO

CHARGING PARTY

Case Nos. CH-CA-22-0432
CH-CA-22-0480
CH-CA-23-0200

Brittany A. Copper
For the General Counsel

Stephani L. Abramson
Neil Hillis
For the Respondent

Claire Marshall
For the Charging Party

Before: LEISHA A. SELF
Administrative Law Judge

DECISION

This case revolves primarily around one manager, Karen Mellott, who has come to see the Union president, Barbara Davis, as an unnecessary interference in the workplace and even a bad representative of the bargaining unit employees. As a result, Mellott appears to have embarked on a campaign against Davis. For one, when she learned Davis had given advice to a bargaining unit employee, she called a meeting of employees to tell them that Davis was wrong, that following "bad advice" from the Union could cost the employees their jobs, and that they "don't work for the

Union, the Union doesn't pay [them] . . . Go through the chain of command." Shortly thereafter, employees asked Davis for information about a particular hiring matter, and Davis told them what she knew. The employees passed the information to one another, with the retelling resulting in new (and incorrect) versions of the information. When Mellott heard a retelling and that employees were upset, she blamed Davis and reported her for harassment due to the alleged false statements. Mellott then investigated Davis and Davis was disciplined for simply responding to questions asked of her.

There are two main legal questions here. The first is whether the Agency violated § 7116(a)(1) of the Statute, which bars an agency from interfering with, restraining, or coercing an employee in the exercise by the employee of any right under the Statute, including the right to obtain union assistance, when Mellott made the statements at the meeting. Because Mellott's statements would tend to coerce or intimidate a reasonable employee, or employees could reasonably have drawn a coercive inference from the statements, I find that there was interference, restraint and coercion. Therefore, the answer is yes.

The second is whether the Agency violated § 7116(a)(2) of the Statute, which prohibits an agency from encouraging or discouraging membership in any labor organization by discriminating in connection with hiring, tenure, promotion, or other conditions of employment, when it investigated and disciplined Davis for responding to questions about the hiring matter. When Davis made the statements about the hiring, she was responding in her capacity as Union president. That is protected activity, and a violation of § 7116(a)(2) will be found in these circumstances unless the Respondent establishes that the employee engaged in either "flagrant misconduct" or "otherwise exceeded the boundaries of protected activity." *DHS, U.S. CBP Laredo, Tex.*, 71 FLRA 1069, 1073 (2020) (*Laredo*). Further, statements alleged to exceed the boundaries of protected activity due to falsity will only lose their protection if they are "knowingly false" and uttered with "reckless abandon." *Id.* Here, the Respondent has failed to establish that Davis's statements were "knowingly false" and made with "reckless abandon." Indeed, they were not even truly false. Moreover, the Respondent has failed to establish "flagrant misconduct." As such, the answer to the second question is yes.

In this case, however, the Respondent further argued that, it was not simply disciplining Davis for her statements about the hiring, but because of a series of "microaggressions" that affect the efficiency of the service. The "microaggressions" the Respondent cited however were actually primarily examples of Davis performing the fullness of her work as the representative of the bargaining unit, such as requesting answers of management to questions raised by bargaining unit employees and filing grievances. As well, the Respondent argued that the employees do not even like Davis and are fearful of her, consistent with Mellott's explanations throughout these matters that she believes that Davis does not serve the bargaining unit employees well.

It is troubling that, in this case, the Respondent defended its actions in investigating and disciplining Davis for her statements on a particular day (which were protected activity) by explaining that it was really because of Davis's continued activity (which is also protected) and that it is justified because it is protecting the bargaining unit against its elected representative. Representational activity is protected under the Statute, whether it is performed on one day or it is

continued (as long as it does not exceed the boundaries of the Statute). Further, it is for the bargaining unit to determine whether they want Davis to serve as their elected representative, and not for manager Mellott.

I. Statement of the Case

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

On July 12 and August 2, 2022, and on January 31, 2023, the American Federation of Government Employees, Local 104 (the Union or the Charging Party) filed ULP charges (CH-CA-22-0432, CH-CA-22-0480 & CH-CA-23-0200) against the National Archives and Records Administration, National Personnel Records Center, St. Louis, Missouri (the Agency or Respondent). GC Ex. 1(a), (b) and (c). After investigating the charges, the Regional Director of the Chicago Region issued an Order Consolidating Cases, and issued the Consolidated Complaint and Notice of Hearing (complaint) on June 2, 2023, on behalf of the Acting General Counsel (GC). GC Ex. 1(d).

The complaint alleged that the Agency violated § 7116(a)(1) of the Statute when supervisor Karen Mellott held a meeting of bargaining unit employees and told them that they should "go through the chain of command" for advice, that they "do not work for the Union," that "the Union does not pay you," and that an employee who followed "bad advice" from the Union was fired. *Id.* The complaint further alleged that the Agency violated § 7116(a)(1) and (2) of the Statute when, in response to the Union president, Barbara Davis, responding to bargaining unit employees' concerns over non-selection to a position, Mellott reported Davis for violating the Agency's anti-harassment policy for purportedly spreading a rumor, investigated her for that, and the Agency issued her a letter of reprimand for her union activity. *Id.*

The Respondent filed its Answer to Consolidated Complaint (answer) on June 23, 2023. GC Ex. 1(f). In its answer, the Respondent admitted there was a meeting, but denied the Agency made the statements indicated in the complaint. *Id.* The Respondent did not deny that Mellott reported Davis for violating the Agency's anti-harassment policy, but stated that "Mellott reported allegations of harassment to the Agency's anti-harassment program in accordance with the Agency's anti-harassment policy for spreading a rumor and disrupting the workplace." *Id.* The Respondent admitted that it conducted an investigation into the allegations of harassment, and that it issued a letter of reprimand as a result of the investigation, but denied that any of these actions related to union activity. Further, the answer denied that the Agency had violated § 7116(a)(1) and (2) of the Statute. *Id.*

A hearing was held on this matter on October 3, 2023, via the Microsoft Teams video platform. 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.

II. Findings of Fact

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the certified exclusive representative of a nationwide unit of National Archives and Records Administration employees, which includes employees of the Respondent. AFGE, Local 104 is an agent of AFGE for the purpose of representing the unit employees employed at the Respondent. Barbara Davis became acting president of AFGE, Local 104 in 2021 and then president in 2022. Tr. 22-23.

The Agency's mission is to retain military and civilian records and respond to requests for records. Tr. 116. It has locations in St. Louis, Missouri and Valmeyer, Illinois. *Id.* Before approximately April 2022, the Valmeyer facility, called Civilian Personnel Records Center (CPR), did exclusively civilian correspondence work. Tr. 117. Also, up until then, at the Valmeyer facility there was a unit referred to as the Digital Correspondence Unit (DCU), which was responsible for scanning and digitizing documents. The employees in that unit were digital imaging technicians, mostly at the GS-4 level. Tr. 24-25.

In order to address changing needs, the Agency decided to create a new military correspondence unit at the Valmeyer facility, which would be responsible for responding to veterans' and agencies' requests for military records. Tr. 26-27, 117. This unit, called a Core unit, would consist of two teams, Team A and Team B. Tr. 25-26. Because the DCU work had become less of a priority, the Agency decided to convert the DCU to become Core Team A. Tr. 117, 119-20. The plan was that the DCU digital imaging technicians would be converted to military reference technicians, also known as archives technicians. These positions are career ladder GS-4/5/6 positions. Tr. 26, 37, 117. While the Agency indicated to the DCU employees that they would be hired for the new Core Team A positions, they were nevertheless told that they had to apply for them. Tr. 26, 37.

At the start of the conversion from the DCU to the new Core Team A in April 2022, the Agency changed the name of the unit to Core Team A. Tr. 25-27. However, during the conversion period, at least some non-management employees, including Davis, referred to the team in various ways, including Core A, Team A or the DCU. Tr. 35 (DCU, Core A), 28-30 (DCU), 37 (DCU), 39 (referring to an employee hired for Core Team A as "convert[ing] to the DCU"), 42 (DCU, Core Team A); Jt. Ex. 1 at 2 (DCU); Jt. Ex. 2 (DCU); Jt. Ex. 3 (Core A); Jt. Ex. 4 at 6-7 (Core A); Jt. Ex. 5 (Core A); Jt. Ex. 7 (DCU); Jt. Ex. 8 (Core A). Management employees generally referred to it as Team A. Tr. 120, 127, 157, 200; Jt. Ex. 17 at 63-64. It will generally be referred to in this decision as DCU/Team A.

During the conversion period, the general atmosphere at the DCU/Team A appears to have been difficult, chaotic and uncertain. For one, the Agency changed the work of the DCU/Team A employees before it filled the vacancies for the archives technician positions. Tr. 26-27. Therefore, the DCU/Team A employees were training for and performing work regarding positions they did not yet have. Tr. 26-27, 71-72. Some of the employees also had concerns about the new archives technician positions, such as the duties, the grade-level of the duties, and whether the Core teams were going to be permanent, as they were not told much. Tr. 26-27, 72. Union president

Davis submitted some of these and other concerns raised by DCU/Team A employees to Karen Mellott, assistant director, CPR, and Scott Levins, director, National Personnel Records Center. Jt. Ex. 1 at 1; Tr. 29.

Also, around this same time period, the supervisor of the DCU/Team A, Rochelle Koperdak, was using employees to perform personal tasks for her, such as driving her to a doctor's appointment, taking out her trash, cleaning and painting her house, and doing personal shopping. Tr. 61, 73. When the employees declined, she would retaliate at work by giving them extra work or having a "poor attitude toward" them. Tr. 73. After the Union got involved, the Agency started an investigation. Tr. 78-79; Jt. Ex. 2 at 3. As part of the investigation, the Agency took statements from at least two employees, including Jessica James. The employees were told that they would be notified before the statements got released. However, thereafter, Koperdak held a meeting with the DCU/Team A employees and basically called out employees who had given statements, including James, discussed the information they had given in their statements, and expressed disappointment, because they "did this stuff together and now [they were] throwing it all back on [her] like it [was her] fault." Tr. 74; *see also* Tr. 34. She also told the employees to "com[e] to her with any concerns that [they] may have with her management or with the office." Tr. 62.

Additionally, around this same time, James received a memorandum for the record due to an erroneous disclosure, Tr. 83, which is a release of information to someone who does not have the right to the information, Tr. 79. James was concerned because the employees had been told at one point they could be fired for erroneous disclosures and at another that "there would be consequences." Tr. 75. As a result of her concerns, James contacted Davis. Tr. 32, 76. Davis thought it was odd that James had received a write-up while she was in training, as that "is a learning period." Tr. 32-33. She explained that previously the Union had handled another employee's write-up during training and that Levins, Mellott's supervisor, had ordered the write-up to be rescinded because the mistake had occurred during training. *Id.*

Shortly thereafter, on June 17, 2022, Davis emailed another supervisor at the Valmeyer facility, Paul Rosewitz, and Levins, complaining that Koperdak had been retaliating against the employees who had given statements about her personal requests, including "writing these employees up," singling the employees out during a meeting, and telling them they should not go around her with concerns or complaints. In the email, Davis further stated that erroneous disclosures "are not counted against an employee" in training and "should not end up being a write-up." She noted that the employees were "crying" and "stressed," and there was very low "morale in the area." Jt. Ex. 5 at 8.

On approximately June 22, 2022, the DCU/Team A employees were notified of a meeting to be held two days later with Mellott, the assistant director of CPR. Tr. 121. Mellott is at least the fourth-line supervisor for these DCU/Team A employees, and it was not common for her to have meetings with them. Tr. 63-64, 76. Mellott also invited Human Capital, AFGE Council 260, and Davis to the meeting, but they did not attend. Jt. Ex. 17 at 67. Mellott testified that she called the meeting to address the "discontent" among the employees that Davis had created and to correct the "totally wrong" information put out by Davis (as indicated in her June 17, 2022 email to Rosewitz

and Levins). Tr. 122. In a statement she wrote about this meeting, she blamed the "Union President" for the "morale problem," as she "told the BUEs something that was 100% wrong."[1] Jt. Ex. 17 at 64.

At the June 24, 2022 meeting, Mellott read the line from Davis's email about erroneous disclosures and told the employees that was "100 percent incorrect." Tr. 125.[2] Mellott told them that, on the contrary, employees are held accountable for erroneous disclosures, whether they are in training or not, Tr. 77, as such disclosures can be "catastrophic" to a veteran "if you sen[d] their records to the wrong person." Tr. 125. Mellott then told them a "cautionary tale" about "the only DCU employee [she] had to terminate," who got information from a supervisor and a human resources employee, Jt. Ex. 17 at 64, which the employee did not like, and "then went to the Union, got information that they wanted, and then tried to use that information and ended up getting fired because of it." Tr. 77; *see also* Tr. 62, 126. She emphasized her point by telling the employees, "You don't work for the Union; the Union doesn't pay you . . . Go through the chain of command." Jt. Ex. 6; Tr. 62-64. While Mellott did not specifically admit the last part, neither did she deny it. Further, one employee who attended the meeting, Charlsa Hensley, documented the statement in notes she took contemporaneously with the meeting. Jt. Ex. 6. As such, I credit that Mellott made the statement.

James, who attended the meeting, believed that the statements were directed at her, as she had just gone to Davis about the erroneous disclosure memorandum she had received. Tr. 77-78. She understood that Mellott was advising them that "going to the Union is not the best option, that you should follow your chain of command," and that Mellott was trying to discourage employees from seeking the Union's advice. Tr. 78. Hensley also felt that Mellott was discouraging employees from seeking the Union's advice, Tr. 65, and she memorialized that in her notes: "Discouraged us from listening/consulting Union." Jt. Ex. 6.

While Mellott agreed that she told the employees that Davis's erroneous disclosure information was incorrect, and also relayed the "cautionary tale," she testified that she simply told the employees to fact check the information they receive from the Union. Tr. 125-26. Mellott testified that she did not intend to discourage the employees from going to the Union, and the "employees should know that . . . they can go to the Union any time." Tr. 126. Based on the context, I do not find that Mellott explicitly told them that they could go to the Union at any time, but rather, in her testimony, she was simply stating her underlying belief that they should know that. *See* Tr. 126.

After the meeting, Hensley emailed Davis that Mellott had discussed the Union at the meeting, Tr. 65, and had cautioned "everyone present in the DCU office that day" to "not follow Union advice." Jt. Ex. 7. Davis then emailed Mellott and other management officials to tell them what she had learned. Jt. Ex. 8. In response to the administrative inquiry that ensued, Mellott wrote that she did not "discourage employees from seeking union representation," but did

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[1] Mellott and others often referred to bargaining unit employees as BUEs, and that initialism will be used from time to time in this decision.

[2] While the transcript indicates that Mellott testified that she told the employees that the line from Davis's email about erroneous disclosures was "100 percent correct," from the context, including, among other things, calling the meeting to correct Davis's information, it is clear that Mellott told them that Davis's information was "100 percent incorrect," rather than "100 percent correct." Tr. 125; *see also* Jt. Ex. 17 at 64.

"encourage them to think and to do their own research and to not assume that all advice is sound." Jt. Ex. 17 at 63. In that statement, Mellott went on to further impugn Davis and the Union, writing that "the Union did, and does at times, lead BUEs astray." *Id.* at 63-64. She provided as an example a meeting Davis held with probationary employees in the "small Union office." She wrote that some of the employees "didn't have any interest in meeting with the Union [] and didn't have any concerns or complaints and they did not want to be involved in anyone's drama." According to Mellott, the meeting violated the collective bargaining agreement because it was not held on official time and further Davis violated social distancing policy. *Id.* at 64.

Returning to the hiring aspect of the Core unit, Davis understood that there would be 30 or more positions, that the DCU/Team A employees would be hired for the Core Team A positions, and that others outside of DCU/Team A would be hired for the remaining positions. Tr. 38. Sometime in June, the DCU/Team A employees received offers for Core Team A, Tr. 37, with start dates of July 17, 2022. Tr. 36-37; *see also* Tr. 120. Davis learned this both from a manager and from some of the DCU/Team A employees who received offers, with one actually showing her the offer. Tr. 36-37. Davis also was told that two of the vacancies had been filled by employees from the Military Personnel Records side of the Agency. *Id.*

Mellott explained that the Agency "took our digital conversion unit personnel and we converted them into military reference technicians." Tr. 119. She testified that the DCU/Team A employees were trained for the positions, and then they were selected for "Team A, and that that filled up Team A." She testified that they then had to "recruit to bring people in from the outside, as well as internally in CPR, to fill the second team." Tr. 120. As such, at this point, Davis's understanding about the hiring process was generally correct.

On July 19, 2022, two days after the official start date for the DCU/Team A employees who had been hired for Core Team A, Davis had at least two conversations, possibly three, in which she made statements about the Core unit hiring. From Davis's statements about the hiring and others' subsequent retelling, some employees in the CPR came to believe that no CPR employees had been hired for any of the Core positions, leading to general upset that day about the hiring. As a result, Mellott reported Davis to the Agency's anti-harassment program for statements Davis made on July 19, 2022 about the hiring. And, the Agency then conducted an investigation into them, after which it issued a letter of reprimand to Davis.

The first conversation was with David Sanford, a medical research searcher in CPR who had applied for a position within the new Core unit at Valmeyer, and Dale Duvall, an employee who has since left the Agency. Tr. 40, 86-87, 90. Davis was just getting to work and had entered the break room when they came to her and asked her "about the DCU unit, the hiring" and "should they file a grievance" over non-selection for a Core position. Tr. 40. Davis explained that employees often approach her in these circumstances, including in the break room, with "concerns, issues, questions." Tr. 42. Sanford's concern in this instance came about because, earlier that day, two employees, Duvall and Christi Matula, told him that nobody from CPR got picked for the Core positions. Sanford was shocked because he was very experienced in archives technician work and believed that he should have been "top of the pick." Tr. 89-90.

Davis told them that the DCU/Team A employees were on the first hire, as their unit had been converted, they were being trained for the work already, and there was nowhere else for them to go. She also told them that they should not file a grievance yet, because there were 30-plus jobs open, and only 17 DCU/Team A employees, and so there would be "other positions open." As a result, she advised them to wait until after the rest of the selections were made before filing a grievance. Tr. 41. She did not tell them that nobody from CPR was going to be selected for the career ladder positions. Tr. 42. I credit this testimony because Sanford's recollection was largely consistent with Davis's, Tr. 90-93, and, thus, it is undisputed. Sanford also recalled that Davis told them that the employees who had been selected started on July 17, 2022. Tr. 91. In this decision, I will refer to this conversation as the Sanford-Duvall conversation.

Davis believed that what she told them was true and also believed that she was speaking in her capacity as Union president, as that is the capacity she is in when employees come to her with concerns, issues, and questions. Tr. 41-42. Sanford confirmed that he spoke to Davis in her capacity as Union president, as he was asking for information about whether he should file a grievance. Tr. 92-93.

Davis also recalled a second conversation, this one with her own supervisor, Vincent Harvey, who, she testified, came to her desk later on July 19, 2022 to ask her about the hiring for the "DC unit/Core Team A," "how people were reacting to the hiring and how the people in other sections felt that they [weren't] going to be hired." Tr. 42-43. She testified that she told him the same thing she had said in the Sanford-Duvall conversation. Tr. 43. Davis believed she was speaking to Harvey in her capacity as Union president, as he had asked her a question about bargaining unit employees' questions and concerns. *Id.*

Harvey testified that he spoke with Davis on July 19, 2022 about the Core hiring, but indicated that it was in the break room and that he, Duvall, and another employee, Lana Miller, were present. Tr. 108-109. He testified that Davis "was asked just to update on the positions and if she knew anything about it," and that Duvall asked the question. Tr. 108, 111. He testified that Davis responded that she "didn't think anyone from our facility, or from the Military Core got any of those positions." Tr. 108-109. At one point, Harvey testified that this update regarded the positions for Team B of the new correspondence Core. Tr. 108. However, later he adamantly denied that Team B was discussed: "it wasn't no Team B"; "there was no Team B"; and "[n]o, I don't recall that." Tr. 112.

While Harvey testified that he did not have reason to believe that Davis was acting as a Union representative during the conversation, Tr. 109, he also testified that, "as she's our Union president," "she pretty much knows," and that if employees want "to ask anything, they could ask her and not [ask] the upper management." He indicated that that was what caused Duvall to ask "her a question about the job postings." Tr. 111. He testified that, to his knowledge, Davis was not part of the hiring process for the positions, Tr. 113, which further supports Harvey's understanding that Davis was asked due to her position as Union president.

Miller also testified about the conversation involving Harvey, Duvall, and to some degree herself. Miller "walked in to [the] ongoing conversation" in the break room, and did not hear the question asked, but testified that she overheard Davis telling Harvey that, to the best of her knowledge, "nobody at Valmeyer got any of the . . . ladder positions in Core." Tr. 162-63, 166.

Miller said, "you got to be kidding me or something," and Miller testified that Davis "kind of laughed and said, no," at which point Miller left the room. Tr. 164. Miller testified that she did not hear Davis specify as to whether she meant the Team A or Team B positions, but Miller understood her to mean "whatever was open." Tr. 163. In an email Miller provided to supervisor Sondra Austin a few days after the conversations, on July 22, 2022, she wrote similarly: "I was in the lunchroom one morning this week and [Davis] was telling [Harvey] that no one from Valmeyer got any of the positions in Core." Jt. Ex. 12 at 27. However, in her investigatory statement she was more specific, writing that she "heard [Davis] telling [Harvey] that no one at the NARA Valmeyer location got any of the 4-6 ladder positions in CORE (DCU)." *Id.* at 24. In that statement, she indicated that Duvall was there also. *Id.*

As noted, Duvall, the only other person who heard this last conversation, no longer works at the Agency and did not testify. He did however send an email to his supervisor a few days after the conversation. In it, he did not mention the Sanford-Duvall conversation, but, as to the other, he wrote that he "overheard [Davis] talking to [Harvey] about GS 4 5 6 position in the new Correspondence unit," and that he heard Davis say that "NONE of the people in our building were being selected for any of the positions." He explained that, "since she is high up in the Union," he assumed she had gotten the information from a "higher source." *Id.* at 23. In his statement for the investigation, Duvall was also more specific, stating that he "was in the break room [and] overheard [Davis] telling [Harvey] that none of the GS 4s in the building were getting the spots in the Old DCU." *Id.* at 20.

In reviewing the testimony and Harvey's statement, it is unclear if Davis and Harvey had a discussion exclusive of the others, as Davis recalled it, but Harvey did not appear to, as he testified to only the discussion between himself, Davis, Duvall, and Miller. His statement was similar. Jt. Ex. 12 at 17-18. Whether or not this particular conversation occurred (and later events will establish that it is unnecessary to resolve this point), what is clear is that Davis knew she had another conversation on July 19, 2022 about the hiring and knew that she had spoken consistently with what she had said in the Sanford-Duvall conversation. Tr. 42-43.

Even though Davis did not specifically remember having a conversation that included Harvey, Duvall and Miller, I find that there was such a conversation, given the number of people who recalled it. The conversation between Davis, Harvey, Duvall and Miller will be referred to as the Harvey-Duvall conversation. I find that, in this conversation, Davis said essentially the same thing she had said in the Sanford-Duvall conversation, which was that the Core Team A positions had been given to the DCU/Team A employees, but that there would be "other positions open." Tr. 41. I so find because Davis recalled speaking consistently about the hiring on that day and that is essentially what she recalled saying earlier in the Sanford-Duvall conversation. Tr. 41-43. I further so find because these statements are consistent with Davis's knowledge at the time, as she had been told by the DCU/Team A employees and a manager that the DCU/Team A employees were hired for Core Team A, and she was aware that there were additional spots to fill beyond those for Core Team A. Tr. 36-37. However, given that all three listeners heard something about the Valmeyer (CPR) employees not being given positions, I find that Davis must have added that the CPR employees had not been given the Core Team A positions. Therefore, I find that she told them essentially that the DCU/Team A employees, and not the CPR employees, had been given the Core Team A positions, but there would be "other positions open."

In addition to Davis's testimony and the state of her knowledge on July 19, 2022, an evaluation of the additional evidence, including the testimony of the other witnesses, as well as the emails and statements collected for the investigation, also leads me to that conclusion. Firstly, I evaluated the various different reports from Duvall and Miller about what Davis said. In some they indicated that she said that no one in CPR got any of the positions, but in their investigatory statements, they both wrote that she referred specifically to the positions in the DCU. Duvall reported that Davis said that "none of the GS 4s in the building were getting the spots in the **Old DCU**." Jt. Ex. 12 at 20 (emphasis added). Miller reported that Davis said that "no one at the NARA Valmeyer location got any of the 4-6 ladder positions in **CORE(DCU)**." *Id.* at 24 (emphasis added). I credit both of these over their more general reports that no one in CPR got any positions because they are more specific, because they were written in response to an investigation, which likely would cause more careful writing, and because they were close in time to the event.[3] Therefore, given that at least some non-management employees, and in particular Davis, referred to Core Team A as the DCU during this period, what Davis said was that "none of the GS-4s in the building were getting the spots in" Core Team A, Jt. Ex. 12 at 20, or that "no one at the NARA Valmeyer location got any of the 4-6 ladder positions in" Core Team A, Jt. Ex. 12 at 24.

Secondly, I credit that Davis was referring to Core Team A when she said that no one in CPR had gotten or was getting a position in the "Old DCU" or "CORE/DCU" because these statements do not make sense otherwise. DCU as DCU was not hiring, as it had been disbanded and converted to Core Team A. As such, Davis was referring to positions in Core Team A when she used the terms "Old DCU" and/or "CORE (DCU)."

Thirdly, despite that Mellott claimed the statements were about Team B hiring, *see, e.g.*, Jt. Ex. 12 at 49, no one who heard Davis's statements heard Davis refer to Team B. At the hearing, while the Respondent's representative asked both Miller and Harvey whether they had heard Davis spread a rumor "regarding Team B positions," to which both responded, "yes," Tr. 108, 162-63, subsequent testimony revealed that the term "Team B" was not used. Miller explained that she "didn't hear [Davis] specify [Team A or Team B], just whatever was open, none of us got it." Tr. 163. Harvey, when asked about his "Team B discussion with [Davis]," adamantly denied that Team B was discussed. Tr. 112. Duvall did not mention Team B in his email or in his statement. Jt. Ex. 12 at 20, 23. Therefore, I credit that the term "Team B" was not used in the conversation.

Fourthly and finally, Sanford explained that, in the Sanford-Duvall conversation, Davis told him that the employees who had gotten the positions started on July 17, 2022. Tr. 91. The employees who had started on July 17, 2022 were the DCU/Team A employees who had been hired for Core Team A. As such, it is clear that Davis had reported that day that the Core Team A positions had been given to the DCU/Team A employees.

The communication breakdown that apparently made people come to the conclusion that no CPR employees got any of the Core positions at all appears to have been because both Duvall and Miller seemed to believe that DCU/Team A was the entirety of the Core unit, instead of only one team of two. The result was that, when Davis stated that no one from CPR was selected for the Old DCU or DCU, which she intended as substitute for the term "Core Team A," they (wrongly)

[3] I also credit them over Harvey's more general statement, as they are more specific.

understood that to mean that no one from CPR was selected for the Core unit. This is apparent from comparing Duvall's statement against his email about the conversation, reporting in one that Davis said that "none of the GS 4s in the building were getting the spots in the Old DCU," Jt. Ex. 12 at 23, and in the other that "NONE of the people in our building were being selected for any of the positions," *id.* at 20. Miller's various reports similarly conflated the entire Core unit and Core Team A, reporting in her statement that "no one at the NARA Valmeyer location got any of the 4-6 positions in CORE (DCU)," *id.* at 24, and then testifying that Davis said that "whatever was open, none of us got it," Tr. 163. Miller's lack of understanding on the subject can be at least partially attributed to having heard only part of the conversation.[4] Tr. 163, 166.

It is unclear why Miller and Duvall did not digest Davis's additional point that there would be "other positions open." She was certainly trying to convey that. Tr. 41. What is likely is that, upon hearing what they (mis)understood to be bad news (that the DCU/Team A employees had gotten the Core Team A positions, and other CPR employees had not), they were no longer open to information.

As to the actual state of selections and hiring as of July 19, 2022, it is clear that the DCU/Team A employees had been hired and had officially started on July 17, 2022. Austin testified, and I credit her undisputed testimony on this point, that, as of July 19, 2022, selections for the other positions in the Core unit had been made and some of those selected were other CPR employees, but "the individuals selected were not aware of it at that point." Tr. 157. Moreover, at least one CPR employee, Lana Miller, had been selected for Core Team A, although she had neither received her offer, nor accepted it, nor been hired for it by July 19, 2022. Tr. 166; Jt. Ex. 34.

That day, in addition to Davis's conversations about the hiring, a number of other employees spoke to one another about the subject. Some did so before Davis arrived at the facility, Tr. 89, and some after. Other than Sanford, Duvall, Harvey and Miller, none spoke directly with Davis. *See, e.g.,* Tr. 146, 173, 192. There were a number of variations about what was said and/or heard, but the main thrust was that no one was selected from CPR for the Core positions. For example, Katelyn Wuelling, a CPR employee, heard from Matula that "all of the vacancies for the Military Core here at CPR were already filled, that everyone who had gotten an email with the acceptance had gotten it Sunday night." Wuelling testified that she "eventually learned that [the information] came from Dale Duvall." Tr. 178. John Johnson testified that his wife, "Michelle Johnson, told [him], John Johnson, that Dale Duvall, who no longer works here, had told her that he overheard [Davis] . . . speaking to [Harvey]" about "the jobs and how nobody from this facility was going to be hired for them." Tr. 143. In his statement, however, he wrote that the overheard statement was that "the new Core jobs have all been filled with people from MPR." Jt. Ex. 12 at 32.

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[4] One of the Respondent's witnesses also made the point that Davis must have been referring to the Team B positions when she stated that no one from CPR got them because the individuals who had been selected for Team A already knew they had been selected. Tr. 157. However, the one point does not flow necessarily from the other. Simply because the DCU/Team A employees hired for Core Team A knew they were selected for Team A does not mean that everyone else concerned about the hiring knew that or knew that there would be other positions open, as illustrated by the comparison of Duvall's email and statement and Miller's statement and her testimony. In fact, Davis testified that that was what she was trying to explain to people: that the DCU employees had been hired for Core Team A (the old DCU or the DCU), but that there would be other positions open. Tr. 41.

The rumor that came to Ms. Johnson was yet another variation on the theme, as Duvall told her that "the NPR people were already getting phone calls that they were coming over," and that "none of the jobs were being taken by CPR people." Tr. 172. She was very upset and was crying over it. *Id.*

Supervisory archives specialist Katherine Gooch testified that she heard a rumor on July 19, 2022, that "no one was getting the positions." Tr. 187. Gooch's investigatory statement was different from that. In the statement, she wrote that other CPR employees told her "that anyone from CPR who applied for the Military Correspondence positions were not selected and that the positions were going to be reposted on USAjobs to get more applicants," Jt. Ex. 12 at 28-29, yet another variation of the rumor. Gooch wrote in her statement that, "from [her] knowledge, the rumor began from Barbara Davis." *Id.* Gooch did not explain in her statement or in her testimony how she came to this conclusion. In that statement, she requested as a remedy that it should be made "common knowledge that Union members or any other BUEs do not have access to information on who gets selected for jobs and who does not get selected." *Id.* at 30. In her testimony, she explained that she wanted this remedy so that if, in the future, an employee hears hiring or selection information from a Union member or a BUE then "they would understand that it was untrue." Tr. 190.

Mellott also did not hear any of Davis's statements directly on July 19, 2022. Tr. 128. However, she "was approached by an employee [John Johnson], and he said that he had heard a rumor," which Mellott testified was that "no CPR employees had been selected for the Team B positions, that all the jobs were going to be filled by MPR employees." Tr. 128. However, neither in his statement, nor in his email about the rumor he heard, nor in his testimony did Johnson indicate that the rumor regarded Team B positions. Tr. 143; Jt. Ex. 12 at 32, 35. Given that, I do not find that he used the term "Team B" in his discussion with Mellott. Mellott told Johnson that the rumor was "100 percent inaccurate." Tr. 128.

At some point, Austin told Mellott that "the staff members were really upset and angry" about the rumor. Tr. 129. Mellott told Austin to tell them to "write a statement" if they are "really concerned about it." *Id.* Austin then encouraged the employees to makes statements. Tr. 153. Thereafter, on July 22, 2022, Austin received two emails from employees, both of which she provided to Mellott. Tr. 154. The first came from Miller, who reported that she had heard Davis "telling [Harvey] that no one from Valmeyer got any of the positions in Core." Jt. Ex. 12 at 27. The second came from Wuelling, who wrote that she "heard from someone else ([she didn't] know who though) that no one at CPR was selected for the positions across the hall. [She] was told that those who were chosen received emails last Sunday night." *Id.* at 47.

With these two statements in hand – one of which did not even implicate Davis and was at least second-hand and the other of which included only the brief statement above – on July 22, 2022, Mellott sent the following email to her supervisor, Scott Levins:

> Barbara Davis started a rumor on Tuesday in the lunchroom that the open Team B 4/5/6 vacancies were not going to be filled by any CPR employees, that MPR employees were going to get those jobs and that if any CPR employee was getting a 4/5/6 job then they would have received a tentative offer NLT than the previous Sunday night. Obviously, not true. I have a few statements, waiting on a few more

> – I'll see what I end up with. [Davis] is in violation of NARA's Anti-Harassment Policy, she deliberately interfered with work productivity by spreading rumors, making a concerted effort to undermine good order and morale. If the statements support it, I'll file with the Ad Hoc Committee on Harassment.

Jt. Ex. 9.

After that and before following up with the committee, Mellott received from Austin two additional emails about the rumors.[5] However, again, both of them, on their faces, were at best second-hand accounts. Jt. Ex. 12 at 35, 39. Mellott testified that she reviewed those statements, and then compared them with "NARA's anti-harassment policy, determined that it had been harassment, and then [she] reported the matter to the ad hoc committee, specifically Tanya Shorter." Tr. 129.

Mellott titled her email to Shorter, dated July 25, 2022, "Report of Harassing Behavior to Ad Hoc Committee on Harassment" and the opening paragraph states that Davis "engaged in unlawful harassment and violated NARA's Anti-Harassment Policy." She explained that CPR was in the selection process to fill vacancies for career ladder technician positions in the Core unit, that "vacancies were announced, announcement closed . . . and that selections were made," but no tentative offers had been made yet to CPR employees. She told Shorter that, on July 19, 2022, Davis, whom she reported "has no knowledge about who was or wasn't selected," "started and spread a rumor" "in the lunchroom to multiple employees that none of the CPR employees were being selected for any of the Team B positions," that "the positions would be filled by MPR employees and that the CPR employees should start filing complaints. [Davis] went on to suggest that if any CPR employees had been selected, they would have received a tentative offer by Sunday, July 17, 2022." She further wrote that this resulted in one employee crying and others were angry. She wrote that Davis made these statements because "she gets enjoyment out of abusing her position as the Union president and making the BUEs think that she has insider information." Jt. Ex. 10 at 13.

Mellott explained that she reported Davis's discussions to the anti-harassment committee, specifically Shorter, because she is "required by the policy to report any allegation of harassment." Tr. 129. However, Mellott was aware of others "spreading rumors" about the Core position selections, Jt. Ex. 12, but there is no indication in the record that she felt compelled to report the other employees.

Shorter put Mellott in charge of investigating her own complaint. Jt. Ex. 10 at 13-15. She instructed Mellott to have the "alleged victim" complete the intake form, and to then provide the allegation from the form to the "alleged harasser" and "witnesses, if any." Further, Shorter instructed that, "if the alleged harasser and/or witnesses refuse to provide a written statement, please use the Harassment Allegation Inquiry to gather statements." *Id.* at 14. The instructions appear to indicate that the substituted "statements" should be personal interviews. *Id.*

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[5] Duvall, who heard from Davis directly, also provided an email about Davis's statements, but it was sent to Mellott after Mellott's report to Shorter in which she deemed Davis in violation of the anti-harassment policy. Jt. Ex. 12 at 23.

Thereafter, Mellott provided a number of employees with intake forms. Jt. Ex. 12. Her cover email for these forms indicated that a harassment complaint was filed and that the email recipient was a "witness/victim." Jt. Ex. 11. She stated that the allegation was that:

> Barbara Davis engaged in unlawful harassment and violated NARA's Anti-Harassment Policy . . . [when] she started and spread a rumor that undermines the integrity of the employment process and interferes with work productivity. Having no knowledge about the career ladder 4/5/6 core technician positions, she started a rumor that no CPR employees have been selected for the positions, that the positions will be filled by MPR employees and that the CPR employees should begin to file complaints against the Agency.

Id.

There are some problematic aspects of this investigation, chief among them being that Mellott was tasked with investigating her own complaint – one in which she had already assessed that Davis was guilty, as indicated in her email to Shorter. Additionally, Shorter had instructed Mellott to first send the intake form to the "alleged victim," and thereafter to provide the "alleged harasser" and any witnesses with the allegation and questions. Jt. Ex. 10 at 13-15. It is unclear who the particular victims were in this case, as Mellott was the one who complained to Shorter. Yet, she did not complete an intake form. Tr. 130-34. On the intake forms that Mellott provided to the employees, there was a line for the "name and title of victim/witness," but no one indicated which they were, and some of the employees did not even provide their names there, although names were otherwise known by their signature lines. Jt. Ex. 12. To Sanford, the form "made no sense" because "it was talking about harassment," and he "wasn't harassed about anything." Tr. 95-96. It also appeared that the intake forms were partially completed by Mellott before she provided them to the employees, as some of the content is identical, including the identity of the alleged harasser, who she described in every form as "Barbara Davis, Union President." Jt. Ex. 12.

Further, the email that apparently accompanied the intake forms was highly suggestive in a number of ways, stating, for example, that "Davis violated the Anti-Harassment Policy," that her "rumor" undermined "the integrity of the employment process and interfere[d] with work productivity," and then went on to describe the exact rumor that Mellott apparently believed Davis spread, rather than asking employees what they heard and from whom. Finally, the email also included a presupposition that neither Mellott nor the employees were in a position to presume, specifically that Davis "had no knowledge about the . . . selections." Jt. Ex. 11. Employees returned their signed statements either on July 27 or 28, 2022. Jt. Ex. 12.

On July 27, 2022, Mellott sent an email to Davis which included the allegation she had provided to the "victims/witnesses." She asked Davis to complete the intake form and to also respond to other questions, including, for example: "If the allegations are false, why might the complainants lie?" Jt. Ex. 13 at 50-51. Davis's representative responded by emailing Mellott and others, including Levins, that she had advised Davis not to "answer these crazy questions." *Id.* at 50.

The next day, July 28, 2022, Davis emailed Agency officials, including Levins, to notify them that Mellott and Austin were "working on writing [her] up." Jt. Ex. 14 at 52. She explained

that they were doing so for discussions she had in her capacity as Union president, in which she had explained to employees that the Core Team A positions had been given to the DCU/Team A employees. *Id.*

That day, the Agency decided to reassign the investigation away from Mellott. *Id.* at 53. As part of the reassignment, on July 29, 2022, Mellott was requested "to forward all work she has done to date on this matter." *Id.* at 54. In addition to forwarding that work, on August 1, 2022, Mellott wrote a long memorandum for the record, Jt. Ex. 12 at 48-49, and submitted that as well, Jt. Ex. 18 at 69. That memorandum reiterated what she had originally written to Shorter, including her determination that Davis had violated the anti-harassment policy. Jt. Ex. 12 at 48. However, Mellott added other material, including expanding on her basis for finding Davis in violation of the policy, responding to Davis's statement in her July 28 email that she (Davis) was acting in her union capacity during the discussions, and also generally impugning Davis as Union president. She wrote, in pertinent part:

> [Davis] enjoys creating chaos and then watching the ensuing crying, anger, etc. . . . [S]he intentionally got the employees all fired up (management is screwing over the CPR employees, we're getting the shaft, this isn't fair) over a lie . . . Davis claims that 'she was in her union capacity whenever she spoke to the BUEs.' [Davis] is always the Union President. However, she was not on official time when she was putting out false information . . . Also, in her email, she mentions the core technician vacancies that have been filled by former digital imaging technicians (Team A). When [Davis] was spreading the rumor about no CPR employees being selected for vacant core technician positions, she was talking about the Team B positions. By mentioning the Team A vacancies [in her email], she is merely trying to obfuscate the matter for anyone who is not familiar with it . . . Two victims/witnesses approached their Branch Chief after they provided their statements. One employee made the statement that he didn't know why we were bothering with collecting statements since NARA wasn't going to do anything about Barbara Davis. The other employee was concerned about whether or not [Davis] would be aware that she had provided a statement. The employee expressed that she wanted to be able to come to work and do her job without harassment or intimidation from [Davis].

Jt. Ex. 12 at 49.

There is no indication in the record that Davis was given an opportunity to respond to this memorandum, the content of which included far more than the original report. *See* Jt. Ex. 18 at 69; Jt. Ex. 19. It is also odd that more was not done to obtain Davis's response even to the original allegation, either in verbal or written form, especially because the instructions Shorter provided indicated that, if a written statement could not be obtained "from any of the parties," then an interview may be conducted. Jt. Ex. 10 at 14. Mellott testified that she did not do so because of Davis's representative's email and she also did not interview Sanford because the investigation was reassigned. Tr. 132, 136; *see* Jt. Ex. 13 at 50-51. After reassignment, there is no indication in the record that the person who finished the investigation attempted to interview Davis or Sanford, *see* Jt. Ex. 19, even though, upon reassignment, it was noted that neither had provided written statements, Jt. Ex. 18.

On August 25, 2022, the new investigator from the Agency's human resources provider provided her report to Shorter, the anti-harassment program manager. The report simply summarized the statements that had previously been provided. Jt. Ex. 19. It did not include any information from Davis's July 28 email, *id.*, even though that email had been forwarded to the investigator, Jt. Ex. 18. Despite the inconsistencies in the statements provided, the report assessed that "all three witnesses who were present during the incident corroborated the allegations that Ms. Davis started and spread a false rumor that negatively impacted the work group." Jt. Ex. 19 at 73.

On September 22, 2022, Shorter wrote a letter to Davis reporting that the committee had determined that the "allegation(s) of harassment made against [her] could not be substantiated by the documentation collected," but had nevertheless found that her "behavior was ***inappropriate.***" Jt. Ex. 21. She did not explain the basis for the finding. *Id.* Davis did not receive the disposition letter until January 2023. Tr. 46. Apparently, the letter was not sent in September 2022 when it was drafted because of an Agency miscommunication between Levins, the director of the Agency, and Shorter. *See* Jt. Ex. 31. Mellott explained in an email to Austin that she started suspecting that the letter hadn't been sent because Davis "had not filed a grievance about [it]" and "she grieves anything and everything." Regarding the miscommunication, Mellott explained to Austin that, "if this issue shows anything it shows that everyone is way too busy to be dealing with [Davis's] bs all the time." *Id.* It is understood that "bs" in this context is the slur term meaning "nonsense," such that Mellott was describing Davis's activities, including filing grievances, to be "nonsense." In the same email, Mellott also expressed hope that a letter of reprimand to Davis would be finalized. To this email, Austin responded, "Totally agree!" *Id.*

The letter of reprimand to Davis was issued on February 9, 2023, months after the July 19, 2022 discussions. Jt. Ex. 32. The reprimand came about because Levins had instructed Mellott to work with the Agency's human resources provider regarding administrative action against Davis for her "inappropriate behavior." Tr. 205-206; Jt. Ex. 29. He did so without apparently knowing even the alleged rumor, as he thought Davis had told "coworkers not to apply for the jobs because they would not be selected for them." Tr. 202. He also was apparently unaware that Mellott both reported the alleged harassment and conducted the investigation. Tr. 204.

Austin issued the letter of reprimand to Davis based on her "inappropriate behavior." Jt. Ex. 32. The letter included the original allegation, but no other specific explanation. *Id.* Austin testified that she issued the letter because "it was something that was uncalled-for, and she's union, and she was not on union time, and just a lot of things all together that day was just not appropriate." Tr. 155. When asked to clarify her statements about the Union, Austin reversed course and testified that the "Union had nothing to do with it," and that Davis "was an employee at the time that she made these accusations and these mistruths," and "that's why [she, Austin] was upset." Tr. 156. I credit Austin's original explanation, as the second statement came about due to a specific effort by the Respondent's representative to rehabilitate Austin's testimony, and is therefore less credible.

In the months after the investigation about Davis's statements and before the reprimand was issued, there were other instances of Mellott and Austin exhibiting animus about Davis's union activities. For example, on October 14, 2022, when Davis, as Union president, sent an email to

Mellott requesting to negotiate over a particular matter, Mellott forwarded it to Austin, with the comment, "Ugh," to which Ms. Austin retorted, "Of Course!!!!!" Jt. Ex. 22. In another instance, on December 5, 2022, Mellott made a request for disciplinary action against Davis to the Agency human resources provider due to Davis notifying management of bargaining unit employees' health concerns following a Covid-cleaning. She alleged that Davis's emails contained false information (that employees had health concerns), because the employees had not reported health concerns to management. As an introduction, Mellott explained that "this is not the first documented instance of [Davis] lying – she was just investigated by ARC for an incident in July 2022. Potential for rehabilitation is poor. [Davis] constantly files ULP and grievances that are without merit. However, in this case, she knowingly made false statements - 9 times," the nine false statements being the nine emails she sent reporting employee health concerns. Jt. Ex. 24.

III. Positions of the Parties

A. General Counsel

The GC argues that Mellott's June 24, 2022 statements at the meeting interfered with, restrained, and coerced employees in the exercise of their § 7102 right to obtain union assistance, in violation of § 7116(a)(1) of the Statute. GC Br. at 12-14. The GC explains that a statement violates § 7116(a)(1) if "it would tend to coerce or intimidate the employee, or if the employee reasonably could have drawn a coercive inference from the statement." *Id.* at 13 (citing *U.S. Dep't of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 66 FLRA 589, 591 (2012). The GC points out that, although surrounding circumstances are taken into consideration, the standard is not based on the subjective perceptions of the employee or the intent of the employer. *Id.* Further, according to the GC, this objective standard is met, where, among other things, a statement explicitly links an employee's protected activity with treatment adverse to the employee's interests. *Id.* (citing *U.S. Dep't of Transp., FAA*, 64 FLRA 365, 370 (2009) (*FAA*)).

The GC argues that an employee could reasonably draw a coercive inference from Mellott's statements because the statements would tend to discourage employees from seeking union assistance and because the circumstances surrounding the statements were coercive. *Id.* at 13. Specifically, Mellott read a part of Davis's email in which Davis explained that employees should not receive write-ups for erroneous disclosures during their training, informed them that that was incorrect, and then told the employees about another employee who had been fired after he followed bad advice from the Union. *Id.* at 13-14. The GC explains that Mellott further emphasized her point by telling the employees that they don't work for the Union, the Union does not pay them, and they should go through the chain of command. According to the GC, these statements were coercive as they linked an employee's protected activity, seeking union assistance, with adverse treatment, being fired. The GC argues that a reasonable inference from these statements is that going to the union, rather than through the chain of command, could have adverse job consequences. *Id.* at 14.

The GC argues that the surrounding circumstances further demonstrate the coercive nature of the statements. Specifically, these employees had reported to the Union fear of retaliation for participating in an investigation over their supervisor's conduct requiring them to run personal errands for her, and the Union brought that concern to management's attention. A week later,

Mellott, their fourth-line supervisor, met with them to correct what she called a "morale problem" caused by the Union president. The GC argues that Mellott's means of correcting that problem was to warn the employees that the consequences of listening to the Union's advice may be termination, and therefore they should follow the chain of command. *Id.* The GC argues that Mellott's response to employees seeking the Union's assistance over such serious concerns would make an employee "think twice" about doing so and as such these statements violated the Statute. *Id.* (citing *Dep't of the Treasury, IRS, Louisville Dist.*, 11 FLRA 290, 298 (1983) (*IRS, Louisville*); *DOJ, BOP, Fed. Corr. Complex, Butner, N.C.*, Case Nos. WA-CA-13-0036, WA-CA-13-0093, 2015 WL 6957089, at *13 (Oct. 30, 2015) (OALJ Dec.) (*Butner*)).

The GC anticipated that the Respondent would argue that Mellott's statements did not violate the Statute because they "correct[ed] the record with respect to [a] false or misleading statement." *Id.* at 14-15 (citing 5 U.S.C. § 7116(e)). The GC argues however that Davis's assertion in her email that erroneous disclosures during training are not counted against an employee and should not end up being a write-up, which the Respondent claims Mellott was correcting, was simply Davis's view about how erroneous disclosures should be handled, rather than a fact needing correction, based upon the Union having successfully grieved a write-up under these same circumstances for another employee. As Davis's assertion in her email was merely her view, rather than a "false or misleading statement," the GC argues that Mellott's statements did not correct any "false or misleading statement" and therefore is not protected by § 7116(e). *Id.* at 15.

Moreover, the GC points out that such an expression is only protected if it "contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions." *Id.* The GC argues that Mellott's statements contained both, as explained above. *Id.* Therefore, according to the GC, Mellott's statements violated § 7116(a)(1) of the Statute. *Id.* at 12-15.

The GC further argues that the Respondent violated § 7116(a)(1) and (2) of the Statute by discriminating against Davis for her protected activity when it investigated and disciplined her for the discussions about the Core hiring. *Id.* at 15-22. The GC explains that, to establish a claim of discrimination under § 7116(a)(2), the GC must make a prima facie showing that: (1) the employee who was allegedly discriminated against engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment in the employee in connection with, among other things, conditions of employment. *Id.* at 15-16 (citing *Letterkenny Army Depot*, 35 FLRA 113, 118 (1990) (*Letterkenny*)). To rebut the prima facie case, the Respondent must thereafter establish that: (1) there was a legitimate justification for the action; and (2) the same action would have been taken even absent the protected activity. *Id.* at 16 (citing *U.S. DOD, U.S. Air Force 325th Fighter Wing Tyndall AFB, Fla.*, 66 FLRA 256, 261 (2011) (*Tyndall AFB*)).

However, the GC explains that, when the alleged discrimination concerns potential discipline for conduct occurring during protected activity, "'a necessary part of the respondent's defense' is establishing that the conduct: (1) constituted flagrant misconduct; or (2) otherwise exceeded the boundaries of protected activity." *Id.* at 16 (citing *Laredo*, 71 FLRA at 1072-73). As the GC points out, the Authority has held that, while an employee can lose protection under the Statute for making false statements, it is only those statements which are knowingly false and uttered with reckless abandon which lose the protection of the Statute. *Id.* at 16-17.

The GC argues that Davis was engaged in protected activity when employees and her supervisor approached her to discuss concerns and potential grievances over the position selections, as she was responding as the Union president, Mellott investigated Davis and the Agency disciplined Davis as the Union president, and the underlying conversations concerned information the employees sought from Davis as Union president and advice on filing grievances from the Union president. As such, according to the GC, the conduct that was the subject of the investigation and the subsequent discipline occurred during protected activity. *Id.* at 17.

The GC further argues that Davis was engaged in protected activity during these conversations even though she was not on official time, as it is the nature of the activity, not whether the representative is on official time, that determines whether the conduct occurred during protected activity. *Id.* at 18. Moreover, according to the GC, it is common and permitted for employees to approach Union representatives on breaks in areas such as the break room here. *Id.* (citing *AFGE, Nat'l Border Patrol Council*, 44 FLRA 1395, 1401(1992) (*Border Patrol*)).

Therefore, according to the GC, since the conduct at issue occurred during protected activity, the Respondent must establish that the statements exceeded the boundaries of protected activity by establishing that Davis's statements were knowingly false and uttered with reckless abandon. *Id.* at 18. According to the GC, they were not knowingly false as Davis testified that she believed them to be true and had a reasonable basis for that belief, given what she had learned from the employees who had been selected and from one of the managers. Moreover, the GC argues that, in fact the statements were true, as the only job offers made to that point were to the DCU employees and others from Military Personnel Records, and not otherwise to CPR employees. *Id.* at 19.

Responding to the Respondent's claim that Davis's statement that "no one in CPR got the positions" regarded the Team B positions and not the Team A positions, the GC argues that makes little sense in the context of the prior DCU employees having just officially started their new positions just prior to the conversations, that no one who heard Davis's comments mentioned hiring for Team B, and two of them did mention hiring for the DCU in their investigatory statements. *Id.* at 19-20.

Moreover, the GC argues there was nothing about Davis's behavior that otherwise constituted flagrant misconduct or exceeded the boundaries of protected activity. Instead, she simply had limited conversations with employees who approached her and did not spread rumors, much less harass people. According to the GC, it was other employees who went from person to person speculating about selections. Moreover, Davis was not insubordinate, disrespectful, or threatening, which is the type of conduct that otherwise might constitute flagrant misconduct. *Id.* at 20.

Responding to the Respondent's claim that it was justified in reporting and investigating Davis for harassment due to the anti-harassment policy's requirements, the GC argues that the Authority has previously rejected similar arguments. *Id.* (citing *Laredo*, 71 FLRA at 1073). In *Laredo,* the Authority noted that, even if the supervisor had acted in accordance with agency policy in reporting the employee, the agency still had to show it would have taken the same action

(reporting the employee) absent the employee's protected activity. 71 FLRA at 1073. As the report was due to the protected activity, it could not do so. According to the GC, the same is true in this case. GC Br. at 20-21.

Lastly, the GC argues that, even if Davis's conversations were not protected activity, Respondent's actions against her were motivated by her protected activity and would not have been taken absent the protected activity. According to the GC, Mellott's conduct and comments around the time of the investigation and discipline establish that motivation. Specifically noted are Mellott's June 24 meeting comments about Davis, Mellott describing Davis in her harassment report as having abused her position as the Union president (drawing a direct connection to Davis's protected activity), Mellott seeking to discipline Davis for contacting management over employee health complaints following the Covid-cleaning, and that the investigation itself was far from impartial, as it was conducted by Mellott, the accuser, and also omitted favorable witnesses and facts. *Id.* at 21. Further, Davis was the only person investigated and/or disciplined for her statements, even though others spread information about the hiring selections. *Id.* at 21-22.

The GC argues that, due to the violation of § 7116(a)(1) and (2) of the Statute, the Respondent should be ordered to rescind and expunge the letter of reprimand, as well as expunging references to it and/or the incidents and investigation that gave rise to it, cease and desist from stating or implying that seeking Union advice may lead to discipline, disciplining or otherwise discriminating against Davis or any other bargaining unit employee because the employee engaged in protected activity, and post and email to bargaining unit employees copies of the related Notice. *Id.* at 22.

B. Respondent

The Respondent explains that the standard for establishing whether Mellott's statements at the June 24, 2022 meeting violated § 7116(a)(1) of the Statute is whether, objectively, a statement or conduct by management tended to coerce or intimidate an employee or whether an employee could reasonably have drawn a coercive inference from the statement. As to the discrimination claims, the Respondent points out that the GC must prove that the employee against whom alleged adverse action was taken must establish that they engaged in protected activity and that consideration of the protected activity was a motivating factor in the adverse action. Resp. Br. at 2.

The Respondent asserts however that, at the June 24, 2022 meeting, Mellott only clarified the rules regarding erroneous disclosures, encouraged staff to do their own research, cautioned against blindly following the Union, and presented a cautionary tale about an employee removed for misconduct after following the advice of the Union, instead of management's guidance. *Id.* at 3-4. The Respondent argues that these statements were permissible management expression, as 5 U.S.C. § 7116(e) allows an agency to correct the record with respect to any false or misleading statement as long as there is no threat of reprisal or force and was not made under coercive conditions. *Id.* at 4. According to the Respondent, there was neither, as Mellott was focused on correcting the record, which she had to do because "Davis and other Union representatives in that facility often gave incorrect advice without worrying about the effect advice would have on the employees seeking it." *Id.* at 6.

The Respondent argues further that the GC's witnesses did not consider the statements to a threat, but rather a warning as indicated by employees who attended the meeting. *Id.* at 5. Further, according to the Respondent, the GC's reliance on Davis's hearsay testimony to the contrary is misplaced, because the testimony is not credible. *Id.* at 6-7. The Respondent argues therefore that, as no one who heard Mellott's statements testified that they felt coerced or restrained from seeking Union advice, the statements fall squarely within § 7116(e), and to hold otherwise would lead to the "logical conclusion that management cannot make *any* comments about the Union to BUEs without violating the Statute." *Id.* at 7. As such, the Respondent argues that the Agency did not violate § 7116(a)(1) with respect to Mellott's comments. *Id.*

The Respondent then argues that the investigation of Davis's conduct did not violate the Statute for several reasons. First, Davis was not "acting in a union capacity" when she made the statements. *Id.* at 7-8. Second, there is no evidence that the investigation and letter of reprimand were motivated by union activity. Third, the investigation was done in accordance with the Agency's neutral policies and consistent with guidance from the Equal Employment Opportunity Commission. *Id.* at 8.

As to the question of whether Davis was acting in a "union capacity," the Respondent argues that, while the conversation with Sanford could have been protected activity, that was not the conversation that led to the investigation. Rather, the conversation that led to the investigation (and subsequently the letter of reprimand) was the one between Davis, Duvall and Harvey when she "started this rumor," and there was nothing presented at the hearing that establishes that Davis was acting in a union capacity then. According to the Respondent, Davis made the statements while "having a coffee in the breakroom while chatting with a supervisor, who had no bearing on the job announcement at issue." *Id.* at 12. The Respondent therefore argues that, to find that Davis was engaging in protected activity during this conversation, would mean that anything Davis says or does at work is presumed to be in her union capacity, making the first step of proof meaningless and immunizing Union officials for all of their actions. *Id.*

According to the Respondent, the investigation was the result of a neutral application of a neutral policy, the anti-harassment policy. *Id.* at 12. The Respondent argues that the anti-harassment policy requires supervisors to report all allegations of harassment to the anti-harassment program and that is what Mellott did. *Id.* at 9. The Respondent also argues that the testimony and evidence establish that Davis told Harvey and Duvall that "no one at CPR was selected for the correspondence technician positions for the new correspondence core at CPR" and that these statements were false. *Id.* According to the Respondent, due to Davis's spreading this false statement or rumor, several staff members were upset, some were furious, and there was disruption. *Id.* Therefore, according to the Respondent, Mellott followed the anti-harassment program guidance by notifying Davis of the allegation, which was followed by an investigation conducted by the Administrative Resource Center, the Respondent's human resources provider, which took over once the Respondent realized that Mellott both instituted the investigation and acted as intermediary for the anti-harassment committee. *Id.* at 10-12. Thereafter, the committee on harassment found inappropriate behavior. *Id.*

According to the Respondent, the hearing testimony supports that the Agency did not have any undue influence over the investigation or otherwise guide it to a pretextual conclusion. As Davis's comments could have constituted harassment based on co-workers' reactions, management

could not ignore it. *Id.* at 13. To require otherwise places the Agency in an impossible position, as it cannot then investigate allegations of harassment if the alleged harasser is a Union official, which undercuts the Agency's ability to comply with anti-harassment directives, according to the Respondent. *Id.*

Regarding the letter of reprimand, the Respondent argues firstly that "Davis was not acting in a union capacity when she engaged in the conduct for which she received the letter of reprimand," as explained above. *Id.* at 14. Secondly, the Respondent argues that "there was no evidence presented at the hearing [that would establish] that the issuance of the letter of reprimand was motivated by [] Davis's actions as a Union official, as opposed to her misconduct in spreading a rumor." *Id.* Thirdly, the Respondent argues that the proper consideration in this case is not whether Davis's comments "were protected and were not flagrant misconduct," but whether "Davis's continued conduct is opprobrious conduct," in violation of § 7106(a)(2)(A) of the Statute. *Id.* at 14-15. Fourthly, the Respondent argued that Davis's comments constituted "flagrant misconduct," although referring to it as an "opprobrious conduct" assessment. *Id.* at 16-17.[6]

Addressing the third point, the Respondent asserts that the GC mistakenly argues that "management cannot take any corrective action against BUEs who happen to be Union officials." *Id.* at 15. Instead, according to the Respondent, § 7106(a)(2)(A) of the Statute provides the Agency with an independent basis for correcting Davis's "continued conduct." *Id.* at 14-15. The Respondent analyzes that § 7106(a)(2)(A) of the Statute explicitly affords "an employer the right to correct conduct" if it has a "legitimate justification," which would include "a serious abridgement of [. . .] rules or regulations and flagrant misconduct.") *Id.* at 15 (citing *U.S. Dep't of VA, VA Med. Ctr., Richmond, Va.*, 70 FLRA 119, 140 (2016) (*VA Med. Ctr., Richmond*)).

The Respondent then argues that, while Davis's "multiple instances of abridgement of rules/regulations" are "not on their own [] flagrant misconduct," this "continued conduct" of "microaggressions have built up over time" and are not protected under the Statute because they "affect the efficiency of service." *Id.* at 14-15. In explanation, the Respondent cites to several joint exhibits. *Id.* These exhibits include emails between the Union and management in which the Union requests answers bargaining unit employees had about the hiring process for Core Team A, Jt. Ex. 4; an email from Mellott to human resources requesting that Davis be disciplined for emailing management about bargaining unit employees' health concerns (raised to the Union) following a Covid-cleaning, Jt. Ex. 24; and an email from Mellott to Austin complaining that Davis "grieves anything and everything," and indicating that Davis's activities are "bs," Jt. Ex. 31. The Respondent argues that Davis's continued conduct, as explained, means that she has lost the protection of the Statute and the reprimand was therefore justified, as Davis's conduct "affected the efficiency of service." Resp. Br. at 15.

As to the fourth point, that Davis's conduct was "flagrant misconduct" (which the Respondent refers to as "opprobrious conduct," but then uses the "flagrant misconduct" framework), the Respondent explains that the Authority looks to the place and subject matter of the discussion, whether the outburst is impulsive or designed, whether it is provoked by the employer's conduct, and the nature of the intemperate language and conduct. *Id.* at 16-17 (citing *DOD, Def.*

[6] It is clear that the Respondent is referring to the "flagrant misconduct" framework as the factors identified and the case cited, *DOD, Def. Mapping Agency, Aerospace Ctr., St. Louis, Mo.*, 17 FLRA 71, 81 (1985), both regard the "flagrant misconduct" standard. Resp. Br. at 16-17.

Mapping Agency, Aerospace Ctr., St. Louis, Mo., 17 FLRA 71, 81 (1985) (*Def. Mapping Agency*)). According to the Respondent, Davis's comments under this test establish "opprobrious conduct," as she was in a "public setting during a casual conversation with a supervisor and BUEs in passing," made her statements calmly and calculatedly, and "she knew the rumor was untrue because management assured her that her understanding of the hiring process was incorrect." Further, according to the Respondent, she was not reacting to anything the Agency had done. *Id.* Therefore, according to the Respondent, Davis's comments were unprotected and management had the right to take corrective action. *Id.* at 17.

IV. Analysis and Conclusions

A. Mellott's statements during the June 24, 2022 meeting violated § 7116(a)(1).

Under § 7116(a)(1) of the Statute, it is an unfair labor practice for an agency "to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter." 5 U.S.C. § 7116(a)(1). One such right is the right of employees to communicate with and obtain the assistance of union representatives under § 7102 of the Statute. 5 U.S.C. § 7102; *Michigan Army Nat'l Guard*, 69 FLRA 393, 397 (2016).

The standard for determining whether management's statement or conduct violates § 7116(a)(1) is an objective one. The question is whether, under the circumstances, the statement or conduct tends to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement. *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Elkton, Ohio,* 62 FLRA 199, 200 (2007) (citing *Marine Corps Logistics Base, Barstow, Cal.,* 33 FLRA 626, 637 (1988)). While the surrounding circumstances are considered, the standard is not based on the subjective perceptions of the employee or on the intent of the speaker. *See Dep't of the Army Headquarters, Wash., D.C.*, 29 FLRA 1110, 1124 (1987).

The standard is met, where, among other things, a statement explicitly links an employee's protected activity with treatment adverse to the employee's interests. *See, e.g., USDA, U.S. Forest Serv., Frenchburg Job Corps, Mariba, Ky.*, 49 FLRA 1020, 1034 (1994) (statement linking employee's use of official time with negative perceptions of employee's performance violates § 7116(a)(1)); *Dep't of the Treasury, U.S. Customs Serv., Region IV, Miami, Fla.*, 19 FLRA 956, 968-69 (1985) (statements linking employee's position as a union official with the denial of job assignments violates § 7116(a)(1)).

However, the Authority does not always require a statement to contain an explicit threat in order to find a violation. Instead, an employee's rights have been interfered with if the employee "has to think twice before exercising a statutory right." *IRS, Louisville*, 11 FLRA at 298. Considerations that tend to support a violation include whether the statement or conduct comes from a higher-level supervisor and whether the statement is made in anger, or with another negative tone. *See U.S. Dep't of the Treasury, U.S. Customs Serv., Miami, Fla.*, 58 FLRA 712, 718-20 (2003) (*Customs, Miami*) (asking employee, "why are you going to ask advice from [the union]?" was coercive as supervisor was clearly "very bothered and . . . peeved" that employee was "shopping for opinions"). On the other hand, § 7116(e) protects "the expression of any personal

view, argument, opinion or the making of any statement which . . . corrects the record with respect to any false or misleading statement made by any person" if "the expression contains no threat of reprisal or force . . . or was not made under coercive conditions." 5 U.S.C. § 7116(e).

The GC alleges as violative of the Statute Mellott's statements during the June 24, 2022 that the Union was incorrect that erroneous disclosures made during training should not result in a write-up, that an employee who followed bad advice from the Union was fired, and that the employees "do not work for the Union, the Union doesn't pay" them, and they need to go through the chain of command. GC Br. at 13-14. In considering whether these statements violated the Statute, I have assessed them as part of an organic whole, rather than as single, free-standing statements, as they were made in a single meeting, to one group of employees, and by a single supervisor seeking to make a single point. Boiled down, Mellott told the employees that the Union gave bad advice about erroneous disclosures, that another employee was fired for following the Union's bad advice, and that it is wrong to go to the Union for assistance. These statements deliver a message that the Agency disapproved of employees going to the Union and that bad things can happen when they do.

Mellott claims, however, that she was conveying to the employees that they should think for themselves and do their own research. Jt. Ex. 17 at 64; Tr. 125-26. This is not really a reasonable interpretation of Mellott's statements, however, as she did not indicate that employees need to think for themselves when told something by human resources or management, but that they do when presented with advice from the Union. The clear point is that it is the Union's advice, not that of human resources or management, that caused the employee to be fired in her cautionary tale, and that the same can happen to them if they go to the Union for advice.

Moreover, while it is possible that a listener might have heard the tale to indicate that the employee was fired only because the Union's advice turned out to be wrong, rather than for simply going to the Union, Mellott's other comments provide a different twist. Specifically, she did not stop with the cautionary tale, but instead followed up with her additional three points: "You do not work for the Union; the Union doesn't pay you . . . Go through the chain of command." Jt. Ex. 6; Tr. 64. None of these statements are addressed to the content of the Union's advice. Instead, they equate simply going to the Union with impropriety. And Mellott linked the parts together, specifically, it is improper to go to the one who "doesn't pay you" and for whom "you do not work" and an employee who did got fired. This is an implicit threat of reprisal for exercising a right under the Statute.

An ALJ decision cited by the GC, *Butner*, 2015 WL 6957089, at *13, addressed the manner in which similar statements contained an implicit threat, which violated the Statute. There, the supervisor's statements that the constant calls to the union were tearing the unit apart and that the employee needed to pick her battles contained the

> subtle, but distinct message that the union's involvement was harmful to the workplace, which ultimately suggested harm to the employees of the unit. A reasonable employee relying on the union to bring benefit to employees . . . could be troubled by the message (delivered by a manager) that the union may be causing

> harm instead, because it suggests that management may feel compelled to respond negatively to such harm. This kind of inference could cause a reasonable employee to 'think twice' about seeking the union's assistance.

Id. In that case, the additional factor of a difficult labor-management relationship helped compel the conclusion that a reasonable employee would "think twice" about seeking the union's assistance. *Id.*

A similar inference (as explained above) and similar coercive factors are at play in the instant case. One such factor, as was the case in *Butner*, *id.*, is that there is a generally "tense" labor-management relationship, as testified to by Davis, Tr. 24. Not only is it tense, but much in the record shows Mellott to have a general disdain for Davis as Union president and for what at least Mellott considers to be the Union's and Davis's interference in the workplace. *See, e.g.,* Jt. Ex. 17; *see also* Resp. Br. 14-15 (describing Davis's union activities as "microaggressions" that "bring[] the efficiency of the service to a deadlock," and citing, as examples, Jt. Ex. 24 (Mellott's email requesting that Davis be disciplined for contacting management over health concerns employees brought to the Union following office Covid-cleaning); Jt. Ex. 31 (Mellott's email noting that Davis grieves "anything and everything," which she considers to be "bs")). It is unlikely that this disdain has escaped the notice of the bargaining unit employees.

Other factors to consider when assessing the impact upon a reasonable employee from management statements include the demeanor in which the manager delivered them. For example, in *Customs, Miami,* the manager was "very bothered and . . . peeved" when asking about why the employee was asking for the union's opinion on a matter, which helped lead to the finding of unlawful coercion. 58 FLRA at 718-20. In *IRS, Louisville*, the manager was upset and angry when he told the union representative that he was doing the employees a disservice by sticking "his nose into things," among other negative statements, which led to the conclusion that the agency had unlawfully coerced the representative with regard to union activity. 11 FLRA at 298.

Mellott's demeanor during the meeting similarly must be considered. While there is no indication that Mellott exhibited anger during it, it is clear that she spoke in strong terms, referring to Davis's information as "100% incorrect," Tr. 122, or "100% wrong," Jt. Ex. 17 at 63, describing how erroneous disclosures can be "catastrophic," Tr. 125, and punctuating her point with "You don't work for the Union; the Union doesn't pay you . . . Go through the chain of command." Jt. Ex. 6. It is also clear that Mellott was irritated with Davis then and generally, as noted above. Given the level of irritation from Mellott toward Davis that is apparent in the record, and her specific irritation regarding Davis's information about erroneous disclosures (which, according to Mellott, made the employees think management was being harsh and unfair), Jt. Ex. 17 at 63, it is highly likely that the irritation came through at the meeting.

Another factor that helps compel the conclusion that Mellott's statements would make a reasonable employee "think twice" before going to the Union for assistance is the sequence of events that culminated in the "erroneous disclosures" meeting. Specifically, the employees were concerned about performing personal errands for their supervisor, Koperdak, and after the Union pushed the issue, the Agency began an investigation of Koperdak. Tr. 50. Then, Koperdak wrote-up James for an erroneous disclosure, which James was concerned was retaliatory, and also held a meeting to tell the employees about her disappointment that they reported her. Jt. Ex. 5. Next,

Mellott called a meeting of the same employees essentially to tell them that Koperdak was correct to issue the write-up for the erroneous disclosure, that an employee was fired after going to the Union, and that it is improper to go to the Union for assistance. Mellott's statement piled on to the message that the employees should stay away from the Union, another surrounding circumstance that supports coercion.

The final factor that leads to the conclusion that Mellott's statements would make a reasonable employee "think twice" before seeking out the Union's assistance is that all of these statements came from the employees' fourth-level supervisor at a meeting that had an air of formality, including, for example, that it was set up in advance and called to address specific matters of concern. Therefore, considering Mellott's statements at the June 24, 2022 meeting as a whole, which contained an implicit threat regarding seeking Union advice, and the surrounding circumstances, including a tense labor-management relationship, Mellott's general disdain toward Davis and her union activities, Mellott's demeanor at the meeting, the sequence of events leading to the meeting, Mellott's higher-level supervision, and the rarity and formality of the meeting, all lead to the conclusion that Mellott's statements would cause a reasonable employee to "think twice" before seeking out the Union's assistance and, as such, the Respondent is found to have violated § 7116(a)(1) of the Statute as a result.

In so finding, I do not agree with the Respondent's argument that Mellott's statements were protected by § 7116(e) as a permissible management expression under the Statute. *See* Resp. Br. at 4. Section 7116(e) protects "the expression of any personal view, argument, opinion or the making of any statement" to "correct the record with respect to any false or misleading statement" and only under certain circumstances, specifically when "the expression contains no threat of reprisal . . . or was not made under coercive conditions." 5 U.S.C. § 7116(e).

The Respondent argues that Mellott was "correcting the record with respect to any false or misleading statement" when she sought "to ensure that staff understood how the Agency addresses erroneous disclosures," and to "be wary of blindly following the Union's guidance." As to Mellott's statement "correcting the record" about how the Agency handles erroneous disclosures, the Respondent has not established that Davis's email was false or misleading. This is so because the GC provided Davis's basis for its belief that erroneous disclosures during training do not count "against an employee and should not end up being a write-up," *see* Jt. Ex. 5, as Davis explained that the Union previously successfully grieved such an issue. Tr. 33. In other words, the GC established that that was a way in which the Agency handled erroneous disclosures during training. While Mellott explained another way of handling them, both in testimony and in the meeting, the Respondent did not establish that that was the only correct way. Therefore, it cannot be said that Mellott was "correcting the record with respect to [a] false or misleading statement," when she explained that Davis was "100% incorrect."

Further, even assuming that the only other thing that Mellott said (which is not the case) was to be "wary of blindly following the Union's advice," it is unclear how that corrects the record. Equally unclear is how the "cautionary tale" about the fired employee and the statements, "You don't work for the Union" and "the Union doesn't pay you" correct the record. Taken literally, there is nothing in the record to indicate that Davis told the employees that the Union employed them or that the Union paid them, and therefore there is nothing literally to correct. Taken

figuratively, which is how the latter statements were intended, Mellott was simply discouraging the employees from going to the Union and was not correcting any false or misleading statements.

The Respondent's argument that § 7116(e) protects Mellott's statements also fails because, even assuming the statements corrected the record as to false or misleading statements (which has not been established), they lose § 7116(e)'s protection when they contain a "threat of reprisal" or were "made under coercive conditions." *See* 5 U.S.C. § 7116(e). It is established above that both were present as part of Mellott's statements. However, it is appropriate to address herein the Respondent's arguments otherwise at this point.

Firstly, the Respondent argues that the GC incorrectly equated Mellott's "cautionary tale" with a "threat" in arguing that the tale was an unfair labor practice, but to the witnesses it was only a warning. Resp. Br. at 4-5 (citing Tr. 63). However, the Respondent did not explain the difference between the words "threat" and "warning" in terms of application to either § 7116(a)(1) or § 7116(e). *Id.* at 4-5. Moreover, the Respondent's citation to the record does not even include the word "warning." Tr. 63. If, however, the Respondent intended to equate the term "cautionary tale," which is included in the Respondent's citation, *id.*, with the word "warning," it is noted that it was not the "cautionary tale" alone that was alleged to violate the Statute, but the entirety of the statements, which included much more than the "cautionary tale."

The Respondent further argues that Mellott's statements were not coercive or did not contain a threat as James heard the distinction in the cautionary tale between following "bad advice" from the Union versus going to the Union for advice at all, *id.* at 6 (citing Tr. 77), and Hensley did not testify that Mellott told them not to go to the Union, but rather emphasized the need to go through the chain of command, *id.* (citing Tr. 62). However, both indicated that they understood Mellott to be discouraging them from going to the Union. Tr. 78; Jt. Ex. 6.

Also in support of its argument that § 7116(e) protects Mellott's statements, the Respondent relies on *162nd Tactical Fighter Group, Ariz. Air Guard*, 18 FLRA 583, 604 (1985) (*162nd Tactical Fighter Group*). Resp. Br. at 7. In that case, the Respondent stated that unions have no place in the National Guard and that unions are a waste of taxpayers' money. The Authority held that those statements were not made under coercive conditions, were not accompanied by any threat of penalty or reprisal, and could not be construed as interfering with the rights of employees to freely join or assist a labor organization. As such, they did not violate the Statute. *162nd Tactical Fighter Group*, 18 FLRA at 604. As Mellott's comments were otherwise, in particular, they were made under coercive conditions, contained an implicit threat of reprisal and interfered with statutory rights, as established above, the case cited does not provide support.

Finally, the Respondent argues that the logical conclusion following the GC's theory is that management cannot make any comments about the Union to bargaining unit employees without violating the Statute. Resp. Br. at 7. This is simply an ill-founded exaggeration, as there are many ways in which management could have addressed the erroneous disclosures issue that would not have tended to coerce the employees with respect to their statutory right to obtain the Union's assistance. The Respondent is therefore found to have violated § 7116(a)(1) by interfering with, restraining, or coercing the employees in the exercise of their rights under the Statute when Mellott

made her statements about the Union's "100% incorrect" or "100% wrong" information, the "cautionary tale," and that the employees "don't work for the Union; the Union doesn't pay [them]" and they should "go through the chain of command."

B. The Respondent violated § 7116(a)(1) and (2) by investigating and disciplining Davis for her protected activity.

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." 5 U.S.C. § 7116(a)(2). In *Letterkenny*, 35 FLRA at 117-18, the Authority established the analytical framework for determining whether an agency action violates this provision. Under *Letterkenny*, the GC must establish, by a preponderance of the 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. If the GC proves these elements, it has established a prima facie case of discrimination. *Id.* 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*).

Further, where the alleged discrimination concerns discipline for conduct occurring during protected activity, a necessary part of the respondent's defense is that the conduct constituted flagrant misconduct or otherwise exceeded the boundaries of protected activity. *Laredo*, 71 FLRA at 1073; *Fed. BOP, Office of Internal Affairs, Wash., D.C. and Fed. BOP, Fed. Corr. Inst. Englewood, Littleton, Colo.*, 53 FLRA 1500, 1514-15 (2001) (*BOP, Internal Affairs*). The Authority has held that false statements can constitute conduct that exceeds the boundaries of protected activity, but only when those statements are "knowingly false and uttered with reckless abandon." *Laredo*, 71 FLRA at 1073 (citing *U.S. Forces Korea, 8th U.S. Army*, 17 FLRA 718, 728 (1985) (*Korea*)).

It is therefore unlawful to investigate or discipline an employee for conduct occurring during protected activity unless that conduct constitutes "flagrant misconduct" or "otherwise exceed the boundaries of protected activity." *Laredo*, 71 FLRA at 1072-73. For example, in *Laredo*, the Authority found that a supervisor reporting an employee for lack of candor during protected activity and the agency's subsequent investigation into that allegation was unlawful retaliation as the employee's statements were not knowingly false or uttered with reckless abandon. 71 FLRA at 1072-73. Finally, this necessary element of the defense remains even when the action is taken consistent with Agency policy. *Id.* at 1073.

i. The General Counsel has established a prima facie case of discrimination for conduct occurring during protected activity.

The evidence establishes that the Agency investigated and disciplined Davis for statements she made on July 19, 2022. *See* Jt. Exs. 9, 10, 11, 12, 13, 19, 32. Although Davis's statements during her conversations on July 19, 2022, were basically the same, the GC and the Respondent disagree as to the conversation(s) that gave rise to the investigation and discipline. The GC assumes that it was for both conversations that Davis recalled: the first one with Sanford and Duvall (Sanford-Duvall conversation) and the second with Harvey. GC Br. at 17-18. However, as it does not appear Mellott was aware of Davis's conversation with Harvey alone at the time of the investigation and discipline (assuming that the conversation occurred and was not a conflation in Davis's mind with the Harvey-Duvall conversation), *see* Jt. Ex. 12, I do not find that that conversation was a basis for the investigation and the discipline.

The Respondent argues that it investigated and disciplined Davis for the Harvey-Duvall conversation, rather than for both the Sanford-Duvall and the Harvey-Duvall conversations, as that was the conversation that "caused staff to be upset and that caused a disruption in the workplace." Resp. Br. at 11. However, it is unclear that it was the Harvey-Duvall conversation alone that caused the upset.[7] Indeed, it would be difficult, if not impossible, to separate that out, as Duvall was present for two conversations, and whatever he said to others was undoubtedly a product of both. *See* Tr. 143, 172, 178. Nevertheless, given that the investigatory material focused primarily on the Harvey-Duvall conversation, Jt. Ex. 12, I find that the Harvey-Duvall conversation was the basis for the investigation and discipline of Davis.

The question then is whether that conversation was protected activity. If so, then the GC will have established its prima facie case for conduct occurring during protected activity. *Laredo*, 71 FLRA at 1073; *BOP, Internal Affairs*, 53 FLRA at 1514-15. Specifically, it will have established that Davis engaged in protected activity (the conversation), that the protected activity was a motivating factor for the investigation and discipline, and that the conduct at issue (the conversation) occurred during the protected activity (the conversation). In essence, the GC will have established a prima facie case that the Agency investigated and disciplined Davis for the content of her protected activity (the conversation).

Regarding union officials, the Authority examines whether the employee was acting in his or her official union capacity at the time of the allegedly protected activity. *BOP, Internal Affairs*, 53 FLRA at 1516-18. For example, in *BOP, Internal Affairs*, the union president was disciplined for conduct during a meeting in which she was being counseled. The Authority held that the employee was acting in her capacity as union president during the counseling meeting because "the counseling meeting was called and occurred solely as a result of the union president's actions as union president and the union president was called to the meeting solely because of her position in the union." *Id.* Moreover, it is the nature of the activity that determines whether it is protected activity. *Border Patrol*, 44 FLRA at 1401. If the discussion or comments are "related to an issue that is of interest to bargaining unit members, rather than merely a private concern," the discussion or comments are appropriately considered protected activity. *U.S. Dep't of VA, VA Med. Ctr. Okla. City, Okla.*, Case No. DA-CA-01-0334, 2002 WL 31994424, at *8 (Nov. 1, 2002) (OALJ Dec.).

[7] Moreover, the upset really came about due to others' misunderstandings, rather than Davis's statements.

It is also well-settled that the union official does not need to be on official time to be considered as acting in an official union capacity. *Border Patrol*, 44 FLRA at 1401-1402; *Air Force Flight Test Ctr., Edwards AFB, Cal.*, 53 FLRA 1455, 1455-56 (1998). As well, the discussion may even be with a manager, rather than a bargaining unit employee, if the purpose is to address matters of interest to bargaining unit members. *See Dep't of Transp., FAA, Wash. D.C.*, 64 FLRA 410, 410 (*FAA, Wash., D.C.*) (union official's discussion with manager regarding overtime assignments to fill vacancies considered to be in official union capacity).

Regarding Davis's Harvey-Duvall conversation, the Respondent characterizes it as Davis simply "having a coffee in the breakroom while chatting with a supervisor, who had no bearing on the job announcement at issue," and as such it was not protected activity. Resp. Br. at 12. This is not however an accurate characterization of the conversation.[8] *Id.* While a supervisor was involved, so were two bargaining unit employees, Duvall and Miller.[9] Further, and most importantly, it was more than a chat, but rather a request to the Union president "to update on the positions and if she knew anything about it." Tr. 108-109. It is telling that supervisor Harvey testified that the reason Davis was asked was because "she's our Union president" and that if employees want "to ask anything, they could ask her and not [ask] the upper management." Tr. 111. Therefore, the conversation involved a matter of interest to the bargaining unit, asked of Davis because she is the Union president.

The Agency's own documents further make clear that the targeted conduct was Davis's actions as Union president. Mellott's harassment report stated that Davis's discussions in the breakroom were examples of Davis "get[ting] enjoyment out of abusing her position as the Union President and making the BUEs think that she has insider information. She started this rumor to hurt the BUEs." Jt. Ex. 10; *see also* Jt. Ex. 12 at 48 (similar). Further, Mellott's intake forms for the investigation identified the alleged harasser as "Barbara Davis, Union President." Jt. Ex. 12. As well, in Mellott's August 1, 2022 memorandum about Davis's statements, she commented that "management officials and Union officials should be working together" and that "maintaining a good relationship with the Union should not mean that Union official or management official misconduct is ignored." Jt. Ex. 12 at 49. As in *BOP, Internal Affairs*, 53 FLRA at 1516, the matter specifically involved "the Union president's actions as Union president, and the Union president was [involved] solely because of her position in the Union." As such, it is established that Davis was engaged in protected activity when she had the Harvey-Duvall conversation.[10]

Therefore, the GC has established that Davis engaged in protected activity (the conversation), that the protected activity was a motivating factor for the investigation and discipline, and that the conduct at issue (the conversation) occurred during the protected activity

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[8] The Respondent similarly mischaracterizes the GC's position as arguing that "any time Ms. Davis is talking about anything related to work she must be acting in her union capacity." Resp. Br. at 11. The GC has not so argued, but rather argues that it is when Davis is addressing bargaining unit employees' concerns that that is so. GC Br. at 18.

[9] Even if the conversation had only involved a supervisor, given that the conversation was addressed to bargaining unit employees' concerns, it also would have been considered protected activity. *See FAA, Wash. D.C.*, 64 FLRA at 410.

[10] Further, it is clear that Davis's Sanford-Duvall conversation, which involved whether to file a grievance, is also protected activity, as cases holding that the pursuit of a grievance constitutes protected activity are legion. *See U.S. Dep't of HHS, SSA, Balt., MD*, 42 FLRA 22, 25 (1991); *EEOC*, 24 FLRA 851, 855 (1986), *affirmed sub nom., Martinez v. FLRA*, 833 F.2d 1051 (D.C. Cir. 1987).

(the conversation).[11] As such, the GC has established its prima facie case, including that the conduct occurred during protected activity. Therefore, the Respondent has the heightened burden to establish, not only: (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; but (3) that the conduct at issue was either flagrant misconduct or that it otherwise exceeded the boundaries of protected activity. *Letterkenny*, 35 FLRA at 117-18; *Laredo*, 71 FLRA at 1073; *BOP, Internal Affairs*, 53 FLRA at 1514-15.

ii. The Respondent has not established that Davis engaged in either flagrant misconduct or conduct that otherwise exceeded the boundaries of protected activity.

With regard to allegations of false statements, at issue here, in order to establish that the statements exceeded the boundaries of protected activity, the Authority has held that the respondent must establish that the statement was false, and specifically "knowingly false and uttered with reckless abandon." *Laredo*, 71 FLRA at 1073 (citing *Korea*, 17 FLRA at 728 (1985)). Therefore, the first question is whether Davis's statements were false.

I found that Davis stated essentially that the Core Team A positions had been given to the DCU/Team A employees, not to other CPR employees, but that there would be "other positions open." In fact, at the time of Davis's statements, the Core Team A positions had been given to the DCU/Team A employees. However, also at that time, one CPR employee, Miller, had been selected for Team A, Jt. Ex. 33, although she had neither received her offer, nor accepted it, nor been hired for it. Tr. 162, 166. As Miller had neither been offered the position, nor accepted it, it literally therefore had not been given to her, making that part of Davis's statement literally true. However, it appears that Davis meant to convey (as to this part of the conversation) that all of the Core Team A positions had been filled already by the DCU/Team A employees. As Miller (who was not a DCU/Team A employee) had been selected, what Davis meant to convey was not fully true, but it also cannot be said to be false, given that it was literally true. It is also noteworthy that Mellott had the same understanding that Davis did about the DCU/Team A employees filling up Core Team A. Tr. 120.

As to the other part, that there were "other positions open," Supervisor Austin testified that, as of July 19, 2022, selections for the Core unit positions had been made and some of those selected were other CPR employees, but "the individuals selected were not aware of it at that point." Tr. 157. Literally, therefore, other positions were still open, consistent with what Davis said, as these employees had not been hired into the positions yet. However, what Davis likely meant was that there would be other selections and that CPR employees might get selected. The truth, however, as Austin explained, was that some CPR employees had actually gotten selected for the other positions already. Tr. 157. Therefore, this part of Davis's statement also falls into a grey area, as it was literally true, but not fully true as to what Davis meant to convey.

[11] The Respondent argued that, even assuming that Davis was "acting in a union capacity, the charge must fail because there is no evidence that the investigation and subsequent letter of reprimand were motivated by the alleged union activity." Resp. Br. at 8. However, this argument misses the precise point. The conversation and statements therein were the union activity. Without them, there was no subject matter to investigate or discipline.

Even though Davis's statements fall in a grey area, such that they cannot be said to be false, it is worthwhile to address the second part of the Respondent's proof, that Davis made the statements knowing them to be false and that she made them with reckless abandon. *See Laredo*, 71 FLRA at 1073; *Korea*, 17 FLRA at 728. The Respondent argues that "Davis knew the rumor was untrue because management assured her that her understanding of the hiring process was incorrect, yet she chose to ignore management." Resp. Br. at 17 (citing Jt. Ex. 4 at 6-7). The cited exhibit however is an email exchange between Davis and management about other matters regarding the Core hiring, and do not regard whether the Core Team A positions had been given to the DCU/Team A employees, and not the CPR employees, and whether there were "other positions open." *See* Jt. Ex. 4 at 6-7; Jt. Ex. 34. Given that, the email exchange does not establish that "Davis knew the rumor was untrue," as the Respondent claims.

Moreover, the GC has established that Davis believed her statements to be true, and that she (reasonably) based her belief on information provided to her by a supervisor and DCU/Team A employees who had received offers. Tr. 42. Further, the evidence does not establish that, as of July 19, 2022, Davis knew or had any reason to know about the additional selections for the Core positions or that at least one CPR employee, Miller, had been selected for Core Team A. As such, the Respondent has failed to establish that Davis's statements were knowingly false and made with reckless abandon. Therefore, the Respondent has failed to establish that Davis's statements, which otherwise would be protected, were outside the boundaries of protected activity.

The Respondent nevertheless also argues that Davis's statements constitute "flagrant misconduct," Resp. Br. at 16,[12] another framework for establishing that conduct, otherwise protected, exceeds the boundaries of protected activity. The "flagrant misconduct" standard is one specifically designed to assess whether language or conduct used during protected activity (typically in a grievance or other union-management meeting) that is intemperate, abusive, insulting or vulgar loses the protection of the Statute, as not all does. It is designed to balance the employer's right to maintain order and respect for supervisory staff against the need for leeway for impulsive behavior during protected activity, such as grievance meetings, where "[p]assions run high and conflicts are highly emotional and personal." *Def. Mapping Agency*, 17 FLRA at 81; *see also BOP, Internal Affairs*, 53 FLRA at 1514-15 and n.10; *Dep't of the Air Force, Grissom AFB, Ind.*, 51 FLRA 7, 11-12 (1995). As such, it is not a standard designed for this situation, as the Agency did not investigate or discipline Davis due to disrespectfulness, abusiveness or vulgarity, but rather because of alleged falsity. Jt. Exs. 9, 10, 11, 12, 14, 19 at 73, 29, 32. Nevertheless, because raised by the Respondent and also addressed by the GC, I will address it briefly, recognizing that I do not find it has application herein.

Under the "flagrant misconduct" framework, the considerations are "the place and subject matter of the discussion, whether an employee's outburst was impulsive or designed, whether the outburst was in anyway provoked by the employer's conduct, and the nature of the intemperate language and conduct." *Def. Mapping Agency*, 17 FLRA at 81. According to the Respondent's assessment, these factors weigh against Davis, as she was not in a union or representational setting, but rather in a public setting, the comments were not impulsive and were not provoked, and Davis was "spreading a baseless accusation." Resp. Br. at 17. The GC argues that Davis's "limited

[12] Respondent actually argues that Davis engaged in "opprobrious conduct," rather than "flagrant misconduct," but then assessed Davis's statements using the flagrant misconduct" standard. Resp. Br. at 16.

conversations with employees who approached her did not constitute 'spreading rumors,' and did not come 'close to the kind of insubordinate, disrespectful, or threatening conduct that might otherwise constitute flagrant misconduct.'" GC Br. at 20. Even assuming this standard applied, I disagree with the Respondent's assessment, because, contrary to the Respondent's view, Davis was in a typical representational setting (Davis presented undisputed testimony to that effect), the statements were literally provoked, as questions were asked, and Davis's statements were not "baseless." Further, I agree with the GC that Davis's statements were not insubordinate, disrespectful, or threatening conduct, and were simply limited responses to questions posed, and as such were not "flagrant misconduct."

Despite that it is clear that the Respondent has failed to meet its burden to establish that Davis's statements exceeded the boundaries of protected activity, given the attention it has given to its application of the Agency's anti-harassment policy as a defense to its investigation and discipline of Davis, it is important and (hopefully) instructive for me to address that matter. The Respondent argues that its investigation "was the result of a neutral application of a neutral policy that NARA instituted" and which "gives management no deference in choosing to ignore the established protocols to investigate whether harassment took place." Resp. Br. at 12. Further, the Respondent argues that "no one in NARA had any undue influence over the investigation or otherwise guided the investigation to a pretextual conclusion." *Id.* at 13.

The Authority rejected a similar argument in *Laredo*, 71 FLRA at 1073, a case in which a supervisor reported an employee to the "Joint Intake Center" for lack of candor based on statements he made during protected activity. The "Joint Intake Center" then investigated the employee. In defense of the § 7116(a)(2) discrimination/retaliation charge, the agency argued that there was a legitimate justification for its action because the supervisor "followed [a]gency policy in filing his report with the Joint Intake Center." *Id.* The Authority reasoned that, "even if the supervisor acted in accordance with [a]gency policy, the [a]gency still must show that it would have taken the same action *in the absence* of the [employee's] protected activity." *Id.* However, the agency was "unable to make that showing because the supervisor's report to the Joint Intake Center, in which he accused the [employee] of lack of candor, was based only on statements that the [employee] made in the course of his protected activity." *Id.* Moreover, the Authority explained that, given that the report and investigation were for statements made during protected activity, the agency had to establish, not only that the supervisor believed the employee's statements to be false when making the report, but "were knowingly false and uttered with reckless abandon." In that case, given that the incident "was the result of miscommunication," the agency failed in meeting its burden. *Id.* at 1073-74.

The Respondent's argument that it was justified in its actions because Mellott was required to report Davis's statements consistent with the Agency's neutral policy fails for the same reason. In order to justify the report and investigation, the Respondent had to establish that it would have taken the same action - reporting, investigating and disciplining Davis - in the absence of Davis's protected activity. However, the Respondent cannot make that showing because the report, investigation and discipline were specifically about the content of Davis's protected activity. Further, Davis's statements were literally not false, and, even if not fully true, they were not knowingly false and made with reckless abandon. As such, the Respondent's argument that it was following a neutral policy fails for this reason.

The Respondent's argument that Mellott was required to report the harassment fails for a number of other reasons also. First among them is that it is a rather large leap to come to the conclusion that Davis's act of responding reasonably to questions asked of her constitutes harassment under the Agency's policy. Under that policy, harassment is "unwanted and unwelcomed behavior that demeans, threatens, or offends someone and results in a hostile environment for that person," based on "race, color, national origin, religion, age (over 40 or older), disability" or other status or reason. Jt. Ex. 35 at 101. While harassment may be in the form of "[s]preading rumors," the rumor must otherwise still fit the general definition of harassment. Jt. Ex. 35 at 102. Based upon the policy language, it is very far from clear that the allegation (which was that Davis responded to questions about the selections for the Core positions in a way that Mellott believed was false) was one of harassment, such that Mellott would have been compelled to report it, as Davis was only responding to questions presented to her, not engaging in unwanted and unwelcomed behavior that demeans, threatens or offends someone based on a particular status or other reason.

Further, even assuming that Mellott believed that Davis engaged in harassment in violation of the Agency anti-harassment policy by starting and spreading a rumor about the hiring, Jt. Exs. 9, 10, 11, 12 at 48-49, and 19, it is noted that nearly all of the bargaining unit employees involved spread information about the Core hiring. There is also evidence that the misunderstanding about the hiring started even before Davis had arrived at the facility that day. Tr. 89. Further, Davis was only one of two who got it right, or close to right, the other being Sanford. Yet, Mellott apparently reported only Davis. The Respondent seems to argue that this was because Davis is the Union president, and therefore the employees believed she must have known something that Duvall did not. Resp. Br. at 12 n.1. However, the anti-harassment policy does not make such a distinction. If the policy compelled Mellott to report Davis, it compelled her to report all who spread information. Conversely, she was compelled to report none, which is the most logical result given the far-fetched assessment that Davis's (or others') statements were harassment. It is also noteworthy that the Respondent admits that it was Davis's status as the Union president that caused Mellott to report her under the policy. That is not a neutral application of reporting.

Also, the investigation itself was not performed in a neutral manner. In support of its claim otherwise, the Respondent argues that, once the Agency realized that Mellott both "act[ed] as intermediary between the Ad Hoc Committee and Ms. Davis" and also had "instituted the investigation," the Agency referred the investigation to its third-party contractor. As to that investigation and conclusion, the Respondent asserts it had "no undue influence." *Id.* at 12-13.

It should be first pointed out that Mellott did not serve as an intermediary, but rather as the investigator. *See* Jt. Exs. 10, 11, 12. This is particularly troublesome given that Mellott had made up her mind that Davis was guilty by the time she made the report to Shorter. This is clear from the title of her email to Shorter: "Report of Harassing Behavior to Ad Hoc Committee on Harassment." Jt. Ex. 10 at 13. It is further clear from the opening paragraph: "[i]t came to my attention last week that [] Davis engaged in unlawful harassment and violated [the Agency's] anti-harassment policy. Specifically, she started and spread a rumor that undermines the integrity of the employment relationship and interferes with work productivity." *Id.* at 13. She even appeared to have come to her conclusion earlier that Davis had violated the policy, as she emailed her supervisor, Levins, to

that effect on July 22, 2022: "[Davis] is in violation of [the Agency's anti-harassment policy, [as] she deliberately interfered with work productivity by spreading rumors, making a concerted effort to undermine good order and morale." Jt. Ex. 9.

Secondly, before the matter was turned over to the Agency's human resources provider, Tr. 133, 136, Mellott's investigation was performed with a heavy thumb on the scale. For example, Mellott's cover email to the employees from whom she requested statements was highly suggestive:

> Please respond to the following allegation: Barbara Davis engaged in unlawful harassment and violated NARA's Anti-Harassment Policy . . . [when] she started and spread a rumor that undermines the integrity of the employment process and interferes with work productivity. Having no knowledge about the career ladder 4/5/6 core technician positions, she started a rumor that no CPR employees have been selected for the positions, that the positions will be filled by MPR employees and that the CPR employees should begin to file complaints against the Agency.

Jt. Ex. 11. Further, in her email to Davis, asking for her explanation, she put Davis in the difficult position of asking her to turn on the bargaining unit employees and speculate about their reasons for lying: "If the allegations are false, why might the complainants lie?" Jt. Ex. 13 at 50-51. Moreover, Mellott did not seek to interview Sanford or Davis, which Shorter had indicated was appropriate absent written statements, although Mellott indicated that she ran out of time before the investigation was turned over to the human resources provider. However, she did have time to write a lengthy summary of her own for the human resources provider, the August 1 memorandum for the record, which was replete with additional accusations about Davis. Jt. Ex. 12 at 48.

As well, as to the claim that the human resources provider did an independent assessment after it was turned over, Resp. Br. at 13, it did not. The record does not support that it performed any investigatory tasks at all. Indeed, the record does not support that it even gave Davis the opportunity to respond to Mellott's accusatory August 1 memorandum for the record. Jt. Ex. 12 at 48-49. Nor is there any indication that an effort was made to interview Sanford. The only function the record reflects that the provider performed was to summarize the statements collected by Mellott pursuant to her highly suggestive investigation. Jt. Ex. 19. The summarization also did not include Davis's email to Agency officials, including Levins, the only document the Agency had that addressed Davis's version of events. Jt. Ex. 16 at 60. Therefore, it is simply incorrect to claim, as the Respondent did, that a third-party conducted an independent investigation.

Finally, after the provider performed its summarization, leaving out the alleged harasser's version, it returned the matter to the Agency, specifically Shorter, Jt. Ex. 19, who had put Mellott in charge of investigating her own complaint, and one in which it was apparent that Mellott had made her decision from the outset. Thereafter, it was Shorter who concluded that Davis had engaged in "inappropriate behavior," Tr. 133, and Levins, Mellott and Austin who put in place the processes for the discipline and then disciplined Davis. Jt. Exs. 29, 31, 32. It is impossible on these facts to say that the Agency had no undue influence over the investigation and the discipline.

It is also important to address the Respondent's argument that § 7106(a)(2)(A) of the Statute provides the Agency with an independent basis for correcting Davis's "continued conduct." Resp. Br. at 14-15. The Respondent analyzes that § 7106(a)(2)(A) of the Statute explicitly affords an "employer the right to correct conduct" if it has a "legitimate justification," which would include "a serious abridgement of [. . .] rules or regulations and flagrant misconduct." *Id.* at 15 (citing *VA Med. Ctr., Richmond*, 70 FLRA at 140).

There are at least two problems with this argument. The first is that § 7106(a)(2)(A) does not provide an independent basis for correcting Davis's conduct. While § 7106(a)(2)(A) is the management rights' provision that preserves the right to discipline employees, such discipline must be done "in accordance with applicable laws." 5 U.S.C. § 7106(a)(2)(A). One such applicable law is § 7116(a)(2), at issue in the instant case.

Second, the Respondent's case citation in support of its position, *VA Med. Ctr., Richmond*, 70 FLRA at 140 (citing *U.S. Dep't of Def., Fort Bragg Dependents Sch., Fort Bragg, N.C.*, 49 FLRA 333, 342-43 (1994)), refers to a standard for determining whether an agency may appropriately deny a non-employee representative access to its facility under § 7106(a)(1) of the Statute (which preserves the right of an agency to determine internal security practices). The standards for such a matter, involving § 7106(a)(1) and preservation of the agency's right to determine internal security practices, do not have application to the matter herein, which involves an employee representative who was disciplined, and not internal security practices.

Finally, it is important to address the Respondent's post-hoc rationalization for the letter of reprimand, which is that it was entitled to discipline Davis for her "continued conduct" involving "microaggressions" which managers "routinely must address," and which distracts "both management and BUEs from the critical elements of their positions." Resp. Br. at 15. The "microaggressions" the Respondent provides as examples, Resp. Br. at 14-15, involved Davis emailing management about bargaining unit employees' concerns about hiring for the Core positions, Jt. Ex. 4, and about Covid-cleaning, Jt. Ex. 24, and filing grievances, Jt. Ex. 31. All of these examples that the Respondent now charges are responsible for Davis's letter of reprimand are examples of representational activity performed on behalf of bargaining unit employees and are protected activity.

As such, taking the Respondent at its word, even if it did not discipline Davis for Davis's statements about the hiring (or only partially for the statements) it disciplined Davis for other protected activity. To rebut that prima facie case, the Respondent again needed to establish flagrant misconduct or that Davis's conduct otherwise exceeded the boundaries of protected activity. *See Laredo*, 71 FLRA at 1073; *BOP, Internal Affairs*, 53 FLRA at 1514-15. There is nothing in the conduct that so establishes that. As such, the Agency is found to have violated § 7116(a)(1) and (2) of the Statute.

iii. Alternatively, even absent establishing that Davis's statements were protected activity, the Respondent nevertheless is found to have violated § 7116(a)(1) and (2).

It is unnecessary to go further, but, as both parties did, I will also address the question of whether, even assuming the statements were not protected activity (and the Respondent did not otherwise admit in its

post-hearing brief that it was motivated to discipline Davis due to her "microaggressions," which are (also) protected activity), the Agency nevertheless violated § 7116(a)(1) and (2) of the Statute. In so assessing, *Letterkenny*, 35 FLRA at 117-18, provides the analytical framework. Specifically, the GC must establish, by a preponderance of the 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. *Id.* 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. *See Davis-Monthan AFB*, 58 FLRA at 637 & n.2.

There is ample evidence that Davis engaged in protected activity, as discussed fully herein, even assuming the hiring conversation was not protected activity. The next question is whether the GC has established that the protected activity was a motivating factor in the Agency's treatment her. This motivation may be established by evidence of union animus close in time to the treatment. *See FAA, El Paso*, 39 FLRA 1542, 1551 (1991). In this case, such animus is shown by Mellott seeking to discipline Davis for raising bargaining unit employee health concerns, *see* Jt. Ex. 31, indicating that Davis constantly files "grievances that are without merit," Jt. Ex. 24, referring to Davis's filing of grievances as "bs," Mellott's negative comments about the Union at the June 24, 2022 meeting, Mellott's description of the Union leading bargaining unit employees astray by among other things, bringing employees who "did not want to be involved in anyone's drama" into the "small Union office" in "violation of social distancing policy," Jt. Ex. 17 at 63, and Mellott's and Austin's negative references to Davis seeking to bargain over a change in conditions of employment, Jt. Ex. 22. There are other examples.[13]

Motivation can also be established by statements that draw a direct connection between protected activity and the Agency's actions. *See FAA*, 64 FLRA at 369. In this case, such statements include the reference on the intake forms that the accused harasser is "Barbara Davis, Union President." Jt. Ex. 12. They also included Austin's testimony that she issued the letter of reprimand to Davis because "it was something that was uncalled-for, and she's union, and she was not on union time, and just a lot of things all together that day was just not appropriate." Tr. 155. While Austin later reversed course, Tr. 156, I credit the initial statement as the truth, because the reversal resulted from a specific, leading effort to rehabilitate the testimony, *id.*, making the reversal less credible. There are other statements as well that draw the direct connection. *See* Jt. Ex. 12 at 48-49, among others.

As such, the GC has established its prima facie case, even absent a finding that the statements themselves were protected activity and even absent the Respondent's admission that the Agency investigated and disciplined Davis for other protected activity, as well, *i.e.*, the "microaggressions." As to the Respondent's defense, it has not established a legitimate

[13] Moreover, Mellott's union animus has plainly spilled over to inferior managers, as exhibited by Gooch's statement and testimony that, following the hiring conversation problems, she wanted to make sure the employees know that, as "their supervisor, [she is] telling the truth and any other information they [] heard [from the Union] was fabricated or a rumor." Tr. 191; *see also* Jt. Ex. 12 at 30.

justification for the investigation and the discipline. Specifically of note is the fact that only Davis was investigated and disciplined as opposed to the other employees who discussed the matter on July 19, 2022. *See Letterkenny*, 35 FLRA at 117-18. Further, as discussed above, the Agency pursued the investigation in a non-neutral manner, also as discussed more fully above. Finally, with regard to the discipline, had the investigation been pursued carefully, without a heavy thumb against Davis on the scale, it should have been apparent that Davis was telling the truth as she knew it. As the Respondent has failed to establish that it had a legitimate justification for its actions, on this basis as well, the Respondent is found to have violated § 7116(a)(1) and (2).

Based on the foregoing, I find that the Agency interfered with, restrained or coerced employees in the exercise of their rights under the Statute in violation of § 7116(a)(1) when Mellott made her comments at the June 24, 2022 meeting. I further find that the Agency violated § 7116(a)(1) and (2) of the Statute due to its investigation and discipline of Davis as a result of her statements about the Core hiring on July 19, 2022.

Accordingly, I recommend that the Authority adopt the following order:

V. 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), National Archives and Records Administration, National Personnel Records Center, St. Louis, Missouri (the Respondent) shall:

1. Cease and desist from:

   (a) Stating or implying that seeking Union advice may lead to discipline.

   (b) Disciplining, or otherwise discriminating against Barbara Davis, or any other bargaining unit employee, because the employee engaged in activity protected by the Statute.

   (c) 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 action in order to effectuate the purposes and policies of the statute:

   (a) Rescind the letter of reprimand of Barbara Davis dated February 9, 2023.

   (b) Expunge from all National Archives and Records Administration records mention of the letter of reprimand or the incidents and investigation that gave rise to the letter of reprimand of Barbara Davis dated February 9, 2023.

   (c) Post copies of the attached Notice at the National Archives and Records Administration, National Personnel Records Center facilities in Spanish Lake, Missouri and Valmeyer, Illinois. The Notices will be displayed on forms to be furnished by the Federal Labor Relations Authority, signed by the Director, and

then immediately posted in conspicuous places, including bulletin boards and all other places where notices to employees are customarily posted. The Notices shall remain posted for 60 consecutive days, and the Respondent shall take reasonable steps to ensure that the Notices are not altered, defaced, or covered by any other material.

(d) Email copies of the attached Notice to all bargaining unit employees represented by the Union. The message of the email transmitted with the Notice will state in its entirety: "The Federal Labor Relations Authority has found that the National Archives and Records Administration, National Personnel Records Center, St. Louis, Missouri violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by the attached Notice."

(e) Pursuant to section 2423.41(e) of the Authority's Regulations, notify the Regional Director of the Chicago Regional Office of the Federal Labor Relations Authority in writing, within 30 days from the date this Order becomes final if no exceptions are filed, as to what steps have been taken to comply.

Issued, January 25, 2024, Washington, D.C.

LEISHA A. SELF
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 National Archives and Records Administration, National Personnel Records Center, St. Louis, Missouri 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:

The Federal Service Labor-Management Relations Statute (Statute) gives employees of the National Personnel Records Center the following rights:

- To form, join, or assist any labor organization;
- To act for a labor organization in the capacity of a representative;
- To present the views of the labor organization, as a representative of a labor organization, to heads of agencies and other officials of the executive branch of the Government, Congress or other appropriate authorities;
- To engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under the Statute; and
- To refrain from any of the activities set forth above, freely and without fear of penalty or reprisal.

The National Personnel Records Center will not violate any of these rights. More specifically:

WE RECOGNIZE that our employees have the right to file grievances, bring unfair labor charges, and seek and receive Union representation.

WE WILL NOT interfere with, restrain, or coerce our employees by stating or implying that seeking Union advice may lead to discipline.

WE WILL NOT retaliate against Barbara Davis, President of the American Federation of Government Employees, Local 104, by investigating her and issuing her a letter of reprimand for engaging in protected union activity.

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

WE WILL rescind the letter of reprimand issued to Barbara Davis.

_____
(Agency)

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

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Chicago Regional Office, Federal Labor Relations Authority, 224 S. Michigan Ave., Suite 445, Chicago, Illinois 60604, and whose telephone number is: 872- 627-0001.