

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

DEPARTMENT OF JUSTICE BUREAU OF PRISONS U.S. PENITENTIARY (ADMINISTRATIVE MAXIMUM) FLORENCE, COLORADO Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1302 Charging Party	Case No. DE-CA-01-0700

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JULY 6, 2004**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
1400 K Street, NW, 2nd Floor
Washington, DC 20424-0001

RICHARD A. PEARSON
Administrative Law Judge

Dated: June 3, 2004
Washington, DC

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

MEMORANDUM

DATE: June 3, 2004

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: DEPARTMENT OF JUSTICE
BUREAU OF PRISONS
U.S. PENITENTIARY
(ADMINISTRATIVE MAXIMUM)
FLORENCE, COLORADO

Respondent

and

Case No. DE-CA-01-0700

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1302

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcripts, exhibits and any briefs filed by the parties.

Enclosures

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

DEPARTMENT OF JUSTICE BUREAU OF PRISONS U.S. PENITENTIARY (ADMINISTRATIVE MAXIMUM) FLORENCE, COLORADO Respondent	
and	Case No. DE-CA-01-0700
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1302 Charging Party	

Michael Farley, Esquire
For the General Counsel

Scot L. Gulick, Esquire
Rick Winter, Esquire
For the Respondent

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

Statement of the Case

On May 14, 2001, the American Federation of Government Employees (AFGE), Local 1302 (the Union or Charging Party) filed an unfair labor practice charge against the Department of Justice, Bureau of Prisons, U.S. Penitentiary (Administrative Maximum), Florence, Colorado (the Agency or Respondent). After conducting an investigation, the General Counsel of the Federal Labor Relations Authority (the Authority), by the Regional Director of the Denver Regional Office, issued an unfair labor practice complaint on July 31, 2002, alleging that the Respondent violated section 7116(a)(1), (2) and (4) of the Federal Service Labor-Management Relations Statute (the Statute), by failing to select Eric Nicholls for a promotion to the position of Senior Officer Specialist because of his protected activities, and by making coercive statements to Mr. Nicholls. On August 26, 2002, the Respondent filed an

answer to the complaint, denying that it committed an unfair labor practice.

A hearing was held in Denver, Colorado, on November 7, 2002. The parties were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The AFGE Council of Prison Locals is the exclusive representative of a nationwide bargaining unit of employees in the U.S. Department of Justice, Federal Bureau of Prisons, and these two parties have a collective bargaining agreement (CBA) covering employees at the U.S. Penitentiary (Administrative Maximum), Florence, Colorado (referred to as AdMax or ADX) and at other prisons. AFGE Local 1302 is an agent of the AFGE Council of Prison Locals for purposes of representing bargaining unit employees at the ADX.

The Federal Bureau of Prisons (BOP) administers four institutions at the Florence, Colorado complex: a medium-security correctional institution, a federal prison camp, and a high-security penitentiary, in addition to the ADX. The ADX has its own warden, and it employs approximately 200 correctional officers. Correctional officers are hired either at the GS-5 or GS-6 pay grade, depending on prior experience, and they can be promoted non-competitively through GS-7, Senior Officer. Promotion to GS-8, Senior Officer Specialist, the highest nonsupervisory correctional position, involves a competitive selection process.

Eric Nicholls has worked for BOP since February 1996 in various correctional officer capacities at ADX, beginning as a GS-6 Correctional Officer. He was noncompetitively promoted to GS-7 Senior Officer in February 1997. Michael Pugh served as the Warden of the ADX from approximately November 1998 to late July 2002. As part of the Warden's responsibilities as the highest official at the institution, Mr. Pugh served as the selecting official for the competitive annual Senior Officer Specialist (GS-8) promotions as well as for quarterly awards.

Mr. Nicholls has been a member of the Union, but he has not held Union office. In late 1998 and early 1999, Nicholls submitted about ten messages on a "guest book" on the Union's internet website; these messages generally expressed support for the efforts of the Union's officers

and his belief that correctional officers at ADX were "loyal." At the time Nicholls's messages were sent, Pugh had just begun his tenure as Warden, and there appears to have been considerable turbulence between Pugh and the Union concerning the Warden's efforts to combat what he believed to be corruption among the ADX correctional staff. The Warden believed that some corrupt officers were giving contraband to some prisoners and depriving other prisoners of basic necessities, and he further believed that some of these corrupt officers were high-ranking Union officials. Pugh became aware that some employees were making inflammatory and offensive comments about him on the Union's website guest book. He had a staff member copy all guest book entries, and he kept two thick binders containing all such entries in his office. (Although several of the entries in the guest book were indeed quite offensive, none of these entries had been made by Nicholls. See G.C. Exhibit 6.)

Throughout his first year as Warden, Pugh held one-to-one "get acquainted" meetings with all correctional officers. He held such a meeting with Nicholls in August 1999, at the same time as Quality Step Increases (QSIs) were being awarded to officers with "outstanding" appraisals. He allegedly told Nicholls that he didn't feel Nicholls was loyal and that Nicholls didn't deserve a QSI, because of comments Nicholls had made in the Union guest book. He held up the binder containing copies of the guest book entries and told Nicholls that he could tell him exactly what he'd said. The Warden then referred to alleged corruption among the correctional staff; said that two key Union officials were passing contraband to white supremacist prisoners at the prison; and said that the Union was "the most corrupt union he had ever seen". (G.C. Exhibit 6, page 6.) Nicholls conceded that he had made entries in the guest book but defended his actions and his loyalty, and after further discussion, the Warden allegedly told Nicholls that his slate was clean and that he would receive his QSI. Pugh held a similar meeting with another employee, Sean Riggins, in July 1999.

Based on these two meetings, the Union filed an unfair labor practice charge against the Agency in Case No. DE-CA-90530. Administrative Law Judge Garvin Lee Oliver held a hearing in that case on December 9, 1999, at which both Nicholls and Pugh testified. Pugh agreed that he had met with Nicholls and Riggins and that their guest book entries were discussed, as well as his belief that some Union officials were engaged in corruption, but he denied questioning Nicholls's or Riggins's loyalty in respect to their guest book entries or threatening to withhold their

QSIs based on those entries. Judge Oliver issued his decision in Case No. DE-CA-90530 on April 26, 2000 (G.C. Exhibit 6), in which he essentially accepted Nicholls' version of the events over Pugh's. He found that Pugh and the Agency had violated section 7116(a)(1) of the Statute by telling Nicholls and Riggins that they initially did not receive QSIs because of their comments on the Union's website; by telling them that he was monitoring the website and would consider those postings in regard to employees' conditions of employment; and by telling them that key Union leaders and the Union itself were corrupt. No exceptions to the decision were filed, and thus it was adopted by the Authority on June 16, 2000.

On January 30, 2001,¹ a vacancy announcement was posted for employees to apply for promotion to GS-8 Senior Officer Specialist. The announcement indicated that five vacancies were being filled, but all witnesses agreed that the Warden commonly selects many more employees for promotion than the posted number. Thirty-five employees applied for the position, and these applications were reviewed in March by a Rating Panel comprised of Acting Captain Rick Marquez and Human Resources Specialist Jamie Wade. Each rater gave a score, from 0 to 5 points, to each applicant for each of the six areas of "Knowledge, Skills and Abilities" (see G.C. Exhibit 7, page 2; last page of G.C. Exhibit 8; last page of each employee's application, G.C. Exhibit 14(a)-(1); G.C. Exhibit 10, page 35; and G.C. Exhibit 12), based on the rater's evaluation of the applicant's experience. Thus each applicant received a score of between 0 and 30 points from each rater; these points were added to points allotted for awards they had received and for their most recent annual performance appraisal (i.e., for the period ending March 31, 2000)², and all of these scores were entered onto a Merit Promotion Ranking form (G.C. Exhibit 12) and given to a Promotion Board. The applicants could receive a maximum score of 30 from each rater, 15 for "performance," and six for awards, for a total maximum score of 81 (G.C. Exhibit 11). Mr. Nicholls and one other officer received scores of 60 points, which tied them for eighth-highest on the list of 35 applicants.

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Hereafter, all dates are 2001, unless otherwise noted.

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Correctional Officers are given performance appraisals for a year beginning April 1 and ending March 31. They are evaluated on various job elements and rated on a scale of five levels: unsatisfactory, minimally satisfactory, fully satisfactory, exceeds, and outstanding.

A Promotion Board, comprised of Captain John Bell, Union Representative Robert Martin, and Ms. Wade, met on March 26. Its job was to identify a "best qualified" list out of the 35 applicants. Those applicants who were ranked "best qualified" (see G.C. Exhibit 13) were then passed on to the Warden for selection, and the Warden was authorized to select for promotion as many, or as few, of the best qualified as he desired (G.C. Exhibit 10, page 37). With the applicants scoring between 21 and 75 points, the Promotion Board determined that 52 points was the appropriate cutoff for the Best Qualified list; 20 applicants received 52 points or more, and their names were all forwarded to Warden Pugh for consideration. Pugh selected 13 of these officers for promotion to GS-8. Nicholls was not among the 13 officers promoted, despite the fact that his 60 points was higher than seven employees who were promoted. Two employees who received even higher scores than Nicholls were also not promoted.

Warden Pugh testified that he selected the 13 officers for promotion based on the same four criteria that he uses for all competitive promotions and awards: the applicants' two most recent performance appraisals, their post assignment history, their sick leave record, and input from his Lieutenants (Tr. 206). From the time he first came to ADX, he told correctional officers at numerous meetings that these were the factors which he considered most important in rewarding and promoting them.³ In preparation for making his promotion selections each year, Pugh testified that he would have his Administrative Lieutenant compile information regarding the sick leave and post assignment records and the

3

Officers Nicholls (Tr. 109-110) and Martin (Tr. 181) confirmed that Pugh often reiterated his four criteria for promotions, although each of them recalled the four criteria slightly differently than the Warden. I credit Pugh's list as the most accurate. First, it was his list, so he was most likely to remember the criteria. Second, Nicholls and Martin omitted different criteria: Nicholls omitted input from Lieutenants and listed seniority instead, a factor which everyone at the hearing otherwise agreed was of no importance to the Warden; Martin listed input from Lieutenants but could not recall the fourth factor (performance appraisals), which was cited by both Pugh and Nicholls. Finally, the criteria cited by Pugh match those listed on his worksheets (Resp. Exhibits 1 and 2) and correspond to much of Nicholls' own testimony (such as his description of how he personally spoke to Lieutenants to find out whether they had supported him for promotion).

two most recent performance appraisals⁴ of the "best qualified" applicants, and Pugh would then condense that information onto a one-page sheet summarizing the applicants' ratings in each of these three areas (See Resp. Exhibit 1). The Warden would also hold a private meeting with all of the Lieutenants, at which he would ask the Lieutenants to express their opinions on each applicant; Pugh would listen to them talk until he identified a consensus as to whether they supported an officer or not (Tr. 207-212, 255-56). For the GS-8 promotions in 2001, the meeting likely occurred on the last Tuesday of February, immediately after the vacancy announcement had closed and the applications had been received (Tr. 260). Since the best qualified list had not yet been issued, all 35 applicants are listed on the Warden's worksheet with his notes of that meeting (Resp. Exhibit 2). Pugh stated that he combined his notes of the February Lieutenants' meeting (Resp. Exhibit 2) with his notes on the applicants relating to the other three criteria (Resp. Exhibit 1) to determine which of the best qualified applicants combined strong ratings in multiple criteria. Because Nicholls was not recommended by most of the Lieutenants and didn't have "strong" ratings in any of the other criteria, Pugh said he did not select him for promotion (See, e.g., Tr. 255-59).

On February 26, 2001, after the application period for the promotions had closed but before the Best Qualified list had been issued, Nicholls scheduled a meeting with the Warden. Nicholls understood that the Warden placed high

4

The appraisals used by the Warden were those for the April 1999-March 2000 year and the not-quite-completed April 2000-March 2001 year. Since officers had not received the latter appraisal at the time the promotion selections were being made, Pugh had his Administrative Lieutenant talk to the applicants' supervisors and estimate what their appraisal was likely to be. This is reflected in the first column next to each applicant's name on Resp. Exhibit 1, prepared by Pugh in advance of making his selections: the first letter (E for exceeds, O for outstanding) represents the applicant's April 2000 appraisal, and the second letter represents the estimated April 2001 appraisal. In cases where an officer was on the borderline between an E or O appraisal, EO was written on the worksheet. In some cases where an applicant was on the borderline, the doubt was subsequently clarified and one of the letters was crossed out to reflect the applicant's actual appraisal for 2001 (Tr. 253-55). In Nicholls's case, for instance, the third letter (which appears to be an O) was crossed out, leaving him with two E's; this in fact corresponds to Nicholls's actual appraisals of "exceeds" for 2000 and 2001.

emphasis on an officer's post assignments and wanted to see his officers "in the trenches," those locations where there is close interaction with the prisoners (Tr. 68, 207, 243). Nicholls was working in a tower assignment that quarter, and he wanted to make sure Pugh understood that such a "non-trench" assignment was not typical for him (Tr. 67-72, 238-40). The Warden testified that at the end of their brief meeting, he felt that Nicholls had done a good job of "selling himself as an exceptional GS-8 candidate," and that "he had pretty much convinced me that he probably would be selected as a GS-8 officer." (Tr. 239.) It did not turn out that way, of course, for the above-cited reasons according to Pugh. Based on his impressions from his recent February meeting with Nicholls, Pugh testified that he was surprised when he met with the Lieutenants shortly thereafter and the Lieutenants did not support Nicholls (Tr. 240).

After Nicholls learned that he had not been selected for promotion, he spoke to several of the Lieutenants who had supervised him over the years, as well as Captain Bell, to find out why he had not been promoted (Tr. 75-76, 89-94). According to Nicholls, all of these supervisors told him, in one way or another, that they had supported his candidacy and didn't understand why he wasn't selected (*Id.*) He then decided to meet with Warden Pugh again, to find out why he wasn't promoted.

The Nicholls-Pugh meeting occurred on May 3. When Nicholls asked why he hadn't been promoted, the Warden said (according to Nicholls) that he had to be careful what he said to Nicholls, because he could say one thing and it could be interpreted in a different way later (Tr. 98). Nonetheless, Pugh proceeded to explain his four criteria and how Nicholls had not stood out in any of those areas (Tr. 99, 216). He showed Nicholls his notes of the Lieutenants' meeting (apparently Resp. Exhibit 2), which reflected a "-" next to his name, meaning that the Lieutenants had not supported him. Nicholls showed Pugh his own notes regarding his post assignment history, and he disputed Pugh's assertion that the Lieutenants hadn't supported him, citing his own conversations with those same supervisors. The conversation began to get heated, as each accused the other of calling him a liar. Nicholls testified that the following exchange then occurred (Tr. 99-100):

I asked him if he considered - actually at that point I wanted to know if he - I asked him if he had - I told him I had felt that he was including me in with a group of people that he was angry with. And at that time he, he cupped his hands

together to form a circle, and he said, "There's a circle of people that have had it out for me since I got here, and there's an outer ring of people who jumped on the bandwagon for a while. But you -- then they later came to their senses, and I don't have anything against them. But the inner ring of people, I will never do anything to help them in their career. They're on their own." He said, "Some of those people I have to do everything in my power to stop myself from doing physical harm to."

For his part, Warden Pugh testified that there was no discussion at the May 3 meeting about any "core group" of employees who didn't support him, or about his unwillingness to help any employees in their career (Tr. 216, 245). He said that he insisted Nicholls leave the office when the officer became argumentative and called Pugh a liar (Tr. 216). On further questioning, however, Pugh conceded that when he first became Warden in 1998, a small group of officers had bitterly opposed his attempts to reform the prison and engaged in "a very vicious, long-term assault on me that became very personal." (Tr. 247). Pugh explained (Tr. 245-46):

I would not include Eric Nicholls in any core group of any, of staff members who did not support me. . . . The core group that I refer to was a handful of inmates - inmates? I'm sorry - staff. There was one particular staff member, and again I will point out he's in a prison now. He clearly was leading the charge back then. And I think there was a few other puppets that followed him very closely and were extremely offensive. And then there was what I'd say was a group of tag-alongs. And, you know, Eric Nicholls, he was probably on the very fringes of that, but I can tell you, I never viewed Eric Nicholls as any prime mover in that activity.

Moreover, when questioned further as to whether he told Nicholls he wouldn't help the careers of that "core group" of officers, Pugh stated (Tr. 251):

I'd not have made that comment to Mr. Nicholls. The only - When you say "core group," again, I can count them on one hand. And I see Eric Nicholls as having nothing to do with that three or four, three or four staff members. And I would do no - I wouldn't do anything for them, on the job or off the job.

Q But you said you - if there was a personnel action involving them, you -

A I removed myself from them. Absolutely.

Q With regard to Mr. Nicholls, you didn't feel you needed to remove yourself?

A Absolutely not. Absolutely not.

Shortly after the May 3 meeting, the Union filed the instant unfair labor practice charge against the Respondent.

Discussion and Conclusions

A. Positions of the Parties

The primary allegation at the heart of this case is the General Counsel's contention that Warden Pugh failed to select Eric Nicholls for promotion in March 2001 because of Nicholls's protected activity. Part of the General Counsel's evidence on this allegation was the Warden's alleged statement to Nicholls on May 3 that he would not do anything to help the careers of an "inner circle" of people who have "had it out" for him throughout his tenure as Warden. According to the G.C., this comment not only demonstrates that Pugh discriminated against Nicholls regarding his promotion (in violation of section 7116(a)(2) and (4) of the Statute), but also constitutes an independent violation of section 7116(a)(1).

Although the Warden and the Agency deny that Pugh made this comment to Nicholls, the General Counsel argues that this denial is not credible, nor is the Warden's insistence that he selected other officers for promotion over Nicholls based on legitimate, non-discriminatory criteria. The G.C. suggests that the instant case is merely a continuation of a pattern of anti-Union coercion and discrimination on the Warden's part. By offering the entire transcript and decision from the earlier ULP hearing, in which Pugh was found to have unlawfully coerced Nicholls by referring to the officer's Union guest book entries and by threatening to withhold his QSI, the General Counsel argues first that Warden Pugh has been motivated throughout his tenure at the ADX to suppress protected activity and to discriminate against his opponents, and second that he was particularly angry at Nicholls, who had successfully pursued his earlier ULP charge and thereby embarrassed Pugh.

With this context in mind, the General Counsel argues that Pugh's decision not to promote Nicholls was motivated at least in part by Nicholls's protected activities, and that the Warden's explanation of why he didn't promote Nicholls is unpersuasive. Regarding Pugh's bias, the G.C. cites a conversation between Pugh and Union President John McCulloch on February 25. In anticipation of his meeting with Nicholls scheduled for the following day, Pugh allegedly contacted McCulloch and asked him to attend the meeting with Nicholls (Tr. 178). According to McCulloch, the Warden told him that Nicholls "had shanghaied him, testified against him at the last FLRA hearing . . . had lied, and he was not a very trustworthy person. He didn't want to have a meeting alone with him." (Tr. 179.)

The G.C. further argues that the criteria posited by Pugh for not selecting Nicholls were a pretext to disguise his discriminatory intent. The G.C. notes that Nicholls was ranked 8th (out of 35 applicants) in the ratings given by the Rating Panel⁵ and that 13 employees were promoted. The Warden selected for promotion seven employees with lower ratings than Nicholls, and all but one of the promoted employees had less seniority than Nicholls. Moreover, the General Counsel argues that Resp. Exhibits 1 and 2, the Warden's worksheets which allegedly corroborate Pugh's decision-making process, are totally unreliable and self-serving hearsay. Specifically, Resp. Exhibit 1 contains information about the applicants' upcoming and most recent appraisals, and evaluations of the applicants' sick leave usage and post assignments. The information in each of these three categories was given to the Warden by his Administrative Lieutenant, who did not himself testify. Resp. Exhibit 2 reflects the Warden's impressions of his Lieutenants' opinions about each applicant, either positive or negative. Since none of the Lieutenants themselves testified, the G.C. asserts that the document is an unreliable indicator of what the Lieutenants told the Warden at the meeting. The G.C. further requests that I draw an adverse inference from the Respondent's failure to call the Administrative Lieutenant or any of the other Lieutenants as witnesses to corroborate Pugh's testimony; specifically, I am urged to conclude from this failure that the Lieutenants would have supported Nicholls and his promotion, and that the Administrative Lieutenant would have contradicted material portions of Resp. Exhibit 1. Finally, the G.C.

5

The G.C. and his witnesses actually referred to Nicholls as ranking 7th, but a careful review of G.C. Exhibit 12 makes it clear that Nicholls and Joe Contreras, with 60 points each, had the 8th highest scores.

points out that two officers were promoted in March 2001 despite the fact that they had been disciplined for serious offenses in the preceding year: one employee was issued a five-day suspension (later reduced to three days pursuant to a Union-negotiated grievance settlement) for failing to observe an assault on an inmate, and the other was demoted from GS-7 to GS-6 for physical abuse of another officer (the demotion was later held in abeyance for two years, subject to the employee's good conduct, also negotiated with the Union). In the G.C.'s view, promoting those two employees, while denying promotion for Nicholls, utterly contradicts the Warden's professed intent to select the most capable, reliable Correctional Officers.

For its part, the Respondent argues that the General Counsel did not establish a prima facie violation of section 7116(a)(2) and (4), because the evidence does not demonstrate that Nicholls's protected activity was a motivating factor in Pugh's decision not to promote him. Moreover, the Respondent insists that Warden Pugh's selections were based on the same four legitimate, nondiscriminatory factors that he has consistently articulated to his staff. Neither seniority, prior disciplinary action nor the rating scores from the Rating Panel was among those criteria, and therefore it is inappropriate for the G.C. to cite those factors as evidence of unlawful motivation. The Respondent also defends its use of Resp. Exhibits 1 and 2 as evidence to support the Warden's decision. While noting that section 7118(a)(6) of the Statute provides that ULP hearings are not governed by the rules of evidence, the Respondent asserts that these exhibits would nonetheless be admissible under Rule 803 of the Federal Rules of Evidence as exceptions to the general exclusion of hearsay. More fundamentally, the Respondent argues that the documents explain the Warden's decision-making process and corroborate his testimony and his legitimate reasons for not selecting Nicholls.

B. Analytical Framework for Decision

Section 7116(a)(1) makes it 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". The General Counsel alleges here that Warden Pugh coerced Nicholls on May 3 when he told Nicholls, in effect, that he would not help Nicholls in his career because of his protected activities. In evaluating whether a supervisor's comments are coercive, the Authority uses an objective standard:

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. . . . While the circumstances surrounding the making of the statement are taken into consideration, the standard is not based on the subjective perceptions of the employee or on the intent of the employer.

Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah, 35 FLRA 891, 895-96 (1990). This rationale was reaffirmed and explained in *U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky*, 49 FLRA 1020, 1034 (1994).

Section 7116(a)(2) and (4) both prohibit agencies from discriminating against employees: (a)(2) makes it unlawful to do so "to encourage or discourage membership in any labor organization"; (a)(4) makes it unlawful to do so "because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter". In *Department of Veterans Affairs Medical Center, Brockton and West Roxbury, Massachusetts*, 43 FLRA 780, 781 (1991), the Authority held that the same analytical framework applies to cases alleging 7116(a)(4) violations as it had previously articulated in *Letterkenny Army Depot*, 35 FLRA 113, 118-19 (1990), for 7116(a)(2) allegations. Specifically, in all such cases the General Counsel bears the burden of establishing by a preponderance of the evidence that an unfair labor practice has been committed. The G.C. must demonstrate (1) that the employee against whom allegedly 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 G.C. does so, it has established a prima facie case of unlawful discrimination. The Respondent can, in turn, rebut the prima facie case by establishing, by a preponderance of the evidence, the affirmative defense that (1) there was a legitimate justification for its actions; and (2) the same action would have been taken in the absence of protected activity.

I will examine first the allegedly coercive statements of the Warden on May 3, and then the allegedly discriminatory failure of the Warden to promote Nicholls, since the former allegation is asserted by the General Counsel as a factual support for the alleged discrimination.

C. The Warden's Statements on May 3

Superficially, there would appear to be a credibility dispute between Nicholls and Pugh as to whether the Warden made the comments attributed to him at their May 3 meeting. Pugh denies making the comments at all. Although I generally accept Nicholls's testimony that Pugh said something about being unwilling to help a small group of officers in their careers, I find that it was said in a context that was not coercive and thus did not violate section 7116(a) (1).

First, as to whether Pugh made the statement at all, it is evident to me that Nicholls steered the conversation that day to the issue of the "group of people that he [Pugh] was angry with." (Tr. 99.) Nicholls had arranged the meeting for the specific purpose of finding out why he had not been promoted, and when the Warden's explanation of his reasons was not acceptable to Nicholls, he offered Pugh his own interpretation of the Warden's motives: "I told him I had felt that he was including me in with a group of people that he was angry with." *Id.* In this context, it would have been difficult for Pugh to have avoided discussing this issue. Additionally, although Pugh testified that he didn't tell Nicholls that he "would never do anything to assist his career" (Tr. 216), other portions of the Warden's testimony, about a group of people who had opposed him, sounded quite similar to Nicholls's testimony. Pugh agreed, for instance, that there had been a group of such officers, that these officers had engaged in extremely offensive conduct and accusations against him, and that he would remove himself from any personnel actions involving them because of his animosity toward them (Tr. 245- 51). The similarities between the language used by Pugh and Nicholls are too close to be coincidental and suggest that Pugh did at some point tell Nicholls that he'd never help those employees.

But the full context of the conversation between Pugh and Nicholls also makes it clear to me that Pugh emphasized to Nicholls on May 3 that he did not consider Nicholls to be within the "group" of officers he would never help. Nicholls's own testimony makes this apparent: immediately after Nicholls suggested to Pugh that he was including Nicholls with that group, Nicholls testified that Pugh replied as follows (Tr. 99-100):

And at that time he, he cupped his hands together to form a circle, and he said, "There's a circle of people that have had it out for me since I got here, and there's an outer ring of people who jumped on the bandwagon for a while. But you -- then they later came to their senses, and I don't have anything against them."

In other words, the Warden was telling Nicholls that he understood that Nicholls had not been in the core group that had behaved so offensively, and that he harbored no animosity to him. Pugh's own testimony reiterated this point that Nicholls was not part of the group of officers who had opposed his reforms, and that he harbored no animosity to Nicholls (Tr. 245-46, 249-51).

Furthermore, even in Nicholls's account of the meeting, the Warden never referred to Nicholls's protected activity in any way. While the General Counsel attempted to link the Warden's animosity against the "core group" of officers to their use of the Union website back in 1998 and 1999, there is no indication from the events of May 3, 2001, that Pugh made such a connection, and I consider such a link to be unreasonable in the facts of this case. This is a far different situation than the discussion Pugh had with Nicholls, described at the 1999 ULP hearing, in which Pugh explicitly referred to comments Nicholls had made on the Union's website, described Nicholls's comments as "disloyal," and stated he could not approve a QSI for such an officer. Again, while the General Counsel argues that the coercion explicit in Pugh's 1999 comments should be understood in his comments two years later, I reject such logic. The only reasonable objective interpretation of the May 3 conversation is that when Nicholls accused him of retaliation, the Warden told Nicholls he did not consider him to have done anything objectionable or worthy of retaliation. Such a statement does not constitute interference, restraint or coercion of protected activity.

Accordingly, I conclude that the Respondent did not violate section 7116(a)(1) as alleged in the complaint.

C. The Nonselection of Nicholls for Promotion

As noted above, in order to make a prima facie violation of 7116(a)(2) and (4), the General Counsel must prove that Nicholls engaged in protected activity and that such activity was a motivating factor in the decision not to promote him. There is no doubt that Nicholls had engaged in protected activity when he made written entries on the Union's website in early 1999, when he subsequently filed a ULP charge relating to Pugh's coercive comments of August 1999, and when he testified at the ULP hearing in December 1999. The real dispute in this case is whether that protected activity was a motivating factor in the Warden's promotion selections in March 2001.

The General Counsel's evidence concerning the Warden's motivation is essentially a circumstantial case (as is often true in proving someone's motivation): in addition to establishing Nicholls's protected activity and Pugh's earlier resentment of Nicholls's website entries, the G.C. argues that Nicholls had superior qualifications to other employees who were promoted in his stead. The totality of this evidence certainly creates a lingering suspicion of the Warden's motives, and if the Respondent had not offered its own account of the Warden's actions and motives, I would likely accept the General Counsel's assertion that Nicholls was not promoted (at least partly) because of his protected activity. Since the Respondent did present evidence concerning the Warden's motivation, however, it is appropriate to consider it when evaluating the second prong of the *Letterkenny* test for a prima facie violation.⁶ And after weighing the entirety of the evidence presented on this issue, I conclude that he made his promotion selections without considering Nicholls's protected activity.

In evaluating Warden Pugh's motivation, I have discounted some of the factors cited by the General Counsel in its case. First, while I recognize that Officer Nicholls's successful pursuit of an unfair labor practice charge against the Warden (including, as it did, contradictory testimony by the two individuals at an FLRA hearing and an ALJ's credibility finding in favor of Nicholls) may give rise to an inference of an improper motive, such an inference does not appear warranted to me in the context of this case.⁷ There was a relatively long period of time between the ULP hearing (December 1999) and the ALJ's decision (April 2000) on the one hand, and the promotion selections of March 2001 on the other hand. The first ULP hearing occurred during the first year of Pugh's tenure as Warden, and it involved a conflict between the Warden and some employees over the Warden's efforts to root out what he perceived to be staff corruption. By March 2001, however, the record suggests that that controversy had faded considerably, particularly insofar as it involved Nicholls and the Warden. Although Pugh did testify that he continued to harbor bitterness toward "three or four" officers, it appears to me that Pugh had become convinced by 2001 that Nicholls had not been trying to undermine his reform efforts

6

Department of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 55 FLRA 1201, 1205 (2000).

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See, e.g. Veterans Administration, Veterans Administration Medical Center, Fayetteville, Arkansas, 9 FLRA 902, 906 (1982).

and did not include Nicholls among his opponents. Moreover, I believe that the General Counsel's emphasis on Nicholls's protected activity is exaggerated; on the contrary, it appears to me that Nicholls had very little public involvement with the Union, and his prosecution of the ULP charge was a relatively discrete event that does not weigh strongly in favor of an inference of bias on the Warden's part. Although I am sure the Warden did not enjoy having to defend himself at an FLRA hearing or having his actions branded as unlawful, and I am also sure that as a result he wanted to be careful in his dealings with Nicholls,⁸ I don't accept the premise that Pugh nurtured an intent to retaliate against Nicholls a year after the FLRA decision.

It is instructive to consider the cases of Officers Smith and Lee, two employees who were promoted over Nicholls and who were cited by the G.C. as examples of how the Warden ignored the qualifications of the applicants. Smith had been demoted by the Warden, but he and the Union contested the action and ultimately reached an agreement that held the demotion in abeyance for two years. Lee was given a five-day suspension by the Warden, but he and the Union contested it and had the suspension reduced to three days. Nonetheless, the Warden selected both of these officers for promotion at the next opportunity. This suggests, as does other circumstantial evidence, that Warden Pugh was able to make promotion selections without considering employees' protected activity. And in the context of this case, I do not view Nicholls's protected activity as significantly different from Smith's and Lee's, nor do I view Pugh's attitude to Nicholls as significantly different from his attitude to Smith and Lee. If he promoted those two employees based on the four criteria that he considered most relevant, he could have and would have promoted Nicholls if he met those criteria.

This brings me to an evaluation of the four promotion criteria cited by the Warden and attacked as pretextual by the General Counsel. First, the criteria themselves

8

It is in this context that I view Pugh's alleged request that Union President McCulloch attend his February 26 meeting with Nicholls. Regardless of whether Pugh said that Nicholls had "shanghaid" him at the previous ULP hearing, I find it unlikely that a management official would go out of his way to invite a Union officer to attend a meeting with an employee he didn't trust and would then confess bias against that employee to the Union officer. He may well have told McCulloch he didn't want to meet alone with Nicholls, but I do not view such caution as indicative of unlawful animus.

(appraisals, sick leave usage, "trench" assignments, and input from Lieutenants) all appear to be relevant factors⁹ for a selecting official to consider.¹⁰ While the General Counsel argues that other factors such as seniority, prior disciplinary actions, and relative rank on the Best Qualified list should have carried more weight in the Warden's decisions, I cannot accept that argument in the circumstances of this case. The Agency's merit promotion plan (G.C. Exhibit 10) allows the selecting official to select any employee on the Best Qualified list, and testimony at the hearing confirmed that the Warden has broad discretion to apply those criteria most important to him in identifying those applicants who stand out in a group consisting entirely of employees who have already been found to be "best qualified" for promotion. In these circumstances, I will not second-guess the criteria chosen by Pugh.

A second factor I have considered is that the four criteria used by Warden Pugh in March 2001 had been cited and reiterated by him to the entire correctional staff on many previous occasions. I would look on Pugh's list of criteria quite differently, and more suspiciously, if the employees had learned of them for the first time after

9

It might be argued that sick leave usage is not a legitimate factor under federal merit system principles, since employees are entitled to use the sick leave given them by law. While the full implications of such an argument would be best addressed in a Merit Systems Protection Board proceeding, I am addressing it only to determine whether the Warden's use of this criterion was a pretext for discriminating against Nicholls's protected activities. In this context, I note the Warden's testimony that his Administrative Lieutenant reviewed sick leave usage to determine whether applicants were using sick leave at times and in ways that suggested abuse or on the other hand suggested praiseworthy restraint (Tr. 255-57). While this evidence might not support disciplinary action against the former group of employees, I consider it a legitimate criterion for a selecting official with broad discretion to use in order to distinguish among qualified applicants.

10

Among the many factors that distinguish the instant case from *Internal Revenue Service, Compliance Service Area 5, Small Business/Self Employed Division, Jacksonville, Florida*, Case No. AT-CA-01-0407 (2002), ALJ Decision Reports, No. 172, at p. 10 (October 17, 2002), cited by the G.C., is that in the *IRS* case the selecting and recommending officials used criteria that were thinly-disguised euphemisms for the applicant's protected activity.

Nicholls had been passed over. It appears, however, that Pugh told his officers at ADX as early as 1998 or 1999 what four factors he would use in selecting candidates for promotions and awards, and that he applied those factors when he passed over Nicholls in March 2001.

What this case really boils down to is whether I should accept Resp. Exhibits 1 and 2 as persuasive evidence corroborating Pugh's testimony as to how he made his selections. The General Counsel argues not only that the exhibits should be excluded as hearsay, but also that they are inherently unreliable. While FLRA hearings need not apply the strict rules of evidence, I do note that the two exhibits generally fit within the business records exception to the hearsay rule. They were prepared by a witness (Pugh) who testified at the hearing, and they represented contemporaneous notes made by him to condense and simplify information he was given by his Administrative Lieutenant (regarding Resp. Exhibit 1) and by all of his Lieutenants (Resp. Exhibit 2). More importantly, however, I am considering the exhibits, and I give them significant probative weight, because I find them to be reliable records of how the used Warden applied his four criteria.

It is useful to keep in mind why institutions in general, and Warden Pugh in particular, make notes and business records such as Resp. Exhibits 1 and 2. In the course of making numerous, repetitive decisions, and faced with large quantities of raw data on those decisions, decision makers often make notes or charts that condense the data and help them make their decision. Pugh testified that he used these two documents to illustrate how the applicants compared to each other in the four areas he considered most important, to show what areas each candidate demonstrated strengths in. The exhibits indeed illustrate the relative strengths and weaknesses of the candidates far more directly than 20 piles of data would. The exhibits succeed in presenting an insight into Pugh's decision-making process. *See, e.g., Indian Health Service, Winslow Service Unit, Winslow, Arizona*, 54 FLRA 126, 127 (1998). Moreover, as time passed and the Warden and Lieutenants made further personnel decisions, the documents prepared by Pugh in February and March 2001 are likely to be more accurate records of their collective views than their personal testimony at the November 2002 hearing.

One significant problem with the General Counsel's opposition to the exhibits is that it essentially requires me to find that Warden Pugh (perhaps with the assistance of his Administrative Lieutenant) consciously falsified the exhibits in order to cover up his discriminatory

nonselection of Nicholls. Unless I find Pugh to have engaged in such outright fabrication and perjury, I must evaluate the substance of what the exhibits say about Nicholls's record: that Nicholls had received an "exceeds" appraisal in 2000 and was going to receive a similar appraisal in April 2001; that he had a sick leave record bordering on abuse; that he had a neutral record of post assignments; and that the Lieutenants overall did not support his promotion. In other words, unless the Warden falsified these exhibits, they corroborate his testimony that Nicholls did not have a strong record in any of the four areas. Furthermore, the record as a whole does not support a conclusion that Pugh or his assistant falsified Nicholls's scores on these criteria.

In this regard, I note that there is at least some independent corroboration of the accuracy of the exhibits. G.C. Exhibit 8 confirms that Nicholls was rated as "exceeds" for the year ending March 2000, as indicated in Resp. Exhibit 1. Moreover, when the hearing was held in November 2002, Nicholls had received his 2001 appraisal, and he did not contradict the entry on Resp. Exhibit 1 that his then-imminent 2001 appraisal would be "exceeds." The General Counsel referred in his argument to the fact that Nicholls had received an "outstanding" appraisal for 1999, but the record is clear that Pugh used only the 2000 and 2001 appraisals in making his promotion decisions, not the 1999 appraisal. A review of Resp. Exhibit 1 shows that none of the 20 best-qualified applicants received an appraisal lower than "exceeds" for either 2000 or 2001, and most of them received an "outstanding" rating for at least one of those years. Thus Nicholls's two "exceeds" appraisals placed him well down in the lower half of the group in that category.

With respect to the sick leave and post assignment criteria, it is true that these are inherently subjective factors that are not easily susceptible to review by an outsider. As a result, these ratings can be misrepresented by a biased official more easily than a purely objective measurement. Nevertheless, Nicholls did not dispute the factual assertions of Pugh's testimony about his leave balance, except to say that he had never been formally accused of any abuse of sick leave, and that is rather faint praise. The Warden was not seeking to formally discipline Nicholls for leave abuse; he was instead seeking to identify those employees who had "strong" records of fastidiously showing up for work before and after weekends and holidays, whether they felt ill or well. He was looking for those officers who went above and beyond the call of duty. Nicholls's own testimony suggests that he did not have a strong record on this score.

As for whether Nicholls had a strong record of "trench" assignments and the support of the Lieutenants, Nicholls directly contradicted the testimony of Pugh and the content of Resp. Exhibits 1 and 2. Nicholls had met with Pugh in February for the sole purpose of telling the Warden that he had often worked in the "trenches," and in April he spoke individually with most if not all of the Lieutenants, who allegedly told him they had supported him for promotion. Pugh testified that at the end of his February meeting with Nicholls, he was satisfied with Nicholls's explanation of his assignment record, but the information compiled by the Administrative Lieutenant on this issue gave him a "neutral" rating in this area. This does not conflict entirely with Nicholls's testimony, because a balanced record of assignments in all areas of the prison may not be the type of strong record of "trench" assignments that the Warden was looking for. Nicholls testified that when he met with Pugh in May, he showed the Warden a list he had compiled of his post assignments, but neither the General Counsel nor the Respondent offered any supporting data to corroborate their witnesses' respective testimony. On the record available, I do not doubt Nicholls's assertion that he felt he had a balanced assignment history, but I also cannot discount Pugh's assertion that he considered Nicholls's record in this area to be neither positive nor negative.

The final, and seemingly most important, factor considered by the Warden in his selections, was the consensus of his Lieutenants.¹¹ On Resp. Exhibit 2, Pugh reduced a series of lengthy discussions to a simple "+" or "-" for each applicant. While I again recognize the potential for fraud or abuse in the Warden's recordkeeping methods, I find no basis for believing that he intentionally recorded a "negative" consensus for Nicholls when in fact the Lieutenants had recommended Nicholls's promotion. In this regard, I give little or no weight to Nicholls's testimony that the Lieutenants told him they supported him. In contrast to Pugh, Nicholls did not make a contemporaneous

11

Pugh testified that this was the most important of the four criteria, and this seems to be born out by the Warden's worksheets. Officer Contreras, who like Nicholls had a score of 60 from the Rating Panel and who did not rate strongly in any of the first three criteria, received a positive recommendation at the Lieutenants' meeting and was selected for promotion. In contrast, Officer Cannon received a higher score from the Rating Panel than Nicholls and had a strong sick leave record, but he received a negative recommendation from the Lieutenants and was not promoted.

business record of his conversations with the Lieutenants; moreover, while I accept Nicholls's truthfulness in his testimony, I do not believe that the Lieutenants would have given him an accurate and reliable account of what transpired at the Lieutenants' meeting with the Warden. That meeting was intended to be confidential, and the Lieutenants would understandably not want their internal discussions about officers to become public knowledge. If they had expressed negative opinions about Nicholls at the meeting, it is unlikely they would admit this to Nicholls when he confronted them later. Moreover, while the General Counsel criticized the failure of the Respondent to call any Lieutenants as corroborating witnesses at the hearing, I do not share the G.C.'s opinion. The Lieutenants met with the Warden several times a year to discuss their recommendations for awards and promotions, and it would be unreasonable to expect that an individual Lieutenant would recall in late 2002 what his collective peers said in February 2001 about one of the 35 or more officers discussed at the meeting. Similarly, it is unlikely that Pugh himself would remember specific discussions about specific officers even a few months later, and that is precisely why he made notes of the discussion. Thus while those notes are undoubtedly a gross simplification of a complex issue and are subject to bias and falsification, I nonetheless accept Resp. Exhibit 2 as the best available evidence of what the Lieutenants said about Nicholls and the other officers in February 2001.

As I have stated more than once, I do not believe that Warden Pugh falsified entries on Resp. Exhibits 1 and 2 to weaken Nicholls's case. There are numerous entries on each document about a large number of correctional officers, and where those entries can be independently and objectively corroborated, they appear to be accurate. When Pugh prepared these notes in advance of making his selections, he had no idea which officer might challenge his decision if he were not selected. Nicholls was no more likely to challenge the decision than any other officer who was passed over, especially since, as I noted earlier, Nicholls did not have any significant history of prominent protected activity in the year preceding the March 2001 promotions. Officers Leitch and Cannon actually received higher ratings than Nicholls from the Rating Panel (and Cannon received at least one "strong" score on Resp. Exhibit 1), but they were not selected for promotion either. If Pugh were to have falsified Nicholls's scores, he would also have to falsify scores for all other unsuccessful applicants, any of whom might challenge the decision. There simply is no basis in the record for finding that Pugh engaged in the sort of fraud that would have been necessary to justify his allegedly biased decision, as the General Counsel would

suggest. On the contrary, I find that Resp. Exhibits 1 and 2 are reliable records of the information the Warden used to make his promotion selections, and that they support his testimony that Nicholls did not meet his criteria for promotion.

For the reasons stated above, I conclude that Eric Nicholls's protected activity was not a motivating factor in the Warden's decision not to promote him in March 2001. Accordingly, the Respondent did not violate section 7116(a) (1), (2) or (4) of the Statute, as alleged, and I recommend that the Authority issue the following Order:

ORDER

IT IS ORDERED that the Complaint be, and hereby is, dismissed.

Issued, Washington, DC, June 3, 2004.

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RICHARD A. PEARSON
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION, issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. DE-CA-01-0700, were sent to the following parties:

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