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

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
SHERIDAN, OREGON

Respondent

AND

Case No. SF-CA-07-0167

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3979, AFL-CIO

Charging Party

Yolanda Shepherd
For the General Counsel

Steven R. Simon
For the Respondent

Michael T. Ellis
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

On December 14, 2006, Michael T. Ellis, President of the American Federation of Government Employees, Local 3979, AFL-CIO (Union) filed an unfair labor practice charge against the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Sheridan, Oregon (Respondent) (GC Ex. 1(a)). On May 14, 2007, Ellis filed an amended charge in his capacity as Vice President of the Union (GC Ex. 1(b)). On May 22, 2007, the Regional Director of the

San Francisco Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing (GC Ex. 1 (d)) in which it was alleged that the Respondent committed an unfair labor practice in violation of §7116(a)(1)

and (2) of the Federal Service Labor-Management Relations Statute (Statute) by charging Ellis with the conduct of an unauthorized investigation, and by subsequently sustaining the charge and noting that action in Ellis' personnel file. It was further alleged that the Respondent's action was in response to Ellis' protected activity on behalf of a member of the bargaining unit.

A hearing was held in Portland, Oregon on July 26, 2007. The parties were present with counsel and were afforded the opportunity to present evidence and cross-examine witnesses. This Decision is based upon consideration of all of the evidence and of the post-hearing briefs submitted by the parties.

Positions of the Parties

General Counsel

The General Counsel maintains that the Respondent sustained the charge against Ellis of conducting an unauthorized investigation because of his inquiry to Lt. Joy Roszel, a shift supervisor, regarding an incident in which the front of the mailbox assigned to a bargaining unit member was smeared with cheese and a derogatory memorandum was placed inside. Since it was obvious that Ellis was acting in his capacity as a Union officer and on behalf of a bargaining unit member, he was engaged in protected activity. According to the General Counsel, the Respondent has not shown how Ellis interfered with the official investigation which had not even commenced when he sent the message to Roszel. Furthermore, he was not engaged in either flagrant misconduct or other inappropriate conduct which would have removed his actions from the protection of the Statute.

The General Counsel also maintains that the Respondent's discriminatory motive is demonstrated by the fact that it did not initiate an investigation of Ellis' alleged misconduct until several months after he sent the e-mail message to Roszel, which is the sole basis upon which the Respondent relied in support of the charge against him. Respondent's discriminatory intent was further demonstrated by the fact that, during the period between the transmission of the message and the commencement of the investigation as to Ellis' conduct, Ellis had initiated another inquiry with regard to the amount of soap provided to bargaining unit employees assigned to the kitchen; this also was protected activity. According to the General Counsel, the soap incident, although

not mentioned by the Respondent in its decision to sustain the charge against Ellis, was a factor in its decision to initiate an investigation into Ellis' conduct.

Finally, the General Counsel argues that the Respondent's affirmative defenses lack merit. The Respondent's action was not justified because Ellis was engaged in protected activity and did not engage in flagrant misconduct.

As a remedy, the General Counsel proposes that the Respondent be ordered to cease making findings that employees engaged in protected activity have conducted unlawful investigations and in placing documentation of such findings in the personnel records of such employees. The General Counsel also proposes that the Respondent be ordered to expunge from Ellis' employment record all references to the sustaining of the charge against him for conducting an unauthorized investigation and that the Respondent be prohibited from taking the sustaining of the charge into consideration with regard to future personnel actions.

Respondent

The Respondent maintains that its actions regarding Ellis were undertaken in accordance with the Standards of Employee Conduct (Standards) which is the result of collective bargaining between the Union and the Respondent. Among the actions prohibited by the Standards is interference with official investigations. Ellis was well aware that the incident involving the mailbox was a violation of the Standards. Therefore, it was reasonable for him to have assumed that, once the incident was reported to the proper authorities, the Respondent would undertake a formal investigation in an attempt to determine the identities of those responsible. In spite of that knowledge, Ellis contacted Roszel, who was a critical witness in the official investigation and possibly a suspect, thereby revealing information that could have compromised that investigation. According to the Respondent, Ellis' message to Roszel evidences his intent to interfere with the official investigation. Since the Respondent's action with regard to Ellis was covered by an agreement with the Union, it was not an unfair labor practice.

The Respondent further maintains that it had a legitimate interest in protecting the integrity of its investigations and that Ellis' interference with an official investigation was not protected activity within the meaning of the Statute.

While the Union had valid concerns concerning the welfare of a member of the bargaining unit, Ellis could have vindicated those concerns without interfering with the official investigation.

The Respondent argues that, even if Ellis' activity was protected, its investigation of his actions was not motivated by a desire to discourage protected activity. Furthermore, its action with regard to Ellis was justified and would have occurred even in the absence of protected activity.

Finally, the Respondent maintains that, although it sustained the charge of misconduct against Ellis, the Warden took no action against him and the Charging Party[1/] has not alleged any actionable harm. Accordingly, the General Counsel has failed to present a *prima facie* case for a violation of the Statute.

Findings of Fact

The salient facts of this case are largely undisputed. The Respondent is an agency as defined in §7103(a)(3) of the Statute. The Union is an agent of the American Federation of Government Employees (AFGE) which is a labor organization within the meaning of §7103(a)(4) of the Statute. The AFGE is the certified representative of a nationwide collective bargaining unit which includes employees assigned to the Respondent's facility (GC Ex. 1(d) and 1(f)). Ellis is employed by the Respondent as a clerk and was the President of the Union from 2003 to 2006 (Tr. 16).

The Mailbox Incident and Ellis' Reaction

On December 20, 2005, John Cherney, who was then a member of the bargaining unit, sent the following e-mail message to Ellis, which is contained in the report of an official investigation of the mailbox incident (Resp. Ex. 4, p. 34):

> On Saturday December 17, 2005 I worked day watch at FCI Sheridan I arrived for work at approx 0735 hrs and went to the staff mail room. I opened my mail box # 142 and had three items inside. . . . On top of that [a time and attendance form] was a paper with the following statement: "Notice This

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[1/] In its post-hearing brief the Respondent incorrectly referred to Ellis rather than the Union as the Charging Party.

> department requires no physical fitness program. Everyone get[s] enough exercise jumping to conclusions, flying off the handle, running down the boss, (the following is highlighted in pink) knifing friends in the back, dodging responsibility, and pushing their luck". The paper had my name written on the top in black ink. . . .
>
> I feel this is a directed [*sic*] threat to me and retaliation due to the fact that I filed a hostile workplace complaint against Officer Rogers. I do not know if Officer Rogers put this note in my mail box himself or put someone else up to it. The only persons who have access to the mail room mailboxes are the lieutenants and the T&A [presumably time and attendance] Clerk. . . . I feel at this point my safety is in jeopardy and that I truly am working in a hostile work environment. I have also learned that my mail box was defaced by unknown means and was photographed by LT. Ellison and cleaned up by Officer Pullen.
>
> I wish this incident be investigated by either the Office of Internal Affairs, the Office of the Inspector General, any designated person(s) from my U.S. Congressmen's or U.S. Senator[']s office or any combination listed.
>
> John J. Cherney, Jr.

On the same page of the investigative report, and below the above message, there is the following undated typewritten statement which appears to have been signed by Cherney:

> I feel I have been threatened but no action to my knowledge has taken place other than the Agency stated they were going to investigate it and asked me to provide a memorandum. I feel this is a strong form of work place violence and nothing has been done to correct it to date. I have not been reassured in any way that this will not keep happening nor have I been asked to provide any affidavit to this issue. I am seeking your help with this issue. I ask that you please assist me in putting a stop to this harassment.

While it is likely that this paragraph was addressed to Ellis, there is no direct evidence to that effect.

According to Ellis, Cherney and other employees had expressed concern for his (Cherney's) safety and Cherney felt that the Respondent was not doing anything to protect him from threats from other employees (Tr. 18, 19, 45). Because of those concerns Ellis sent an e-mail message to Roszel on January 4, 2006[2/], (GC Ex. 2; Resp. Ex. 5, p. 79). In the message, the subject of which was "Questions / Dec. 12, 2005", Ellis stated:

> I am conducting an investigation regarding an incident that I believed [*sic*] took place on you[r] shift on Dec 12, 2005 concerning a staff members mailbox. The mailbox was defaced, but also a document threatening the staff member was found by the staff member in the mailbox. I have been told it was not done on day shift by staff who observed the mail room on day shift so we must conclude it took place on evening watch since it was found defaced by the on coming shift on morning watch on Dec 13, 2005. I need to know who had any access to the back of the mailboxes on your e/w shift besides you or your acting lieutenant? If you wish to discuss this in person then let me know.
>
> This incident or issue should not be discussed with any BUE.[3/]
>
> Mike Ellis, President, Local 3979
> 971-241-7871

Ellis acknowledged that he knew that he did not have the authority to direct Roszel not to discuss the incident with bargaining unit employees, but that he could request that she not do so. He also realized that Roszel might not respond to his message and, in fact, she did not (Tr. 20, 48). Ellis further testified that he reported the incident to the Respondent's Office of Internal Affairs on the same day that he sent the message to Roszel (Tr. 26). He acknowledged that there had been prior incidents in which cheese had been spread on employees' mailboxes and that those incidents resulted in

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[2/] All subsequently cited dates are in 2006 unless otherwise indicated.

[3/] It is undisputed that BUE is an abbreviation for bargaining unit employee.

the Respondent providing locked boxes (Tr. 36).[4/]

The Respondent's Investigations

Robert Scyoc is the Associate Warden and, at all times pertinent to this case, also served as the LMR [labor-management relations] chairman for the Respondent (Tr. 80). Roszel forwarded Ellis' message to Scyoc and, on January 5, he sent an e-mail message to Ellis (Tr. 82; Resp. Ex. 5, p. 78) in which he stated:

> Mike, you are not authorized to conduct an investigation at this facility. If you request any information, follow procedures outlined by case law. Only the Warden can authorize an investigation at this facility.

Chad Cape, a SIS [Special Investigative Services] Lieutenant, was assigned to investigate the mailbox incident (Tr. 96). Cape also conducted an investigation of the charge against Ellis of conducting an unauthorized investigation, but there is no evidence that Ellis was ever specifically notified that such a charge had been made or that the Respondent was conducting an investigation into his conduct. Nevertheless, it is likely that Ellis realized that his conduct was in question when he was interviewed by Cape on July 5 and submitted an affidavit (GC Ex. 3) which is described below. The Respondent's investigative file (Resp. Ex. 5), which includes Cape's report to the Warden, contains no documentation of either formal or informal notification. On cross-examination Cape testified that he did not inform Ellis of the charge of an unauthorized investigation because the charge fell under "inattention to duty" (Tr. 104, 105). Yet, there is no evidence that Ellis was ever informed that any charge was pending against him, and certainly not before he was interviewed by Cape on July 5.

Ellis' affidavit of July 5, which was taken under oath administered by Cape and which is included in Cape's report

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[4/] The Local Supplemental Agreement (local CBA) between the Union and the Respondent, which went into effect on November 8, 2000, obligates the Respondent to make "every reasonable effort" to provide locking mailboxes to employees (Resp. Ex. 2, p. 16). The local CBA, as well as the Master Agreement of March 9, 1998 (Resp. Ex. 1), remained in effect as of the date of the hearing pending the negotiation of successor agreements (Tr. 37, 38).

(Resp. Ex. 5, pp. 72, 73), states, in pertinent part:

> 2. That I have requested Representation at this time and Pete Moone, Attorney at Law [h]as been appointed as my Staff Representative.[5/]
>
> * * *
>
> 5. That I received a copy of the Program statement P.S. #3420.09 on the Standards of Employee Conduct on March 31, 1999.
>
> 6. That I sent an E-Mail to Joy Roszel, evening watch Operations Lieutenant, Which stated: [The e-mail message is set forth in full.]
>
> 7. That I did not recall talking to Lieutenant Roszel in person. I think the E-mail was the only communication.
>
> 8. That I looked into a complaint that an employee brought to my attention as the union President and as his Representative.
>
> 9. That I was aware that people were talking about [that] issue all over the work place.
>
> 10. That Conducting an investigation was the wrong word to use, I should have used inquiring. I was inquiring into a complaint by one of our members being threatened. I was concerned for his safety.
>
> 11. That I did not know there was an investigation going on at the time.
>
> 12. That threats were made toward a staff member and he thought the agency was not addressing the issue. He was concerned for his safety.
>
> 13. That no one gave me permission, I did not conduct an investigation for the agency.
>
> 14. That I was acting as Local 3979 President, and for the employee as their Representative.

[5/] There is no evidence as to Moone's relationship, if any, to the Respondent or as to whether he was present when Ellis submitted his affidavit.

Cape also took an affidavit from Roszel as part of his investigation of the mailbox incident (Resp. Ex. 4, pp. 54, 55). She disclaimed any knowledge of the incident and did not mention either the message from Ellis or any further communication with him on that subject. There is no other affidavit or statement from Roszel in the record and she was not called as a witness by either party.

Cape also took an affidavit from Scyoc (Resp. Ex. 5, p. 75) in which he stated, in pertinent part:

* * *

> 2. That, on Thursday, January 5, 2005 [*sic*], was the first time I heard of Mike Ellis, President, Local 3979 conducting an investigation into a staff member[']s defaced mailbox.
>
> 3. [Scyoc set forth the contents of his e-mail to Ellis.]
>
> 4. That the E-mail forwarded to me was the only time I heard Mike Ellis was conducting an investigation.
>
> 5. That I don't know if Mike Ellis continued with the investigation. I never heard anything mentioned of it again.

Scyoc's affidavit is followed by multiple copies of Ellis' message to Roszel as well as a copy of Scyoc's message to Ellis (Resp. Ex. 5, pp. 77-79).

Cape's investigative report to Warden Charles A. Daniels, dated July 3[6/], concludes with the following (Resp. Ex. 5, pp. 66, 69, 70):

[6/] The date is obviously incorrect since the investigative report cites Ellis' affidavit of July 5. The discrepancy is not critical to this Decision.

SUMMARY OF FACTUAL INFORMATION

1. On January 4, 2006, Officer Ellis sent an e-mail which started out by stating, "I am conducting an investigation. . . ."

2. In his affidavit Officer Ellis changed the word investigation to inquiring.

3. Officer Ellis was inquiring into a complaint made by a Union member.

4. No one gave Officer Ellis permission to investigate the alleged incident.

5. Officer Ellis stated he did not conduct an investigation for the agency.

6. Official Investigation. Includes, but is not limited to, investigations conducted by [Scyoc listed various governmental organizations] or any other employee the CEO [the Warden] authorizes or orders to conduct an investigation.[7/]

CONCLUSION

The investigation concludes Officer Ellis started an investigation which he was not authorized to do. Additionally, Officer Ellis believed by changing the word investigate to inquiring and using his authority as President of Local 3979, he would be justified in conducting an investigation. There is a preponderance of evidence to substantiate the charge. The charge of Conducting an Unauthorized Investigation; Interfering with an Investigation is sustained.

Daniels testified that, when he learned of Ellis' message to Roszel, he thought that Ellis was conducting an investigation without authority. He also felt that, if staff members had been acting inappropriately, he needed to "get to the bottom of it" (Tr. 108). He thereupon reported Ellis' action to the Office of Internal Affairs (IA) through Lieutenant Deborah Payne, the SIS Supervisor. IA determined

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[7/] Presumably this language is taken from an official publication.

that there was a possibility of staff misconduct and referred the matter back to him for investigation. He, in turn, referred the matter to Payne so that she or someone else in the SIS office could conduct the investigation (Tr. 109, 110). It was Payne who assigned the investigation to Cape, who, at that time, assisted her in the SIS function (Tr. 75).

In the course of his investigation of the mailbox incident Cape obtained affidavits from Roszel as well as from all other employees who were on duty during the period in which the incident was presumed to have occurred. Each of them disclaimed any involvement in or knowledge of the incident and Cape reported that, "There is not a preponderance of evidence to substantiate the charge of Unprofessional Conduct against a specific staff member." (Resp. Ex. 4, pp. 19-61)

The Result of the Investigations

According to Ellis, he knew of no further activity regarding the investigation of his conduct until September 25 when he received a letter dated September 21 from Daniels (GC Ex. 4) stating:

> This letter is to inform you that the investigation into the allegation of Conducting an Unauthorized Investigation/Interfering with an Investigation has been completed. This investigation revealed the charge was sustained and no disciplinary action will be taken.

Upon receipt of the letter, Ellis asked Scyoc and a Mr. Lane, the Employee Services Manager, whether the letter from Daniels would count as progressive disciple; he was told that it would not, but that the letter would not be removed from his file (Tr. 23-24). Daniels confirmed that he sent the letter to Ellis so as to inform him that the investigation was over, that the charge had been sustained and that no disciplinary action would be taken against him (Tr. 111). Daniels testified that he did not recall having instructed anyone to put a copy of the letter in Ellis' personnel file and that he does not become involved in the disposition of documents after he has made his decisions (Tr. 113).

There is no evidence as to the identity of the person who decided to put a copy of Daniel's letter in Ellis' personnel file, nor has the Respondent explained why it did so. It is possible that the decision to put the letter in Ellis'

personnel file arose out of the Respondent's desire to go "on the record" with regard to Ellis' activities. Ellis testified that, some time before he sent the e-mail message to Roszel, an employee notified him that the Respondent was allegedly not providing enough soap for the dishwashers. Although the issue was eventually resolved, Ellis was called into the Warden's office where, in the presence of Scyoc, he was told that he was not authorized to conduct investigations. Ellis believes that the meeting in the Warden's office occurred after he had sent the e-mail message to Roszel (Tr. 24, 25). The Respondent's concern over the soap incident apparently arose out of the fact that Ellis had temporarily removed from the food service area for copying certain "bin cards" which showed how much soap had been ordered. Ellis testified that the food service supervisor knew that he had removed the cards (Tr. 64, 65, 125, 126). Scyoc's description of the incident suggests that Ellis refused to leave the office of the food service supervisor until he had been given the bin cards (Tr. 86, 87). Neither party submitted documentary evidence of the soap incident and, in view of the testimony describing it, it is possible that none exists.

According to Daniels, he issued his letter to Ellis after he had obtained the approval of Regional Director Robert E. McFadden who was his immediate superior; McFadden consulted with the Labor-Management Relations Branch in Phoenix, Arizona before giving his approval (Tr. 123, 124). This process is reflected in a memorandum from McFadden to the Labor-Management Relations Branch (Resp. Ex. 5, p. 65)[8/]. The memorandum, the subject of which is "Informal Action (Sustained)", states:

> The following memorandum is submitted as justification for no formal disciplinary action to be taken on Michael Ellis, Senor Officer Specialist, FCI Sheridan. Specifically, on August 16, 2005[9/], an investigation was sustained with charge(s) of Inattention to Duty and Failure to Follow Policy.
>
> Although, the evidence supported the conclusions made by the investigator, the following factors were considered. Mr. Ellis has been employed with the Bureau of Prisons for 16 years, and he has no prior history of disciplinary action. In addition,

[8/] The memorandum was incorrectly dated September 28, 2008 instead of 2006.

[9/] This date should be 2006.

> Mr. Ellis was acting [in] the capacity as Union President, while he was researching information as the Union representative for the Bargaining Unit Employee.
>
> It is my decision that a verbal reprimand should have the desired corrective effect. Therefore, no formal action will be taken on the sustained charges.

The Respondent's record includes an undated memorandum (Resp. Ex. 5, p. 64) from Betty Gannon to Christopher Wade. While the identities of Gannon and Wade are unclear, the text of the memorandum suggests that they are assigned to the Labor-Management Relations Branch. This memorandum, the subject of which is "No Action Request", states:

> Employee: Mike Ellis
> Title: Senior Officer Specialist
> Institution: FCI Sheridan
>
> NOTE: Mr. Ellis is also the Union President at FCI Sheridan.
>
> According to the memorandum from Robert McFadden, Regional Director, an investigation sustained Inattention to Duty and Failure to Follow Policy against Mike Ellis. However, a review of the SIS Report reveals that Conducting an Unauthorized Investigation and Interfering with an Investigation were the charges sustained.
>
> In either case, it appears [that] an employee contacted Ellis about his institution mail box being defaced and a threatening document which he found within. Ellis sent an e-mail to a lieutenant asking what the lieutenant knew about the incident and said he was conducting an investigation. Ellis' e-mail to the lieutenant was forwarded to Associate Warden Scyoc, who told Ellis [that] he was not authorized to conduct an investigation. Unbeknownst to Ellis, an official investigation was being conducted on this incident.
>
> It appears that Ellis' "investigation" began and ended with the e-mail he sent to the lieutenant. Ellis acknowledged that he should have used the word "inquiring" rather than "investigation" but he was

> acting as Union President and checking into a concern of a staff member when he sent the lieutenant the message.[10/]
>
> I am in agreement with Regional Director McFadden that no disciplinary action need be taken in this instance.
>
> I faxed you a copy of the file which was provided by FCI Sheridan. Please call me if you have any questions.

The Stated Grounds for the Respondent's Action

The Respondent has cited Paragraph 13c of the Standards (Resp. Ex. 3, pp. 10, 11) in support of its action with regard to Ellis. Paragraph 13 is entitled "OFFICIAL INVESTIGATION"; subparagraph c states, in pertinent part:

> Any employee who fails to cooperate fully or who hinders an investigation is subject to disciplinary action, up to and including removal.

The Respondent also cites Article 3 of the Master Agreement between the Federal Bureau of Prisons and the Council of Prison Locals of the AFGE (Resp. Ex. 1, pp. 5, 6) as showing that the Standards of Employee Conduct have been incorporated into the Master Agreement. The Respondent has not invoked a specific portion of Article 3, but presumably relies on the following language:

> Section a. Both parties mutually agree that this Agreement takes precedence over any Bureau policy, procedure, and/or regulation which is not derived from higher government-wide laws, rules, and regulations.[11/]
>
> * * *
>
> Section b. In the administration of all matters

[10/] It is unclear whether this was Gannon's conclusion or merely a reiteration of Ellis' contention.

[11/] The Standards of Employee Conduct is at least partially derived from issuances by the Office of Government Ethics as well as from various statutes and regulations that are applicable to the general public or to all personnel in the executive branch (Resp. Ex. 3, pp. 1-3).

> covered by this Agreement, Agency officials, Union officials, and employees are governed by existing and/or future laws, rules, and government-wide regulations in existence at the time this Agreement goes into effect.

There is nothing in Article 3 which specifically refers to the Standards.

Ellis acknowledged that he considered the mailbox incident to have been a violation of the Standards and that he expected that the Respondent would conduct an investigation. However, he did not know whether the Respondent had commenced or contemplated such an investigation when he sent the message to Roszel. Ellis also stated that he considered the mailbox incident to have been a violation of the collective bargaining agreement (Tr. 21, 27).

Although neither of the parties have cited a specific portion of the Standards of Conduct covering the mailbox incident, it is safe to assume that the defacement of government property and the insertion of a derogatory message in an employee's mailbox were not permissible. Presumably, the person or persons responsible for the mailbox incident violated the provisions of the Standards which state:

> (3) An employee may not use physical violence, threats or intimidation toward fellow employees, family members of employees, or any visitor to a Bureau work site.
>
> (4) An employee may not use profane, obscene, or otherwise abusive language when communicating with inmates, fellow employees, or others. Employees shall conduct themselves in a manner which will not be demeaning to inmates, fellow employees, or others.

(Resp. Ex. 3, p. 9)

Similarly, there have been no citations to specific portions of either the Master Agreement or the Local Supplemental Agreement with regard to the mailbox incident. There is an inaccurate subject index at the back of the Master Agreement (Resp. Ex. 1, pp. 95-99) which is of no help. There is no index at all to the Local Supplemental Agreement (Resp. Ex. 2). However, during cross-examination Ellis acknowledged that he could have filed grievances over the mailbox incident,

over the progress of the Respondent's investigation of the incident[12/], and over the result of the investigation. Ellis also acknowledged that he could have taken the grievances to arbitration. Another option available to the Union was the submission of an information request (Tr. 61, 62). Finally, Ellis could have viewed the roster of shift assignments from a computer system maintained by the Respondent to which he had access (Tr. 41, 42; Resp. Ex. 8).[13/]

The Respondent does not allege that its investigation of the mailbox incident was in progress when Ellis sent the message to Roszel. However, it maintains that Ellis compromised an investigation that he expected to take place by alerting Roszel to the fact that she might become a target of the investigation. The evidence does not support the Respondent's position. Although Ellis assumed and hoped that the Respondent would eventually conduct an investigation (Tr. 27), Cape assumed that Roszel knew of the mailbox incident before she received the message from Ellis (Tr. 104). It is difficult to imagine that Roszel did not know of the incident shortly after it occurred although, in her affidavit submitted to Cape (Resp. Ex. 4, p. 54), she disclaimed any knowledge as did each of the other employees from whom Cape obtained affidavits (Resp. Ex. 4, pp. 39-61). Apparently Cape did not see fit to press Roszel as to when she did learn of the incident, nor, apparently, did Cape make any assessment of the credibility of the affiants. The reported conclusion of the investigation (Resp. Ex. 4, p. 28) was that the incident occurred

> . . . sometime during the end of evening watch December 12, 2005, or the beginning of morning watch on December 13, 2005. The piece of hate mail was most likely placed in his [Cherney's] mailbox at the same time. . . . The three staff who had access to the mailboxes never relinquished their keys to anyone during their shift.[14/] There is not a preponderance of evidence to substantiate the charge of Unprofessional Conduct against a specific staff member.

[12/] Ellis testified that he had never filed such a grievance before, but that, "I'm assuming so since you're [counsel for the Respondent] telling me I can."

[13/] Ellis qualified his admission by stating that he could have obtained the information if the roster was correct (Tr. 42). There is no evidence that it was not correct.

[14/] Cape apparently did not challenge those assertions.

The Respondent produced no evidence that Ellis interfered with Cape's investigation (such as it was) other than the fact that Ellis expected an investigation to take place and that Roszel would be interviewed by the investigating officer. The Respondent has not alleged that Cape's investigation would have produced more definitive results but for Ellis' message to Roszel.

Discussion and Analysis

The Controlling Law

Each of the parties has correctly cited *Letterkenny Army Depot*, 35 FLRA 113, 118 (1990) (*Letterkenny*) as setting forth the order of proof in a case in which it is alleged that an employee was subject to discrimination for engaging in protected activity in violation of §7116(a)(2) of the Statute. In order to sustain her burden of proof the General Counsel must present a *prima facie* case by showing that (1) the employee in question was engaged in activity protected by the Statute, and (2) that the protected activity was a motivating factor in the imposition of discipline. Once the General Counsel has presented a *prima facie* case, the Respondent may present an affirmative defense by showing that the action taken against the employee was justified and that the Respondent would have taken such action in the absence of the protected activity.

In *U.S. Dept. of the Air Force, Aerospace Maintenance and Regeneration Center, Davis Monthan Air Force Base, Tucson, Arizona*, 58 FLRA 636 (2003) the Authority clarified the *Letterkenny* precedent by ruling that, when the discrimination alleged by the General Counsel concerns discipline for protected activity, a necessary part of the agency's defense is that the conduct at issue constituted flagrant misconduct or that it otherwise exceeded the limits of acceptable conduct. If the agency fails to show that the nature of the employee's conduct provided a legitimate reason for the adverse action, the second prong of *Letterkenny*, *i.e.*, whether the agency proved that it would have taken the same action in the absence of the protected activity, becomes moot.

The Authority has held that a determination of the existence of flagrant misconduct or otherwise unacceptable behavior depends upon the facts of the individual case, *Dept. of Defense, Defense Mapping Agency Aerospace Center, St. Louis, Missouri*, 17 FLRA 71, 81 (1985). Subsequent decisions

by the Authority support the proposition that there are no black-letter standards to determine when activity loses the protection of the Statute. For example, in *United States Forces Korea/Eighth United States Army*, 17 FLRA 718, 728 (1985) it was held that flagrant misconduct occurred when a union representative published a letter in a foreign newspaper containing derogatory and defamatory statements about U.S. government officials. Yet, in *Federal Aviation Administration, Honolulu, Hawaii*, 53 FLRA 1762, 1772 (1998) the Authority declared that statements made on behalf of a union do not fall outside the protection of the Statute merely because they are offensive. Such statements are grounds for discipline only when they are blatantly offensive (such as racial epithets) or made with a reckless disregard for the truth. *U.S. Dept. of Justice, U.S. Marshals Service, et al.*, 26 FLRA 890, 901 (1987) stands for the principle that a physical response in a labor dispute is beyond the limits of acceptable behavior. However, in *Dept. of the Air Force, 315th Airlift Wing, etc.*, 57 FLRA 80 (2001) the Authority held that there is no *per se* rule that physical touching is beyond the protection of the Statute.

In *U.S. Dept. of Veterans Affairs Medical Center, Jamaica Plain, Massachusetts*, 50 FLRA 583, 587 (1995) the Authority cited with approval the decision in *Dreis & Krump Mfg. Co., Inc. v. NLRB*, 544 F.2d 320, 329 (7th Cir. 1976) (*Dreis*) in which the court stated that protected activity remains protected unless it is found to be, "so violent or of such serious character as to render the employee unfit for further service." This is, perhaps, the most useful guide in assessing the nature of alleged employee misconduct.

The Nature of Ellis' Activity

In §7102 of the Statute, protected activity is defined to include the right:

> (1) to act for a labor organization in the capacity of a representative . . . .[15/]

While the General Counsel argues that the above definition encompasses all activity taken by a union officer on behalf of a bargaining unit employee, it is not necessary to go that far to determine that Ellis was engaged in protected activity. The working conditions of Cherney, a member of the bargaining

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15/ This language has been incorporated into Article 6 of the Master Agreement (Resp. Ex. 1, p. 10).

unit, were clearly affected by the defacement of his assigned mailbox and the insertion of a derogatory, and arguably threatening, message. The mailbox incident itself as well as the fear, possibly exaggerated, which it engendered in Cherney amply justified Ellis' decision to take action on his behalf. While it may be argued that Ellis' action was inept and unnecessary, that fact, in itself, did not remove the activity from the protection of the Statute. Even if, in spite of a total lack of supporting evidence, I were to accept the proposition that Ellis violated the prohibition against interfering with an official investigation, his message to Roszel still would not meet the standard of flagrant misconduct or other conduct, as set forth in *Dreis*, which would cause his action to lose its protected status.

Ellis would not have been entitled to immunity from the consequences of his message to Roszel merely because the Respondent had not yet undertaken its investigation of the mailbox incident. While it is possible to imagine circumstances under which Ellis' inquiry would have interfered with the investigation that the Respondent eventually conducted, his message to Roszel did not amount to such interference. The Respondent does not claim that Ellis took any further action after being informed that he was not authorized to conduct an investigation, nor did Ellis or the Union protest the Respondent's failure to provide the information which Ellis had requested of Roszel. The Respondent has not alleged, nor does the evidence indicate, that Ellis' action prevented Cape from conducting a more effective investigation or from determining the identity of the person or persons responsible for the mailbox incident.

The Respondent's Motivation

With regard to the coercive effect of the Respondent's action against Ellis, the Authority has adopted an objective standard in determining whether an agency's actions have the coercive effect which is prohibited by §7116(a)(1) of the Statute; the actual intent of the agency is not determinative, *U.S. Dept. of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky*, 49 FLRA 1020, 1034 (1994). Upon consideration of the evidence as a whole, I have concluded that Ellis, as well as other members of the bargaining unit who knew of the Respondent's action, could reasonably have drawn a coercive inference from the filing and investigation of the charge as well as from the sustaining of the charge and the insertion of the Warden's letter into Ellis' personnel

file. Regardless of the Respondent's intent, it would be naïve to suppose that no such effect would occur.

With regard to the alleged violation of §7116(a)(2) of the Statute, it is undisputed that, regardless of the Respondent's coercive intent or lack thereof, it sustained the charge against Ellis solely because of his message to Roszel. Since that message fell within the scope of protected activity, the General Counsel has met the second element of her burden of proof under *Letterkenny*.

In view of the foregoing factors, I have determined that the General Counsel has presented a *prima facie* case.

The Respondent's Affirmative Defenses

As shown above, the Respondent has presented no evidence to prove that Ellis interfered with an investigation by virtue of his message to Roszel. It is undisputed that Ellis had no further communications with Roszel concerning the mailbox incident and the Respondent has not contested the proposition that Roszel was already aware that the incident occurred. If Ellis is assumed to have presumed that the Respondent would undertake an investigation of the incident, surely Roszel would have made a similar presumption and would have expected that she would be asked to provide information to the investigator. Neither Roszel nor any other management representative could have had any reasonable doubt that Ellis was acting solely as a Union representative, especially since, as a clerical employee, he would not have been assumed to have been conducting an investigation on behalf of the Respondent. In view of the overall circumstances, Ellis' use of the word "investigation" in his message to Roszel is of little or no consequence and certainly did not justify the Respondent's action against him.

For the reasons stated above, I have concluded that the Respondent was not justified in its action against Ellis. It is, therefore, unnecessary to determine whether the Respondent would have taken such action in the absence of protected activity. The Respondent has not sustained its affirmative defenses under *Letterkenny*.

The Respondent's Contractual Defense

I am not persuaded by the Respondent's contention that, because it purportedly acted according to the collective bargaining agreement (whether the Respondent is relying on the Master Agreement or the Local Supplemental Agreement is unclear), it could not have violated the Statute.[16/] That argument apparently is derived from the proposition that the Standards are indirectly recognized in the labor contracts and that the Standards prohibits interference with an official investigation. The problem with that argument, in addition to its questionable legal basis, is that there is no evidence that Ellis interfered with the investigation of the mailbox incident. Furthermore, the Respondent has not cited any contractual language to the effect that the Union is prohibited from inquiring into any matter merely because it is, or may be, the subject of an official investigation.

I am similarly not persuaded by the Respondent's argument that there were no harmful effects from the sustaining of the charge against Ellis. While Ellis was told that no progressive discipline was involved, the Respondent, for whatever reason, put a copy of the September 21 letter from Daniels (GC Ex. 4) in his personnel file and refused to remove it. That refusal is inconsistent with the Respondent's assertion that no discipline was imposed and, at the very least, suggests that it will be taken into account in Ellis' performance evaluation or in the event that he is subject to another charge of misconduct.

For the reasons set forth above, I have concluded that the Respondent committed an unfair labor practice in violation of §7116(a)(1) and (2) of the Statute by charging Ellis with interfering with an investigation and by subsequently sustaining the charge and placing a notice of that action in Ellis' personnel file. Accordingly, I recommend that the Authority adopt the following Order[17/]:

[16/] On page 5 of its post-hearing brief the Respondent has cited two cases involving the application of the so-called "covered by" defense to charges of failure to negotiate in violation of §7116(a)(5) of the Statute. Those cases do not support the Respondent's contention that adherence to the provisions of a collective bargaining agreement is an absolute defense to any unfair labor practice proceeding.

[17/] I have revised the Order proposed by the General Counsel to more accurately reflect the conclusions contained in this Decision.

ORDER

Pursuant to §2423.41(c) of the Rules and Regulations of the Authority and §7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Sheridan, Oregon (Respondent), shall:

1. Cease and desist from:

(a) Coercing or discriminating against bargaining unit employees acting on behalf of the American Federation of Government Employees, Local 3979, AFL-CIO (Union) by filing and sustaining charges of misconduct against them because of their activities on behalf of the Union or on behalf of bargaining unit employees.

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

2. Take the following affirmative action:

(a) Expunge from the personnel file of Michael T. Ellis and from all other pertinent records all references to the letter to Michael T. Ellis from Warden Charles Daniels dated September 21, 2006, as well as all other notations showing that the charge against Michael T. Ellis of conducting an unauthorized investigation/interfering with an investigation was sustained.

(b) Take all necessary action to ensure that it does not rely upon the sustaining of the aforementioned charge in any future personnel action with regard to Michael T. Ellis.

(c) Post at all of its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the Warden of FCI Sheridan, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced or covered by any other material.

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

Issued, Washington, DC, November 1, 2007

PAUL B. LANG
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 U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Sheridan, Oregon (Respondent), violated the Federal Service Labor-Management Relations Statute (Statute) and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT coerce or discriminate against bargaining unit employees acting on behalf of the American Federation of Government Employees, Local 3979, AFL-CIO (Union) by filing and sustaining charges of misconduct against them because of their activities on behalf of the Union or on behalf of bargaining unit employees.

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 expunge from the personnel file of Michael T. Ellis and from all other pertinent records all references to the letter to Michael T. Ellis from Warden Charles Daniels dated September 21, 2006, as well as all other notations showing that the charge against Michael T. Ellis of conducting an unauthorized investigation/interfering with an investigation was sustained.

WE WILL take all necessary action to ensure that we do not rely upon the sustaining of the aforementioned charge in any future personnel action with regard to Michael T. Ellis.

_____
(Agency)

Dated: _____ By: _____
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, San Francisco Regional Office, whose address is: Federal Labor Relations Authority, 901 Market Street, Suite 220, San Francisco, CA 94103-1791, and whose telephone number is: 415-356-5000.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by PAUL B. LANG, Administrative Law Judge, in Case No. SF-CA-07-0167, were sent to the following parties:

_____

CERTIFIED MAIL & RETURN RECEIPT **CERTIFIED NOS:**

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DATED: November 1, 2007
Washington, DC