



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

MEMORANDUM

DATE: March 10, 2022

TO: The Federal Labor Relations Authority

FROM: DAVID L. WELCH  
Chief Administrative Law Judge

SUBJECT: DEPARTMENT OF THE NAVY  
SUPERVISOR OF SHIPBUILDING  
PASCAGOULA, MISSISSIPPI

RESPONDENT

AND

Case No. AT-CA-20-0136

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES,  
LOCAL R5-315

CHARGING PARTY

Pursuant to § 2423.34(b) of the revised Rules and Regulations, 5 C.F.R. § 2423.34(b), I hereby transfer 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 transcript, exhibits, briefs, and other pleadings filed by the parties.

Enclosures.



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Case No. AT-CA-20-0136

**NOTICE OF TRANSMITTAL OF DECISION**

The above-entitled case having been submitted to the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Federal Labor Relations Authority (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 Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions is governed by 5 C.F.R. Part 2423, Subpart D.

Any such exceptions must be filed on or before **APRIL 11, 2022** electronically at **www.flra.gov** by selecting **eFile** under the **Filing a Case** tab and following the instructions, or by U.S. Mail to:

Office of Case Intake & Publication  
Federal Labor Relations Authority  
1400 K Street, N.W., 2nd Floor  
Washington, DC 20424-0001

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DAVID L. WELCH  
Chief Administrative Law Judge

Dated: March 10, 2022  
Washington, D.C.



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

OALJ 22-09

DEPARTMENT OF THE NAVY  
SUPERVISOR OF SHIPBUILDING  
PASCAGOULA, MISSISSIPPI

RESPONDENT

AND

NATIONAL ASSOCIATION OF GOVERNMENT  
EMPLOYEES, LOCAL R5-315

CHARGING PARTY

Case No. AT-CA-20-0136

Brian R. Locke  
For the General Counsel

Meranda L. Jackson  
Christopher C. Dopke  
For the Respondent

David A. Perkins  
For the Charging Party

Before: DAVID L. WELCH  
Chief Administrative Law Judge

**DECISION**

**STATEMENT OF THE CASE**

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

On February 4, 2020, the National Association of Government Employees, Local R5-315 (the Union), filed an unfair labor practice charge against the Department of the Navy, Supervisor of Shipbuilding (also referred to as “SUPSHIP”), Pascagoula, Mississippi (the Agency or Respondent). GC Exs. 1(a) & 1(h). After investigating the charge, the Regional Director of the FLRA’s Atlanta Region issued a Complaint and Notice of Hearing on May 7, 2021, on behalf of the FLRA’s Acting General Counsel (GC). The Complaint alleges that the Agency violated § 7116(a)(1) and (2) of the Statute by terminating employee Robert Ladnier’s employment because he engaged in protected activity under § 7102 of the Statute, specifically, filing a grievance and meeting with management to discuss the grievance. GC Ex. 1(b). The Respondent filed its Answer to the Complaint on May 26, 2021, denying it violated the Statute. GC Ex. 1(c).

A hearing was held in this matter on October 5-7, 2021, via the WebEx video platform. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The GC and the Respondent filed post-hearing briefs, which have been thoroughly reviewed and fully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, the undersigned makes the following findings of fact, conclusions of law, and recommendation.

### **FINDINGS OF FACT**

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. The Union is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of a bargaining unit of the Respondent’s employees. GC Exs. 1(b) & 1(c). The Respondent and the Union were parties to a collective bargaining agreement (CBA) covering the employees of the bargaining unit; the CBA was in effect at all relevant times. GC Ex. 1(i) at 2; Resp. Ex. 3.

The Respondent, a field activity under the Naval Sea Systems Command (NAVSEA), oversees new construction shipbuilding contracts along the Gulf Coast. Tr. 310; *see* Resp. Ex. 9 at 1. The Respondent’s Quality Assurance Department (also referred to as Code 300), performs multiple methods of nondestructive testing (NDT), including ultrasonic testing (UT). *See* Tr. 22-23, 201, 321; Jt. Ex. 6 at 1-2.

In 2018 and before, the Respondent brought in an individual from SUPSHIP Bath in Maine once or twice per year to perform the UT Level III examiner work. Because this was costlier than having a UT Level III examiner on-site and resulted in less robust oversight, and because there was an increase in demand for UT work, the Respondent sought to hire its own UT Level III examiner. Tr. 262.

William “Robert” Ladnier applied for the vacant position. Ladnier had spent approximately ten years performing UT Level III work in the private sector and thus appeared qualified with the skill set for which the Respondent posted the position. Tr. 127, 261; GC Ex. 1(i).

After interviewing and vetting, the Respondent engaged Ladnier on September 4, 2018. Based upon superior qualifications, the Respondent hired Ladnier at an increased step level. As a new employee, Ladnier was subject to a two-year probationary period. GC Ex. 1(i) at 1; Resp. Ex. 14; Tr. 206.

The requirements of Ladnier's position, Quality Assurance Specialist (also referred to as an NDT Examiner), were outlined in his position description, PD 13355. Resp. Ex. 13; Tr. 22. Ladnier likely had the impression that he was working under a different position description, PD F0095, which was shown to Ladnier during his job interview with Timothy Hughes, the Quality Assurance Director (Tr. 260), and Jonathan Graves, the Deputy Quality Assurance Director. Tr. 202. PD F0095 was tailored to the NDT Level III methods that management ultimately desired Ladnier to become certified, specifically, UT, RT (radiographic testing), and VT (visual/dimensional testing). Because PD F0095 remained in the process of being classified, Ladnier was hired and worked under, PD 13355. See Tr. 30, 235, 239; Jt. Exs. 5 & 6.

Initially, Ladnier met with Kelvin Howard, who would be Ladnier's first-line supervisor, and Carl Fehrenbach, a Division Manager, and Ladnier's third-line supervisor, to discuss Ladnier's work plan. Fehrenbach and Howard informed Ladnier that his top priority would be to pass the UT Level III certification exam and become UT Level III certified. In another meeting early on, Hughes similarly told Ladnier that the plan was for Ladnier to get UT certified and later RT certified. Tr. 23, 121, 202, 210, 267. Under NAVSEA regulations, Ladnier would be able to take the UT Level III certification exam three times within one year of his first attempt. Resp. Ex. 9 at 10.

Ladnier also communicated with Lee Robinson, who briefly served as Ladnier's first-line supervisor, about TSM, a web application used to document daily work performance. As the end of the calendar year was approaching, and since Howard would soon be taking over as Ladnier's first-line supervisor, Robinson told Ladnier that he should focus on new-employee training in preparation for Howard instructing Ladnier in TSM. Tr. 40, 221.

In December 2018, the Respondent sent Ladnier to the Portsmouth Naval Yard in Maine to take the UT Level III certification exam. Ladnier failed the exam. Tr. 128, 130; Resp. Ex. 5.

Ladnier's exam failure concerned Joseph Thomas, a Quality Assurance Manager and Ladnier's second-line supervisor. Tr. 23, 164. Ladnier's failure led Thomas to ask Fehrenbach, "[A]re you sure we did the right thing by hiring this guy?" Tr. 168-69. Thomas recommended that Ladnier should be terminated, but Hughes and Fehrenbach declined. Tr. 241.

In February 2019, Ladnier took the UT Level III exam at Portsmouth for the second time and again failed, as well as the RT Level III certification exam. Resp. Ex. 6; Tr. 132-33. After Ladnier's second UT Level III exam failure, Thomas continued to believe that Ladnier should be terminated, about which Hughes was aware. Similarly, Ladnier's second failure led Hughes and Fehrenbach to "start to lose some confidence in [Ladnier's] abilities," Fehrenbach

testified. Tr. 241, 288. Ladnier himself could sense that management was disappointed after his second exam failure, writing that he was “mentally devastated,” that management was “not happy with me,” and that Howard was the only supervisor who would talk to him after the failed exam. GC Ex. 1(a). Although disappointed, management decided to allow Ladnier to take the exam the third time within the one year period. The reasoning, Fehrenbach explained, was that the NAVSEA regulations “give him three attempts in a year, we’re going to give him that third attempt.” Tr. 241.

In March 2019, management formally classified PD F0095. Jt. Ex. 5 at 1; Tr. 239. Although management had originally planned to move Ladnier to that position description, Fehrenbach explained that management would “hold off to see how [Ladnier’s] third attempt went before we went through . . . all the paperwork” that would be involved in giving him a new position description. Tr. 239-40.

In May 2019, Ladnier went to Portsmouth again for testing. Ladnier passed the RT Level III exam, but failed the UT Level III exam for the third time. Resp. Ex. 7; Tr. 27, 134-35, 287.

Management was displeased with Ladnier after his third failure on the UT Level III exam. Howard recognized, as did Ladnier, who wrote that management was “not pleased” that he had failed the UT Level III exam, and that “[n]one of them [management] said a word to me or even looked at me except for my supervisor.” Tr. 136; GC Ex. 1(a) at 8. Thomas was “shocked,” explaining that it was simply not normal for someone to fail the exam three times. Tr. 167-68. After Ladnier’s third failure, Fehrenbach joined Thomas in concluding that Ladnier should be terminated and expressed that sentiment to Hughes, though Fehrenbach stopped short of formally recommending Ladnier’s immediate termination. *See* Tr. 241-42, 269, 288.

Ladnier’s third failure created practical difficulties for management. Because Ladnier was not UT Level III certified, Hughes testified, there was “[v]ery little” quality assurance specialist work for Ladnier to perform. Ladnier had become RT Level III certified, but there was little RT work that needed to be performed. Tr. 272. Management sought to qualify Ladnier for certification in other methods of quality control, but Hughes testified, that management took these steps mostly “because [Ladnier] couldn’t pass the UT, and we had to give him something to do, not just sitting around at his desk all day.” Tr. 289.

Ladnier believed it was “obvious” after his third exam failure that he was “not going [to] pass this [UT Level III exam] without going through . . . training.” Tr. 27. Ladnier asked Howard if he could get training at Portsmouth Naval Shipyard, and Howard responded affirmatively. A couple of weeks later, Howard told Ladnier he was still looking into Ladnier’s training request; the two did not discuss the matter subsequently. Tr. 27-28.

To resolve these issues, Hughes met with his leadership team and asked if there were options other than termination. Because their need for a certified UT Level III examiner in-house was necessary to meet their quality standards, rather than continually having to hire outside examiners to address the increasing Level III workload, he pursued any additional

means to enhance Ladnier's success. Specifically, Hughes asked whether it would be possible to obtain a waiver of the NAVSEA regulations to allow Ladnier to take the UT Level III exam a fourth time within the one-year period. Tr. 218, 268-69. Hughes further testified that he sought to explore alternatives to terminating Ladnier because it had been lengthy and challenging for the Respondent to hire a Level III examiner, and there was "nobody waiting to take [Ladnier's] place." Tr. 269-70. Hughes directed Fehrenbach and Thomas to inquire if a waiver could be obtained, a task that was ultimately delegated to Howard. Tr. 243.

On May 23, 2019, Howard emailed his findings to Hughes, Fehrenbach, Thomas, and Graves. Howard wrote that Jason Hence, the NAVSEA director responsible for overseeing NDT programs, would authorize a waiver under certain conditions, specifically, that Ladnier attends a training course or receives on-the-job training at another Naval Shipyard. Tr. 202, 215; Resp. Ex. 11 at 1. Howard recommended that the Respondent send Ladnier to another Naval Shipyard for two weeks of training, adding that "[w]e can pull [Ladnier] back early if the [Naval Shipyard] believes that he is at the point where they can provide no further meaningful assistance." Resp. Ex. 11 at 2. Howard noted that the hosting Naval Shipyard would still have to confirm their availability to provide Ladnier training. *Id.* Alternatively, Howard wrote, the Respondent could: wait until a Naval Shipyard had a class scheduled; allow Howard to become UT Level III certified; prepare another employee for UT Level III certification; or ask David Perkins, an NDT Level III examiner and the Union's president, to attempt UT Level III certification. *Id.* Management agreed that they should try to get Ladnier training at another Naval Shipyard. *See* Tr. 215.

Meanwhile, in the wake of Ladnier's third exam failure, Howard sent Ladnier an email on May 14, 2019, with additional tasks and assignments to address in place of being able to work on his Level III certification. Tr. 137; Jt. Ex. 7. One action item involved TSM. Thomas noted that Ladnier was not inputting his TSM data (as much as normally expected which is 70 percent of time recorded on TSM to be performed and documented for one's main "deck plate" functions; referred to as "the 70 percent requirement"), and asked Howard to address Ladnier accordingly. Tr. 53, 179, 222-23. In his email, Howard asked Ladnier to meet to review "observation creation" entries in TSM. Howard told Ladnier that he could backdate observations in the system. In another email, Howard told Ladnier that he could consult with Perkins if Ladnier needed more help with TSM. Tr. 50, 138-39; Jt. Ex. 7. Shortly after Howard's email, Ladnier studied the procedure for complying with TSM entries and started inputting TSM data. Howard and Ladnier met regarding TSM in July 2019. It is noted that on August 20, 2019, Howard asked Ladnier to complete two overdue TSM tasks that week. Resp. Ex. 4; Tr. 42, 141-42.

Another assignment addressed in Howard's May 14, 2019 email was for Ladnier to commence obtaining a DAWIA (Defense Acquisition Workforce Improvement Act) Level II certification, another requirement of Ladnier's position that required completion within 24 months of his start date. Howard wrote that Ladnier should spend about 10 hours per week on this DAWIA certification, and further that he would like Ladnier to complete his online

study part of the DAWIA training process by December 31, 2019. *See* Tr. 38-39, 139, 185-186; Jt. Ex. 1; Jt. Ex. 7 at 2; Resp. Ex. 16 at 2.

After Howard's May 23, 2019 email to management, Hughes and Howard learned that Puget Sound Naval Shipyard appeared to be able to provide training for Ladnier in October 2019. Hughes noted Puget Sound would not be able to train Ladnier until after finishing their NAVSEA headquarters NDT audit scheduled in the fall. Tr. 153, 270. Through no fault of Ladnier, he did not receive the additional training required to obtain the waiver to take the exam a fourth time. Tr. 290.

In the fall of 2019, Howard informed Ladnier of his intention to have Ladnier become certified in MT (magnetic particle testing) and PT (liquid penetrant testing). Tr. 30; Resp. Ex. 9 at 13. Ladnier replied that he worked under job description PD F0095, which did not require MT or PT certification, and that he was told during his job interview that he would not need to be MT or PT certified because Howard and Perkins already had those certifications. Tr. 30. Ladnier testified that Howard was "obviously not happy that I told him that—that I was going to have to push back on taking those certs and get with the Union about it." Tr. 30-31.

On October 3, 2019, Howard sent Ladnier an email assigning Ladnier to attend PT training class the week of October 14, 2019. Howard also assigned Ladnier to undertake VT training. *See* Jt. Ex. 2 at 1; Tr. 31.

On October 8, 2019, Perkins filed a grievance on Ladnier's behalf alleging that Ladnier was being assigned work, attending a PT Level II class, that was not required in Ladnier's position description. GC Ex. 1(i) at 2; Jt. Ex. 2 at 1. The grievance alleged that management violated the collective bargaining agreement (CBA) by failing to provide the Union written notification of this change or of a plan to change Ladnier's position description. As a remedy, Ladnier requested that he be removed from the PT Level II certification, or that management change his position description to PD 13355. Jt. Ex. 2 at 1.

A short time thereafter Howard called Ladnier into his office and told him that filing a grievance "[wasn't] going to look good to upper management, especially since [Ladnier] was on probation." Tr. 31.

On October 18, 2019, Thomas issued the Agency's Step I decision denying the grievance. (Howard would have responded, but he was out on leave.) Tr. 88. Thomas wrote that there was no change in Ladnier's position description, that it was reasonable for management to assign Ladnier to PT training and certification testing since that was consistent with his position description and within management's rights, and that the assignment did not constitute a change in working conditions. Thomas also denied Ladnier's request to be removed from the PT Level II certification class. Jt. Ex. 3.

Upon receiving the Step I decision, Ladnier emailed Thomas to thank him for clarifying that Ladnier was working under PD 13355. Ladnier added that UT Level III certification was not in his position description and that by becoming RT Level III certified, he exceeded the requirements of PD 13355 concerning UT and RT. Resp. Ex. 12 at 4. It is noted that PD 13355



requires the incumbent to attain Level III certification in VT, MT, and PT, as well as Level II certification in either UT or RT, within 12 months of accepting the position. Jt. Ex. 6 at 2. PD 13355 also states that “training and knowledge must meet the requirements . . . for . . . at least that of Inspector (Level II) for the RT or UT discipline.” *Id.* at 2-3.

Several days later, Thomas asked Ladnier and Perkins to meet with Labor and Employee Relations Specialist Tiffany McFadden. Tr. 33, 76. Thomas viewed the meeting as an opportunity to finally resolve the grievance. Tr. 174-75. Ladnier, however, viewed Thomas’s response as showing that Ladnier’s previous email “obviously made [Thomas] mad.” Tr. 33.

At the meeting, Thomas told Ladnier that management expected him to be Level III certified in UT and all other methods. Perkins objected, arguing the difficulty to accomplish it. GC Ex. 1(a); Tr. 33. Thomas and McFadden replied that management had the right to assign training. *See* Tr. 34, 174. At the hearing, Ladnier recalled: McFadden stating that the Agency “couldn’t fire us for not passing the exams that were not in the PD [position description]. And we agreed. . . . [W]hen we walked out, we told them that we would go get the certifications.” Tr. 34. For his part, Thomas testified that the meeting went smoothly, though he noted that McFadden was “getting a little mixed up with the PD . . . acronyms.” Tr. 174.

On October 23, 2019, Perkins sent an email to Executive Director Nadia Herron advising that Ladnier’s grievance was closed and would not be advanced to Step 2. GC Ex. 1(i); Tr. 309. Perkins expressed frustration that Ladnier was directed to obtain certifications that were not in his PD 13355, and that required travel to Portsmouth on multiple occasions. Resp. Ex. 12 at 1-2.

In early to mid-October, Thomas contacted McFadden to inquire about the possibility of terminating Ladnier due to his failures on the UT Level III certification exam. *See* Tr. 90-91, 97-98, 102, 172, 241-42. McFadden and Thomas provided different background details, but the undersigned finds it is more likely than not that they both testified about their identical conversation. McFadden suggested that Thomas talk to leadership about Ladnier’s performance issues and that since Ladnier was in his probationary period management could consider terminating Ladnier if he was failing to show that he would be able to meet the requirements of the position by failing to become UT Level III certified. Tr. 90-91, 172. Thomas indicated that he would talk with leadership as McFadden recommended. Tr. 91. Notably, both McFadden and Thomas recalled this discussion as pertaining to Ladnier’s performance. There was no mention of Ladnier’s grievance. Tr. 90-91, 172.

In the middle of October 2019, Fehrenbach formally recommended to Hughes that Ladnier be terminated. Tr. 241-42. Fehrenbach was not involved in Ladnier’s grievance, and Fehrenbach testified credibly that he did not know when Ladnier’s grievance was filed, or even whether it was filed before or after October 2019. Tr. 242.

In early November 2019, Hughes met with McFadden to discuss Ladnier’s termination, and in mid-November, the two met with attorneys to discuss the matter further. Tr. 277-78,

286-87. McFadden testified that after Ladnier's grievance was closed, senior leadership "came to me and indicated, again, that they were having continued issues," specifically, Ladnier's "inability to get certified." McFadden recommended that Ladnier be terminated, just as she had advised Thomas. Tr. 91, 97-98, 102.

Because the shipyards close around the middle of the month of December for holidays there appeared to be a pause in activities concerning these matters. In January 2020, McFadden prepared a packet of information regarding terminating Ladnier for Herron's review and approval. Tr. 293-94. By January, it was apparent that Ladnier had failed to complete his online DAWIA training by December 31, 2019, as earlier assigned. According to the Agency's records, Ladnier had not completed any of the nine online classes that were needed to receive DAWIA Level II certification. Jt. Ex. 7 at 2; Resp. Exs. 16 & 17; Tr. 190-91, 358.

On January 17, 2020, Fehrenbach emailed McFadden (and copied Hughes) a justification for Ladnier's termination, including Fehrenbach's belief that Ladnier was so far behind in his DAWIA work that it would be impossible for him to be certified within 24 months of his start date, as required. Resp. Ex. 16 at 2. It is noted that Perkins believed an employee who was not "over tasked" could finish DAWIA training in six months. Tr. 51-52. Herron reviewed Fehrenbach's submission and approved Ladnier's termination. See Tr. 315-17, 319-20; Resp. Ex. 16; Jt. Ex. 1.

On January 24, 2020, Herron issued Ladnier's termination letter, making essentially the same points that Fehrenbach made in his January 17, 2020 email. Jt. Ex. 1; Resp. Ex. 16. In the termination letter, Herron advised Ladnier that "[a] number of concerns relating to your performance . . . have been brought to the attention of management over the past year." Jt. Ex. 1 at 1. Specifically, Ladnier had failed to obtain "all required levels of NDT certifications." Jt. Ex. 1 at 1. Further, Herron wrote that Ladnier had "struggled with accomplishing assigned tasks," as he was failing to properly document work in TSM as directed and failing to "master the [DAWIA] curriculum and testing" that was needed to become DAWIA Level II certified in the "authorized timeframe" as required by PD 13355.

Ladnier's termination occurred within his two-year probationary period. GC Ex. 1(i) at 1. Ladnier never obtained UT Level III certification. Tr. 27. At the time of his termination, Ladnier had filled out paperwork to take the UT Level III exams again in April 2020. GC Ex. 1(a) at 9. Ladnier had not been scheduled for Level III certification exams in VT, MT, or PT. Tr. 36.

Numerous disputed issues about Ladnier's termination were raised during the hearing. First, witnesses presented conflicting interpretations of PD 13355. Ladnier testified that PD 13355 required only Level II certification in UT or RT. Tr. 36. Fehrenbach countered that PD 13355 permitted management to require Ladnier to become UT Level III certified because it states that training and knowledge requirements will be "at least" Level II for UT and RT. Tr. 212. Fehrenbach noted that PD 13355 is more comprehensive than PD F0095, that NDT Level III Examiners Perkins and Howard were working under PD 13355, and that Howard was

UT Level III certified; Howard became UT Level III certified in February or March 2021. Tr. 236-37, 247, 250; *see also* Tr. 119-20, 146.

Witnesses also provided context to Ladnier's exam-related struggles. When asked whether waivers of the NAVSEA's three-exams-per-year rule were normally required, Hughes answered, "No. I mean, not at all." Tr. 272. Hughes and Fehrenbach indicated that someone in Ladnier's position should not have needed any training to pass the UT Level III certification exam. Tr. 217, 270. Indeed, Howard passed the UT Level III exam upon initially taking the exam, in February or March 2021, and did so without receiving any formal training specific to UT Level III in the months leading up to the exam. Howard had received hands-on UT training at Portsmouth Naval Shipyard in 2007, and he did some minor refresher training before his UT Level II recertification exam in late 2020 or early 2021. *See* Tr. 120, 135-36, 168. In contrast, Perkins had recently failed three UT examinations required in PD 13355, though Perkins stated that this was because he hardly uses the UT method at all. Tr. 55.

As for why Ladnier was terminated, Herron, Hughes, and Fehrenbach consistently indicated that Ladnier was fired primarily because he could not pass the UT Level III exam and attain UT Level III certification. Tr. 231, 282-83, 315-16. Hughes stated Ladnier was terminated because "he couldn't pass UT Level III, which is the primary reason I brought him onboard and paid him extra money." Tr. 282-83. Fehrenbach similarly stated, "[W]e really needed [Ladnier] to pass this UT examiner test, and he failed to demonstrate his qualifications for continuing employment by not passing that." Tr. 231. Fehrenbach added that Ladnier's failure meant the Respondent would have to bring in a UT Level III examiner from elsewhere, resulting in extra costs and burdens. Tr. 214. Relatedly, while Howard testified that Ladnier's work was satisfactory, Howard also acknowledged that "in some areas [Ladnier] . . . didn't meet the requirements," including in ultrasonic testing. Tr. 142, 157. Howard added that Ladnier "wasn't where we expected him to be with his DAWIA certification." Tr. 142.

Herron, Hughes, Fehrenbach, and McFadden all denied that Ladnier's grievance was a motivating factor behind Ladnier's termination. *See* Tr. 101, 230-31, 282, 327-29. Thomas similarly testified that he did not take Ladnier's grievance personally. Tr. 178.

On the matter of protected activity generally, Fehrenbach testified that he had been involved in resolving grievances and that grievances did not upset him or result in treating employees who had filed grievances differently. Tr. 219-20. Hughes similarly testified that he promoted people who had filed grievances and awarded people after they filed grievances. Tr. 277. Hughes also stated that "all grievances aren't bad," that employees sometimes need grievances to "understand something better they're just not getting from his supervisor. I mean, it would be better if he just come to my open door and ask me, but they don't always do that." Tr. 274. Hughes acknowledged that employees have a right to file grievances (Tr. 282), and also stated that resolving a grievance at Step 1 "is clearly a win-win for both the employees, the union and management" because the employee "understands what the issue is, he's been well represented by the union, and we—we also have lessons learned too from grievances, hey, we're not communicating, for example." Tr. 276.

Herron and Fehrenbach indicated that they would have taken the same action against Ladnier regardless of whether he had filed a grievance. Tr. 231, 330.

Additional reasons for Ladnier's termination were his "inability to follow [his] supervisor's direction in the area of TSM entry and DAWIA," Hughes testified. Tr. 279. Concerning TSM, Fehrenbach testified that Ladnier didn't make any entries for the month of March 2019, and Hughes testified that Ladnier's use of TSM was "sporadic." Tr. 226, 281. Perkins countered that other (non-probationary) employees failed to meet the 70 percent requirement and that the worst penalty for that offense would be a discussion with management. Tr. 54, 70-72; Jt. Ex. 4. Howard similarly testified that it was not usual for employees to miss the 70 percent mark. Tr. 154. Fehrenbach stated that it was reasonable for the Respondent to treat Ladnier's failure to meet the 70 percent requirement differently, because only Ladnier was a probationary employee, and probationary employees are held to a higher standard. See Tr. 226-27, 232.

Concerning Howard's August 20, 2019 email to Ladnier about two overdue TSM tasks, Howard testified that he did not consider the interaction about the overdue issues to be significant. It was the only time he'd discussed overdue issues with Ladnier, and it was not unusual for employees to have two overdue TSM tasks. See Tr. 43, 157. Ladnier testified that he was sometimes assigned work that was already overdue. Tr. 345.

Concerning DAWIA, Ladnier acknowledged that he did not complete the DAWIA self-study that he was directed to have completed by December 31, 2019. Tr. 37-38. Ladnier claimed that he put in over 100 hours of DAWIA training and that he completed about three-fourths of what was required, but this was supported by only two documents, one showing Ladnier completed an orientation session, which did not count towards his certification, and another indicating the completed Quality Assurance Auditing, but it was not revealed on the transcript kept by the Agency. Tr. 37, 356-58; GC Exs. 2 & 3. Howard did not check Ladnier's progress on DAWIA. Ladnier had until September 2020 to be certified, and Ladnier did not receive a reminder to finish his DAWIA work by the end of the year. Tr. 38, 154.

## **POSITIONS OF THE PARTIES**

### **General Counsel**

The GC asserts that the Respondent violated § 7116(a)(1) and (2) of the Statute when it terminated Ladnier's employment for engaging in protected activity, specifically, filing and pursuing his grievance. GC Br. at 11, 22.

The GC argues that Ladnier's protected activity was a motivating factor in the Respondent's decision to terminate. The GC asserts that after the grievance was filed, Howard warned Ladnier that his grievance would not look good to upper management, especially because Ladnier was still a probationary employee. *Id.* at 11-12. The GC argues that it was not until the grievance meeting that Thomas announced Ladnier would be required to be certified in all NDT methods. Further, the GC asserts, the Respondent initiated the termination process less than one month after the grievance was filed. The GC adds that the Respondent

did not point to any incident occurring in that limited window of time that would explain why it decided to begin the termination process at that time. *Id.* at 12. The GC notes McFadden assured Ladnier at the grievance meeting that he could not be fired for failing to earn a certification outside his position description. *See id.* at 12-13. The GC also urges that the undersigned ignore self-serving testimony from management's witnesses that Ladnier's protected activity had nothing to do with his termination. *Id.* at 13.

In addition, the GC contends that the Respondent's asserted reasons for terminating Ladnier are wholly pretextual. *Id.* The GC suggests that Ladnier's exam failures could not have been the reason for his termination, since the Respondent waited at least five months after Ladnier's third failure to initiate the termination process. *See id.* at 14. The GC also asserts that the Respondent failed to explain why it "abandoned" its plan to get Ladnier trained in October 2019 at the Puget Sound Naval Shipyard "shortly after Ladnier engaged in protected activity," and that the Respondent failed to explain why it gave Howard, but not Ladnier, training before the UT Level III exam. *Id.* The GC also contends that if Ladnier's exam failures were the real reason for his termination, then McFadden would not have told Ladnier at the grievance meeting that he could not be fired for failing to earn a certification outside his position description. Indeed, the GC argues, PD 13355 shows that Ladnier was not required to be UT Level III certified. *Id.* at 15. Further, the GC submits that Ladnier's TSM issues were not the real reason for Ladnier's termination, given that the Respondent hadn't expressed concern about his TSM entries from August to December 2019, and given that other (non-probationary) employees had similar TSM issues but were not fired for such offenses. *See id.* at 18-19 & n.19. Finally, the GC asserts that Ladnier's failure to become DAWIA Level II certified was not the real reason for his termination, given that (a) Howard merely told Ladnier that he'd "like" him to be finished with this DAWIA training by December 31, 2019; (b) Howard never followed up with Ladnier because Ladnier had until September 2020 to become certified; and (c) Ladnier's termination letter did not cite his failure to be trained by December 31, 2019, as a basis for his termination. *Id.* at 20-21.

#### Respondent

The Respondent asserts that the GC has failed to establish a prima facie case because it has failed to show that Ladnier's termination was unlawfully motivated. R. Br. at 9, 11, 27. With respect to timing, the Respondent notes that Ladnier wasn't terminated until months after his grievance was closed. *Id.* at 11-12. Furthermore, the Respondent asserts that Ladnier's grievance was resolved amicably at Step 1; that Herron, Hughes, and McFadden denied being influenced by Ladnier's grievance; that Herron oversaw a thorough and fair review of Ladnier's termination; that Herron was not involved in Ladnier's grievance; and that the Respondent held no animus concerning Ladnier's protected activity or protected activity generally. *Id.* at 11-12, 23-26.

The Respondent contends that Ladnier was terminated for legitimate reasons, specifically, his failure to obtain UT Level III certification, his failure to properly document daily work performance in TSM as directed, and his failure to obtain DAWIA Level II

certification within the directed timeframe. The Respondent argues that it was entitled to require that Ladnier obtain UT Level III certification, based on Ladnier's position description. Further, they argue that Ladnier worked under the identical position description for other UT Level III examiners and that the Respondent's practices were consistent in treating Ladnier. In addition, the Respondent points out management's right to assign work and employees under § 7106 of the Statute. *Id.* at 13-15, 18-23. Given Ladnier's pre-hiring work experience, the Respondent contends that it was reasonable to expect he would pass the UT Level III exam without any additional training. *Id.* at 15-17, 21. The Respondent notes that Ladnier's failures meant that the Respondent would have to return to using a UT Level III examiner from a facility other than the Respondent's. *Id.* at 21-22.

Finally, the Respondent asserts that termination was appropriate in light of Ladnier's probationary status and that Herron, Fehrenbach, and Hughes all testified that the Respondent would have fired Ladnier in the absence of his protected activity. *See id.* at 18-19, 23.

### ANALYSIS AND CONCLUSIONS

It is well established that an agency may remove a probationary employee without cause. *Dep't of the Navy, Naval Weapons Station Concord, Concord, Cal.*, 33 FLRA 770, 771 (1988) (citing *U.S. Dep't of Justice, INS v. FLRA*, 709 F.2d 724 (D.C. Cir. 1983)). Thus, it is permissible to terminate a probationary employee for "[g]ood reason or even no reason at all." *Indian Health Serv., Crow Hosp., Crow Agency, Mont.*, 57 FLRA 109, 114 (2001) (Indian Health Service). However, a probationary employee cannot be terminated for an illegal reason, and termination for a reason in violation of the Statute constitutes an unfair labor practice. *Id.* Ladnier was a probationary employee at the time of his termination.

Under § 7116(a)(2) of the Statute, it is an unfair labor practice "to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment." In *Letterkenny Army Depot (Letterkenny)* 35 FLRA 113 (1990), the Authority established the analytical framework for determining whether an agency action violates this provision of the Statute. *Id.* at 117-18. The GC always bears the burden of establishing, by a preponderance of the evidence, that an unfair labor practice was committed. *Id.* at 118. First, the GC must show by preponderant evidence: (1) that the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) that such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment. *Id.* A finding that protected conduct was a motivating factor in the employer's decision may be based on circumstantial as well as direct evidence. *See U.S. Dep't of the Air Force, 315th Airlift Wing, Charleston AFB, Charleston, S.C.*, 56 FLRA 927, 927, 931 (2000). If the GC proves these elements, then it has established a prima facie case of retaliation. *Id.* The existence of a prima facie case is determined by considering the evidence in the record as a whole, not just the evidence presented by the GC. *U.S. DOD, U.S. Air Force, 325th Fighter Wing, Tyndall AFB, Fla.*, 66 FLRA 256, 261 (2011) (*Tyndall AFB*).

Even if the GC makes the required prima facie showing, the agency will not be found to have violated § 7116(a)(2) if it can demonstrate, by a preponderance of the evidence, that: (1) there was a legitimate justification for its action; and (2) the same action would have been taken even in the absence of protected activity. *Letterkenny*, 35 FLRA at 118.

It is well settled that the pursuit of a grievance, including the filing of a grievance and attendance at grievance meetings, constitutes protected activity within the meaning of § 7102 of the Statute. *See U.S. Dep't of the Air Force, Aerospace Maintenance & Regeneration Ctr., Davis Monthan AFB, Tucson, Ariz.*, 58 FLRA 636, 636 (2003); *EEOC*, 24 FLRA 851, 855 (1985). Ladnier engaged in protected activity by filing a grievance and meeting with management to discuss it, and the Respondent admits that Ladnier engaged in protected activity. GC Ex. 1(c) at 2. Accordingly, the undersigned turns to the question of unlawful motivation.

The undersigned finds that Ladnier's protected activity was not a motivating factor in the Agency's decision to terminate his employment, and the reasons given by the Respondent for terminating Ladnier are not pretextual.

The Authority has long considered the timing of a management action significant in determining whether a prima facie case of discrimination has been established under § 7116(a)(2). *E.g.*, *U.S. Dep't of Transp., FAA*, 64 FLRA 365, 368 (2009). However, while the proximity in time between an agency's employment decision and an employee's protected activity may support an inference of unlawful motivation, it is not conclusive proof of unlawful motivation or a violation. Rather, timing must be evaluated within the totality of the evidence. *Dep't of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 55 FLRA 1201, 1205. The words and conduct of supervisors may also shed light on a respondent's motivation. *FAA*, 64 FLRA at 369. Further, a supervisor's anti-union animus can shed light on the supervisor's motivation concerning his or her activity. *See U.S. Dep't of Transp., FAA, El Paso, Tex.*, 39 FLRA 1542, 1552-53 (1991).

In establishing an unlawful motivation, the GC may seek to establish that the respondent's asserted reasons for taking the allegedly discriminatory action were pretextual, *Tyndall AFB.*, 66 FLRA at 261, i.e., that the proffered, lawful reasons for the respondent's actions did not motivate the respondent, *see AFGE, Local 1345, Fort Carson, Colo.*, 53 FLRA 1789, 1794 n.4. *See also U.S. Dep't of the Air Force, Seymour Johnson AFB, Goldsboro, N.C.*, 50 FLRA 175, 183 (1995) (respondent's justification for its action was neither frivolous nor improbable). In addition, the disparate treatment that is unexplained except as retaliation for protected activity supports a finding that an agency's reason for taking its action was pretextual. *Indian Health*, 57 FLRA at 114.

At first glance, the timing, in this case, appears suspect, at least when focusing only on the fact that Ladnier filed his grievance on October 8, 2019, and Fehrenbach formally recommended to Hughes in mid-October 2019 that Ladnier be fired. When viewed in context, however, it becomes clear that the close timing is coincidental, and that Ladnier's grievance was not a motivating factor in his termination.

Significantly undermining the GC's timing argument is the fact that Ladnier's termination was essentially decided as one of two options for Ladnier in May 2019, five months before Ladnier engaged in protected activity. The sentiment in favor of terminating Ladnier's employment came into being with his first exam failure and grew with each subsequent failure. Specifically, Thomas believed Ladnier should be fired after his first exam failure in December 2018, Hughes and Fehrenbach began to doubt Ladnier's abilities after his second exam failure in February 2019 (and Hughes was aware at that time of Thomas's view that Ladnier should be terminated), and Fehrenbach concluded that Ladnier should be terminated after his third exam failure in May 2019. In May 2019, Hughes decided, contrary to the views of Thomas and Fehrenbach, that the Agency should pursue a training-and-waiver option as an alternative to terminating Ladnier, and arrangements were pursued for Ladnier to receive training at Puget Sound in October 2019. The training option at Puget Sound became impossible due to Puget Sound's need to complete its audit before being able to provide Ladnier training. This left the Respondent with termination as its sole remaining option, one it had considered initiating as early as May 2019. That Ladnier's termination was seriously contemplated in May 2019, months before his protected activity, and was carried out after the extraordinary step of considering the failed attempt to obtain training to obtain permission for Ladnier to take the Level III examination a fourth time within one year, strongly contradicts the argument that Ladnier's grievance was a motivating role in the termination process.

Furthermore, significant additional evidence bolsters the conclusion that Ladnier's termination was not motivated by his grievance. First, it is unlikely that Ladnier's grievance would motivate the Respondent to retaliate against him, given that Ladnier agreed at the end of the grievance meeting to obtain the certifications that management required.

Second, no testimony or documentary evidence was introduced into evidence indicating that Herron, Hughes, Fehrenbach, Thomas, or McFadden considered Ladnier's grievance when deciding he should be terminated. That Fehrenbach could not remember when Ladnier's grievance was filed, or even whether it was before or after October 2019 (the month when Ladnier formally recommended that Ladnier be terminated), strongly supports the conclusion that management's decision to terminate Ladnier was unrelated to Ladnier's grievance.

Third, while Howard told Ladnier that his grievance "[wasn't] going to look good to upper management," there is no indication that this was based on anything other than Howard's speculation. Neither is it surprising that any party to a labor dispute would not be pleased with the necessity of having to file a grievance. Further, had Howard's comments been indicative of his displeasure with the filing of Ladnier's grievance, his having presented upper management with extraordinary options on behalf of Ladnier after his third exam failure is indicative that the grievance was not the motivating factor of management to pursue Ladnier's termination. Lastly, there is no indication that Howard was involved in discussions as to whether Ladnier should be terminated.

The undersigned does not infer animus from Hughes's comment that it would be better if an employee met with him rather than filing a grievance. Tr. 274. When viewing Hughes's



testimony as a whole, it is clear that he understands the right of employees to file grievances and the potential benefit of grievances, and he made no statement indicating he was specifically affected by Ladnier's grievance. Tr. 276, 282.

The GC's pretext claims fail. The GC suggests generally that the Respondent's reliance on Ladnier's exam failures was mere pretext. That, however, ignores the credible testimony of management's witnesses that Ladnier's exam failures were the primary reason for his termination. Further, it also ignores the observations of Ladnier himself, who noted that management was so disappointed after the second and third exam failures that only Howard would speak to him. GC Ex. 1(a). The reactions Ladnier observed are consistent with the interview process Ladnier experienced in being hired. They are consistent with the directions and priorities the Respondent provided Ladnier after being hired, i.e. to work on passing the Level III examination. Hence, Ladnier's noticing the disappointment by management after failing the exam repeatedly is also consistent with the view that Ladnier's repeated failures to pass the UT Level III exam made it impossible for him to do the work he was hired to do. The Respondent hired an experienced examiner like Ladnier because it needed someone who could be certified to perform Level III examiner work. By repeatedly failing to become UT Level III certified, Ladnier defeated that purpose and thus presented a real, rather than pretextual, basis for his termination.

The GC suggests it was a retaliatory scheme by the Respondent that caused Ladnier's October 2019 training at Puget Sound to fail to materialize. First, it is unclear exactly when Ladnier's training at Puget Sound became impossible. If Ladnier's training fell through before his grievance was filed, the GC's argument would be a non-starter. But even if Ladnier's training fell through after his grievance was filed, the GC has failed to cite evidence supporting the suggestion that the Respondent deliberately "abandoned" training in response to Ladnier's protected activity. *See* GC Br. at 14. In the absence of such evidence, the undersigned cannot conclude that the Respondent's failure to get Ladnier training at Puget Sound was a ruse that was concocted in retaliation for Ladnier's grievance--particularly in light of the evidence in the record of the consistent and persistent efforts the Respondent took to obtain their Level III examiner to remain compliant with their audit requirements and to avoid the continuing extra expense of retaining an outside Level III examiner to perform required duties.

The GC argues that the Respondent treated Ladnier differently from Howard with training given before the UT Level III exam. However, the record supports Respondent's position that someone with Ladnier's experience should not have needed additional training to pass the exam. Likewise, why would the Respondent have made any effort to get Ladnier additional training after his third exam failure but for their true motivation to fulfill their need for a Level III examiner? While Howard had received such training in the distant past, he did not require UT Level III specific training in the months leading up to his exam. For all of these reasons, the GC's argument alleging disparate treatment fails.

The GC suggests that Ladnier's exam failures could not have been the basis of his termination because months passed between Ladnier's third failure in May 2019 and Fehrenbach's initiation of the termination process in mid-October 2019. Unfortunately, the

record is unclear about precisely when Ladnier's planned October 2019 training at Puget Sound fell through. Absent evidence linked to the Puget Sound training and the timing of the grievance the undersigned is unable to find anything inherently nefarious about the timing of the termination. Again, it is understandable that management did not want to terminate Ladnier immediately after his third exam failure, especially given the difficulty the Agency had in hiring an NDT examiner with UT Level III experience, and it likely took the Agency time to coordinate a plan for Ladnier's training at Puget Sound. At some point, later on, Ladnier's training option fell through, leaving management with no alternative but to terminate Ladnier. A more likely scenario is that, after seeking extraordinary steps to try to get Ladnier eligible to take the exam a fourth time, when Puget Sound delayed offering Ladnier training before the end of the year, management concluded, in light of Ladnier's prior three exam failures and his overall lack of progress in timely achieving the requirements of PD 13355, termination became the paramount option in light of his probationary status. In this view, the filing of the grievance pales in significance to the timing of events leading to Ladnier's termination.

The GC contends that Ladnier's exam failures cannot be the real reason for his termination because, according to Ladnier, McFadden stated at the grievance meeting in October 2019 that the Agency "couldn't fire us for not passing the exams that were not in the PD." Tr. 34. Ladnier was not terminated solely for failing to pass his Level III exam. He was also cited in his termination letter for his inability to follow his supervisor's direction in the area of TSM entry and DAWIA. These additional facts undermine the legal significance of the GC's contention in light of their citing McFadden's statement. As cited above it is well established that probationary employees can be terminated for any lawful reason. Moreover, McFadden agreed in conversations with Thomas and senior leadership that Ladnier could be fired for failing to become UT Level III certified.

It is further noted that Ladnier's recollection of McFadden's statement lacks corroboration by the lack of additional consistent testimony or documentary evidence in the record. Overshadowing McFadden's statement is the evidence that management began to consider termination as early as May 2019 for failing to become UT Level III certified. Further, management continued to hold this belief, with McFadden's approval, after Ladnier's grievance was closed in October 2019. There is nothing false or pretextual about the Agency's consistent position that Ladnier was hired to perform Level III work and repeatedly failed to pass the qualifying examination during his probationary employment period to be able to perform such work.

The GC argues that terminating Ladnier for failing to become UT Level III certified is pretextual because it is contrary to the requirements outlined in his position description, PD 13355. Nothing in PD 13355 prevented the Respondent from requiring an employee to take the UT Level III exam or become UT Level III certified. The record supports the fact that as a matter of practice, it was not unusual to assign employees working under PD 13355 to become UT Level III certified. Howard proposed options that NDT Examiners working under PD 13355, specifically Howard himself or Perkins, become UT Level III certified in his May 23, 2019 email, and Howard ultimately became UT Level III certified. Regardless of PD

13355's wording, the parties agree that the Respondent lawfully hired Ladnier and placed him in PD 13355. Consistent therewith, the parties also agree that Ladnier's UT background and skills are consistent with his primary work objective to become UT Level III certified which is borne out by Ladnier's testimony of his taking the exam three times. Firing Ladnier for failing to carry out a goal established from the beginning of Ladnier's employment is not pretextual.

The GC argues that Ladnier's DAWIA and TSM issues were not real reasons for Ladnier's termination. The Respondent never claimed that Ladnier's failure to meet DAWIA and TSM expectations were the exclusive reasons for his termination. Rather, the Respondent clearly and consistently indicated that Ladnier was primarily terminated for failing to become UT Level III certified. That reason, i.e., Ladnier's failure to "obtain[] all required levels of NDT certifications," including UT Level III certification, was outlined in his termination letter, along with his shortcomings regarding TSM and DAWIA. Together they were a sufficient justification for terminating a probationary employee. Moreover, there is nothing unreasonable about the Respondent including Ladnier's issues with TSM and DAWIA among its reasons for his termination. While Ladnier's problems with TSM were relatively small, they were not negligible. Ladnier's entry rate of only 55.8 percent in November 2019 was well below the 70 percent requirement, and further, this was after Howard had trained Ladnier in TSM. Furthermore, it was rational to scrutinize Ladnier differently than other employees who were not on probation for these failures. As for DAWIA, although asked in May of 2019 to complete courses, it was disputed whether Ladnier completed either one or any of the nine courses by December 31, 2019. Neither one nor no courses bode well for Ladnier to become DAWIA Level II certified by September 2020, as required, even if other employees could have finished DAWIA training in six months, as Perkins claimed.

While Perkins testified he recently failed three UT examinations required in his position description, this is not a sign of disparate treatment, as Perkins and Ladnier were not similarly situated. Unlike Ladnier, Perkins was not a probationary employee, and while Ladnier was hired primarily to perform UT Level III work, Perkins hardly uses the UT method at all.

Given the totality of the evidence in the record, the GC has failed to demonstrate that Ladnier's termination was unlawfully motivated, and failed to demonstrate that the multiple reasons by the Agency for terminating Ladnier were pretextual or unjustified. Accordingly, the GC has failed to establish a prima facie case.

The Respondent has demonstrated, by a preponderance of the evidence, that there were multiple legitimate justifications for terminating Ladnier, and that the record supports the identical termination being justified in the absence of Ladnier's protected activity.

Even if the GC had established a prima facie case, it is abundantly clear that the Respondent had a legitimate justification for terminating Ladnier, and that the Respondent would have taken the same action even in the absence of protected activity. *Letterkenny*, 35 FLRA at 118.

It is not in dispute that the Respondent had legitimate reasons to terminate Ladnier's employment. Ladnier was hired for his UT skills and told early on that he was to obtain UT Level III certification. After three attempts, however, Ladnier failed to become UT Level III certified. Ladnier's repeated failure to be certified in the method he was hired to perform is more than enough reason to establish a legitimate justification for the Respondent's decision to terminate Ladnier's employment. Adding to the legitimacy of that decision are the facts that: (1) Ladnier showed no sign of being able to pass the exam after a fourth attempt without remedial training; (2) no training was immediately available (and given Ladnier's past failures, it is far from certain that he could pass the fourth attempt even with additional training); (3) without a UT Level III certification, there was not enough work for Ladnier to perform; and (4) it appeared that Ladnier would continue to be underutilized until at least April 2020, which was the next time Ladnier would become eligible to take the UT Level III absent the extra training. That Ladnier failed to complete most or all of his DAWIA training within the timeframe requested and had relatively small but not trivial issues with TSM further bolsters the conclusion that there was a legitimate justification for the Respondent's decision to terminate Ladnier's employment.

It is also clear that the Respondent would have terminated Ladnier even in the absence of his protected activity. Management reasonably viewed the probationary period as a time to determine whether employees were qualified to do their jobs (*see* Tr. 90-91), and Ladnier had demonstrated to management over the course of three failed UT Level III exam attempts that he was not qualified to do his job. That members of the management team had considered as early as May 2019, months before Ladnier's protected activity, that Ladnier might warrant termination, provides further support for the conclusion that the Respondent would have terminated Ladnier even in the absence of his protected activity. The Respondent's termination decision is all the more reasonable given Ladnier's additional shortcomings, specifically, his issues with TSM and his failure to complete most or all of his required DAWIA training in a timely manner. Absent proof of motivations based upon the protected activities, the Respondent acted in conformance with concerns designed to oversee and manage lawfully hired probationary employees.

### **Summary**

Based on the foregoing, the undersigned finds that the evidence is insufficient to support the allegation that the Agency terminated Ladnier's employment because of his protected activity. The undersigned concludes that the GC failed to prove a *prima facie* case of discrimination and that in any case, the Respondent demonstrated legitimate justification for terminating Ladnier, as a probationary employee.

**ORDER**

It is ordered that the Complaint be, and hereby is, dismissed.

Issued, Washington, D.C. March 10, 2022

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DAVID L. WELCH  
Chief Administrative Law Judge



**CERTIFICATE OF SERVICE**

I hereby certify that copies of this **DECISION**, issued by David L. Welch, Chief Administrative Law Judge, in Case No. AT-CA-20-0136, were sent to the following parties as indicated below:

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Dated: March 10, 2022  
Washington, D.C.

