



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

OALJ 16-06

DEPARTMENT OF JUSTICE
BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
BUTNER, NORTH CAROLINA

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 408, AFL-CIO

CHARGING PARTY

Case Nos. WA-CA-13-0036
WA-CA-13-0093

Mark D. Halverson
For the General Counsel

Tara Roberts
For the Respondent

Edmund Kirton
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

For many years, the Federal Medical Center at the Federal Correctional Complex in Butner, North Carolina, has been chronically short-staffed, and this has given rise to employee complaints. The union representing the health professionals there has encouraged employees to call them for assistance with their staffing concerns. Consequently, a Union representative has responded to repeated employee complaints by coming to the medical center, particularly Unit 5B, to talk to them and to the Nurse Manager, Valesia Daniels. Holly Borges is a nurse on 5B and a frequent caller to the Union.

On October 11, 2012, Borges was in the break room with some other employees, discussing their staffing problems. Daniels entered and told them the problems would soon be getting worse, because about thirty nurses per week would be attending Annual Refresher Training (ART). Lynette Lea, a nurse, noted that she had been assigned to three different posts in a single shift, and she hoped that would not happen again. Borges suggested that she call the Union. According to Borges, Daniels then asked her if she was now a Union representative. Borges said she wasn't, but that the Union might be able to help. Daniels advised Borges to pick her battles, adding that the Union was tearing the unit apart. She asked Borges if she knew how long the medical center had been standing.

Approximately two weeks later, Borges and Daniels met to discuss Borges's semi-annual progress review. Borges saw notations that she considered "extremely negative" and inconsistent with her performance logs. She sought the assistance of the Union, which filed the unfair labor charge giving rise to the instant case.

This case presents two primary questions for resolution. The first is whether the Agency violated § 7116(a)(1) of the Statute when Daniels made the statements attributed to her during the October 11 encounter. I find that Daniels's questions about whether Borges was now a Union representative, and whether Borges knew how long the medical center had been standing, were neutral and noncoercive, and thus did not violate the Statute. However, the other two statements (that constant calls to the Union were tearing the unit apart, and that Borges needed to pick her battles) contained coercive suggestions that could reasonably intimidate employees from engaging in activity protected by the Statute. Therefore, the latter two statements violated the Statute.

The second question is whether the Agency retaliated against Borges when Daniels made negative entries on three of the performance elements in Borges's October 2012 progress review. I find the evidence linking Borges's protected activity to the negative comments on her progress review unconvincing. The events Daniels cited in the progress review had indeed occurred, and her observations about them were reasonable; moreover, Daniels's comments in the progress review also contained very complimentary language, which undercuts the notion that Daniels was retaliating. Thus, I conclude that Borges's activity in support of the Union was not a motivating factor in Daniels's comments in the progress review, and the Agency did not violate § 7116(a)(2).

STATEMENT OF THE CASE

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

On October 25, 2012, the American Federation of Government Employees, Local 408, AFL-CIO (Local 408 or Union), filed an unfair labor practice (ULP) charge (WA-CA-13-0036) against the Department of Justice, Bureau of Prisons, Federal Correctional Complex, Butner, North Carolina (the Agency, Respondent, or FCC Butner).

GC Ex. 1(a). On November 30, 2012, the Union filed a second charge (WA-CA-13-0093) against the Respondent. GC Ex. 1(b). After investigating the charges, the Regional Director of the FLRA's Washington Region consolidated the cases and issued a Complaint and Notice of Hearing on August 23, 2013, on behalf of the FLRA's General Counsel (GC), alleging that the Agency violated § 7116(a)(1), (2), and (4) of the Statute by making statements to bargaining unit employees that would tend to interfere with, restrain, or coerce employees in the exercise of their rights under the Statute, and by discriminating against Borges in her progress review, based on Borges's protected activity, including her providing an affidavit to the FLRA in connection with a different ULP charge. GC Ex. 1(c). The Respondent filed its Answer to the Complaint on September 17, 2013, denying that it violated the Statute. GC Ex. 1(d).

A hearing was held in this matter on December 18 and 19, 2013, in Raleigh, North Carolina. At the hearing, the GC withdrew the allegations of the Consolidated Complaint pertaining to Case No. WA-CA-13-0093 (specifically, paragraphs 9, 10, 32, 33 & 36), as well as the allegations (in paragraphs 25 through 28 and part of paragraph 35) that the Respondent violated § 7116(a)(1) and (4) of the Statute by discriminating against Borges for providing an affidavit to the FLRA. Tr. 6-7. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The GC and the Respondent filed post-hearing briefs, which I have fully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. The American Federation of Government Employees (AFGE), Council of Prison Locals (Council), is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of a nationwide bargaining unit of employees of the U.S. Department of Justice, Federal Bureau of Prisons (BOP). GC Exs. 1(c) & 1(d). The Union is an agent of the Council for the purpose of representing bargaining unit employees at FCC Butner. The Council and the BOP are parties to a collective bargaining agreement, known as the Master Agreement. *Id.*

FCC Butner consists of four institutions – a low security Federal Correctional Institution (FCI), a medium security institution (FCI II), a prison camp, and the Federal Medical Center (FMC). The complex houses about 4,000 inmates. Tr. 21-22. The FMC is a prison hospital serving 800 to 1000 inmates. About 300 civilian employees of the BOP work there, alongside about 150 commissioned officers of the Public Health Service (PHS). The civilian employees are in the bargaining unit represented by Local 408. Tr. 22-23. All employees at the FCC are trained as correctional officers. Tr. 28-29. Some medical units are not staffed with correctional officers, so, in these locations, medical employees serve dual roles as health care professionals and correctional staff. This makes adequate staffing a health and a safety issue, for both inmates and employees. Tr. 28-30.

In recent years, there has been an increase in the number of patients treated at the FMC, as well as in the severity of their medical conditions, and in response the FMC has added a hospice unit, an advanced care unit, and a full surgical room. Tr. 21, 130, 173. The FMC is the oncology center for all of BOP, and radiation and chemotherapy are performed there. Inmates undergoing chemotherapy live on the fourth floor, while the sickest patients are housed on the fifth floor and in Unit 5B, where they receive 24-hour care. Tr. 131-32.

With all of this growth, and the increased severity of illnesses, the difficulties in maintaining adequate staffing at the hospital have caused strains. Tr. 44, 54, 69, 166-67, 173, 202, 240. The FMC is allotted 223 nurses, but has only 215. The Agency is attempting to hire additional nurses, but the process is slow. Tr. 171-72. Although there is no requirement that specific numbers of employees must be on duty on each unit, the Agency recognizes that five nurses and a health care technician are needed to fully staff Unit 5B, and that it cannot function adequately with less than four nurses and a tech for the thirty beds on the unit. Tr. 167-68, 171, 203, 239. In order to meet the staffing needs in different units, nurses and technicians may be moved to or from other units, floaters may be used, or PHS nurses may be required to work overtime. Tr. 167-71, 203. Even with these flexibilities, it is not unusual to have only four nurses on Unit 5B. Tr. 203. Nurse Manager Valesia Daniels testified that she must staff twenty different units of the FMC, and if staffing is low in one, she must move nurses from another. She acknowledged that this makes the work difficult for the nurses on 5B, especially given the high acuity of the patients there. Tr. 203, 239-40. Since the nurses deal with a patient population that is not typical, staffing is an important issue to them. Tr. 261-62.

AFGE Locals 405, 408, and 3696 represent about 1,400 bargaining unit employees at FCC Butner. Local 408 represents the civilian medical staff at the FMC and throughout the complex. Tr. 23-27. Officials of Local 408 have been active in advocating for employees when staffing is low. They have encouraged employees to contact the Union for assistance when they believe such circumstances might affect their ability to provide care that is up to standard. Tr. 28, 30-31, 46-47, 54, 76. And since 5B is often staffed with fewer than five nurses, the Union has been contacted regularly, indeed almost daily. Tr. 204-05. The Union Vice President, Frank Olmo, visited 5B on many occasions. After speaking with employees, he would use his radio to obtain the Nurse Manager's phone extension, and then attempt to speak directly to her about the shortage of nurses on the unit. Borges estimated that this happened two or three times a week in the past four years. Tr. 54-56, 69-72. Daniels testified that, since she took the position of Nurse Manager in 2012, she found the Union's almost daily presence on the unit "intimidating" and, at times, "frustrating." Tr. 238-39, 249. She stated that she has never tried to stop the employees from coming to the Union, and she would not, but she believes it would be better if employees addressed their concerns directly to her. Tr. 241-44, 246.

The Encounter in the Break Room on October 11, 2012

Holly Borges is a Clinical Nurse who has worked on Unit 5B for about four years. Tr. 53, 169. On October 11, 2012,¹ several FMC employees were in the break room discussing the staffing situation. Ms. Borges was there, along with Nurse Lynette Lea and Michelle Shaver, a PHS Nurse who was also assigned to 5B.² Tr. 56-57, 200. Daniels came into the room, heard them talking about staffing problems, and said the short-staffing would continue, because about thirty nurses a week would soon be sent to Annual Refresher Training (ART), and the employees needed to “buckle down” and get used to it.³ Tr. 57, 250. Lea expressed concern, saying that she had been assigned to three different posts in a single shift, and she hoped that would not happen again. Borges suggested that Lea contact the Union because that was not sound nursing practice. Tr. 57. According to Borges, at that point, Daniels asked her, “What are you, a union representative now?” Tr. 107. Borges said she was not, but that the Union might be able to help with the situation. *Id.* Daniels then told Borges “that the constant calling of the Union was tearing the unit apart; doing bad things to unit morale; that I need to pick my battles.” Finally, Daniels said, “Well, do you know how long this place has been here?” Tr. 57-58, 104, 106-07.

According to Borges, when Daniels discussed ART training, her tone was “resigned,” but she appeared “annoyed” or “angry” when Borges mentioned the Union. Tr. 57-58, 74, 107. Daniels’s comments led Borges to believe that there would be repercussions for employees who sought the assistance of the Union. Tr. 58, 109. By picking her battles, Borges understood Daniels as telling her to remain quiet and maintain the status quo. Tr. 109. Borges testified, “[S]he wasn’t pleased that I called the Union over staffing issues. 5B is her unit. I think she felt maybe I should address the issue with her.” Tr. 58-59. Borges further testified that Daniels had never told her not to go to the Union. Tr. 76.

Daniels testified that she did not recall Lea’s concern about having to move to three different posts within a shift. Nor did she recall Borges’ recommendation that Lea contact the Union. However, she did remember asking whether Borges was a Union representative, and recommending to Borges that she pick her battles. Tr. 251. Daniels testified that she did not think that staff were tearing the unit apart when they called the Union, and she does not recall saying anything to that effect. Tr. 246, 248, 251. She believes, however, that if they contacted her, she would have addressed their concerns. Tr. 263.

Borges’ October 2012 Performance Logs and Progress Review

For the medical staff at FCC Butner, the performance year begins on April 1 and ends on March 31. Tr. 134. The appraisal process has three stages. The first consists of performance logs, which are updated by supervisors quarterly and contain brief statements by

¹ Unless otherwise noted, all dates are in 2012.

² Another nurse, Ms. Seate, may also have been present. Tr. 57, 200.

³ All federal correctional employees must attend ART, which addresses changes that have occurred within the BOP, correctional techniques, and laws or issues that may affect the work at the BOP. Medical staff receive medical refresher training, CPR certification, etc. Tr. 75-76.

supervisors on the employees' work in each of their five critical elements. The logs include qualitative ratings (Unsatisfactory, Minimally Satisfactory, Successful, Excellent (sometimes referred to as "Exceeds"), or Outstanding) for each element. Tr. 134, 159-61; *see, e.g.*, the logs entered by Daniels for Borges in each of the four quarters of the 2012-2013 rating period, Jt. Ex. 5 at 1-20. According to Borges, the supervisor enters comments on a computerized form and releases them to the employee; the employee reviews the comments and acknowledges that he or she has reviewed them; and finally the supervisor and employee meet to discuss the logs.⁴ Tr. 60, 78. They discuss the ratings and comments until they reach agreement. Then the supervisor transmits the log to the employee electronically for acknowledgment. Tr. 212-13, 222-23.

A progress review takes place at the six-month mark. The employee receives written comments, but no qualitative ratings. Joint Exhibit 3 is Borges's progress review for the rating year April 1, 2012, to March 31, 2013, which was given to Borges in late October. The supervisor meets with the employee at the progress review for a more in-depth examination of the employee's work than the performance log meeting. The supervisor may make written observations, but if the employee is on target, the supervisor may simply write, "no recommendations made." Tr. 135, 157-58, 222-24.

The final stage of the process is the annual appraisal, which encompasses the employee's work for the entire year. It includes comments and numerical ratings for each of the five performance elements. Tr. 135, 137. Joint Exhibit 6 is Borges's annual appraisal for 2012-2013; the first page reflects Daniels's mid-year comments and final comments, and the second page shows that Borges was rated "Excellent" in each of the five critical elements. Employees who disagree with an appraisal may note their disagreement on the form, and they also may request a meeting with Daniels and Assistant Director of Nursing Sally Maire, or with the Director of Nursing, at which time they can offer information they believe should have been considered in the appraisal. Tr. 135-36, 148-49.

⁴ None of the witnesses was able to adequately explain the process used for completing performance logs and other performance records. Daniels was confused about the meaning of the headings "Created On" and "Incident Date," and why certain dates appeared in those columns. *See* Jt. Ex. 5. She testified that she believed the "Incident Date" was the day she met with the employee. Tr. 217. After some questioning, she seemed to decide that "Acknowledged On" was the date Borges acknowledged her log and "Rating Official Ack" was the date that Daniels confirmed Borges's acknowledgment. Tr. 217-19. Maire understood "Created" to be the date on which the log was opened and the entry was created, and "Rating Official Ack" was the date on which the supervisor acknowledged that the process had been completed. Tr. 155-56, 179. Borges's October 2012 performance log was acknowledged on October 19 and was acknowledged by the rating official on October 25. Jt. Ex. 5. Daniels seemed to conclude that she met with Borges sometime between October 3 and October 19 to discuss it. Tr. 221. She also testified that she conducted the progress review and performance log discussion at the same time. Tr. 227. She claimed that the progress review document was dated October 30, not because that was the date on which she and Borges met, but because she did not timely enter the actual date on which she and Borges met. Tr. 228. She does not recall the actual date of her meeting with Borges. Tr. 221.

About two weeks after her encounter with Daniels in the break room, Borges received an email generated by the Agency's software program in which employee performance data is entered and stored. Borges believes this meant that Daniels had just completed and forwarded her progress review. Tr. 60, 78. Daniels testified that she and Borges met in Daniels's office sometime between October 3 and October 19 to discuss both Borges's performance logs for the quarter and her six-month progress review. Tr. 227-28. Borges believes the meeting took place on October 25. Tr. 61-62.

When Borges saw her October progress review, she found some of the comments to be "extremely negative." Tr. 60; *see also* Jt. Ex. 3. She had never received critical notations before. Tr. 60. Borges was particularly troubled by Daniels's comments for Elements 1, 2, and 3 of the progress review, and she noted that they differed from the comments Daniels had made for the corresponding elements of her performance log for the same time period. Tr. 63; *compare* Jt. Ex. 3 at 2 *and* Jt. Ex. 5 at 6-8. In the October performance log, Daniels rated Borges as "Excellent" and wrote the following for Element 1, "Plans, Monitors, and Evaluates":

Ms. Borges continues to work on a fast paced inpatient sub-acute unit where her patient load consist [sic] of a variety of multisystem conditions and terminal illnesses. Upon completion of her assessments of her patient, she provides clinical encounters that display completed care plans for her patients. Borges take [sic] the initiative to evaluate the plan of care as needed, but questions herself and looks for reassurance from her team members.

Jt. Ex. 5 at 6. For Element 2, "Performs Professional Duties," Daniels also rated Borges as "Excellent" and wrote:

Ms. Borges performs her everyday patient care duties in a professional manner. She complies with the Bureau of Prisons nursing policy and makes referrals as needed for her patients. She demonstrates knowledge of the nursing concept when providing direct patient care. Ms. Borges completes her documentations in a timely manner that is legible and accurate.

Id. at 7. Under Element 3, "Communicates," Borges received an "Excellent" rating, and Ms. Daniels wrote:

Ms. Borges communicates effectively with staff through both written and verbal expression. She completes all written documents according to policy. Ms. Borges notifies the appropriate team members when there is change in a patients [sic] status. She attends treatment meetings every other Tuesday where she is better able to communicate with the entire disciplinary team.

Id. at 8. By comparison, the October progress review notations made by Daniels for Elements 1, 2, and 3 are as follows:

Job Element #1: Plans, Monitors & Evaluates – Progress Review:

Ms. Borges is doing a great job with her daily patient assignment. Would like to see Ms. Borges utilize her critical thinking skills a little more in the near future with patient care plan situations.

Job Element #2: Performs Professional Duties – Progress Review:

Ms. Borges has lacked in following through with the return of patient equipment once the patient is no longer in need of it.

Job Element #3: Communicates – Progress Review: Ms. Borges is a great communicator, but at times holds information that may be beneficial to her co-workers.

Jt. Ex. 3 at 2.

After Borges met with Daniels about her performance, she sought the assistance of the Union. She considered Daniels's notations on her progress review "vague," and she did not believe that those notations reflected the quality of her work. Tr. 112. Because the progress review meeting occurred shortly after her encounter with Daniels in the break room, Borges thought her review "just maybe seemed a little off." Tr. 61-62. She testified that she would not have gone to the Union if she thought Daniels' criticisms were valid.⁵ Tr. 67. Daniels and her supervisor testified that Borges did not tell them about her disagreements with the progress review. Tr. 148, 233.

Regarding Element 1, "Plans, Monitors, and Evaluates," Daniels testified that her comments on the performance log and the progress review essentially addressed the same concern. She did not know why she chose to say that Borges "questions herself and looks for reassurance from her team members" in the log (Jt. Ex. 5 at 6), and that she "would like to see Ms. Borges utilize her critical thinking skills a little more" in the review (Jt. Ex. 3 at 2), but she intended the remark to be constructive. Tr. 229, 254-55. She believes Borges can identify a problem but needs to be able to think through to a solution. Tr. 229. Borges admitted that she checks with coworkers when she has doubts, but she viewed Daniels's two comments as different, the reference to "critical thinking" being more negative than the statement that she "seeks reassurance." Tr. 65, 83, 118-19. During their meeting, Borges

⁵ In this regard, Borges did not take issue with Daniels's comments on Element 4, "Maintains and Provides Expertise," where Daniels stated that Borges was delinquent with her Clinical Medical Education (CME) credits, two of which are required monthly. Borges acknowledged that this notation was accurate, as she was not up to date with her CME at that time. Jt. Ex. 3 at 2; Tr. 62, 88, 144. Her performance log for the same period contained a "Minimally Satisfactory" rating for failing to maintain the monthly requirements for CMEs. Jt. Ex. 5; Tr. 99. Element 4 was also the only area in which Borges was rated "Satisfactory" rather than "Excellent" by her previous supervisor. *See* Borges's annual appraisal, dated April 17, 2012, prepared by Bonnie Timberlake. Jt. Ex. 2 at 1, 2.

asked Daniels to explain what she meant; Daniels told her that she was relatively new and that she questioned more experienced coworkers a little too much. Borges viewed this as a different rationale than what Daniels wrote. Tr. 64, 83. At the hearing, Daniels did not recall discussing this issue with Borges. Tr. 256-58.

Borges testified that she also considered the comment on Element 2 of the progress review to be unjustified. She explained that in one instance, a patient no longer needed a piece of equipment that the unit had leased. She called the company to let them know it should be picked up, but the company did not respond promptly. She admitted that the equipment remained on the unit for a long time, but stated that she has no control over the company's timing. During the progress review, she tried to explain this to Daniels. Tr. 66, 83-84. At the hearing, she acknowledged, that it was her responsibility to follow up if the company did not retrieve the equipment promptly. Tr. 87-88. Daniels could not explain why she included this observation only in the progress review, and not in the performance log, but she thought this was something that she should mention to Borges. She believed that Borges should have been more attentive to the process for returning equipment, and that the equipment should have been taken to the front lobby for pick-up, rather than allowing it to stay at the nurses' station for a long time. Tr. 230-31, 259. Daniels and Borges both recall discussing this element. Tr. 85, 258. Daniels testified that, since she pointed out this issue at the progress review, Borges has sent her an email to inform her of each time she calls for the return of a piece of equipment. Tr. 238.

With regard to the comment in Element 3 of the progress review, that "at times [Borges] holds information that may be beneficial to her co-workers[,]" Daniels testified that this referred to an incident when Borges walked into a room where several other employees were talking and said, "That's not what I heard," and left. Daniels testified that she raised this issue in the progress review because she thought Borges might have had some information that would have been beneficial to the others. She said this was a small thing, but she felt that, if Borges knew something, it would have been helpful to communicate it. Tr. 232, 259-61. She said that she may have told Borges that her behavior was rude. Tr. 261. When Borges read the review, she thought Daniels was accusing her of withholding important medical information, but when they met, Daniels explained that she was referring to a discussion about televisions for inmates. Tr. 67. Daniels remembered discussing this element with Borges, but at the hearing she could not recall what the employees had been discussing. Tr. 260-61.

Borges signed her final performance appraisal for the 2012-2013 rating year on April 5, 2013. She was rated as “Excellent” (also referred to as “Exceeds”) on all five elements, and she received an overall rating of “Exceeds.”⁶ Jt. Ex. 6 at 1, 2; Tr. 137, 236-37. The notations from her October progress review were included, but all comments on the final appraisal were positive. Jt. Ex. 6.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel argues that the Agency, through Nurse Manager Daniels, violated § 7116(a)(1) of the Statute on October 11 by making statements to bargaining unit employees that would reasonably be understood to interfere with the employees’ right to seek the Union’s assistance regarding staffing shortages. GC Br. at 1, 11-12. The GC further alleges that the Agency violated § 7116(a)(1) and (2) of the Statute on or about October 30, by making negative comments on Borges’s mid-term progress review after Borges had contacted the Union about the staffing problems. *Id.* at 1.

With regard to the statements made by Daniels, the GC describes the ongoing staffing problems at the FMC and the Union’s persistent presence there to address those problems. The GC asserts that, under these circumstances, Daniels’s comments would tend to interfere with employees in the exercise of their rights. *Id.* at 10-11. Specifically, the GC cites Daniel for: (1) asking Borges whether she was a Union representative; (2) saying that constantly calling the Union was tearing the unit apart; (3) telling Borges she needed to pick her battles; and (4) for asking Borges whether she knew how long the hospital had been in existence. The GC argues that, when Borges suggested that Ms. Lea contact the Union, Daniels’s tone became negative, and her words, combined with her tone, would have caused a reasonable employee to think twice about future contacts with the Union. *Id.* at 11-12 (citing *Dep’t of the Treasury, IRS, Louisville, Ky.*, 11 FLRA 290, 298 (1983)). The GC also cites *Dep’t of the Treasury, Bureau of Alcohol, Tobacco & Firearms, Chicago, Ill.*, 3 FLRA 723, 730 (1980), to argue that, despite the fact that Daniels made no explicit threats to the employees, her comments violated the Statute because they were made in a coercive context and in an angry manner. GC Br. at 12-13. The GC argues the implied threats were proven to be actually coercive when, just a couple of weeks later, Daniels changed positive comments on three elements in Borges’s performance log to negatives on her progress review. *Id.* at 13.

⁶ Borges’s previous supervisor, Bonnie Timberlake, had rated her at the “Excellent” level for all of her performance elements on her 2011-2012 performance appraisal, except she was rated “Satisfactory” for Element 4. Jt. Ex. 2 at 1. Timberlake’s comments were uniformly positive, although they were identical for each quarter. *Id.* at 2; Tr. 103. Timberlake’s comments for each of the four quarters gave no explanation whatever as to why she rated Borges lower on Element 4, an area which continued to be a problem for Borges in the following year. Jt. Ex. 2 at 2.

The GC then argues that when Daniels made these critical notations on Borges's progress review, she violated § 7116(a)(1) and (2) of the Statute, because this was done in retaliation for Borges encouraging Lea to contact the Union. *Id.* at 14. Citing *Indian Health Serv., Crow Hosp., Crow Agency, Mont.*, 57 FLRA 109, 125 (2001), the GC argues that Borges was engaged in protected activity when she exercised the right to seek the Union's assistance with the ongoing staff shortages at the FMC, and that Daniels's comments during the October 11 discussion demonstrate that she was aware of Borges's protected activity. GC Br. at 14-15. The GC also argues that Daniels demonstrated anti-union animus when she spoke negatively to Borges in the break room. *Id.* at 15, 17. As for a causal connection between Borges' protected activity and Daniels' statements on the review, the GC points to the rapid sequence of events between Daniels's entry of the initial, positive comments on Borges's performance log on October 3; the protected activity on October 11; and Daniels's adverse comments on Borges's progress review a week or two later. *Id.* at 16 (citing *Clark County School Dist. v. Breeden*, 532 U.S. 268, 273-74 (2001)). The GC submits that this evidence establishes a prima facie case of discrimination.

The GC notes that, despite the fact that Daniels gave Borges an entirely positive annual appraisal in March 2013, the problem has not been cured, because the negative comments will remain in Borges's personnel file and pose a "danger" of being mistaken for serious performance problems. GC Br. at 18. Additionally the GC argues that, despite the Respondent's representations to the contrary, these comments can only be construed as "functionally negative." *Id.* at 19. The GC observes that Daniels could not explain the change that took place between Borges' October 3 performance logs and her October 30 progress review. Under these circumstances, the GC contends that the Respondent has failed to rebut the prima facie case and that the evidence has established that the Respondent violated the Statute. GC Br. at 20.

To remedy the violations, the GC requests that the Respondent be ordered to cease and desist its unlawful activity and post a notice, signed by the Warden of the FMC, to be placed on bulletin boards throughout the FCC and distributed by email to employees represented by Local 408. The GC states that the bargaining unit employees represented by Local 408 are spread out among the four institutions that comprise FCC Butner, and the Respondent typically communicates with them by email.

Respondent

The Respondent asserts that it did not violate the Statute. With respect to the October 11 meeting, it argues first that the GC did not prove that Daniels made all of the allegedly unlawful statements that were attributed to her. Shaver did not corroborate Borges's testimony that Daniels said that calling the Union was tearing the unit apart; moreover, Daniels did not tell employees not to contact the Union. Resp. Br. at 15. In this regard, the Respondent notes that the GC did not call either Ms. Lea or any other employee in the room that day to corroborate Borges's account of what was said. Thus, relying on *Fed. Aviation Admin.*, 55 FLRA 1271, 1283 (2000), the Respondent urges that I should draw an adverse inference against Borges and the GC from their failure to call Lea to testify. Resp. Br. at 16.

Next, the Respondent argues that it would be unreasonable to interpret Daniels's statements as coercive. It observes that Borges continued to call the Union about staffing, even after October 11, and it argues that this shows Borges was not threatened by the circumstances surrounding that encounter. Finally, it asserts that Borges's description of the threat she felt was based on a subjective interpretation of Daniels's comments that was not supported by other witnesses. *Id.* at 17.

Finally, relying on *Okla. City Air Logistics Ctr. (AFLC), Tinker AFB, Okla.*, 6 FLRA 159, 160-61 (1981)), the Respondent contends that when Daniels spoke to Borges and the other employees on October 11, she was merely expressing her personal opinion that involving the Union in the staffing issue was not going to change the situation, and that she preferred that employees address their concerns to her. Such statements, it argues, do not violate the Statute. Resp. Br. at 17, 19. The Respondent cites the Authority's decision in *Community Serv. Admin.*, 6 FLRA 616, 625 (1981) (*CSA*), that a comment that a bargaining unit employee "always runs to the union," standing alone, did not justify an inference of hostility to the employee or the union. The Respondent argues that Daniels, similarly, did not threaten employees by making her comments.

With respect to the allegation that the Respondent violated § 7116(a)(1) and (2) of the Statute, the Respondent argues that the GC failed to meet its burden of proving that Borges's protected activity was a motivating factor in the way Daniels evaluated her performance. Resp. Br. at 19-20. First, Respondent observes that although Borges received her progress review close in time to the October 11 encounter, the GC did not establish that the progress review was written after October 11. Respondent further argues that, other than Borges's subjective belief that she was discriminated against, no evidence was produced to demonstrate that her evaluation was based on anything other than her performance. *Id.* at 20-21.

The Respondent asserts instead that Daniels had a legitimate justification for her comments on Elements 1, 2, and 3 of Borges's progress review. Although Borges found Daniels's comments to be too vague and trivial, she did not dispute their substance. Borges did not dispute that she refrained from sharing information with other employees, and that it was her job to follow up with the equipment company to make sure it picked up unneeded equipment. Similarly, she did not disagree with the comment that she asks questions of other staff. Thus, the Respondent states that, while Borges may have disagreed with the specific wording of the notations on her progress review, they were based on her actual performance, not on her protected activity. *Id.* at 22. The Respondent concludes that Daniels's comments and ratings reflect normal feedback from a supervisor and that, overall, Daniels considered Borges to be a good nurse.

The Respondent argues that any unfair labor practice notice should be posted in the traditional manner, on its bulletin boards. It further asserts that because the events in this case took place in the nursing unit at the FMC, any posting should be limited to the FMC. *Id.* at 23.

ANALYSIS AND CONCLUSIONS

Some of the statements made by Daniels on October 11 were coercive.

Section 7116(a)(1) of the Statute provides that it is an unfair labor practice for an agency “to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter.” The standard for determining whether management's statement or conduct violates § 7116(a)(1) is an objective one. The question is whether, under the circumstances, the statement or conduct tends to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Elkton, Ohio*, 62 FLRA 199, 200 (2007) (*FCI Elkton*) (citing *Marine Corps Logistics Base, Barstow, Cal.*, 33 FLRA 626, 637 (1988)). While the circumstances surrounding the making of the statement are considered, the standard is not based on the subjective perceptions of the employee or on the intent of the speaker. *See Dep't of the Army Headquarters, Wash., D.C.*, 29 FLRA 1110, 1124 (1987) (*Army Headquarters*).

The Authority does not always require a statement to contain an actual threat in order to find a violation. *See U.S. Dep't of the Treasury, U.S. Customs Serv., Miami, Fla.*, 58 FLRA 712, 718-20 (2003) (asking employee, “why are you going to ask advice from [the union]?” was coercive); *U.S. Army Military Traffic Mgmt. Command, E. Area, Bayonne, N.J.*, 16 FLRA 881, 892, 901 (1984) (finding that when supervisor asked a union representative, “why don't you stop this Union nonsense and do your job like you're supposed to do instead of like you were in [Building] 82?” she implied her disapproval of protected activity, which would tend to chill such activity); *U.S. Air Force, Lowry AFB, Denver, Colo.*, 16 FLRA 952, 960 (1984) (*Lowry AFB*) (saying that an employee had become a “troublemaker” since becoming a union steward was unlawful).

Here, the GC specifies four allegedly coercive statements made by Daniels to Borges in the presence of other employees while they were gathered in the break room on October 11. These comments were made in the context of ongoing employee concerns about inadequate staffing on 5B, which prompted some employees to contact the Union, and Daniels, in turn, found the Union's almost-daily presence on the unit “intimidating” and “frustrating.” Tr. 238, 249. When Daniels came into the break room on October 11, she bore the unhappy news that ART would be taking an additional thirty nurses a week away from their normal work, only to hear Borges and others grumbling about the existing staffing shortage. Her advice was that the employees “buckle down” and get used to it. Tr. 57. When Lea mentioned that she had been assigned to three posts within a single shift, Borges suggested she call the Union. At that point, according to Borges, Daniels's tone changed and she asked if Borges was now a Union representative; stated that the constant calls to the Union about staffing were tearing the unit apart; told Borges that she needed to pick her battles; and asked if Borges knew how long the FMC had been standing. Tr. 57-58.

Daniels remembered very little in specific about the October 11 conversation. She claimed she did not even recall the topic, saying only that she thought the employees were discussing “staffing, as a possibility.” Tr. 245. She was halting and inconsistent about what she did remember. For example, she said she did not recall Lea’s complaint about moving to different posts on a single shift, or Borges’s suggestion that Lea contact the Union about this. Yet she acknowledged that she asked whether Borges was now a Union representative. Tr. 250- 51. That question makes sense only if there was a prior reference to the Union. Accordingly, I find Borges’s testimony – that the question was triggered by Borges’s suggestion that Lea contact the Union – more plausible. Otherwise, Daniels seemed to have some recollection that she asked Borges how long the place had been standing, but did not recall telling Borges that the Union’s constant calls were tearing the unit apart, or that Borges needed to pick her battles. Tr. 246-47, 251. Ultimately, Daniels’s testimony is noteworthy for all she did not remember. Yet neither she nor any other witness denied that she made any of the allegedly coercive statements.

By contrast, Borges provided specific, detailed testimony about the October 11 discussion, describing who was there, what they were talking about, what Daniels said when she joined the discussion, Lea’s concerns, Borges’s response, the shift in Daniels’s mood, and the statements Daniels made. Tr. 56-58, 106-08. I find her testimony regarding Daniels’s statements to be consistent and credible, and find further that the Respondent offered no factual basis for disbelieving her.

I do not find it appropriate, in these circumstances, to draw an adverse inference from the General Counsel’s failure to call Ms. Lea to testify about the statements made in the October 11 discussion. The Authority has found that it is reasonable to draw an adverse inference “when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party . . . regarding any factual question on which the witness is likely to have knowledge.” *Internal Revenue Serv., Phila. Serv. Ctr.*, 54 FLRA 674, 682 (1998) (quoting *Int’l Automated Machines, Inc.*, 285 NLRB 1122, 1123 (1987)). But in that same *IRS* decision, the Authority held that another adverse inference was not appropriate. 54 FLRA at 782-83. *See also U.S. Dep’t of Commerce, Nat’l Oceanic & Atmospheric Admin., Nat’l Ocean Serv., Coast & Geodetic Survey, Aeronautical Charting Div., Wash., D.C.*, 54 FLRA 987, 1017 (1998) (finding that the Judge reasonably drew an adverse inference where a second-level supervisor could have been expected to testify as to his specific role in denying a union official’s request for annual leave to conduct union business); *U.S. Dep’t of Justice, Immigration & Naturalization Serv.*, 51 FLRA 914, 925-26 (1996) (Judge drew an adverse inference where the agency refused to make available the supervisor, who was the responsible decisionmaker, and who declined to approve a recommendation for an award).

In its brief, the Respondent claims that two of the statements Borges claims to have heard during the October 11 meeting were not corroborated by other witnesses: neither Daniels nor Shaver recalled Daniels telling Borges to stop calling the Union or that Borges was “dividing/tearing up the unit.” Resp. Br. at 15. The Respondent notes that Lea had been

named by the GC in its prehearing disclosure, but then she was not called. Lea is a bargaining unit employee who is supervised by Daniels, and she was present when Daniels made her allegedly violative comments.

Unlike the scenario in the *FAA* decision (55 FLRA at 1283) cited by the Respondent, this situation does not warrant an adverse inference against the GC. First, I note that Borges herself testified that Daniels never told her to stop calling the Union. Tr. 76. So the parties agree that Daniels did not make such a statement, and there is no need for testimony from Lea or anyone else on this point. With respect to Borges's assertion that Daniels told her that "the constant calling of the Union over staffing issues was tearing our unit apart," Shaver and Daniels testified that they couldn't recall saying or hearing this, but neither of them could be certain the statement wasn't made. Tr. 208, 246, 251. At one point, Daniels asserted generally that she wouldn't say such a thing because, "I can't stop her." Whether she could stop Borges from calling the Union or not, however, that would not preclude Daniels from saying that it was tearing the unit apart. Since neither Daniels nor Shaver could offer any clear account of much of the conversation in question, it is hard to fault the GC for failing to call Lea; if Lea's recollection of Daniels's comments was as uncertain as Daniels's and Shaver's, her testimony would have resolved nothing. On this basis, *FAA* is distinguishable, and under these circumstances, I do not draw an adverse inference from the GC's decision not to call Lea to testify, and I credit Borges's testimony as to what Daniels said in the October 11 discussion.

The question then is whether an employee could have reasonably drawn a coercive inference from the statements made by Daniels. See *FCI Elkton*, 62 FLRA at 200. The evidence reflects that the FMC was short-staffed and that both employees and managers, including Daniels, were unhappy with the situation. Further, Daniels acknowledged that she found the Union's involvement with this issue intimidating and frustrating. She testified that she never tried to stop the Union from coming to 5B or any other unit, but she preferred for employees to speak with her directly. Tr. 241-43, 247. Both the Agency's and the GC's witnesses described a staffing situation, and the labor-management relationship concerning that situation, which was difficult. The Authority has indicated that the surrounding circumstances should be considered when analyzing whether an employee could have drawn a coercive inference from statements made by a management official. *Army Headquarters*, 29 FLRA at 1124. The circumstances in this case lend support to the coercive nature of Daniels's statements.

The Respondent submits that, when Daniels made the four statements on October 11, 2012, she was expressing a personal opinion that did not amount to a violation of the Statute. Citing *CSA*, 6 FLRA at 625, and other cases, the Respondent argues that Daniels was merely expressing her belief that repeated calls to the Union would not change the staffing situation, and that she would prefer employees to bring those issues to her. Resp. Br. at 19. It is quite likely that Daniels was faced with an impossible task in trying to provide adequate coverage for all twenty areas under her control, with the staff available, and that it was similarly

beyond the Union's control. Nonetheless, bargaining unit employees have a right to seek Union assistance free from interference, restraint, or coercion. 5 U.S.C. §§ 7102, 7116(a)(1); *FCI Elkton*, 62 FLRA at 200. While Daniels may have reasonably believed that repeated Union intervention only made the staffing and morale problems worse, rather than better, employees may see it differently. They may view the pressure applied by their exclusive representative as their only way of directing management's attention to the problem and of ensuring that management does not forget the problem. The Statute affords employees that recourse, and supervisors may not discourage them from pursuing it. For the reasons that follow, I find that two of Daniels's statements did not violate the Statute, but the two other remarks would have been intimidating and coercive to a reasonable employee in these circumstances.

Borges testified that when she suggested that Lea contact the Union about her shift assignment, Daniels asked if she was a Union representative now. Tr. 57. When Borges mentioned the Union, it seemed to her that the tone of the conversation turned negative. Tr. 74. However, she did not give any explanation as to how a reasonable person could construe Daniels's query as coercive or intimidating, and I am unable to find one. This is a neutral question, revealing bias neither for nor against the Union. Indeed, if Borges were a Union steward or officer, Daniels would have a legitimate need to know that fact, since Borges then would have been a designated intermediary between employees and management regarding this and other problems. Thus, I find that this statement did not rise to the level of interference, restraint, or coercion.

Borges was also troubled when Daniels asked her how long the FMC had been standing. Borges believed that Daniels was telling her that the building would still be standing long after she was gone, and her voice, however large or small, would not shut down the FMC. Tr. 108. Whatever unhappy images that may have brought to Borges's mind, I am unconvinced that it contained a threat, explicit or implicit. Although the statement hints that the Union might not always be as effective as Borges would like, it makes no suggestion of harm to anyone resulting from the Union's activities, or any attempt to discourage protected activity. Daniels was simply saying that problems such as staffing shortages have long existed, and will likely continue long after individual employees are gone; that comment should not have reasonably intimidated anyone.

However, the two other comments by Daniels, taken together, are more problematic. Borges said she was not a Union representative, but the Union might be able to offer assistance. At that point, Daniels responded that the constant calling of the Union was tearing the unit apart, and that Borges needed to pick her battles. In my view, Daniels's reference to "tearing the unit apart" contained a subtle but distinct message that the Union's involvement with the staffing problem was harmful to the workplace, which ultimately suggested harm to the employees of the unit. A reasonable employee relying on the Union to bring benefit to employees out of a difficult situation could be troubled by the message (delivered by a manager) that the Union may be causing harm instead, because it suggests that management may feel compelled to respond negatively to such harm. This kind of

inference could cause a reasonable employee to “think twice” about seeking the Union’s assistance. *Lowry AFB*, 16 FLRA at 960. The statement that Borges needed to pick her battles, standing alone, could be construed as advice or an opinion. However, in combination with the comment about tearing the unit apart, I find that a reasonable employee would see it as a threat. By saying that Borges should “pick her battles,” Daniels was suggesting that Borges was fighting too many “battles;” she thus was telling Borges to go to the Union less often. But that decision belonged to Borges, not to her, and her comment was an attempt to interfere with Borges’s rights. This is a classic example of a supervisor’s statement that causes employees to “think twice” before engaging in protected activity. Particularly when the comment about “tearing the unit apart” is made with the comment about picking battles, the overall effect is to discourage employees from engaging in protected activity, and it is therefore unlawful.

Daniels’s comments on Borges’s six-month progress review were not discriminatory.

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*, 35 FLRA 113, 117-18 (1990), the Authority established the framework for determining whether an agency action violates § 7116(a)(2). 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 that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency’s treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment. *Id.* If the GC makes this showing, it has established a prima facie case of discrimination. In determining whether a prima facie case has been established, it is appropriate to look not only at the evidence presented by the GC, but at the record as a whole. *Dep’t of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 55 FLRA 1201, 1205 (2000) (*Warner Robins*). However, an agency can still rebut the prima facie case 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. *Id.*

There is no question that Borges engaged in protected activity. On October 11, when Daniels joined an informal conversation about staffing in the break room, Borges exercised her statutory right to assist the Union by suggesting, in Daniels’s presence, that Lea contact the Union. Tr. 57. And it was when Borges invoked the Union that Daniels made statements, some of which, as discussed above, carried the implication that involving the Union in the staffing problems was harming the employees. This suggests, at the very least, that Daniels was sensitive to the Union’s attempts to reduce staffing shortages at the FMC.

The question, however, is whether Borges’ protected activity was a motivating factor in Daniels making critical comments about her in the October progress review. The GC cites two indicators of Daniels’s improper motivation: anti-Union animus and timing. Regarding the first indicator, the GC asserts that since I have already found that Daniels made coercive statements to Borges on October 11, I should also find that Daniels acted on that same

hostility in the progress review. Having observed Daniels's demeanor and heard her testimony, I do not believe that such logic is appropriate in this case. Daniels did not express or demonstrate any generalized anti-union sentiment, but rather a frustration that repeated complaints to the Union about the staffing shortages were useless in addressing a problem that predated all of the staff and would likely outlive all of them. Her frustration resulted in her making comments on October 11 that unlawfully discouraged Borges from going to the Union, but there is a significant difference between expressing that sort of frustration and abusing the evaluation process to penalize a Union supporter. While a supervisor's coercive comments may sometimes be an indication of a proclivity to retaliate, I did not find that to be true of Ms. Daniels. In October 2012, she was still a relatively new manager, and even at the hearing she struck me as rather timid and nonaggressive. I believe that when she was evaluating Ms. Borges during the 2012 rating year, she was learning on the job the best ways of improving employee performance, and her comments on Borges's mid-year progress review and on her year-end evaluation reflected her attempts to help Borges improve, rather than to punish protected activity.

The other factor cited by the GC is the timing of the progress review in relation to the incident of October 11. Although the testimony of all the witnesses was far from clear on this point, the evidence (particularly the dates in the "Created On" column of the October entries in Joint Exhibit 5) seems to suggest that Daniels initially made entries on Borges's performance log on October 3, before her encounter with Borges in the break room. With the exception of Element 4 (concerning timely completion of CME units, which was the only critique Borges agreed with), and possibly the comment in Element 1 that she questions herself and looks to others for reassurance, the entries were uniformly positive. Daniels then prepared a progress review later in October, most likely after the October 11 discussion. At the hearing, Daniels was uncertain when she made these entries in the system, which are reflected in Joint Exhibit 3, but she believed that she met with Borges to discuss the progress review sometime between October 3 and October 19. Borges was also uncertain of the date of their meeting, but testified that it took place "a few days" after the October 11 encounter. Considering Daniels's nearly total uncertainty about the date, Borges's confidence that it took place after October 11, and the fact that the review itself was electronically signed by both Borges and Daniels on October 30, I find that the progress review occurred in late October, after the October 11 incident in the break room.

The Authority has long considered the proximity of time between an agency's action and an employee's protected activity significant in determining whether the GC has established a prima facie case of discrimination under § 7116(a)(2). See *U.S. Dep't of the Navy, Naval Aviation Depot, Naval Air Station Alameda, Alameda, Cal.*, 38 FLRA 567, 568-69 (1990); *U.S. Customs Serv., Region IV, Miami Dist., Miami, Fla.*, 36 FLRA 489, 495 (1990). However, although such timing may support an inference of illegal anti-union motivation, it is not conclusive proof of either unlawful motivation or of discrimination. *Warner Robins*, 55 FLRA at 1205-06; *U.S. Dep't of Labor, Wash., D.C.*, 37 FLRA 25, 37 (1990).

The GC argues that Daniels's negative entries on the progress review represented "conspicuous departures" from her previous notations on the performance log, and were the only negative comments Borges has ever received on those elements. GC Br. at 16.⁷ Borges viewed them as "extremely negative." Tr. 60. In order to determine whether the nature of the comments on Elements 1, 2, and 3, and the closeness in time between the October 11 conversation and the progress review support a finding of discrimination, or even a finding of improper motivation, it is necessary to look more closely at these comments.

Before examining these details, however, it is appropriate to understand the broader context in which the comments on the progress review were situated. Four times a year, employees are given performance logs, which advise them of the positive and negative aspects of their work; at the midway point, they meet with their supervisor for a progress review; and finally, they receive a full performance evaluation, with quantitative ratings, at the end of the rating year. Thus, while all of these documents apparently are retained in the employee's personnel file, the annual evaluation clearly stands out as the most important measurement of the employee's performance. Additionally, it is important not to lose sight of the fact that Ms. Daniels rated Ms. Borges as "Excellent" in Elements 1, 2, and 3, notwithstanding the specific verbal critiques that Daniels made on the October progress review. Additionally, in the year-end performance evaluation in April 2013, Daniels rated Borges as "Excellent" in all job elements, including Element 4 – on which Ms. Timberlake had rated her as "Satisfactory" and on which Borges conceded she had been deficient. While the GC correctly states that Daniels's actions in April 2013 cannot "cure the problem" created by the critical comments in the October 2012 progress review, I believe that the GC's focus on different shades of "excellent" misses the forest for the trees. The "forest," in this case, is that throughout the 2012-2013 rating year, Daniels considered Borges to be an "excellent" performer in all areas except Element 4, and the three suggestions for improvement that Daniels made in the progress review did not diminish Daniels's overall high opinion of Borges.

I recognize that supervisors may retaliate against employees, or send them subtle messages that protected activity will be harmful to their career, in a variety of ways. But the persuasiveness of the GC's claim that Daniels's comments on Elements 1, 2, and 3 were made to punish Borges for urging employees to go to the Union is greatly diluted by her overall rating of Borges as "Excellent" on those elements. There is no evidence that Daniels made any verbal statements to Borges, in their October progress review meeting, connecting the critiques in those elements to her Union activity. If Daniels had indeed been trying to tell Borges that her Union activity would be punished in her performance evaluation, I think Daniels would have found a more effective way of delivering the message than rating her as "Excellent."

⁷ The GC's assertion here is conveniently selective. By isolating Job Elements 1, 2, and 3 for comparison, the GC omits Element 4, on which Borges conceded she was deficient, and on which her prior supervisor had actually rated her lower than Daniels did. *Compare* Jt. Ex. 6 and Jt. Ex. 2.

Looking at the specific entries on Borges's progress review, Job Element 1 is entitled "Plans, Monitors, and Evaluates." In the performance log, Daniels noted that Borges "questions herself and looks for reassurance from her team members." Jt. Ex. 5. In the progress review, she stated that Borges "is doing a great job," but could "utilize her critical thinking skills a little more in the near future with patient care plan situations." Jt. Ex. 3. Borges found these two statements to be inconsistent with each other, and viewed the reference to "critical thinking" as far more negative than the earlier observation that she "looks for reassurance." She also viewed Daniels's explanation during their meeting, that Borges "questioned [her] coworkers a little bit too much[]" to be further evidence of Daniels's inconsistency. Tr. 64-65, 83, 118-19. She admitted that she does check with coworkers when she has doubts, but sees that as something different from "critical thinking." Daniels testified that she views these statements as essentially the same. She claimed that, in the progress review, she was trying to offer constructive criticism because she found that Borges was able to identify problems, but needed to follow through to find solutions. She said she considers the ability to develop solutions to be "critical thinking." Tr. 229, 254-56.

My review of this evidence fails to identify anything improper done by Daniels in writing Element 1 of the progress review. First, Daniels's statements on Element 1 are compatible with each other. Finding that an employee questions herself and seeks reassurance from others is consistent with saying that the employee needs to rely on her ability to think critically. Also, I disagree with Borges's conclusion that "critical thinking" sounds significantly more negative than "seeks reassurance." What Daniels actually said was that she would like to see Borges use her critical thinking skills a little more. This sounds like the constructive criticism Daniels claimed it to be. She did not say Borges lacked those skills; rather, she noted that Borges should use the skills she possessed "a little more." Jt. Ex. 3. I note further that Borges agreed that she consults with coworkers when she has doubts, which supports Daniels's essentially consistent observations. Finally, I find it difficult to conclude that Daniels's critique was motivated by anti-Union sentiment when she prefaced it with a statement that Borges was "doing a great job." In this context, I conclude that Daniels did nothing more than observe a pattern of reliance on others, and encourage Borges to do more of her own thinking, which is precisely what midyear progress reviews are meant for.

Under Element 2, "Performs Professional Duties," Borges's performance log states that she is professional, complies with policy, makes referrals as needed, demonstrates knowledge, and completes documentation in a timely manner. Jt. Ex. 5 at 7. In the progress review, Daniels noted that Borges failed to follow through with the return of a piece of equipment that was no longer needed. Tr. 230-31; Jt. Ex. 3 at 2. Borges argued that this notation was not justified because the situation was out of her control. She called the company and they did not pick it up promptly. Tr. 66, 83-84. She admitted, however, that the equipment had remained at the hospital for a long time, and that it was her responsibility to call the company again. Tr. 66, 83-84, 87-88. Daniels did not know why she didn't mention this in the performance log, but she believed that this was something Borges could do better, and that it should be pointed out to her. Tr. 259. The question is whether Daniels

put the comment in the progress review because of Borges's recent protected activity; I find that she did not. First, as discussed above, it appears that the performance log and progress review were not written on the same date. Thus, it would not necessarily be suspicious that the two comments were not identical. Second, the equipment return may have taken place after October 3. Nowhere in the record is there any indication of when it happened. If it occurred after the performance log was written, and before the progress review took place, it would not be possible to attribute the difference between the two to some sort of discriminatory purpose. Third, Borges acknowledged the factual validity of the underlying critique. The evidence shows, then, that the notation was not some sort of "attack" on Borges, nor was it a matter of such consequence that it was likely to cause any meaningful harm to Borges. Thus, I find that Daniels was not acting unreasonably, or in a retaliatory manner, when she included this entry in Borges's progress review.

The notation that disturbed Borges in Element 3 of her progress review was that she "at times holds information that may be beneficial to her co-workers." Jt. Ex. 3. In the performance log, Daniels was uniformly positive about Borges's communications. Jt. Ex. 5 at 8. When Borges read her progress review, she thought Daniels was saying that she withheld important medical information. During her meeting with Daniels to discuss the progress review, Daniels explained the incident she was referring to, and why she felt Borges had been rude. Once again, I am not persuaded that Daniels added this comment as a way of discouraging Borges from going to the Union. As with Element 1, Daniels introduced her critique by saying that Borges was a "great communicator." Jt. Ex. 3 at 2. If she sought to harm Borges through her comment in Element 3, it is unlikely she would have opened with such a clearly positive observation. While it is understandable that Borges was alarmed when she read the comment, Borges acknowledged that she and Daniels talked about it, so she ultimately understood Daniels' concern. Borges did not deny that the incident occurred. I find that it was not unreasonable for Daniels to mention a situation in which she felt Borges was not fully cooperating with her coworkers. I note again that neither party introduced evidence as to the date this incident occurred; thus it is possible that it occurred after October 3, which would explain its absence from the performance log.

In summary, although Borges engaged in protected activity during her encounter with Daniels on October 11, the evidence fails to support the General Counsel's argument that the protected activity motivated Daniels to write negative comments about Borges in her midyear progress review. Rather, those comments simply appear to be Daniels's attempt to make Borges aware of ways to improve her work. Although Daniels was frustrated with having to address repeated calls to the Union about the staffing shortages, I conclude that Daniels's comments on October 11 were an isolated incident, and they are not indicative of any intent to punish Union supporters. Considering the evidence as a whole, I am not persuaded that

Borges's protected activity was a motivating factor in any way in her progress review. Accordingly, I conclude that the GC has not made a prima facie case of discrimination, and I will recommend that this portion of the Complaint be dismissed.⁸

REMEDY

Because the statutory violations were committed only at the FMC, I find that the Notice to Employees should be signed by the FMC's highest official. However, since members of the bargaining unit represented by Local 408 work throughout the FCC, the Notice should be posted in all such areas of the FCC. *See U.S. Dep't of Veterans Affairs*, 56 FLRA 696, 699-700 (2000).

Finally, in accordance with the Authority's recent decision that unfair labor practice notices should, as a matter of course, be posted on bulletin boards and electronically whenever an agency uses such methods to communicate with bargaining unit employees, I find that both types of postings are appropriate here, and that the notice should be sent electronically to all members of the bargaining unit represented by Local 408. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014).

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

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Department of Justice, Bureau of Prisons, Federal Correctional Complex, Butner, North Carolina, shall:

1. Cease and desist from:

(a) Making statements or comments that interfere with, restrain, or coerce its employees in the exercise of their rights under the Statute, including their right to seek help from the American Federation of Government Employees, Local 408, AFL-CIO (Local 408).

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

⁸ Even if I were to find that the General Counsel's evidence was sufficient to survive a motion to dismiss on the element of motivation, I would still conclude that the GC has not proved the allegation of discrimination. For the reasons I have already explained, the preponderance of the evidence does not support a finding that Borges's protected activity was a motivating factor in Daniels's entries on her progress review; moreover, Daniels had a legitimate justification for the comments in the progress review, and she would have made those comments even in the absence of protected activity by Borges.

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

(a) Post at its facilities at the Federal Correctional Complex, Butner, North Carolina, where bargaining unit employees represented by Local 408 are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Warden of the Federal Medical Center, Butner, North Carolina, and shall be posted and maintained for sixty (60) days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees represented by Local 408 are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

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

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

Issued, Washington, D.C., October 30, 2015



RICHARD A. PEARSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department Justice, Bureau of Prisons, Federal Correctional Complex, Butner, North Carolina, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT make statements that interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured by the Statute, including their right to seek assistance from the American Federation of Government Employees, Local 408, AFL-CIO.

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

(Agency/Activity)

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

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Atlanta Region, Federal Labor Relations Authority, whose address is: 225 Peachtree Street, Suite 1950, Atlanta, GA 30303, and whose telephone number is: (404) 331-5300.