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

OALJ 15-61

DEPARTMENT OF VETERANS AFFAIRS
VA MEDICAL CENTER
RICHMOND, VA

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2145, AFL-CIO

CHARGING PARTY

Case No. WA-CA-13-0152

Jessica S. Bartlett
Merritt Weinstein
For the General Counsel

Timothy M. O'Boyle
For the Respondent

Kia Postell
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

## DECISION

This case involves a staff meeting for the Department of Veterans Affairs, VA Medical Center, Richmond, Virginia's (the Agency's, the Respondent's, or the Medical Center's) Police Service held at a time when, in the words of one supervisor, the department had "got hit with a bunch of grievances." Tr. 134. The supervisors in the department did not like these grievances, and at least two of them made this clear at the meeting. One, the assistant chief of police, said that filing grievances would send the "wrong message" to the chief, and it indicated that employees were ungrateful and disloyal to a man who had gone out of his way to accommodate employee requests. Tr. 134-35. The other, a lieutenant, said that a lot of the grievances being raised were "frivolous," and he said that employees who were unhappy were free to look for other jobs. Tr. 172.

As it so happened, an employee at the meeting was surreptitiously using his iPhone to make an audio recording of the meeting. After the meeting, the employee played the recording for the president of the local union, and the president sent a copy to a Federal Labor Relations Authority (FLRA or Authority) Regional Office. By the time of the hearing, however, all copies of the recording had been either damaged or destroyed. While it is unclear how the recordings were damaged, all evidence indicates that they were not intentionally damaged or destroyed.

There are two main questions in this case. The first is whether I should impose sanctions on the Charging Party and the General Counsel for failing to preserve the recordings. Because the recordings were not intentionally damaged or destroyed, and because a complete recording would not have materially helped the Respondent's case, I do not believe sanctions are appropriate. The second question is whether statements made at the meeting violated § 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute). By telling employees that filing grievances was a demonstration of disloyalty and ungratefulness, and that employees who don't like their work should find other jobs, supervisors crossed the line from opinion to intimidation; employees hearing these comments would reasonably have hesitated to go to their Union to pursue further complaints. Therefore, these statements were unlawful.

## STATEMENT OF THE CASE

This is an unfair labor practice (ULP) proceeding under 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 FLRA, 5 C.F.R. part 2423.

On January 14, 2013, the American Federation of Government Employees (AFGE), Local 2145, AFL-CIO (the Union or the Charging Party), filed a ULP charge against the Respondent. GC Ex. 1(a). After investigating the charge, the Regional Director of the FLRA's Washington Regional Office issued a Complaint and Notice of Hearing on April 4, 2013, on behalf of the General Counsel (GC), alleging that certain statements made by supervisors during a staff meeting violated § 7116(a)(1) and (2) of the Statute. GC Ex. 1(b). The Respondent filed its Answer to the Complaint on April 26, 2013, denying that it violated the Statute. GC Ex. 1(c). On May 24, 2013, the GC filed a Motion to Amend Complaint, to allege only a violation of § 7116(a)(1); this motion was granted. GC Exs. 1(e), 1(g).

A hearing was held in this matter on June 11, 2013, in Richmond, Virginia.[1] 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.

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[1] Counsel for the Respondent argued in his opening statement that I should dismiss the complaint because it failed to state a § 7116(a)(1) violation, and because the Union failed to produce certain evidence. Tr. 10-11. The complaint alleged a violation of § 7116(a)(1) on its face, and it would have been premature to rule on the alleged failure to produce evidence without first hearing testimony on that issue. Accordingly, I denied the Respondent's motion. Tr. 12.

Based on the entire record,[2] including my observations 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 AFGE 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 Department of Veterans Affairs (VA). The Union is an agent of the AFGE for the purpose of representing bargaining unit employees of the Respondent. AFGE and the VA are parties to a collective bargaining agreement, known as the Master Agreement. GC Exs. 1(b), 1(c).

This case pertains to a monthly Police Service staff meeting held on January 3, 2013. The meeting lasted about an hour. Tr. 16-17, 132, 171. The meeting took place at a time when the Police Chief had recently been "hit with a bunch of grievances that could have been easily fixed at the service level . . . minor little things." Tr. 134; *see also* Tr. 196. The chief evidently passed on his irritation to Deputy Chief Thomas Buhl, who was conducting the January 3 staff meeting and following the agenda set mainly by the chief. Tr. 132, 134.

The meeting began around 8:00 a.m. Tr. 18, 42. Supervisors in attendance included Lieutenants Christopher Stith, John Buck, and Luke Cassidy, in addition to Buhl. Police Chief Kevin Guidry was not present. Bargaining unit employees at the meeting included Officers Tony Armstrong, Emmett Ferrell, and Michael McFadden; and Dispatchers Stephen Henry and Spencer McNeely. Also present were Detective Angela Taylor and Security Assistant Sonja Powell, who was Chief Guidry's secretary. Tr. 21, 23-24, 42.

McNeely is one of the central figures in this dispute. He works a midnight-to-8:00 a.m. shift and is responsible for dispatching officers over the radio and entering information into an electronic journal. Tr. 14, 18. Because the monthly staff meetings begin as his shift is ending, McNeely (with management's permission) attends meetings only every two or three months; but for other employees, the meetings are mandatory. Tr. 18-19. In October 2012, McNeely had sought the Union's assistance with "scheduling issues," and the Union filed a grievance on his behalf. Tr. 31.

Before the meeting began, McNeely, started making an audio recording of the meeting on his iPhone. McNeely did not tell anyone (except, perhaps, Henry), that he was recording the meeting.[3] Tr. 42; *see also* Tr. 35, 44, 164. I'll describe what was said at the meeting, and then what became of McNeely's recording.

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[2] Included in the record is a digital copy of an audio recording of the meeting that is the focus of this case, and a written transcript of that digital recording. R. Ex. 1. The transcript of the recording was prepared – after the hearing – by the court reporting service that also prepared the hearing transcript. I will have much more to say about this exhibit later.

[3] Article 17, Section 4 of the Master Agreement states: "No electronic recording of any conversation between a bargaining unit employee and a Department official may be made without mutual consent except for Inspector General" and other investigations. Jt. Ex. 1 at 61. Asked whether the Master

The Meeting

The meeting began with Buhl talking about problems with police officers' reports. Tr. 170; *see* R. Ex. 1 at 2. Buhl had written a course on police report writing, and he wanted officers to improve their reports, because they were going to be inspected in the near future. Tr. 132, 141. He also talked about journal entries that had been improperly deleted during the overnight shift, a comment McNeely understood as being directed at him, even though Buhl did not refer to anyone by name. Tr. 24, 71-72, 144. While the transcript of the audio recording of the meeting is too garbled to make much sense of, it does appear that the discussion of these issues occupied most of the recording, which took a bit more than twenty-seven minutes. R. Ex. 1.

Lieutenant Stith spoke next. He told employees that they should come to management with problems or complaints, because management was there to help employees, not hurt them. Tr. 24-25.[4] He also asked employees whether they had any issues they wanted to talk about. Officer McFadden took Stith up on the offer and spoke about the importance of employees showing up for their shifts on time, to relieve the officers going off duty. Tr. 154; *see also* R. Ex. 1 at 15-16, which seems to resemble McFadden's comments, as described by Stith at the hearing.

Lieutenant Buck spoke after Stith. Tr. 25. At the hearing, Buck acknowledged that he described "union filed grievances" (as well as other types of complaints) as being "frivolous." Tr. 172. Buck initially testified that he was not referring to a specific person or grievance, but when he was later asked to describe what he meant, Buck went into some specifics, stating, "When you're given instructions from your supervisor or if you are held accountable on a journal entry or report and you file a union complaint." Tr. 183. He also told employees at the meeting that he had previously worked at non-union jobs, where employees "did what [they] were told to do." Tr. 172-73.

McNeely also testified about Buck's comments at the meeting. He said Buck told employees, "[W]e don't want to overwhelm Chief Guidry with frivolous stuff that we can all work out." Tr. 52; *see also* Tr. 25, where McNeely characterized Buck's comments as "we didn't need to bog down the Chief with frivolous complaints, just continuous going back and forth trying to file grievances because it didn't look good."

At the hearing, Buck was also asked, "did you tell the employees who were present that if they weren't happy, they should find another job?" Buck replied, "Yes, I did, sir." Tr. 174. Asked to explain, Buck testified, "Basically, being a first responder in law enforcement, some people, they find that it's not cut out for them and, you know, if this isn't

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Agreement bars tape recordings in the workplace without the consent of all, Union President Jennifer Marshall answered, "Yes." Tr. 122-23.

[4] It is possible that this change of subjects at the meeting occurred at page 18 of the 19-page transcript, when a speaker says, "I think I'll open up the issue of communication. We are not mind readers. . . . we make mistakes, simple communication . . . solve problems. If we know about it, we can fix it. If we don't know about it, we can't fix it, you know." R. Ex. 1 at 18.

what, you know, some folks find that they don't want to do then they are free to pursue whatever they qualify to do." *Id.* Buck denied that he was talking about Union grievances and denied telling employees that if they didn't like what they were doing, they were going to be fired. Tr. 174-75. He further testified that he told employees that they "should do what their resume could handle." Tr. 175. When asked what he meant by this, Buck answered, "Whatever it is that they are qualified for, if they're not happy with their current position or job, they are, you know, it's their prerogative to seek other jobs." *Id.* He indicated that "complaints that people were making at the meeting" prompted his remarks, but he added, "I don't recall anyone saying anything about not liking the job." Tr. 176-77; *see also* Tr. 77-79 for McNeely's description of Buck's comment.

After Buck spoke, Buhl echoed some of the comments made by the other managers. McNeely testified that Buhl told the employees at the meeting that they:

> need to show a little bit of loyalty towards the chief because he bends over backwards for people in the service, and basically that didn't look right to keep going down with the Union because basically what it was coming down to was what's the message that's being said, and that message that he stated was that if we kept going back to the Union, it would show that we were ungrateful.

Tr. 26. Buhl confirmed that he said employees should show "loyalty" to the chief, but he said that his comment had been "taken out of context." Tr. 133-34, 139-40. Asked to provide the appropriate context, Buhl referred first, as noted above, to the "bunch of grievances" that had been filed with Chief Guidry. Tr. 134. He told the officers at the meeting:

> [A] lot of that stuff can be fixed at the service level. It's no problem, if we know about it. And I said it sends a wrong message to the Chief; he's gone out of his way to help, you know, you guys with agendas you have. You keep hitting him with these little things when they could be easily fixed by management right there. It was no big deal.

Tr. 134-35. Asked specifically about his use of the word "loyalty," Buhl testified:

> I think I, what I meant by, you know, I think it's kind of taken really kind of out of context what I meant. I mean loyalty as far as giving him the courtesy, at least, that's probably the better word I should have used, give him the courtesy of being able to at least try to tackle the problem first, because a lot of times the minor things can be taken care of very quickly.

Tr. 139-40. When asked whether he told employees not to file grievances, Buhl said, "No. I said but first try to go through the police service management. And if you don't get redress there or you're not happy with the results, then you can go to the Union, because that's what the Union is for." Tr. 135. Additionally, Buhl testified that he was unaware of any grievances filed by McNeely and that his remarks were not specifically directed towards McNeely. Tr. 139.

About halfway through the meeting, Buhl opened the floor to anyone who wanted to speak. Lieutenant Cassidy, who was McNeely's supervisor at the time of the meeting,[5] made a statement about factfinders throwing procedurally deficient grievances into the "shredder." Tr. 30. McNeely testified that Cassidy told employees:

> [Y]ou can file a union grievance, but if you don't give your chain of command the first crack at solving that issue, that no matter if you have all your facts right, if everything was done correctly, when it got to the administrative judge, he would throw your case into the shredder.

*Id.* McNeely understood this remark as Cassidy's attempt to "discourage us from going to file, to filing grievances or issues with the Union." Tr. 30.

Asked at the hearing to explain his "shredder" remark, Cassidy testified, "I did use the word, you know, a shredder in the context of saying that you could be completely right in your grievance, but if you don't follow through the processes and procedures, I said you might lose a grievance process because you didn't follow through that process." Tr. 192. Cassidy based the "shredder" remark on an AFGE training session he attended, and he recalled learning that because an employee "didn't follow through with certain processes of, and in the case that [he] can vaguely remember was more specifically dealing with EEO, that they didn't follow through with the Agency's timing requirements." Tr. 203; *see also* Tr. 198-99.

McNeely also testified about other statements made during the second half of the meeting. According to McNeely, Henry told Stith that when the Union filed grievances, it was "just . . . business and not personal." Tr. 28. Stith asked Henry for clarification, but Henry declined and the meeting went on. Tr. 165-66. Buck told employees that he could "say good things about people in the room," singling out some attendees, but skipping McNeely. Tr. 60-61. Towards the end of the meeting, Stith stated, "Don't make false accusations about me or you will lose." Tr. 30. McNeely felt that Stith's comment about false accusations was directed at him, since "everything that that meeting entailed was basically discouragement of going to the Union as far as filing charges or seeking guidance." Tr. 30-31.

McNeely did not say anything at the meeting himself. Tr. 35. Asked why, McNeely testified, "Everything about that meeting was basically statements . . . made for discouraging the bargaining unit employees from seeking union advice and filing grievances. And I did not at that time feel comfortable. I didn't want anything that I did say to jeopardize my job." Tr. 36.

Several additional points were touched on by the Respondent's witnesses. Buhl, Stith, and Cassidy each described the meeting atmosphere as casual and the tone as conciliatory. Tr. 133, 153-54, 194. In addition, Buhl and the lieutenants talked about having

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[5] Between the meeting and the hearing, Buck became McNeely's supervisor. Tr. 181

previously been bargaining unit employees. Cassidy talked about having been a union steward, and Stith and Buck testified that they had both received about $5,000 as the result of a grievance, and that they both still pay union dues. Tr. 129-30, 156-57, 169-70, 177-78, 188-89. Finally, the Respondent's witnesses all denied telling employees that they couldn't go to the Union, and they all denied threatening them or telling them that they would suffer adverse consequences for going to the Union. Tr. 136, 156, 177, 201.

The Audio Recording

McNeely left the meeting having captured the entire session on his iPhone. Tr. 42. He then made copies of the recording, but all were either damaged or destroyed. There are two accounts of what happened.

McNeely's Testimony Regarding the Recording

McNeely testified that he met with Union President Jennifer Marshall on January 14, 2013, in her office. Tr. 32, 67. There, McNeely played Marshall a portion of the recording of the meeting on his iPhone. Tr. 67. Marshall asked McNeely to copy the recording onto cassette tapes that she could send to the FLRA's Washington Regional Office. Tr. 47, 67. McNeely did so by playing the iPhone recording through speakers and capturing the speakers' output using a mini-recorder. Tr. 46-47. McNeely called the first tape that he made the "master" tape. Tr. 58. After making the "master" tape, McNeely repeated the process twice, making three tapes in all. Tr. 47.

McNeely testified that when he gave the master tape to Union President Marshall, it contained an audio recording of the entire meeting, "from start to finish," as did the two additional tapes. Tr. 44. He gave all three tapes to Marshall, so the only recording that McNeely retained was the one on his iPhone. Tr. 44-45. McNeely, Marshall, and Henry listened to one of the tapes at the Union office. *See* Tr. 67-68. Marshall kept the "master" tape and sent the other two tapes to the FLRA's Washington Regional Office. Tr. 44, 48

In February, McNeely's iPhone met an untimely demise. "My daughter was running to church as I was trying to lock the back door and set the alarm and go out the front, and as soon as I turned around . . . the phone dropped on the actual cement," McNeely testified. The phone was "cracked just everywhere." Tr. 43-44. Asked whether he still had the recording stored on the iPhone, McNeely answered, "No, I don't." Tr. 44.

At the hearing, Counsel for the Respondent showed McNeely a cassette labeled "police master." Tr. 59. McNeely did not recognize the handwriting, but he recognized the tape. "I bought these at Radio Shack," he stated. Tr. 59-60. When McNeely was told that the "master" tape contained less than thirty minutes of material, he found this "surprising," since Marshall had not said anything about the tapes being incomplete in the days or weeks after he delivered them. Tr. 64-65, 68. Asked if he knew why the "master" tape was less than thirty minutes long, McNeely stated, "No I don't, because once I physically made sure the whole meeting was on those tapes, I took that tape out of the player, put it back in the

case, and put it back into my bag. And as soon as I was able to give them to Ms. Marshall, I did." Tr. 66. Asked whether he had any idea what happened to the "master" tape, McNeely stated, "No, I sure don't." Tr. 68.

Marshall's Testimony Regarding the Recording

Marshall has been an employee of the Medical Center for thirty-two years and has been president of the Union for fifteen years. Tr. 92. She has been involved in the litigation of "hundreds" of grievances and EEO cases and understands that a party in an EEO case can be sanctioned for destroying evidence. Tr. 117-18.

Marshall testified that McNeely and Henry came to the Union office on January 14 and played a recording of the meeting on a mini-recorder. Tr. 94. Marshall listened to the tape, which captured the entire meeting, and she wrote "police master" on the cassette. Tr. 96-97, 111. The tape contained "several statements that were made by four separate supervisors." Marshall could "tell by the voices" that the supervisors included Buhl, Stith, Buck, and Cassidy. According to Marshall, the tape contained "disparaging" comments "about going to the Union, filing grievances, making frivolous complaints." She specifically remembered hearing Cassidy make his "shredder" remark. Tr. 99. Marshall did not listen to the "master" tape again. Tr. 96. She filed the ULP charge in this case on the same day that she met with McNeely and Henry.

Marshall asked McNeely to email her a description of the meeting. Tr. 93-94. In addition, she asked McNeely for "copies" of the recording that she could send to the FLRA General Counsel's office in Washington, D.C. Tr. 95. McNeely took the tape home to make copies. Tr. 113. He later returned to the Union office and gave Marshall the "master" tape and one additional tape (the second tape), which Marshall then sent to the FLRA's Washington Regional Office. Tr. 96-97, 115.

Marshall kept the "master" tape in her briefcase, in the cassette recorder that McNeely had given her to play the tape. Tr. 113. She carried the briefcase every day between home and work, and she took the cassette out of the recorder once, to use the recorder for a separate situation. Tr. 113-15. She mailed the other tape to the FLRA's Washington Regional Office shortly after filing the ULP charge. Tr. 95, 115. The following month, Marshall asked the FLRA attorney handling the case whether she had received the tape; the attorney informed Marshall that the tape "got erased when it went through . . . the regular mail scanning system and it was blank." Tr. 115-16. Asked whether the FLRA attorney asked her to send another copy of the tape or to preserve the master copy, Marshall said, "No, they didn't. . . . They pretty much said they weren't going to use the tape." Tr. 116.

Days before the hearing, Marshall sent the "master" tape to the FLRA's Washington Regional Office. Tr. 97. The GC converted the "master" tape to a digital recording and sent Marshall a copy electronically. Tr. 123.

Marshall testified that the GC's digital recording "had some skips in it" (Tr. 96) and was "very incomplete"; it was missing "part of the beginning" and "the entire end part" of the meeting (Tr. 124), and the "disparaging" statements heard on the tape were missing from the digital recording (Tr. 99-100). Marshall estimated that the digital recording captured "less than half" of the meeting. Tr. 125.

The Remains of McNeely's Audio Recording

The digital recording, which was not played for witnesses at the hearing, captured only about twenty-seven minutes of the approximately one-hour meeting. R. Ex. 1. It does not contain the main statements at issue in this dispute, and none of the speakers is identified by name. The overall quality of the recording is poor, and about every other sentence is punctuated either by voices speaking so softly or quickly that individual words cannot be identified (the transcript marks these inaudible moments as "indiscernible" and there are also several times when the police radio makes it difficult to hear anything else). Because there are so many moments of indiscernibility, it is often difficult to determine what the speakers at the meeting are talking about, much less the details of what they are saying.

The recording begins with the sound of chitchat, followed by thirty seconds of "dead air," probably the result of a recording error. This is followed by a male speaker, probably Buhl, talking about police reports. He refers to spelling mistakes, and to how attorneys litigating against the department might use poorly written reports to their advantage. *Id.* at 2-5. Next, a female speaker talks about correcting reports and says, "If anyone has any problems, don't hesitate to come back to us. We'll come out and that's what we're here for. You don't need to go to anybody else." *Id.* at 5. A male speaker, probably Buhl, talks about making "corrections" to police reports, and then talks about journals, saying, "I don't know why it's happening, but someone was taking stuff out of the journal. It's not authorized. Because I'll sit there look at one and then I look at another one printed later – one printed at midnight and one printed at [six]." *Id.* at 6-8. A male speaker, during a long discourse covering a variety of topics, makes a passing remark about a union complaint, but the context is impossible to understand. *Id.* at 9. There is more talk regarding journals, followed by minutes of chatter and laughter. *Id.* at 9-13. An "unidentified speaker," possibly Stith, asks, "Anything else? Does anybody have any issues?" *Id.* at 14. In response, a male speaker talks about how "we need to work together to find a solution to the problem," but it is unclear what the problem is. *Id.* A male speaker, probably Officer McFadden, talks about being "considerate" and getting to work on time to "let them [presumably, other employees] get out" on time. *Id.* at 16. At least two speakers talk more about the importance of writing good police reports (one says, "You can't come here and write a half-ass report"). *Id.* at 17. A male speaker talks about the "issue of communication" and says, "We are not mind readers .... If we know about it, we can fix it. If we don't know about it, we can't fix it, you know." *Id.* at 18. A male speaker says that the Chief is "trying to give a more professional image and it's our part to back that up," but more moments of "indiscernible" speech follow. *Id.* at 19. At that point the recording ends.

## POSITIONS OF THE PARTIES

### General Counsel

The General Counsel contends that Buhl, Buck, and Cassidy spoke coercively and violated § 7116(a)(1) of the Statute by suggesting that employees exercising their statutory rights were disloyal and might lose their jobs. *Id.* at 10. Specifically, the GC alleges that Buck violated § 7116(a)(1) when he described employee grievances as "frivolous," when he said that unhappy employees should look for "another job," and when he said that a disgruntled employee should "do what his resume could handle." GC Br. at 10-11. The GC also alleges that Buhl violated the Statute by saying that employees who filed grievances would send the wrong message to the Chief, that employees needed to show more loyalty to the Chief and try to resolve complaints within the Police Service before filing grievances with the Union; and that Cassidy similarly coerced employees by telling them that their grievances would end up "in the shredder" if they didn't go to their supervisor first. *Id.* Further, Buck stated that grievances were frivolous and that employees should not overwhelm the Chief with them. *Id.* The GC adds that McNeely's testimony should be credited, as it was corroborated by the testimony of the Respondents' witnesses. *Id.* at 11.

On the law, the GC asserts that an employee has the right under § 7102 of the Statute to form, join, or assist any labor organization, freely and without fear of penalty or reprisal, and that interfering with that right violates § 7116(a)(1). *Id.* at 9 (citing *Nuclear Regulatory Comm'n*, 28 FLRA 820, 831 (1997)). According to the GC, the Authority finds violations of 7116(a)(1) on facts establishing a direct threat in connection with the exercise of protected rights; it has found coercive the statement that work would be contracted out if the union continued to file grievances; and it has held that statements connecting an employee's exercise of a right under the Statute to discipline or adverse treatment unlawfully discourage employees from exercising their rights. GC Br. at 9-10 (citing *U.S. Penitentiary, Florence, Colo.*, 53 FLRA 1393 (1998) (*USP Florence*); *Bureau of Engraving & Printing*, 28 FLRA 797, 803 (1987); *U.S. Marine Corps, Marine Corps Logistics Base, Barstow, Cal.*, 5 FLRA 725, 743-44 (1981)). The GC adds that if a statement is coercive, it is not protected as a personal opinion under § 7116(e) of the Statute. GC Br. at 11 (citing *Okla. City Air Logistics Ctr., Tinker Air Force Base, Okla.*, 6 FLRA 159, 161 (1981)).

As a remedy, the GC requests that the Respondent post a notice to employees, signed by Chief Guidry, and that the notice be posted on bulletin boards and electronically.

### Respondent

The Respondent argues that the GC and the Charging Party should be sanctioned because they "failed to prevent the destruction" of McNeely's recording. R. Br. at 4. In this regard, the Respondent contends that a party may be sanctioned for destruction of evidence that it knows, or reasonably should know, is relevant to reasonably foreseeable litigation. *Soc. Sec. Admin., Dall. Region, Dall, Tex.*, 51 FLRA 1219, 1225-26 (1996) (*SSA*) (citing

*Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72-73 (S.D.N.Y. 1991) (*Turner*); Jamie S. Gorelick et al., Destruction of Evidence § 3.11 at 93 (1989) (*Gorelick*)). The Respondent further asserts that federal courts "routinely find that a sanction is appropriate for failure to safeguard relevant evidence." R. Br. at 4 (citing *Gerlich v. Dep't of Justice*, 711 F.3d 161 (D.C. Cir. 2013) (*Gerlich*)).

The Respondent argues that the Charging Party "created multiple copies of the audio recording," that the GC was "aware of the existence of these audio recordings," and that Marshall, an experienced union official who was "aware that a party can be sanctioned for destroying evidence," "had custody of the 'master' recording." R. Br. at 5. "Nonetheless," the Respondent asserts, "neither Marshall nor the [GC] took any steps to ensure the preservation of these multiple audio recordings." *Id.* The Respondent claims that the GC did not tell Marshall to preserve the "master" tape. Further, the Respondent alleges that the explanations for what happened to the recordings – McNeely "accidentally destroyed" the iPhone recording; a tape was "destroyed in the mail"; "at some point, Marshall destroyed most of the master recording, including the portion of the tape containing all the allegedly 'coercive' and 'threatening' statements" – are "odd." *Id.* at 5-6.

The Respondent argues that the absence of a complete recording results in "prejudice to Respondent's ability to defend itself," and that "based on the testimony of the witnesses at the hearing," a recording "would likely support Respondent's version of the events." *Id.* at 6. The Respondent adds that a full recording is of "obvious relevance." *Id.* at 4. Accordingly, the Respondent urges that I should dismiss the complaint or, in the alternative, make an adverse inference against the GC – specifically, I should infer that if the complete recording existed, it would corroborate the testimony of the Respondent's witnesses. *Id.* at 6.

In addition, the Respondent argues that I should draw an adverse inference from the GC's failure to have Henry testify; I should infer that if Henry had testified, he would have shown that the statements made by the supervisors were not coercive or otherwise unlawful. *Id.* (citing *IRS, Phila. Serv. Ctr.*, 54 FLRA 674 (1998) (*IRS*)).

On the merits, the Respondent argues that it did not violate the Statute, as none of the statements made at the meeting were coercive. *Id.* at 8, 11. In this regard, it asserts that the standard for determining whether a statement violates § 7116(a)(1) is an objective one, and that the question to be asked is whether the statement would tend to coerce 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., Safford, Arizona*, 59 FLRA 318, 322 (2003); *Dep't of the Air Force, Scott AFB, Ill.*, 34 FLRA 956, 962 (1990).

The Respondent attacks McNeely's testimony, arguing that it was "muddled and often nonsensical." R. Br. at 8. In this regard, it asserts that McNeely "for some unknown reason . . . found threatening a reference Buck made to . . . Man in the Mirror." *Id.* at 9 (internal quotation marks omitted). It also asserts that McNeely "backed away from the GC's theory of the 'threatening' nature" of Stith's statements. *Id.* at 8. With regard to Buck's "resume" statement, the Respondent contends that McNeely "admitted that he did not even know what Buck meant." *Id.* at 9. Further, the Respondent suggests that McNeely acted in an

underhanded manner by recording the meeting, and that his testimony is therefore untrustworthy. In this regard, the Respondent asserts that the only apparent reason McNeely attended the meeting was to make the "surreptitious" recording, which contravenes Article 17, Section 4, of the Master Agreement. *Id.* at 6-8.

Respondent does, however, cite portions of McNeely's testimony to support its position that the supervisors' statements were not coercive. In this regard, McNeely acknowledged that: (1) Buck "did not reference any specific grievance" when speaking of "frivolous" grievances; (2) no supervisor threatened to fire McNeely or anyone else at the meeting; (3) Buck "praised" several employees at the meeting, saying that he "can say good things about them"; and (4) Cassidy's "shredder" comment was another way of saying that employees should address issues at the lowest possible level, a principle set forth in Article 43, Sections 6 and 7 of the Master Agreement. The Respondent adds that none of the supervisors mentioned McNeely by name, and the supervisors themselves denied that they threatened or coerced employees at the meeting. *Id.* at 8-11. Respondent also argues that it is unlikely the supervisors would have spoken in a coercive manner, since they all had previously been bargaining unit employees, and some had financially benefited from Union grievances. *Id.* at 11.

## ANALYSIS AND CONCLUSIONS

### Preliminary Matters

The Respondent requests sanctions of the Charging Party and the GC for failing to preserve McNeely's audio recording of the meeting.

An Administrative Law Judge may, in his or her discretion, impose sanctions as "necessary and appropriate." *P.R. Air Nat'l Guard, 156th Airlift Wing (AMC), Carolina, P.R.*, 56 FLRA 174, 177 (2000), *aff'd*, 239 F.3d 66 (1st Cir. 2001); *see also* 5 C.F.R. § 2423.24(e). In determining whether to impose sanctions for spoliation of evidence, the "critical questions in most cases are whether the party intended to destroy material relevant to litigation and whether the victim suffered prejudice as a result." *Gorelick* at § 3.11; *see also id.* at § 2.8 ("Although most courts adhere to the requirement that spoliation of evidence be intentional, some courts now allow the inference to be drawn for negligent spoliation of evidence."). The *Turner* opinion adds some balance to the question: the court states that where the destruction of evidence was negligent rather than willful, special caution must be exercised to ensure that the inference is commensurate with information that was reasonably likely to have been contained in the destroyed evidence. Where there is no extrinsic evidence showing that the destroyed evidence would have been unfavorable to the spoliator, no adverse inference is appropriate. 142 F.R.D. at 77.

Consistent with these principles, the Authority determined in *SSA* that the "knowing destruction" of information requested under § 7114(b)(4) – after the request has been made but prior to a determination of the merits of the request – is an independent violation of the Statute. 51 FLRA at 1225-26. Similarly, in the *Gerlich* case cited by Respondent, the evidence in question had been intentionally destroyed. 711 F.3d at 171.

As an initial matter, I credit Marshall's testimony, which was highly detailed, and find that she received only two tapes from McNeely, not three, as McNeely testified. Whether there was a third tape, and if so what happened to it, is a mystery that cannot be answered here. For our purposes, it is enough to say that there is no evidence that any tape was intentionally hidden or destroyed.

With regard to the recording stored on McNeely's iPhone, McNeely testified credibly that the recording was destroyed when the phone was dropped on the cement at McNeely's house. Tr. 43-44. Incidents such as this are, sadly, too common to justify an inference of malicious intent. With regard to the second tape, which was mailed by Marshall to the FLRA, Marshall testified that she was told by an attorney in the GC's office that the tape "got erased . . . through . . . the regular mail scanning system." Tr. 115-16. It would be preferable to have a more detailed explanation than this, but it is plausible and indicates that neither Marshall nor the GC caused the destruction, and the Respondent does not contradict Marshall's explanation. R. Br. at 5-6. Accordingly, there is no basis for imposing sanctions for the second tape's destruction.

As for the master tape, McNeely and Marshall indicated that it contained the entire meeting as of January 14, if not later (Tr. 44, 111), and both were surprised when they learned, shortly before the hearing, that approximately the second half of the recording had been erased. Tr. 64-65, 68, 96, 113-15, 124-25. This testimony, which I credit, supports the conclusion that neither McNeely nor Marshall intentionally destroyed the master tape. Further, while the Respondent asserts that Marshall "at some point . . . destroyed most of the master recording" (R. Br. at 5), the Respondent does not provide specific evidence demonstrating that it was Marshall who damaged the tape. And there is no evidence indicating that anyone in the GC's office damaged the master tape.

While we do not know what caused the master recording to be damaged, it is of course possible that Marshall inadvertently harmed the recording during the nearly five months when the tape sat in the mini-recorder in her briefcase. But even if this were true, and even if Marshall's decision to leave the tape in her briefcase was unwise, this would amount to simple negligence on her part, and I would not consider sanctions appropriate.

Moreover, sanctions would be warranted only if the tape contained information helpful to the Respondent. But in my view, it is unlikely that the complete master tape would have supported the Respondent's case. Most likely, a complete version of the master tape, or of the copy sent to the GC, would be as poor in quality as the partial recording in evidence, making it of little evidentiary value. Most important in evaluating possible prejudice to the Respondent, however, is that the supervisors who testified admitted to making the statements

described by McNeely. Thus, there really is no credibility dispute that might be resolved by listening to a crystal-clear recording of the full meeting. The real dispute in this case is not over "what" was said, but how to interpret what was said. Therefore, I do not accept the Respondent's claim that it has been prejudiced by the absence of a complete recording of the meeting.

The Respondent also asserts that the Union violated Article 17, Section 4, of the Master Agreement by recording the January 3 meeting. While this may be true, that is a matter for the Agency and the Union to resolve on their own, perhaps through the contractual grievance procedure. The possible contract violation does not make it inadmissible in this hearing: its admissibility should be based instead on whether it sheds any light on what happened at the January 3 meeting, and I will comment on that further below.

Based on the foregoing, I reject the Respondent's request for sanctions for spoliation of evidence.

The Respondent has not sought to exclude the evidence entirely; indeed, the recording was offered as a Respondent exhibit, not a GC exhibit, and it is in this context that I will comment on the probative value of the exhibit itself, both in its digital format and its written transcript. Because both the digital audio and the transcript are barely intelligible, my overall conclusion is that the exhibit has little or no probative value, but I stop short of excluding it entirely. Listening to the tone of the people speaking on the audio recording, it is evident that the meeting was in many respects casual, as the Respondent asserts, as the participants bantered back and forth on seemingly trivial routine matters. Additionally, even though it is nearly impossible to discern the specifics of what the participants said, the transcript shows that the specific comments that are alleged to be unlawful were not made in the recorded portion of the meeting. The transcript indicates that the first twenty-seven minutes of the approximately hour-long meeting was preoccupied with routine departmental issues, such as the importance of writing reports and journal entries carefully and accurately, showing up for shifts on time, and complaints about lawyers. Although Respondent Exhibit 1 is of no value in determining whether supervisors made any coercive statements, it does show that such remarks were not made in the first half of the meeting. For these limited purposes, it is worth considering.

If this recording were the only evidence before me, I would wholeheartedly agree with the Respondent that it committed no ULP, and the complaint should be dismissed. However, there is considerably more evidence in the record. What we have is testimony from a bargaining unit employee (McNeely) and four supervisors, and their collective testimony sheds significant light on what was said during the unrecorded half of the meeting. Buck, Buhl, Stith, and Cassidy corroborate many of the details of McNeely's account concerning their perception of employee grievances, and as a result there is not a significant factual dispute about what the supervisors said. While it would have been helpful if McNeely's recording had been preserved intact and fully audible, its inadvertent loss simply leaves us in the same position as in most ULP hearings: we must determine the facts and apply the law based on the testimonial recollection of the witnesses.

The Respondent also asks that I draw an adverse inference against the GC for its failure to call Henry to the stand. In general, when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *IRS*, 54 FLRA at 682. An adverse inference is not appropriate, however, where merely cumulative testimony is involved. *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, 1018 (1998). Since, as I have already noted, McNeely's description of the supervisors' statements is in general accord with the supervisors' own testimony, I do not think that Henry's testimony would have added anything new to the record, and the GC cannot be faulted for deciding not to ask Henry to repeat what McNeely had already said. Henry's testimony would thus have been cumulative, and I draw no adverse inference.

The Respondent Violated § 7116(a)(1) of the Statute

It is a ULP under § 7116(a)(1) of the Statute for an agency to interfere with, restrain, or coerce any employee in the exercise of his or her rights under the Statute, including the right to present and process grievances under a negotiated grievance procedure. *See, e.g., USP Florence*, 53 FLRA at 1404; *see also U.S. Dep't of the Treasury, U.S. Customs Serv., Miami, Fla.*, 58 FLRA 712, 717-18 (2003). .

As the Authority explained in *U.S. Dep't of Transp., FAA*, 64 FLRA 365, 370 (2009) (*FAA*):

> The standard for determining whether management's statement or conduct independently 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. Although 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 employer.

(internal citations omitted); *see also U.S. Dep't of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 66 FLRA 589, 591 (2012). A violation of § 7116(a)(1) may be found "where, *inter alia*, a statement explicitly links an employee's protected activity with treatment adverse to the employee's interests." *FAA*, 64 FLRA at 370; *see also EEOC, San Diego Area, San Diego, Cal.*, 48 FLRA 1098, 1107 (1993). A statement may violate § 7116(a)(1) even if it does not explicitly (or implicitly) threaten termination. For example, in *Soc. Sec. Admin., Balt., Md.*, 18 FLRA 249, 258 (1985), the Authority found that a manager, who asked an employee why he had filed a grievance and implied only that the grievance would hurt the employee's future career, violated § 7116(a)(1) as the statement would tend to "chill" the exercise of the right to process grievances under the parties' collective bargaining agreement. And in *U.S. Air Force, Lowry AFB, Denver, Colo.*, 16 FLRA 952 (1984) (*Lowry AFB*), the Authority found a

violation of § 7116(a)(1) when a manager told an employee that she had become a "troublemaker" since becoming a union steward, just like a former employee who had filed complaints and was no longer employed at the agency. The statement was coercive because it would cause a reasonable employee to "think twice" before exercising rights under the Statute. *Id.* at 960.

In determining whether statements at the meeting were coercive, I first note the context in which the meeting was held. In the preceding months the Agency had, in Buhl's words, been "hit" with "a bunch" of grievances (including the one filed by McNeely in October 2012). The grievances were important enough for Chief Guidry to mention to Buhl, who viewed the grievances dismissively – "minor little things" that could have been "fixed by management," not the Union. Tr. 134-35. It is apparent that this attitude helped foster an anti-grievance tone at the meeting. The fact that this subject did not come up in the first half of the meeting shows that the meeting was not called for the purpose of discouraging grievances, the fact that it was touched upon by several of the supervisors reflects that it touched an ongoing sore nerve among the department's management.

Supervisors clearly expressed that they were not happy with employees filing grievances. Buck's hostility was obvious. He referred to Union grievances as "frivolous," (Tr. 172), told employees that they "didn't need to bog down the Chief" with complaints, and told employees that filing grievances "didn't look good" (Tr. 25). When pressed as to what complaints he viewed as frivolous, Buck said, "When you're given instructions from your supervisor or if you are held accountable on a journal entry or report and you file a union grievance." Tr. 183. Buhl was more restrained, but still spoke to employees in a somewhat accusatory manner, saying, "You keep hitting him [the Chief] with these little things [grievances] when they could be easily fixed by management right there." Tr. 134-35. Buhl and Stith both told employees to first bring their complaints to management, rather than to the Union. Tr. 70-71, 135. And toward the end of the meeting, Stith warned, somewhat ominously, "Don't make false accusations about me or you will lose." Tr. 30.

In the midst of this anti-grievance rhetoric, Buck and Buhl both indicated that employees filing grievances would suffer adverse consequences. Buhl's words showed that managers would view employees filing grievances as uncourteous or disloyal (Tr. 139, 145-46; GC Ex. 3), and Buck's words told employees, in so many words, that they would be better off finding other jobs than filing grievances. Tr. 174. Further, while Buck's statement about "doing what your resume could handle" might in isolation appear trite (that is, merely stating that employees should take jobs that they're qualified for) or incomprehensible, Buck himself testified that he was actually reiterating his point that unhappy employees should find other jobs. Tr. 175.

These statements made clear that employees filing grievances would lose the esteem of management and any right to feel secure in their jobs. Such statements would certainly cause an employee to think twice before filing a grievance. The statements were therefore coercive and violated § 7116(a)(1).

I recognize, however, that in this atmosphere of discouraging complaints to the Union, the supervisors were trying to make a legitimate point: that the Police Service management sincerely wanted to help the employees, and that employees should give them a chance to resolve their problems before going to the Union or to higher levels of management. Tr. 134-35. Thus, Buhl testified that he didn't tell employees not to go to the Union at all, but rather "first try to go through the police service management. And if you don't get redress there, or you're not happy with the results, then you can go to the Union, because that's what the Union is for." Tr. 135. This is an admirable and appropriate statement, and if it was the only statement that he or Buck made, I would find no ULP. But, by impugning the employees' loyalty in going to the Union (even if that action was premature), Buhl crossed the line from lawful to unlawful. Challenging a person's loyalty has, both in labor relations contexts and in social and political discourse, often been a pretext for persecution, because it connotes an attitude of treason that carries with it a serious threat. Even if Buhl meant the remark simply as an indication that Chief Guidry had frequently gone out of his way to help police officers, and that officers should give their first-line supervisors a first shot at helping them, suggesting that doing otherwise is disloyal conveys a distinct threat. Buhl himself conceded at the hearing that "courtesy" would have been a better word than "loyalty." Tr. 139. While I don't know whether my decision would be different if Buhl had used that word instead, I do know that Buhl's comments as uttered, in combination with Buck's, conveyed to employees that they would be viewed negatively by management if they filed complaints directly with the Union.

I also acknowledge that while Cassidy's remark about complaints going into the "shredder" could be viewed as harsh and intimidating, he was really just expressing a truism: if a person fails to follow procedural rules, that failure can result in a complaint's dismissal. *See* Tr. 87, 192. He was not saying that employees should not file complaints or that those who file complaints will suffer adverse consequences (other than possibly having their complaints dismissed). I do not view that comment as unlawful.

The Respondent claims that none of the statements made at the meeting violated § 7116(a)(1), but its arguments are unpersuasive. The Respondent asserts that McNeely's testimony was "muddled and often nonsensical," and suggests that McNeely's decision to surreptitiously record the meeting makes him untrustworthy. It is true that McNeely's testimony was not always easy to follow. For example, McNeely had difficulty explaining why Buck's "resume" remark was objectionable (Buck's testimony on that comment was much more helpful than McNeely's). It is also likely that McNeely came to the meeting hoping to catch a supervisor saying something unlawful, and that McNeely had a pre-existing anti-management bias. Nevertheless, I credit McNeely's testimony overall, mostly because the Agency's own witnesses corroborated material aspects of his testimony.

The Respondent argues that Buck did not reference any "specific" grievances when calling grievances "frivolous," and that the statements made at the meeting did not refer to McNeely by name. But McNeely and others had recently filed grievances, and it would be reasonable for them to assume that the anti-grievance comments were directed at them

personally. Further, even if the supervisors were not referring to specific grievances, their references to grievances generally were enough to make an employee think twice before exercising the right to file a grievance.

The Respondent asserts that supervisors did not specifically threaten to fire McNeely or anyone else at the meeting. But statements can be coercive even if they do not expressly threaten termination. *E.g.*, *Lowry*, 16 FLRA 952, 960. And while the Respondent may be correct that, in general, the meeting had a casual atmosphere, I reject that assertion in regard to the discussion of employee grievances. The evidence demonstrates that at that point in the meeting, supervisors crossed the line from helpfulness to veiled threats. While the supervisors denied intending any such threats, their words bely their stated intentions. As I noted above, neither the supervisors' intent nor the employees' subjective perceptions are material in this regard.

In order to remedy the Respondent's ULP, the Authority requires agencies to post a notice to employees that it will cease and desist from threatening its employees. It should be signed by the Director of the Medical Center, the activity responsible for the violation here. *See U.S. Dep't of Veterans Affairs*, 56 FLRA 696, 699-700 (2000). And, in accordance with the Authority's recent decision that ULP notices should, as a matter of course, be posted on bulletin boards and disseminated electronically whenever an agency uses such methods to communicate with bargaining unit employees, I will order both types of postings here. *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014).

## ORDER

Pursuant to § 2423.41 of the Rules and Regulations of the Authority and § 7118 of the Statute, it is hereby ordered that the Department of Veterans Affairs, VA Medical Center, Richmond, Virginia, shall

1. Cease and desist from:

(a) Discouraging employees from filing grievances with the Union.

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

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

(a) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be provided by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director, VA Medical Center, Richmond, Virginia, and shall be posted and maintained for sixty (60)

days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(b) In addition to physical posting of the paper Notice, the Notice shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, customarily used to communicate with employees. This Notice shall be sent on the same day that the paper Notice is posted.

(c) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Washington Region, 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., September 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 of Veterans Affairs, VA Medical Center, Richmond, Virginia, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

**WE HEREBY NOTIFY EMPLOYEES THAT:**

**WE WILL NOT** discourage employees from filing grievances with the American Federation of Government Employees, Local 2145, AFL-CIO.

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

_____
Agency

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, Washington Region, Federal Labor Relations Authority, whose address is: 1400 K Street, N.W., 2nd Floor, Washington, D.C. 20424, and whose telephone number is: (202) 357-6028.