



FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
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OALJ 18-17

DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
LAREDO, TEXAS

RESPONDENT

AND

NATIONAL BORDER PATROL COUNCIL,
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2455, AFL-CIO

CHARGING PARTY

Case No. DA-CA-17-0068

Zachary Wooley
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For the General Counsel

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Jesus Ybaraa
For the Respondent

Sergio Moreno
Jared Gonzales
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

This case follows the fraught work relationship between a border patrol agent and one of his supervisors. The events of the case unfolded in the weeks between late August and October of 2016, beginning with the agent filing an informal grievance against the supervisor, and leading to a series of actions by the supervisor that the agent perceived as retaliation. Employees are entitled, under federal law, to consult with their union representatives and file grievances (both formal and informal) to correct problems, and agencies are correspondingly prohibited from retaliating against employees for doing so. On the other hand, agencies are entitled to discipline employees who engage in misconduct. This case illustrates the friction between these two principles.

After Border Patrol Agent Eulalio Rodriguez was told by a supervisor, Rudy Lopez, that he would be interviewed the next day by someone from the Office of Inspector General, Rodriguez and a Union steward approached the station's Patrol Agent in Charge (PAIC) to find out more about the interview. A few minutes later, as Rodriguez drove out into the field, he received an angry telephone call from Lopez, who ordered him to come back to the station. Rodriguez felt that Lopez acted in a rude and unprofessional manner, prompting him and a second Union official to meet informally with the PAIC and to file a formal grievance a few days later over the incident. Shortly thereafter, Lopez filed an internal administrative complaint with the Agency's Joint Intake Center (JIC) against the Union official for "targeting" him. Although the parties were subsequently able to resolve this grievance, an incident occurred a couple of weeks later, in which Rodriguez and his partner radioed into the station, asking for backup assistance as they were tracking a group of suspected border-crossers. When they did not receive the assistance they expected, Rodriguez and his partner discussed the matter with the Union and filed a second grievance against Lopez, who was the Watch Commander that night. This grievance was initially raised informally with the PAIC and later formally, at the first and second steps of the negotiated grievance procedure. A few days after the informal grievance was raised, Lopez again went to the JIC and expanded his administrative complaint to include Rodriguez and his partner for lying about him in the informal grievance.

As a result of Lopez's JIC complaint, Rodriguez was summoned to be interviewed by Agency investigators about his alleged "lack of candor," an allegation which could result in disciplinary action, up to and including termination, against him. While the investigation was pending he could not be promoted, detailed, or transferred. When he realized that Lopez had filed this complaint against him, Rodriguez and his Union representative emailed the PAIC, objecting to Lopez's new act of retaliation, but they did not file a formal grievance regarding this. Instead, they filed the unfair labor practice charge pending before us now.

The primary, substantive issue presented here is whether Lopez (and by extension the Agency) retaliated against Rodriguez because of the most recent grievance he had filed against Lopez. Since Lopez essentially admitted that he filed his "lack of candor" complaint against Rodriguez because Rodriguez had complained to management about his conduct, it is clear that Lopez was motivated by Rodriguez's protected activity. This is further demonstrated by the timing of Lopez's JIC complaint and by his manner of responding to other examples of protected activity engaged in by Rodriguez and the Union. The Agency's defense – that Rodriguez committed flagrant misconduct by lying about Lopez – is contradicted by the evidence that Rodriguez did not engage in any deliberate, conscious deception. Therefore, the Agency violated § 7116 (a)(1) and (2) in its treatment of Rodriguez.

The case also presents a threshold jurisdictional issue: was the unfair labor practice charge (ULP) barred by the earlier filing of any of the informal or formal grievances? Because the two formal grievances involved different events and factual predicates than the

ULP charge, the answer is that they do not bar the charge. And because the informal email protest raised by the Union concerning Lopez's filing of the JIC complaint against Rodriguez was not a grievance filed under the parties' negotiated grievance procedure, it also did not bar the filing of a ULP charge.

STATEMENT OF THE CASE

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

On November 23, 2016, the National Border Patrol Council, American Federation of Government Employees, Local 2455, AFL-CIO (the Union) filed a ULP charge against the Department of Homeland Security, U.S. Customs and Border Protection, Laredo, Texas (the Agency or Respondent). GC Ex. 1(a). After investigating the charge, the Acting Regional Director of the FLRA's Dallas Region issued a Complaint and Notice of Hearing on March 23, 2017, on behalf of the General Counsel (GC), alleging that the Agency violated § 7116(a)(1) and (2) of the Statute by subjecting an employee to a misconduct investigation in response to the employee's protected activity. GC Ex. 1(c). The Respondent filed its Answer to the Complaint on April 17, 2017, denying that it violated the Statute and asserting that the ULP charge is barred by § 7116(d) of the Statute. GC Ex. 1(d).

A hearing in this matter was initially scheduled for June 27, 2017, but it was postponed at the Respondent's request, due to the pendency of a related criminal proceeding. GC Exs. 1(e) – 1(i). Upon the resolution of the criminal case, a hearing was held in this matter on February 7-9, 2018, in Laredo, Texas. 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 observations of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent, an activity within the Department of Homeland Security, U.S. Customs and Border Protection (CBP), is an agency within the meaning of § 7103(a)(3) of the Statute. The National Border Patrol Council, American Federation of Government Employees, AFL-CIO (AFGE), a labor organization within the meaning of § 7103(a)(4) of the Statute, is the certified exclusive representative of a nationwide unit of CBP employees. The Union, Local 2455, is an agent of AFGE for the purpose of representing the Respondent's bargaining unit employees. GC Ex. 1(c); Tr. 8-9.

I begin with some background about the parties' negotiated grievance procedures and the Agency's procedures for reporting misconduct. The Agency and the Union operate under a collective bargaining agreement (CBA). *See* Tr. 166, 270. Although the CBA was not entered into evidence, it is apparent that Article 33 of the CBA pertains to the parties'

grievance procedure. *See* GC Ex. 2 at 3; Resp. Ex. 1 at 3; Resp. Ex. 2 at 1; Resp. Ex. 3 at 1. The Agency and the Union often try to resolve problems informally, with an exchange of emails, a conversation, or a meeting. Tr. 274. Sometimes these complaints, referred to as informal grievances, lead management to conduct an inquiry into the problem. *See* Tr. 486. These informal complaints are made prior to the filing of a grievance under the parties' negotiated grievance procedure. *See* Tr. 274, 486. Step 1 of the parties' negotiated grievance procedure is the point at which a grievance is actually filed. If a matter is not resolved there, the grievance can be appealed to Step 2, Step 3, and arbitration. *See* Tr. 166, 274-75, 319.

CBP personnel are obligated to report misconduct of other employees or officials, either to the JIC or to their supervisors, who are themselves obligated to forward the allegations to the JIC. Tr. 148, 150-51; GC Ex. 15; Resp. Ex. 4.¹ An employee can be disciplined for failing to report misconduct. Tr. 148. On the other hand, the Agency's Guidance for Reporting Employee Misconduct cautions that "[f]ederal laws and regulations prohibit retaliation against employees for reporting misconduct[]" and counsels employees to use a "common-sense approach . . . about reporting less-serious misconduct." GC Ex. 15 at 1, 2.

The people involved in this dispute work at the Zapata Station, which is one of nine stations within the Laredo Sector. Tr. 26, 147, 237. The station's area of responsibility includes a fifty-two mile stretch of the U.S.-Mexico border. Tr. 424. The main dispute in the case arose from a series of conflicts between Eulalio Rodriguez, a border patrol agent (BPA), and Rudy Lopez, a supervisory border patrol agent (SBPA) with over ten years of supervisory experience. Tr. 25-26, 412, 419.

Although Rodriguez and Lopez had both worked at Zapata Station since 2011, the first sign of conflict between them occurred on August 30, 2016.² That morning, in a room at the station where the start-of-shift muster was to begin, Lopez approached Rodriguez and told him, in front of other agents, that he would be interviewed the following day by investigators from the Agency's Office of Inspector General (OIG). Tr. 30-31. Rodriguez was embarrassed to be advised of this in front of his coworkers, since such news was usually delivered privately. Tr. 31.

When the muster ended, Rodriguez consulted his Union representative, Cesar Gomez, who offered to talk to the station's Patrol Agent in Charge, Charles Arsuaga, to get more information about the OIG interview. Tr. 32. While Rodriguez was waiting outside Arsuaga's office, Lopez walked past him in the hallway, and the two made eye contact. Tr. 33. Gomez came out of Arsuaga's office shortly thereafter and told Rodriguez that the IG wanted to interview him as a witness in an investigation of another agent. Tr. 32-34.

¹ Respondent Exhibit 4 is, essentially, the second page of the two-page GC Exhibit 15.

² All dates are in 2016, unless otherwise noted.

Immediately afterward, Rodriguez and his partner left the station and began driving to their assigned location, when Lopez called Rodriguez on his cell phone. Rodriguez testified that Lopez asked him (in Spanish) “what happened, and why the fuck did I jump in, and has he ever fucking done anything wrong to me?” Tr. 34.³ Rodriguez understood “jump in” to mean why did he “jump the chain of command” to talk to Arsuaga. *Id.* Rodriguez told Lopez he didn’t appreciate being talked to like that, and Lopez said, “you know what, just come to my office right now.” Tr. 35.

Back at the station, Rodriguez found Gomez, who agreed to serve as his Union representative, and the two went to Lopez’s office. Tr. 35-36. There, Rodriguez stated that he did not like how Lopez had spoken to him and, Rodriguez testified, Lopez “denied everything.” Shortly thereafter, the meeting ended. Tr. 36-37.

Later that day, Gomez put Rodriguez in touch with Jared Gonzales, a union steward and BPA who had transferred to Zapata from another station in the Laredo Sector a couple of months earlier. Tr. 28-29, 269-70; Resp. Ex. 9 at 108-10. Gonzales met with Rodriguez to discuss the incident with Lopez, and later that day they met with Arsuaga and Acting Deputy Patrol Agent in Charge Nick Maszatics to discuss it.⁴ Tr. 38-39. Arsuaga told Gonzales that he would look into the incident, and that he would have Rodriguez and Lopez submit statements about what took place. Tr. 39-40, 282.

On September 4, Gonzales filed a Step 1 grievance (the Cell Phone Incident Grievance) on Rodriguez’s behalf with Arsuaga. Tr. 41-42; GC Ex. 2 at 1. The letter outlining the grievance began: “Border Patrol Agent Eulalio Rodriguez . . . has requested the assistance of the National Border Patrol Council Local 2455 in preparing and presenting a STEP 1 grievance” GC Ex. 2 at 1. It then described Lopez’s actions in detail and asserted that Lopez had violated various Agency policies. Specifically:

The [CBP] Officers Handbook addresses the topic of Officer Conduct and professionalism. Both of which were blatantly disregarded by (A)WC [Acting Watch Commander] Lopez.

. . . .

Furthermore, [CBP] Policy Prohibiting Discriminatory Harassment . . . states in pertinent part, “It is CBP’s policy to treat all individuals in a non-discriminatory manner.” “More specifically, CBP Policy prohibits discriminatory harassment against coworkers, subordinates.” CBP Directive 51735-013A Standards of Conduct . . . states in pertinent part, “Employees will be professional in their contact with their supervisors, subordinates, co-workers and members of the public.”

Id. at 2-3 (emphasis omitted).

³ In the Step 1 grievance that was later filed, the Union steward translated this as, “Why the fuck are you jumping over me?” GC Ex. 2 at 1.

⁴ In Gonzalez’s recollection of this meeting, Maszatics did not attend. Tr. 280-82.

With regard to next steps, Gonzales wrote:

Now, in accordance to Article 33 of the [CBA], [BPA] Eulalio Rodriguez with the assistance of Union Local 2455 . . . ask that the actions of (A)WC Lopez be addressed and corrected. Furthermore, that any future harassment and public innuendoes by station management toward Agent Rodriguez or any other employee cease immediately. . . .

Id. at 3.

The grievance contained a five-paragraph list of proposed remedies, asking (among other things) that Lopez attend sensitivity training; that the Agency acknowledge that the CBP Table of Offenses prohibits “[i]nterfering with employees[’] rights or taking reprisal against employees for exercising their rights, to file or participate in grievance or appeal, or for their affiliation or non-affiliation in labor unions”; and that the Patrol Agent in Charge address the Agency policy against harassment at muster, with Lopez present. *Id.* at 3-4. The grievance did not allege a violation of the Statute.

A few days after the Cell Phone Incident Grievance was filed, Arsuaga and Maszatics met with Rodriguez and Gonzales about it.⁵ Tr. 42-43, 283. Arsuaga said that he would not tolerate unprofessional conduct or harassment, and that he would make this clear to employees, but he denied the grievance because it was a “he said/she said deal,” and because the remedies were “inappropriate.” Tr. 43-44, 283-84, 483. After the grievance meeting, Arsuaga sent an email to employees at the station, reminding them of the importance of acting and speaking in a professional manner. *Id.* The Union was satisfied with this and did not pursue the grievance further. Tr. 285; *see also* Resp. Ex. 9 at 2.

Around this time, on September 8, Lopez sent an email to the Joint Intake Center with the subject heading “Targeting by BPA Jared Gonzalez.” GC Ex. 14 at 12; Resp. Ex. 9 at 109. Lopez asserted that Gonzales was “unfairly and maliciously target[ing]” him by filing grievances against him. GC Ex. 14 at 12; Resp. Ex. 9 at 109; Tr. 434-36. He cited a report, sent to him on September 1 by a supervisor at the Laredo South Station, that Gonzales had made remarks while stationed at Laredo South, that he was going to “set [Lopez] straight” once he was transferred to Zapata. GC Ex. 14 at 12-13; Resp. Ex. 9 at 109-10.

The next conflict between Rodriguez and Lopez occurred on the September 17 midnight shift, which actually began at 10:00 p.m. on September 16. Tr. 45, 49. Lopez was the shift’s Watch Commander. Tr. 240. At muster, Rodriguez was assigned to follow or “track” a group believed to be made up of aliens (referred to as “subjects”) who had crossed the border illegally. Tr. 47, 101. After muster, Rodriguez drove to his assigned location, met up with Rafael Garza, another border patrol agent, and the two agents then drove to a ranch. They left their vehicle there and walked, following the footprints left by the subjects. Tr. 48-49, 52, 101, 266-67.

⁵ According to Gonzalez, Lopez also attended this meeting. Tr. 283.

At some point in the night, probably around 1:00 a.m., Rodriguez radioed for assistance, hoping that additional border patrol agents would join him and Garza to provide backup. *See* Tr. 50, 102, 104-06, 245. Asked to explain why he requested assistance, Rodriguez testified:

We're walking in the middle of the night We're outnumbered. It's myself and Mr. Garza. . . . We're walking in creeks. It's a dangerous area and we never know who we're going to come across. We know there's, for sure, 10 to 15 people in this group just by agent experience.

Tr. 54. The agents did not hear back from anyone, even though requests for assistance are usually responded to immediately. About fifteen minutes later, Rodriguez again radioed for assistance, but no one responded. Tr. 50-52, 126-27, 129. Rodriguez thought that something might be wrong with his radio, so Garza used his own radio to request assistance. Tr. 53. BPA Jason Wells heard Garza's request and radioed back. Tr. 51. Wells advised Rodriguez and Garza that he and his partner, Carlos Narvaez, had been directed by Supervisory Border Patrol Agent Osbaldo Luera to stay in their area by the highway and monitor motion-activated sensors that are placed along the border. Therefore, Wells and Narvaez could not come over to provide assistance to Rodriguez and Garza. Tr. 51, 53, 56, 110, 240, 242. Wells's response was especially disappointing for Rodriguez and Garza because, Garza testified, "there was no other traffic going on" at the time. Tr. 264. In this regard, Rodriguez and Garza both testified that they did not hear any sensors going off on their radios at that time. Tr. 109, 267-68.

Later that night, Luera announced over the radio that he would be tracking the subjects Rodriguez and Garza were following by "cutting ahead," meaning that Luera would try to intercept the subjects a mile or two further down their projected path. Tr. 104, 126-27, 427; Resp. Ex. 9 at 65, 75. Eventually, Rodriguez and Garza reached a point where the tracks stopped, indicating that the subjects had been picked up and driven away, so the search for the subjects was called off. Tr. 55. Luera drove over to pick up Rodriguez and Garza and drive them back to their vehicles. Tr. 54-57, 127; Resp. Ex. 5, Resp. Ex. 9 at 76.

During the ride, Rodriguez asked Luera why Wells and Narvaez were not permitted to provide assistance to him and Garza. *See* Tr. 137, 247. According to Rodriguez, Luera replied, "After what happened between you and Rudy he is keeping everyone in their area." Tr. 137. Garza testified that Luera told them that assistance was not provided because "Lopez didn't like for any agents to leave their assigned areas."⁶ Tr. 247. Luera's response gave Rodriguez the impression that Lopez "knew exactly what was going on out in the field and he still kept their agents in their respective area not to go assist us." Tr. 137. Asked whether it was only Luera's comment that gave him this impression, Rodriguez answered: "No. I could read between the lines before he told me that. Not getting help from any agent was not common at all" Tr. 139.

⁶ Rodriguez and Garza both testified that Luera referred to Lopez when explaining why assistance was not provided, and I credit their consistent testimony on this point over Luera's claim that he did not mention Lopez. *See* Resp. Ex. 9 at 40, 44, 76.

Back at the station, at the end of the shift, Rodriguez met up with Wells and Narvaez, who told him they were sorry they couldn't provide assistance during the shift. Tr. 57. Narvaez showed Rodriguez a text Luera had sent at the beginning of the shift advising Narvaez and Wells to stay in their position and answer sensors and respond to traffic while Rodriguez and Garza tracked the subjects. See GC Ex. 13; Tr. 57, 59-61, 114.

After talking with Wells and Narvaez, Rodriguez was sure that management's decision to keep Wells and Narvaez by the highway constituted an illegitimate "denial of assistance." Later that morning, he retained Gonzales as his Union representative to look into the matter. Tr. 65, 287-88. Gonzales spoke to Garza, Wells, and Narvaez about the events of the previous night. Tr. 288; Resp. Ex. 5. Then, on September 19, Gonzales sent Arsuaga an email, with copies to Rodriguez and Garza, titled "Concern on WC Rudy Lopez." Resp. Ex. 5. Gonzales described the events of the September 17 shift⁷ and asserted that the Union did not understand why Rodriguez and Garza had been "denied assistance"; he further asserted that Rodriguez "feels like this is Union Retaliation" for having filed the Cell Phone Incident Grievance. *Id.* at 2.

Arsuaga spoke to Lopez later in the day on September 19, advised him that Rodriguez and Garza were upset that they had not received assistance, and instructed him to submit a memorandum describing the events of the September 17 shift. Tr. 443-44. Lopez wrote that he did not recall hearing the agents request assistance over the radio, and he asserted that the agents did not attempt to contact him. Resp. Ex. 9 at 36. Rodriguez and Garza also submitted written accounts of the events, reiterating their earlier complaints that supervisors on the September 17 shift should have sent agents to assist them. GC Exs. 3 & 4; Resp. Ex. 9 at 65-66, 68.

Meanwhile, Lopez sent another email to the JIC on September 20, elaborating on the allegations he had made in his September 8th email that Gonzales had been planning to "put [Lopez] in [his] place" even before he was assigned to Zapata Station. GC Ex. 14 at 12; Resp. Ex. 9 at 108. And on September 24, Lopez emailed the JIC again, this time accusing Rodriguez and Garza of "lack of candor," an offense punishable by termination, in their complaints about him to Arsuaga. Tr. 182, 414-15. In the September 24 email, Lopez described the events of the September 17 shift and then wrote:

Patrol Agent in Charge (PAIC) Charles E. Arsuaga . . . informed me that Union Steward Jared Gonzales had reported to him that BPA Rodriguez and BPA Garza had reported not receiving assistance when they requested it

BPA Rodriguez and BPA Garza are purposely displaying a lack of candor with this report as there were additional agents in the area from the off going shift, an air support unit and SBPA Luera. Steward Gonzales is taking advantage of this situation to continue targeting me.

⁷ Gonzales's description of what took place is mostly consistent with the descriptions provided by Rodriguez and Garza. To the extent there are discrepancies, I credit the accounts of Rodriguez and Garza, since they experienced the events first-hand.

GC Ex. 14 at 15; Resp. Ex. 9 at 107. Lopez's emails of September 8, 20, and 24 were all sent under the subject heading of "Targeting by BPA Jared Gonzalez," and Lopez testified that he intended the September 24 email to be a "continuation" of his earlier messages to the JIC. Tr. 436.

At the hearing, Lopez elaborated on why he reported Rodriguez and Garza to the JIC. Lopez acknowledged that "the basis" for his action was the complaint filed by Rodriguez and Garza against him. Tr. 437. Asked to explain if there was something that occurred after meeting with Arsuaga on September 19 that led him to report Rodriguez and Garza to the JIC, Lopez testified: "I can't remember if he [Arsuaga] showed me the Step 1. I don't know when they filed the grievance for this incident. So I'm guessing I might have seen the grievance itself and then also based on the conversation that I had with Mr. Arsuaga." Tr. 446-47.

Once Lopez's report was submitted to the JIC, it was seen by the OIG and by the CBP's Office of Professional Responsibility (OPR). Neither entity pursued the matter, so the report was sent back to the Laredo Sector. There, the Professional Standards office initiated an investigation, which was carried out by the Sector Evidence Team (SET Team). Tr. 149, 152-53. In cases where the Professional Standards office finds a violation, it initiates the disciplinary process by proposing discipline for the offense. Tr. 155.

On September 30, Arsuaga sent Rodriguez an email stating that his inquiry had concluded, and that he could not verify Rodriguez's allegations that Lopez had denied him assistance on September 17, coerced supervisors, or retaliated against him for filing a grievance. Resp. Ex. 6.

On October 5, Gonzales filed with Arsuaga a Step 1 grievance by email on Rodriguez's behalf regarding the events of the September 17 shift (the Denial of Assistance Grievance). Resp. Ex. 1.⁸ The grievance begins:

Border Patrol Agent Eulalio Rodriguez of the Zapata Station, Laredo Sector has requested the assistance of the National Border Patrol Council Local 2455 in preparing and presenting a STEP 1 grievance on an incident that occurred on September 17. . . . The following information is being presented to your office in order to report and document the unprofessional actions, Dereliction of duty, coercing of Supervisors and Union Retaliation taken by . . . Rudy Lopez

Id. at 1.

⁸ Abbreviated versions of this grievance were admitted as Respondent Exhibits 7 and 9 (pages 85-86), but I will refer to the full document, Respondent Exhibit 1. In the date, "September" is crossed out and "October" is written by hand. While Gonzales did not make the correction himself, he testified that October 5 was the date he filed the grievance. Tr. 296-97.

The grievance: (1) described what Rodriguez and Garza experienced during the September 17 shift; (2) noted that Gonzales had interviewed Garza, Wells, and Narvaez about what took place that night; (3) asserted that “BPA Rodriguez and BPA Garza felt like requesting assistance was the right thing to do,” as their situation presented an “officer safety issue”; (4) noted that Rodriguez “feels like this is Union Retaliation due to the fact he filed a Step 1” in the Cell Phone Incident Grievance; and (5) requested that “Mr. Lopez not deny request for assistance when agents ask for help.” *Id.* at 1-2.

The grievance further alleged that Lopez’s actions violated CBP policies, including the policy against discriminatory harassment, using much the same language as in the Cell Phone Incident Grievance. It continued:

Now, in accordance to Article 33 of the [CBA] . . . [BPA] Rodriguez with the assistance of Union Local 2455 now come to you to ask that the actions of (A) WC Lopez be addressed and corrected. . . .

We would like to address and remedy this issue at the lowest possible level in accordance with the [CBA] and believe that this Step 1 grievance can be remedied as such. We will not be requesting any type of meeting with Patrol Agent in Charge Arsuaga and would request a response via email.

Id. at 3-4.

Under the heading “Remedies,” Gonzales submitted a five-paragraph list that is virtually identical to the remedies sought in the Cell Phone Incident Grievance. *Id.* at 4. The grievance did not allege that the Agency had violated the Statute. *Id.* at 2-4.

Asked why he filed the Step 1 grievance, Rodriguez testified: “To make it official, and we felt none of the remedies or our concerns were important to him. We felt that we weren’t being met . . . in trying to resolve this at the lowest level, so we made an official – a grievance.” Tr. 74-75. Rodriguez and Gonzales met with Arsuaga and Maszatics to discuss the Step 1 grievance, but the problem remained unresolved. *See* Tr. 297-98. On October 11, Arsuaga denied the grievance, finding that the Union’s allegations were unfounded. Resp. Ex. 2 at 1; *see also* Tr. 76, 472.

On October 12, Rodriguez received a Notice to Appear before an official of the SET Team to answer questions as the “subject” of an allegation of “general misconduct.” GC Ex. 8. On about the same date, Garza received a similar Notice to Appear. Rodriguez was advised by someone on the SET Team that his alleged misconduct was based on a “lack of candor” charge stemming from his own claims about the events of September 17. GC Ex. 9.

The next day, October 13, Gonzales sent Arsuaga an email, with the subject heading “Union Discrimination/Retaliation,” protesting the Notice to Appear given to Rodriguez. GC Ex. 9. Gonzales wrote that the SET Team was planning to interview Rodriguez to

answer “lack of candor” charges filed against him “regarding the incident we are currently in the Grievance Process with.” *Id.* The email continued:

[Rodriguez] had a private meeting with you and . . . he wanted to make sure there was no Union Retaliation for filing the Grievance on Supervisor Rudy Lopez. He asked he not be reported to the Joint Intake Center for false allegations simply to try to Retaliate or Reprimand him. You assured him he would not be held to any Union Retaliation or Discrimination for Union protected activity. This is clearly going on with BPA Rodriguez also clearly going on with myself as we are both receiving Notice to Appear after Grievances or Union Activity is taking place. We have several Unfair Labor Practice issues with Union Discrimination and Retaliation. We ask that all management respect the LAW and you speak or send email to all management to discuss the . . . seriousness of Union Discrimination, Retaliation and false complaints for revenge.

Section 7116(A)(2) Discrimination For Protected Activity.

Section 7116(A)(1) Interference.

Id. When asked about this letter at the hearing, Gonzales could not recall whether Arsuaga responded to it. Tr. 311. There is no evidence in the record that anyone at the Agency responded to it.

On October 19, Gonzales and the Union filed a Step 2 appeal of the Denial of Assistance Grievance. Resp. Ex. 2. The Step 2 appeal reiterated the arguments Gonzales had raised at Step 1, to the effect that Lopez had refused to send assistance to Rodriguez and Garza because Rodriguez had filed the Cell Phone Incident Grievance. But in support of the retaliation claim, the Step 2 appeal also cited three “stare down” incidents, on October 12, 13, and 19, in which Lopez allegedly tried to intimidate Rodriguez, and an allegedly unprofessional comment Lopez had made during muster on October 18. *Id.* at 3-4. The Step 2 letter did not refer to the “lack of candor” charges filed by Lopez against Rodriguez, Garza, and Gonzales. A meeting on the Step 2 grievance was conducted on November 16 by the Laredo Sector’s Chief Patrol Agent, Mario Martinez, who denied the grievance on December 12. Tr. 87, 315-16; Resp. Ex. 3. The Union did not pursue the grievance further. Tr. 319.

After some changes in scheduling, Rodriguez was interviewed by two officers of the SET Team on November 7, and Garza was interviewed on November 8.⁹ Tr. 320, 378-80; GC Exs. 8, 11 and 12; Resp. Ex. 9 at 15, 25, Resp. Ex. 10. The interviewers told Rodriguez that it was Lopez who had filed the complaint against him with the JIC. Tr. 80. The interviews focused on whether Rodriguez and Garza displayed a lack of candor in filing a grievance against Lopez concerning the events of September 17. Tr. 397, 400-02.

⁹ While Rodriguez testified that he was interviewed twice by the SET Team, on October 18 and November 7 (Tr. 79, 83), it appears more likely that he was interviewed only on November 7 (Tr. 253-55, 378-80; Resp. Ex. 10). The discrepancy is not material, in any case.

During the time that Rodriguez and Garza were subjects of the investigation, Agency policy dictated that they could not be promoted, detailed or transferred. Tr. 81, 256. As Rodriguez put it, when an agent is under investigation, “You can’t move laterally. . . . You can’t even do a detail within the station. . . . You’re basically frozen.” Tr. 81.

On November 16, the SET team presented its findings to Chief Patrol Agent Martinez. Resp. Ex. 9 at 1. Ultimately, the SET team’s report of investigation was forwarded to Edwin Torres, Assistant Chief of Professional Standards, who reviewed it with labor relations officials. Tr. 144, 157-60. They determined that “it was more of a miscommunication between everybody involved.” Tr. 160. Accordingly, sector management decided to close the case without any charges against anyone, and Rodriguez and Garza were notified of this on December 14. Tr. 160, 393.

Additional Issues Explored at the Hearing

At the hearing, the parties submitted into evidence a Department of Homeland Security policy guidance describing the types of matters appropriately reportable to the JIC. Resp. Ex. 4; GC Ex. 15; Tr. 234. The policy guidance provides examples of misconduct that must be reported, specifically:

1. Criminal activity: conduct that would violate state or federal criminal laws including all employee arrests. Examples of criminal activity include, but are not limited to: bribery, theft or misuse of funds, smuggling, drug possession, perjury, civil rights violations such as mistreatment of aliens, etc.
2. Serious misconduct: substantive misconduct that could jeopardize the agency’s mission. Examples of serious misconduct include, but are not limited to: misuse of TECS [the Treasury Enforcement Communications System], falsification, abuse of official position for private gain, workplace violence or harassment, improper association, willful misuse of government vehicle or property, etc.

Resp. Ex. 4; GC Ex. 15 at 2. As for other types of misconduct, the policy guidance states:

A common-sense approach should be used about reporting less-serious misconduct. Rather than being reported to the Joint Intake Center or to a CBP-IA Field Office, these matters are best handled directly by supervisors and managers or are more appropriately remedied through other avenues that are specifically established for reviewing employee concerns, such as the grievance or complaint process.

Id.

In addition, the policy guidance provides examples of misconduct that “should not be reported to the Joint Intake Center.” *Id.* (capitalization altered). This includes leave issues; performance-related issues, such as insubordination; workplace atmosphere issues, such as personality conflicts and disruptive conduct; and rude or unprofessional conduct, such as the use of profanity or other discourteous language, demeanor, or gestures. *Id.*

Jessica Samuel oversees the JIC and testified about the policy guidance generally. Tr. 192. Asked what it means by “should not report,” she answered: “It’s just a guidance thing that it could be handled by supervisors and managers. That does not mean that they cannot report it, because we get those kind of reports quite often.” Tr. 235. Samuel was unaware of employees being disciplined for having reported a matter to the JIC. She testified that it would “hurt the process[]” if employees feared discipline for reporting misconduct to the JIC. Tr. 215. In addition, Samuel testified that “lack of candor” is a type of conduct that is reportable to the JIC. Tr. 192, 210. Gonzales himself testified that he had reported allegations of “unprofessional conduct” to the JIC, explaining that he felt the report was appropriate “[f]or that situation” Tr. 342.

Lopez defended his decision to report Rodriguez and Garza to the JIC. In this regard, Lopez asserted that he would have reported the matter to the JIC, even if Rodriguez and Garza had reported it directly to Arsuaga, without the involvement of Gonzales and the Union, because Rodriguez and Garza had “misrepresented what happened that night.” Tr. 415. Lopez elaborated: “[T]he agents said that I refused to send them backup, when I didn’t. I didn’t refuse to send them backup because the backup was never requested.” Tr. 445. Lopez believed that Rodriguez and Garza were lying because there were in fact “assets out there to help them out.” Tr. 449. Specifically, Lopez testified, there were other agents in the field when Rodriguez started his shift, and there was air cover until midnight. Tr. 448-49. Asked to elaborate on why he felt it was appropriate to report Rodriguez’s and Garza’s conduct to the JIC, Lopez answered: “Just again, they’re lies. They lied about it. They shouldn’t have lied about it.” Tr. 453.

At the same time, Lopez acknowledged that it was possible Rodriguez did radio for assistance, and that he and Duty Supervisor Richard Lopez did not hear it. Tr. 422, 445. Similarly, Lopez acknowledged that while Rodriguez might have been mistaken about being denied assistance, that did not necessarily mean that Rodriguez’s allegations were lies. Tr. 448.

In contrast to Lopez, Arsuaga testified that when Gonzales sent him the September 19 email, asserting that Lopez had improperly failed to assist Rodriguez and Garza, he did not believe those claims merited a JIC complaint, because the agents’ claims were based on “miscommunication” and not on a lack of candor. Tr. 473. Arsuaga stated that the best way to address what happened on the September 17 shift was to “have a management inquiry into the incident[,]” which is what he in fact conducted. Tr. 474. He did not view the competing allegations as “an integrity[-]based issue[,]” because Rodriguez and Garza “were basing their report on something that the supervisor had said, Luera. . . . I could see how the agents might have . . . interpreted it differently to make it seem like, yeah, he’s – you know, Rudy’s got it out for them. So it just seemed like a miscommunication.” Tr. 479.

Torres similarly explained his conclusion that the events of September 17 were “more of a miscommunication between everybody involved.” Tr. 160. He testified:

I think that the failure in communications were where [Rodriguez] felt that his request was denied because one agent said that he was assigned to work the highway so he couldn't leave that area. And then even though somebody else was sent to the area to assist, I felt the supervisor did a poor job in relaying that information that, no, this agent can't go and help you out because he's already assigned another area, but there is somebody else coming your way. So I think that's where the communications unraveled between both sides.

Tr. 163-64.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel argues that Lopez unlawfully discriminated against Rodriguez when he reported Rodriguez to the JIC because of his protected activity. GC Br. at 11. Applying the analytical framework articulated by the Authority in *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*), for such cases, the GC insists that Lopez's conduct violated § 7116(a)(1) and (2) of the Statute.

The GC asserts that Rodriguez was continuously engaged in protected activities from August 30 to (and beyond) September 24, the date that Lopez filed his JIC complaint against Rodriguez: he sought out a union representative on August 30 to help him find out why he'd received a Notice to Appear; later that same day he consulted with Gonzales about Lopez's language in the cell phone call; he and Gonzales met with Arsuaga about Lopez's allegedly unprofessional conduct and then filed the Cell Phone Incident Grievance on September 4; and on September 19 Gonzales sent an email to PAIC Arsuaga, relating Rodriguez's and Garza's objections to Lopez's conduct during the September 17 shift, which triggered an internal investigation by sector management. GC Br. at 13. Both Rodriguez and Garza continued to engage in protected activity in the weeks thereafter, as the Union filed and pursued the Denial of Assistance Grievance on their behalf. The GC cites *NTEU, Chapter 284*, 60 FLRA 230, 231 (2004), among other cases, for the proposition that protected activity includes the filing of a grievance and attending grievance meetings. Moreover, the GC states that Lopez knew that Rodriguez was pursuing these grievances with the Union. GC Br. at 14-15.

Next, the General Counsel contends that Rodriguez's protected activity was a motivating factor in Lopez's decision to report Rodriguez to the JIC. GC Br. at 13-15. In this regard, the GC argues that Lopez admitted – through his own emails and his hearing testimony – that he filed the JIC complaint against Rodriguez because Rodriguez sought the Union's aid in pursuing his denial of assistance claim against Lopez. *Id.* at 15. That Lopez viewed Rodriguez's complaints as part of Gonzales's “targeting” of Lopez is, the GC argues, further evidence that Lopez was motivated by protected activity. *Id.* at 14-15. Lopez made his motivation clear in his September 24 email to the JIC, when he stated that Rodriguez and

Garza were “purposely displaying a lack of candor with this report [i.e. their complaint to Gonzalez, which was referred to Arsuaga]” GC Ex. 14 at 15. This was reinforced by Lopez’s testimony explaining his email. Tr. 415. The Authority has consistently considered the timing of a management action significant in determining whether there was unlawful motivation. *See, e.g., U.S. Dep’t of Def., U.S. Air Force, 325th Fighter Wing, Tyndall AFB, Fla.*, 66 FLRA 256, 261 (2011) (*Tyndall AFB*). When the timing of Lopez’s JIC report is considered along with Lopez’s own explanations, the GC contends that his unlawful motivation is clear. GC Br. at 15-16.

The General Counsel adds that the filing of the JIC complaint affected Rodriguez’s conditions of employment, because it directly initiated a SET Team investigation of Rodriguez for lack of candor, an offense for which employees can and are disciplined, even terminated. And during the course of the investigation, Rodriguez could not be promoted, transferred, or detailed. *Id.* at 14.

Turning to the next step in the analytical framework, the General Counsel argues that there was no legitimate justification for Lopez’s actions, and that the Agency’s justifications for Lopez’s actions are pretextual. *Id.* at 17-18. The GC submits that there was no reason for Lopez to report Rodriguez to the JIC, because: (1) Arsuaga was already investigating the underlying incident that Lopez raised to the JIC; (2) the matter was not appropriately reportable to the JIC, under the CBP’s own policy guidance; and (3) Rodriguez did not engage in any misconduct. *Id.* at 21-22.

The GC rejects the Agency’s assertion that the importance of the JIC complaint process justifies Lopez’s use of that process. The GC cites an ALJ decision on this point, *U.S. Dep’t of Homeland Sec., ICE, DA-CA-14-0436, ALJD No. 16-23* (April 29, 2016), in which the judge found that a supervisor unlawfully filed a JIC complaint against a union official for his allegedly false testimony at an unfair labor practice hearing. While staff must be free to utilize the JIC complaint process, the GC insists that does not justify its use as a retaliatory weapon by supervisors. GC Br. at 19-20. Similarly, while it is important that staff report suspected employee misconduct, PAIC Arsuaga was already investigating the events of September 17 and the alleged denial of assistance, and Lopez had already explained his position to Arsuaga that Rodriguez and Garza were misrepresenting his actions. The dispute between Lopez, Rodriguez, and Garza was simply a personality dispute over a series of miscommunications, and it was not appropriate for a JIC complaint. *Id.* at 20-22.

Whether this case is viewed as a “pretext” or a “mixed motive” case, the GC argues that the Agency cannot demonstrate that Lopez would have taken his action (reporting Rodriguez to the JIC) even if Rodriguez had not pursued a grievance against him. It is impossible, in the GC’s view, to separate Rodriguez’s protected activity (pursuing a grievance) from Lopez’s filing of his JIC complaint. *Id.* at 24-25. Lopez admitted this in the language of his complaint to the JIC and in his testimony at the hearing.

When alleged discrimination concerns discipline imposed solely for conduct occurring during protected activity, an agency must show that the employee engaged in flagrant misconduct. *Fed. Bureau of Prisons, Office of Internal Affairs, Wash., D.C.*, 53 FLRA 1500, 1514 (1998) (*Internal Affairs*). The GC insists that the Respondent has failed to meet this burden. GC Br. at 25. Citing the Authority's decision in *U.S. Dep't of Veterans Affairs, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 58 FLRA 44, 47, 56 (2002) (*Johnson Med. Ctr.*), the GC states that in order for a false statement made during the grievance process to constitute flagrant misconduct, an agency must demonstrate that the statement was a deliberate, conscious deception on the part of the employee. GC Br. at 25-26. Here, the Agency's own investigators and managers determined that Rodriguez did not lie, and that the dispute between Lopez and Rodriguez regarding the events of September 17 were simply a series of miscommunications; accordingly, Lopez's use of the JIC complaint process was unjustified.

Finally, the General Counsel argues that the Union's ULP charge is not barred under § 7116(d) of the Statute. Looking specifically at the Cell Phone Incident Grievance and the Denial of Assistance Grievance, the GC argues that those grievances pertained to incidents and events that occurred prior to the action that constitutes the basis of the ULP charge (Lopez reporting Rodriguez to the JIC). Because the grievances and ULP charge are based on separate and distinct factual circumstances, § 7116(d) is not a bar. *Id.* at 27-28.

As a remedy, the General Counsel requests, among other things, that the Respondent cease discriminating against Rodriguez. *Id.* at 28.

Respondent

The Respondent asserts that this ULP proceeding is barred under § 7116(d) of the Statute by an earlier-filed grievance. But rather than citing the Cell Phone Incident Grievance or the Denial of Assistance Grievance as the basis for its claim (as the GC obviously anticipated), it cites the email Gonzales wrote to Arsuaga on October 13. Resp. Br. at 6 (citing GC Ex. 9). The Respondent argues that the October 13 email is a grievance within the meaning of § 7103(a)(9) of the Statute because it is a complaint concerning conditions of employment; no degree of formality is required, by either § 7116(d) or § 7103(a)(9). *Id.* Furthermore, the Respondent argues that the October 13 email was "presented through the grievance procedure" and was part of an "informal grievance process." *Id.* The issue cited by Gonzales in the October 13 email (retaliation by Lopez in filing a complaint at the JIC) is the same legal issue, and arises from the same set of facts as the ULP charge filed on November 23; therefore, the charge is barred. *Id.* at 7.

Turning to the substance of the complaint, Respondent acknowledges that the September 19 email (Resp. Ex. 5), sent by Gonzales on behalf of Rodriguez and Garza regarding the events of September 17, constituted protected activity. Resp. Br. at 8. (Respondent does not acknowledge the discussions and grievance filed earlier on the Cell Phone Incident Grievance.) But while an employee may have the statutory right to file grievances, the employee loses the protection of the Statute if he engages in flagrant misconduct or similar improper behavior. *Id.* at 8-9. *U.S. Dep't of Def., Def. Contract*

Mgmt. Agency, Orlando, Fla., 59 FLRA 223, 226 (2003). Respondent argues that the statements made by Rodriguez and Gonzales in support of the Denial of Assistance Grievance were so recklessly and intentionally inaccurate that they were not protected. Resp. Br. at 9-10.

Specifically, the Respondent asserts in this regard that Rodriguez falsely accused Lopez of coercing supervisors into denying assistance without considering the possibility that his requests for assistance had not been successfully transmitted to his supervisors. *Id.* at 9. The Respondent also asserts that Rodriguez was “recklessly inaccurate” in: (1) alleging there was a denial of assistance, when in fact Luera provided assistance; (2) claiming that no sensors were going off and, thus, implying that Wells was lying when he said he had to stay and monitor the sensors; and (3) maintaining that Lopez’s desire to do things “by the book” meant that Lopez wanted to act in an improper manner. *Id.* at 9-10. In support of its argument, the Respondent cites *U.S. Forces Korea/Eighth U.S. Army*, 17 FLRA 718, 728 (1985) (*U.S. Forces Korea*), as an example of how defamatory or false statements lose their protected status when made with knowledge of their falsity or with reckless disregard for their veracity.

Additionally, Respondent asserts that the filing of the JIC complaint against Rodriguez actually affected the conditions of his employment. Resp. Br. at 11-12. An investigation of the JIC complaint was conducted and determined that while Rodriguez’s statements were not completely accurate, there was no evidence of misconduct. Rodriguez suffered no disciplinary action or other adverse effects, and while there was “general testimony regarding limitations” on his ability to transfer or be promoted, there was no evidence that Rodriguez was actually denied a promotion or transfer. *Id.*

The Respondent submits that in reporting Rodriguez to the JIC, Lopez was not motivated by Rodriguez’s protected activity. As evidence of this, Respondent notes that Lopez similarly reported Garza to the JIC, “even though BPA Garza had not reported his concerns through the Union or engaged in other protected activity.” *Id.* at 12. Moreover, even if Lopez had not filed his JIC complaint, there was evidence that the incident in dispute would have been referred to the JIC anyway. *Id.* at 14 (citing Tr. 149-51).

Finally, the Respondent argues that there was a legitimate justification for Lopez’s conduct and that Lopez would have taken the same action in the absence of any protected activity. In this regard, the Respondent insists that Lopez acted in accordance with the “Agency practice of referring integrity related issues to the Joint Intake Center.” *Id.* at 14. The Respondent urges that Lopez believed that the denial of assistance claims against him were “serious in nature” and “demonstrably false.” *Id.* at 14-15.

ANALYSIS AND CONCLUSIONS

The ULP Charge Is Not Barred Under §7116(d) of the Statute

The second sentence of § 7116(d) of the Statute provides:

Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.”

Citing the legal standard that has long been applied,¹⁰ the Authority stated in *U.S. Dep't of the Air Force, 62nd Airlift Wing, McChord AFB, Wash.*, 63 FLRA 677, 679 (2009) (*McChord AFB*):

In order for a ULP charge to be barred under § 7116(d) by an earlier-filed grievance: (1) the issue that is the subject of the grievance must be the same as the issue that is the subject of the ULP; (2) such issue must have been raised earlier under the grievance procedure; and (3) the aggrieved party in both actions must be the same.

Each prong of the test must be met for the ULP to be barred. The sequential analysis required by § 7116(d) is perhaps best demonstrated in *Dep't of Def., Def. Logistics Agency, Def. Depot Memphis, Memphis, Tenn.*, 40 FLRA 334, 338-39 (1991) (*DLA*), where the Authority remanded the case to the arbitrator for additional findings on all the elements required under the Statute. The Authority has also noted that the test is substantively the same, regardless of whether a grievance predates a ULP charge, or vice versa. In either case, the earlier filing bars the later one. *Olam Sw. Air Def. Sector (TAC), Point Arena Air Force Station, Point Arena, Cal.*, 51 FLRA 797, 801 n.5 (1996) (*Point Arena*).

In evaluating whether the first prong of the test is met, the Authority has explained that it “looks at whether the ULP charge arose from the same set of factual circumstances as the grievance and [whether] the theory advanced in support of the ULP charge and the grievance are substantially similar.” *U.S. Dep't of the Army, Army Fin. & Accounting Ctr., Indianapolis, Ind.*, 38 FLRA 1345, 1351 (1991) (*Army Finance*). The theories raised do not need to be identical, but rather to be substantially similar. *U.S. Dep't of the Navy, Navy Region Mid-Atl., Norfolk, Va.*, 70 FLRA 512, 517 (2018) (*Navy*). As the court stated when it affirmed the *Army Finance* decision, the question is whether the grievances and the ULP charge were based on “different factual and legal predicates.” *AFGE, AFL-CIO, Local 1411 v. FLRA*, 960 F.2d 176, 178 (D.C. Cir. 1992).

When a grievance and a ULP charge involve substantially similar legal theories, but different factual circumstances, the later-filed action is not barred by § 7116(d). See *DLA*, 40 FLRA at 338. For instance, in *Equal Emp't Opportunity Comm'n*, 48 FLRA 822 (1993), the Authority held that different factual circumstances were involved in grievances objecting to the improper implementation of a performance appraisal plan that had been present in ULP

¹⁰ This same standard, with virtually identical language, can be traced at least as far back as *Dep't of Def. Dependents Schools, Pacific Region*, 17 FLRA 1001, 1002 (1985).

charges objecting to the agency's conduct during negotiations of that plan. In *Overseas Education Ass'n v. FLRA*, 824 F.2d 61, 71-72 (D.C. Cir. 1987) (*Overseas Educ.*), the court held that the Authority erred in refusing to accept the arbitrator's finding that a ULP charge objecting to the elimination of a teacher's position in late 1981 involved different factual circumstances than his later grievance objecting to his dismissal in 1982. As the court explained, "the situation facing Schussel, and the corresponding actions being taken against him, were quite different when he filed the grievance than was the case when the unfair labor practice charge was filed." *Id.* at 72. And in *U.S. Dep't of the Air Force*, 61 FLRA 797, 799 (2006), the Authority held that a charge objecting to the agency's bargaining conduct in proposing a RIF involved different factual circumstances than a subsequent grievance objecting to how the RIF was implemented, even though the union claimed in both actions that the agency violated the same articles of the CBA.

Controversy regarding the first prong arises most often on the question of whether the grievance and charge are based on the same (or substantially similar) legal theories. In *Dep't of the Treasury, U.S. Customs Serv., Region VIII, S.F., Cal.*, 13 FLRA 631 (1994) (*Customs*), the Authority held that a ULP charge, alleging that the agency's refusal to furnish its crediting plans violated § 7114(b)(4) of the Statute, was barred by an earlier grievance that alleged the refusal to furnish the crediting plans violated the parties' CBA. Despite the purported difference between a CBA violation and a statutory violation, the Authority stated that the issue in both cases was whether the agency could refuse to furnish the crediting plans, and therefore § 7116(d) applied. *Id.* at 634. In *U.S. Dep't of Def., Marine Corps Logistics Base, Albany, Ga.*, 37 FLRA 1268 (1990), the Authority found that some of the claims in a grievance were barred by an earlier ULP charge, but that other claims were not. Both the grievance and the charge involved the suspension of an employee, and in both forums the union argued that the agency had cancelled and reissued the suspension in an untimely manner, in violation of the CBA. Accordingly, that issue could not be raised in the grievance. *Id.* at 1272-73. But since the union alleged that the agency lacked good cause to suspend the employee only in the grievance, the arbitrator could address that claim. *Id.* at 1274-75.

Perhaps this principle is best illustrated by two decisions issued within a few weeks of each other: *Dep't of Justice, Bureau of Prisons, FCI Butner, N.C.*, 18 FLRA 831 (1985), and *Fed. Bureau of Prisons*, 18 FLRA 314 (1985). In the first case, the Authority ruled that a ULP charge alleging that the agency interfered with an employee's ability to question witnesses related to his disciplinary action involved a different issue than a grievance alleging that the employee was suspended without just cause under the CBA. 18 FLRA at 832. But in the second case, the Authority ruled that a grievance alleging that an employee's discipline violated the CBA because it was done to harass the employee for his union activity involved the same issue as a ULP charge alleging that the employee's discipline for union activity violated § 7116(a)(1) and (2) of the Statute. 18 FLRA at 315. Even though the grievance cited a violation of the contract and the charge cited a violation of the Statute, the underlying issue in both forums was whether the employee was disciplined for union activity.

In its *Point Arena* decision, the Authority made an additional point concerning an aggrieved party's choice of using the grievance procedure or the ULP process for pursuing its claims. The agency argued that because the union could have raised both its contractual and statutory claims in the grievance procedure, it was barred by § 7116(d) from pursuing its ULP charge. The Authority rejected this, stating:

[U]nlike the first sentence in section 7116(d), which precludes adjudication in a ULP proceeding of issues which "can properly be raised under an appeals procedure," whether or not they are in fact raised, the second sentence of section 7116(d) . . . states a different rule. It plainly precludes only subsequent litigation of issues that, in the discretion of the aggrieved party, were raised earlier.

51 FLRA at 806-07 (footnote omitted). This same conclusion was reached by the Authority in *Immigration & Naturalization Serv., U.S. Dep't of Justice*, 18 FLRA 412, 414 n.3 (1985) (*INS*).

In its recent *Navy* decision, the Authority announced that it intended to "re-evaluate our interpretation of § 7116(d) and to return to the original intent of Congress." 70 FLRA at 512. Based on the "plain language" of the Statute, the Authority said that "Congress clearly intended to discourage forum shopping, or the classic 'two bites at the apple.'" 70 FLRA at 515. The majority believed that in recent years the application of this principle "has become an exercise in technical hair-splitting and artful pleading." *Id.* at 514-15.

In *Navy*, the union had filed several ULP charges protesting the implementation of a policy that required certain employees to pass a physical agility test; the charges alleged that the new policy changed employees' conditions of employment without adequately negotiating. When the policy was implemented at another location, the union filed a grievance instead of a ULP charge, alleging that the policy changed conditions of employment, in violation of the CBA. The Authority held that the grievance was barred by the earlier charges. "While the Union's earlier-filed ULP charges make no mention of contractual bargaining rights, the issues are nonetheless substantially similar to the alleged violation of the parties' agreement." *Id.* at 516 (citing *Army Finance*, 38 FLRA at 1351). The dissent argued that case law interpreting § 7116(d) has recognized that ULP charges alleging statutory violations raise different issues than grievances alleging CBA violations.¹¹ But the majority found that the union's contractual claim in that case was "no different in any meaningful respect" from the claims made in the ULP charges, "because the contractual claim is a derivative of the statutory claim." 70 FLRA at 516. Otherwise, aggrieved parties could evade the legislative intent (of requiring parties to choose one forum or the other) by artfully pleading their claims to obtain two decisions on the same issue. *Id.*

¹¹ Dissenting opinion of Member DuBester, 70 FLRA at 518 (citing *Overseas Educ.*, 824 F.2d at 72).

In determining whether the second prong of the test is met, the Authority looks at whether the issue was raised first in the grievance procedure or in the ULP charge. In this regard, “an issue is ‘raised’ within the meaning of § 7116(d) at the time of the filing of a grievance or a ULP charge, even if the grievance or ULP charge is subsequently withdrawn and not adjudicated on the merits.” *U.S. Dep’t of the Navy, Naval Air Eng’g Station, Lakehurst, N.J.*, 64 FLRA 1110, 1112 (2010) (*Navy, Lakehurst*); *Headquarters, Space Division, L.A. Air Force Station, Cal.*, 17 FLRA 969, 970 (1985). However, for a filing prior to a ULP charge to constitute an election of remedies under this section, the filing must truly be a grievance invoking the parties’ negotiated grievance procedure, rather than a letter of protest that falls outside the parties’ negotiated procedure. *Norfolk Naval Shipyard*, 9 FLRA 458, 471-72 (1982) (*Naval Shipyard*). As the Authority stated in *Customs*, “the Union’s prior invocation of the grievance procedure under the parties’ negotiated agreement . . . constituted an election of that procedure under section 7116(d) . . .” 13 FLRA at 634. *See also Internal Revenue Serv., Chicago, Ill.*, 3 FLRA 478, 486 (1980) (*IRS*), where the judge related the language of 7116(d) to that of 7121(e)(1): “An employee shall be deemed to have exercised his option . . . under the negotiated grievance procedure at such time as the employee . . . timely files a grievance in writing in accordance with the provisions of the parties’ negotiated grievance procedure. . . .”

With regard to the third prong of the test, the Authority does not look at the precise identity of the party filing the charge and grievance, but rather at whether the choice of forum was made “in the discretion of the aggrieved party.” *Army Finance*, 38 FLRA at 1353-54. Furthermore, the Authority stated that if a union files a ULP charge in its representational capacity, alleging harm to an employee, it will infer that the charge was filed in the employee’s discretion, unless there is evidence that the employee had attempted to prevent the union from filing. *Id.* at 1354. The circuit court found that such an inference may be reasonable as a general matter, but it might not be reasonable if the evidence showed that the employee was unaware of the first action filed by the union. 960 F.2d at 180. On the other hand, a union may have its own institutional interests that motivate it to file a charge or grievance, and those interests may be separate from those of the individual grievant for purposes of 7116(d). *See McChord AFB*, 63 FLRA at 679-80, where the employee was the aggrieved party in a grievance challenging the grounds for his discipline, but the union was the aggrieved party for a subsequent ULP charge objecting to anti-union comments made by a supervisor to the employee.

As I noted earlier, both the Respondent and the GC addressed the applicability of 7116(d) in their briefs, but they looked at different grievances as the basis for the alleged bar.¹² The Respondent affirmatively alleged that Gonzales’s October 13 email to Arsuaga barred the subsequent ULP charge. Resp. Br. at 6. The GC, who argued against a bar, speculated (incorrectly, it turns out) that the Respondent was basing its defense on the Cell Phone Incident and Denial of Assistance Grievances. GC Br. at 27-28. Normally I would

¹² The Respondent cited § 7116(d) in its Answer to the Complaint (GC Ex. 1(d) at 4), but it did not specify what “grievance” barred the charge, nor did it address the issue at the hearing.

address only the defense articulated by the Respondent, but since 7116(d) affects the Authority's jurisdiction to hear the case, I will address all possible grounds for barring the ULP charge.¹³ In this regard, a brief recap of the chronology of the case is in order.

Rodriguez and Lopez first had angry words on August 30. Rodriguez and Gonzales met with Arsuaga that same day to register their objection to Lopez's conduct, and on September 4 Gonzales filed the Cell Phone Incident Grievance, accusing Lopez of unprofessional conduct (GC Ex. 2). That grievance was not pursued further. On September 19, Gonzales sent Arsuaga an email (Resp. Ex. 5) outlining the events of September 17, protesting the failure of Lopez to send assistance to Rodriguez and Garza in the field, and citing Rodriguez's view that Lopez had retaliated against him for filing the Cell Phone Incident Grievance. After Arsuaga indicated that he did not think Lopez did anything wrong on September 17 (Resp. Ex. 6), Gonzales filed the Denial of Assistance Grievance (Resp. Ex. 1) on October 5, reiterating the same allegations he had made in his September 19 email. On October 12, Rodriguez was given a Notice to Appear to be interviewed by the SET Team (GC Ex. 8). This was the first time Rodriguez realized that Lopez had charged him with misconduct and that he was under investigation. The next day, October 13, Gonzales emailed Arsuaga, advised the PAIC that both he and Rodriguez had been given notices to appear to respond to charges of "lack of candor," and asked Arsuaga to intervene to stop Lopez from discriminating and retaliating against them for their union activity (GC Ex. 9). On November 23, Gonzalez and the Union filed the instant ULP charge, alleging that Lopez had abused the JIC complaint process to retaliate against Rodriguez for union activity (GC Ex. 1(a)).

It is evident, therefore, that the Cell Phone Incident Grievance, the Denial of Assistance Grievance, and the October 13 email were all submitted to Arsuaga prior to the filing of the ULP charge. Accordingly, the time element of the second prong of the 7116(d) analysis is satisfied.

The Cell Phone Incident Grievance and the Denial of Assistance Grievance

The General Counsel argues that the ULP charge is based on a different factual and legal predicate than the Cell Phone Incident and the Denial of Assistance Grievances. The Respondent does not dispute this argument, as it did not identify or discuss either of these grievances as a basis for barring the charge.¹⁴ And after examining the two grievances in

¹³ See *U.S. Dep't of Homeland Sec., ICE, L.A., Cal.*, 68 FLRA 302, 304 (2015).

¹⁴ Although the Authority has made it clear that it will address jurisdictional issues regardless of whether they were previously raised by a party, it is also true that a party raising an affirmative defense has the burden of proof on that issue. 5 C.F.R. § 2423.32. Therefore, to the degree that there is any lack of clarity on any of the § 7116(d) issues, the Respondent here must be held accountable for the lack of evidence. Respondent has raised a separate ground for the charge being barred by § 7116(d), which I will address later; but it consciously decided that the Cell Phone Incident Grievance and the Denial of Assistance Grievance were not jurisdictional bars to the ULP charge. I believe that is at least a tacit agreement with the GC that these grievances do not represent a legitimate jurisdictional basis for dismissal.

accordance with the principles outlined above, I agree with the GC that they arise from different factual circumstances than the ULP charge. Therefore, the first prong of the test has not been met, and § 7116(d) does not bar the charge.¹⁵

The Cell Phone Incident Grievance was filed on September 4, shortly after Lopez had confronted Rodriguez and allegedly behaved unprofessionally in doing so. The grievance primarily alleged that Lopez had violated Agency standards of conduct, but also referred to Agency policy against union-related harassment. GC Ex. 2. The Denial of Assistance Grievance was filed pursuant to Step 1 of the grievance procedure on October 5, after Rodriguez and the Union had previously sent a letter to Arsuaga informally protesting Lopez's actions during the September 17 shift. After describing Lopez's actions on the night in question, the grievance stated that Rodriguez "feels like this is Union Retaliation due to the fact he filed a Step 1." Resp. Ex. 1 at 2. It is apparent, therefore, that these two grievances were specifically based on separate events that occurred on August 30 and September 17, respectively. The ULP charge, filed on November 23, alleged that Lopez "used the Joint Intake Center to make a frivolous allegation against [Rodriguez] as retaliation for the grievance." GC Ex. 1(a). The use of the JIC, cited in the charge, was Lopez's filing of the JIC complaint on September 24, which Rodriguez didn't learn about until he was served with a Notice to Appear before the SET Team on October 12. The charge, therefore, was based on alleged retaliation by Lopez that occurred on September 24.

These facts show that while Rodriguez consistently alleged that Lopez was retaliating against him for exercising his right to consult a union representative and file a grievance, he was asserting three separate and distinct acts of retaliation. The first occurred (at least in Rodriguez's view) when Lopez chewed him out on August 30; the second occurred on September 17, when Lopez failed to send him assistance; and the third occurred on September 24, when Lopez filed a JIC complaint against him. Rodriguez and the Union chose to fight the first two incidents of retaliation through the contractual grievance procedure, but they chose to fight the third incident of retaliation through the FLRA and its ULP procedure.

While Rodriguez certainly could have incorporated his JIC-related allegations into his Denial of Assistance Grievance, the Statute does not require him to do so. Rather, it allows him to choose which forum to utilize, and he exercised that choice by going to the FLRA to remedy the third act of alleged retaliation. As the Authority noted in its *INS* and *Point Arena* decisions, the second sentence of § 7116(d) does not require an aggrieved party to raise all possible issues in one forum, even though such a requirement might promote a more effective and efficient government. *Point Arena*, 51 FLRA at 806-07; *INS*, 18 FLRA at 414 n.3. By filing a ULP charge to remedy the third incident, Rodriguez is not getting a third bite at the apple, any more than his Denial of Assistance Grievance gave him a second bite. He alleges that Lopez engaged in three separate and distinct acts of retaliation, and resolving those allegations requires an examination of three separate sets of factual circumstances.

¹⁵ While the third prong, and the time element of the second prong, of the 7116(d) test are satisfied with regard to the Cell Phone Incident Grievance and the Denial of Assistance Grievance, all three prongs must be met in order to bar the ULP charge.

Additionally, the allegations of the ULP charge involve a different type of facts than the allegations in the two grievances. The grievances each involved workplace incidents: the August 30 confrontation during and immediately after the cell phone conversation between Lopez and Rodriguez; and the events of September 17, when Lopez did (or did not) provide his agents with adequate assistance. The ULP charge, however, is based on Lopez's decision to file a JIC complaint against Rodriguez and Garza. Even though Rodriguez believed each of Lopez's disputed actions constituted retaliation (and thus involved similar legal theories), the JIC complaint addressed in the ULP charge is a different type of retaliation – a fact that reinforces my conclusion that the charge is based on a different factual predicate than the grievances.

Therefore, I agree with the GC's uncontested argument that the Cell Phone Incident and the Denial of Assistance Grievances do not bar the ULP charge under § 7116(d) of the Statute.

The October 13 Email

The Respondent argues that Gonzales's October 13 email to Arsuaga (GC Ex. 9) constitutes an earlier-filed grievance, involving the same facts and issues raised in the ULP charge, and that the charge is therefore barred by § 7116(d).

I agree with Respondent that the first prong of the test has been satisfied. Gonzales sent the October 13 email to Arsuaga immediately after Rodriguez told him that Lopez had gone to the JIC and charged him with lack of candor. Both the facts and legal theories raised by Gonzales in the email were direct precursors of the subsequent ULP charge. *Compare* GC Ex. 1(a) *with* GC Ex. 9. The act that was complained about in the email was the filing of charges against him at the JIC, just as this was the focus of the ULP charge; and in both instances the Union alleged that Lopez was unlawfully retaliating against Rodriguez for his protected activity. But it is much less clear that the other two prongs of the test have been satisfied.¹⁶

The second prong of the test requires a determination of whether the issue was raised earlier under the grievance procedure. In determining when an issue is "raised" within the meaning of § 7116(d), the Authority has stated that this occurs "at the time of the filing of a grievance or a ULP charge." *Navy, Lakehurst*, 64 FLRA at 1112.

¹⁶ Of course, we have no counter-arguments from the General Counsel on these points, and this highlights a problem with the current case law, which requires ALJs and the Authority to rule on issues that have not been adequately fleshed out, either at trial or in the pleadings. *See* footnotes 13 and 14 above. As illustrated in our case, we have the GC trying to refute an argument that the Respondent was not actually making, and we have the Respondent pursuing an argument that the GC had no opportunity to refute. I am in the odd position of a boxing referee who must judge a "fight" in which only one of the boxers was given the chance to throw a punch. At some point, a party must accept the adverse consequences of its conscious litigation decisions, even on jurisdictional issues.

The word “grievance” must be understood in the full context of § 7116(d). As I noted above, the second sentence of the subsection (the sentence applicable to our case) first refers to “the negotiated grievance procedure” and then twice refers simply to the “grievance procedure.” From this, I infer that the subsequent references to “grievance procedure” incorporated the initial phrase: the “grievance procedure” that an aggrieved party may elect is “the negotiated grievance procedure.” This meaning is reflected in our case law.

In the early *IRS* case, 3 FLRA at 485-86, the ALJ cited (with the Authority’s approval) the language of § 7121(e)(1) to shed light on the meaning of 7116(d). In pertinent part, § 7121(e)(1) states, “An employee shall be deemed to have exercised his option . . . under the negotiated grievance procedure at such time as the employee . . . timely files a grievance in writing in accordance with the provisions of the parties’ negotiated grievance procedure. . . .” The important words, with regard to our case, are “the parties’ negotiated grievance procedure,” not simply “grievance.”

This distinction is important, because the Respondent makes the valid point that “grievance” is broadly defined in § 7103(a)(9) as “any complaint” by an employee “concerning any matter relating to the employment of the employee” (among other things). And the Authority has applied this broad definition of grievance in a variety of statutory situations. *U.S. Dep’t of VA, VAMC, Richmond, Va.*, 68 FLRA 882, 884 (2015); *see also Nat’l Treasury Emp. Union v. FLRA*, 774 F.2d 1181, 1185-89 (D.C. Cir. 1985). So in the broad sense, Gonzales’s October 13 email was a grievance. But was it a grievance filed “in writing in accordance with the provisions of the parties’ negotiated grievance procedure,” as required by § 7121(e)(1) and 7116(d)? Clearly not.

In assessing whether a grievance was filed within the meaning of 7116(d), the Authority has considered a variety of factors: whether the requirements for filing a grievance under the parties’ collective bargaining agreement were met;¹⁷ whether there was an “invocation” of the grievance procedure under the parties’ negotiated agreement;¹⁸ whether there was an intent to initiate the grievance process;¹⁹ and whether the document claimed to be a grievance had the requisite amount of “formality.”²⁰ These factors are consistent with the concept of the verb “file,” which suggests a level of procedural formality. *See* “File,” *Black’s Law Dictionary* (10th ed. 2014) (“To deliver a legal document to the court clerk or record custodian for placement in the official record”; “To commence a lawsuit”; “To record or deposit something in an organized retention system or container for preservation and future reference”).

Thus, the Authority has indicated that the mere existence of a grievance is not enough to find that an election of forums has been made under § 7116(d) of the Statute. Rather, that conclusion must be supported by a finding that the grievance was filed under the parties’ negotiated grievance procedure. This principle is best illustrated by the facts and decision in

¹⁷ *Naval Shipyard*, 9 FLRA at 471-72.

¹⁸ *Customs*, 13 FLRA at 634.

¹⁹ *Internal Revenue Serv., W. Region, S.F., Cal.*, 11 FLRA 655, 664-65 (1983).

²⁰ *Naval Shipyard*, 9 FLRA at 472.

the *Naval Shipyard* case. The union filed a ULP charge alleging that an agency representative had used intimidating tactics and violated § 7116(a)(1) and (8) in questioning an employee. Previously, however, the union had written a letter to an agency HR official, complaining about the agency's investigatory procedures and requesting that a union-management meeting be held to discuss the problem. The parties' CBA contained an article titled "employee-council meetings" and a separate article titled "grievance procedures." 9 FLRA at 468. The judge and the Authority held that while the union's request for a meeting was in writing, it was not filed under the CBA's grievance procedure and did not constitute an election of forums under § 7116(d).

In applying these principles to the facts of our case, I start by considering how the parties' negotiated grievance procedure defines a filing. While neither party submitted the CBA into evidence, testimony at the hearing shed some light on the matter. Witnesses described both an informal and a formal grievance process, with the formal process beginning when a "Step 1 grievance" is submitted; prior to that time, informal discussions of problems that would fit the § 7103(a)(9) definition of grievance are frequently held. In this regard, Arsuaga testified that informal complaints are brought to management before a grievance is formally filed. Tr. 486. This is consistent with Gonzales's statements, when he filed the Cell Phone Incident Grievance and the Denial of Assistance Grievance at Step 1, that he was seeking "to address and remedy the issue at the lowest possible level in accordance with the Collective Bargaining Agreement" ²¹ GC Ex. 2 at 3; Resp. Ex. 1 at 4. As a grievance is first "filed" at Step 1, we must consider whether the October 13 email was a grievance filed at Step 1 (or later), or whether it was an informal complaint submitted prior to the filing of a grievance under the parties' negotiated grievance procedure.

The evidence clearly shows that the October 13 email was an informal complaint and not a grievance filed under the parties' negotiated grievance procedure. I look next at the text of the October 13 email, which lacks key attributes of a Step 1 filing. Unlike the Step 1 filings in the record, the October 13 email: (1) does not refer to "Step 1," or to any other step in the grievance process; (2) does not refer to Article 33, which sets forth the parties' grievance procedures, or to any other provision of the CBA; (3) does not specifically identify individuals as grievants (and does not refer to the matter as an institutional grievance); (4) does not identify a Union representative handling the matter; and (5) does not expressly seek to "address and remedy" the matter through further meetings or discussions. *Compare* GC Ex. 9 *with* GC Ex. 2 & Resp. Ex. 1. That so many key attributes of a Step 1 filing are missing from the October 13 email strongly supports a conclusion that the October 13 email is not a grievance filed under the parties' negotiated grievance procedure.

²¹ Because Gonzales is a Union steward who has utilized the parties' grievance procedures over a period of years, I credit his characterization of Step 1 as the lowest level of the parties' negotiated grievance process over Rodriguez's statement (Tr. 74-75) suggesting that the informal resolution attempts that precede a Step 1 filing are the "lowest level" of the parties' negotiated grievance process. *See* Tr. 74-75. Gonzales's account is also in accordance with Arsuaga's.

Moreover, the assertions in the October 13 email are less specific, less complete, and less formal than the claims seen in the Step 1 filings in the record. Unlike the allegations in the Step 1 filings in the record, the October 13 email does not expressly identify a management figure claimed to be behind the alleged violation and does not provide a detailed description of the Agency's actions or its alleged violations. Further, while the October 13 email asks that management respect the law and that Arsuaga notify supervisors of the seriousness of the problem, the email does not use the term "remedy," as the Step 1 grievances do. The fact that the language used in the October 13 email is less specific, less complete, and less formal than the Step 1 filings in the record is further evidence that the October 13 email is not a grievance filed under the parties' negotiated grievance procedure.

Looking beyond the text, there is no sign that Gonzales intended the October 13 email to constitute a Step 1 grievance. Rather, Gonzales testified that he sent the October 13 email as a means of expressing disbelief and anger (he and Rodriguez were "speechless" that Rodriguez was now being investigated). At the hearing, Gonzales did not characterize the email as a "grievance" and said nothing to indicate that the email was intended to bring about formal meetings or discussions. Tr. 310-11. That the Union did not intend the October 13 email to initiate the grievance process is strong evidence that it was not a grievance filed under the parties' negotiated grievance procedure.

Likewise, there is no sign that the Agency understood the October 13 email to be a grievance filed under the parties' negotiated grievance procedure (at least not until the Agency filed its post-hearing brief). In this regard, Arsuaga did not testify about the October 13 email, nor did he indicate (at the hearing or elsewhere) that the email was a grievance filed under the parties' negotiated grievance procedure. Moreover, if the Agency had understood the October 13 email to be a grievance, one would expect to see a response, or at least an acknowledgement of receipt, from the Agency; but there is no such evidence in the record. See Tr. 311. Instead, it is apparent that the Agency itself did not view the October 13 email as a grievance under the negotiated grievance procedure. This is yet another sign that the October 13 email did not constitute an election of remedies under § 7116(d) of the Statute. Accordingly, it does not bar the later-filed ULP charge in our case.

Finally, while it is unnecessary to determine whether the third prong (that the aggrieved party in both actions must be the same) is met regarding the October 13 email, I believe it is worth noting the inadequacy of the record to fully address this issue. This email was sent by Gonzales a few hours after Rodriguez had advised him that Lopez had filed a JIC complaint against him. The Authority stated in *Army Finance* that when a union files a charge or a grievance alleging harm to an employee, it will conclude that the action was filed on the employee's behalf and in the employee's discretion, unless there is evidence that the employee attempted to prevent the union from filing. 38 FLRA at 1353-54. Certainly, the October 13 email was sent by Gonzales at least partly on behalf of Rodriguez, and we have no explicit testimony that Rodriguez disapproved of sending the email, but it is also true that Lopez had previously filed JIC complaints against Gonzales for "targeting," and Gonzales cited this fact in the October 13 email. GC Ex. 14, GC Ex. 9. The record is unclear as to whether Rodriguez even knew about the email until long after the fact, or whether he approved of it as an election of remedies that would bar a subsequent ULP. In other words,

while Rodriguez may certainly have agreed with the substance of what Gonzales was saying in the email, it is not at all clear that he was choosing to pursue a grievance and to foreclose filing a ULP charge. But since neither Rodriguez, Gonzales, nor the Agency understood the October 13 email to be a grievance under the CBA, it was not an election of remedies, and we do not need to speculate about Rodriguez's role in sending it.

The Agency Violated § 7116(a)(1) and (2) of the Statute

Under § 7116(a)(2) of the Statute, it is a ULP “to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment[.]” In *Letterkenny*, 35 FLRA at 117-18, the Authority established the analytical framework for determining whether an agency action violates this provision. The GC always bears the burden of establishing, by a preponderance of the evidence, that a ULP was committed. *Id.* at 118. First, the GC must show: (1) that the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) that such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment. *Id.* If the GC proves these elements, it has established a prima facie case of discrimination. The existence of a prima facie case is determined by considering the evidence in the record as a whole, not just the evidence presented by the GC. *Tyndall AFB*, 66 FLRA at 261.

If the GC establishes a prima facie case, then the burden shifts to the agency to demonstrate, by a preponderance of the evidence: (1) that there was a legitimate justification for its action; and (2) that the same action would have been taken even in the absence of protected activity. *Id.* If the agency fails to meet this burden, it will be found to have committed a ULP. *U.S. Dep't of the Air Force, Aerospace Maintenance & Regeneration Ctr., Davis Monthan AFB, Tucson, Ariz.*, 58 FLRA 636, 637 & n.2 (2003) (*Davis Monthan AFB*).

The General Counsel Has Established a Prima Facie Case of Discrimination

I first consider whether Rodriguez was engaged in protected activity. It is well settled that the pursuit of a grievance, including the filing of a grievance and attendance at grievance meetings, constitutes protected activity within the meaning of § 7102. *See, e.g., Equal Emp't Opportunity Comm'n*, 24 FLRA 851, 855 (1985). In this context, protected activity includes not only the filing and pursuit of a formal grievance but informal investigative activity and discussions with management prior to the filing of a formal grievance. *Davis Monthan AFB*, 58 FLRA at 645.

Applying these principles to our case, it is clear that Rodriguez was engaged in protected activity. He first enlisted a Union representative (Gomez) to assist him in speaking to Arsuaga on August 30, and when that appeared to make Lopez angry, Rodriguez consulted with Gonzales and filed a Step 1 grievance on September 4; he consulted Gonzales again on September 17, after the events of the previous night's shift, prompting Gonzales to file an

informal complaint on his behalf, which was later pursued as a formal Step 1 and Step 2 grievance.²² As I will further explain later, Rodriguez did not engage in flagrant misconduct or do anything else that would cause him to lose the protection of the Statute.

The next question is whether Rodriguez's protected activity was a motivating factor in Lopez's decision to report him (and Garza) to the JIC. The analysis may include considerations such as the timing of an action,²³ the words and conduct of supervisors,²⁴ and the disparate treatment of an employee.²⁵ In addition, the absence of any legitimate basis for an action may form part of the proof of the GC's prima facie case. *See Davis Monthan AFB*, 58 FLRA at 650. And a supervisor's anti-union animus can also shed light on the supervisor's motivation concerning his action. *See U.S. Dep't of Transp., FAA, El Paso, Tex.*, 39 FLRA 1542, 1552-53 (1991).

At the hearing, Lopez essentially admitted that Rodriguez's protected activity was what motivated him to report Rodriguez to the JIC. Specifically, Lopez testified that Rodriguez and Garza made complaints about Lopez's conduct during the September 17 shift; Rodriguez and Garza brought their complaints to Gonzales, their union representative; Gonzales forwarded those complaints, or informal grievances, to Arsuaga; and those complaints served as "the basis" of Lopez's decision to report Rodriguez and Garza to the JIC. Tr. 415, 437, 446-47; *see also* GC Ex. 14 at 15. Lopez's testimony alone is enough to show that Rodriguez's protected activity was a motivating factor in his decision to report Rodriguez to the JIC.

Additional factors confirm what Lopez admitted. The timing suggests an unlawful motivation, as Lopez reported Rodriguez to the JIC within days of Rodriguez complaining to Arsuaga about the events of September 17. The suspicious timing of the JIC complaint is compounded by Lopez's general hostility to being questioned by subordinates, an attitude which he demonstrated repeatedly from August 30 onward. The cause of the August 30 Lopez-Rodriguez confrontation was, by itself, somewhat ambiguous, but it was clarified by the events that came immediately afterward. Lopez certainly was angry with Rodriguez for speaking to Arsuaga, and his language about "jumping over me" could be construed in different ways, but at the hearing Lopez never addressed this incident, leaving un rebutted Rodriguez's testimony that Lopez objected to him going to the PAIC with a problem (i.e., he objected to Rodriguez engaging in protected activity). This conclusion is borne out by Lopez's action in filing a JIC complaint against Gonzales on September 8 for "targeting" him, four days after Gonzales filed the Cell Phone Incident Grievance at Step 1. Gonzales testified that he had heard about labor relations problems at Zapata before he transferred there, and that he intended to address those problems once he got there, but it is perfectly

²² Even if I focus simply on the events beginning on September 17 or 18, as cited in ¶ 7 of the Complaint (GC Ex. 1(c)), it is clear that Rodriguez was engaged in protected activity as he pursued his allegation that Lopez had retaliated against him on September 17.

²³ *U.S. Dep't of Transp., FAA*, 64 FLRA 365, 368 (2009).

²⁴ *Id.* at 369.

²⁵ *Dep't of the Air Force, AFMC, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 55 FLRA 1201, 1205 (2000).

appropriate for a union official to pursue this type of protected activity. The fact that Lopez perceived Gonzales's actions as "targeting" demonstrates a particularly thin skin and lack of tolerance toward protected activity, all of which cast Lopez's actions after September 17 in a particularly bad light. Again, Lopez did not seek to ameliorate these suspicions in his hearing testimony. Looking at these events together, Lopez's filing of the JIC complaint against Rodriguez and Garza on September 24 was actually a continuation of the ongoing dispute he had with Gonzales, and the JIC complaint he had previously filed against Gonzales. Lopez admitted as much at the hearing. Tr. 433-35. In its totality, the evidence demonstrates that Lopez did not take kindly to employees filing grievances focused on his behavior, and that his preferred mode of response was retaliation. Or, as he was fond of saying, "You be cocky and arrogant, even when you're getting beat. That's the secret." GC Ex. 14 at 12, 16; Resp. Ex. 9 at 101, 102, 108. To put it in terms of our Statute, Lopez was clearly motivated to file his series of JIC complaints by the protected activities of Rodriguez, Garza, and Gonzales.

Finally, it is clear that Lopez's filing of a JIC complaint affected Rodriguez with respect to hiring, tenure, promotion, or other conditions of employment. By reporting Rodriguez to the JIC, Lopez triggered an investigation, during which Rodriguez could not be promoted, detailed, or transferred. Tr. 81, 256. While Respondent denied this allegation in its brief (Resp. Br. at 11-12), it did not actually offer any evidence to the contrary, even though several management officials testified at the hearing. Moreover, the JIC complaint subjected Rodriguez to the risk of being disciplined, even terminated. Tr. 182. The potential for disciplinary action is perhaps the most significant factor here. Even though the JIC investigation ultimately found that Rodriguez committed no misconduct, this did not alter the peril that he faced while the investigation was pending. Putting aside the administrative complexities of the JIC process, Lopez's report to the JIC was no different than a supervisor's filing of disciplinary charges against an employee through the chain of command. Regardless of whether an accused employee is ultimately disciplined, the filing of charges against him certainly affects his hiring, tenure, promotion, or other conditions of employment. Cf., *U.S. Dep't of Justice, U.S. INS, El Paso Dist. Office*, 34 FLRA 1035, 1044-45 (1990) (agency changed conditions of employment by expanding list of offenses that are subject to discipline).

Based on the foregoing, I find that Rodriguez's protected activity was a motivating factor in Lopez's decision to report Rodriguez to the JIC, and that Lopez's action affected Rodriguez's conditions of employment. Accordingly, I find that the General Counsel has established a prima facie case of discrimination.

The Respondent Has Failed to Rebut the General Counsel's Prima Facie Case

The Respondent contends that there was a legitimate justification for Lopez's action against Rodriguez, and that Lopez would have taken the same action in the absence of any protected activity, but its arguments are unconvincing.

First, Respondent contends that Rodriguez engaged in flagrant misconduct, or otherwise exceeded the boundaries of protected activity, by making “false statements” regarding the September 17 shift. *See* Resp. Br. at 10. This is crucial to the Respondent’s case, because when (as here) alleged discrimination concerns discipline for conduct occurring during protected activity, a necessary part of an agency’s defense is that the conduct constituted flagrant misconduct or otherwise exceeded the boundaries of protected activity. *Davis Monthan AFB*, 58 FLRA at 636. If indeed Rodriguez engaged in flagrant misconduct by virtue of his grievance allegations against Lopez, then his conduct loses its protection under the Statute and can be the basis for discipline. *Johnson Med. Ctr.*, 58 FLRA at 47 (citing *Internal Affairs*, 53 FLRA at 1514-15), which traced the rule back to the days of Executive Order 11491).

In *U.S. Forces Korea*, 17 FLRA at 728, the Authority stated that an employee can lose protection under the Statute for making false statements, but “[i]t is only those statements which are knowingly false and uttered with reckless abandon which lose the protection of the Statute.”²⁶ Similarly, in *Johnson Med. Ctr.*, 58 FLRA at 47, 56, the Authority agreed with the ALJ that with respect to an allegedly false statement made in the course of processing a grievance, an agency must show that the statement was a “deliberate, conscious deception” on the part of the employee in order to prove that the statement constituted flagrant misconduct.

The Respondent asserts that Rodriguez made a number of false statements, but it has failed to show that those statements were knowingly false or deliberately deceptive. With respect to Rodriguez’s claim that Lopez denied assistance to Rodriguez and Garza during the September 17 shift, that claim was based on factors that Rodriguez reasonably believed to be true: that there was no immediate response to Rodriguez’s two radio requests for help; that Wells told Garza he could not provide assistance; that Rodriguez could not hear sensors and therefore questioned whether it was correct for Wells to continue monitoring sensors instead of coming to help them; and that Luera did not immediately respond to Rodriguez’s and Garza’s requests. Moreover, given the fact that Rodriguez had recently filed a grievance against Lopez, and given Luera’s comment indicating that it was Lopez who was responsible for the lack of assistance, it was understandable that Rodriguez would be suspicious of Lopez. In light of these factors, it is similarly understandable that Rodriguez would interpret Luera’s statement that Lopez liked doing things “by the book” to mean, essentially, that Lopez used the rules as a pretext for failing to provide assistance to Rodriguez and Garza. *See* Tr. 136. Moreover, Lopez himself acknowledged that Rodriguez’s denial-of-assistance claim could have been based on a mistaken belief on Rodriguez’s part, and that Rodriguez’s

²⁶ Ultimately, the Authority found that the employee’s statements were not protected, not because the statements were false, but because the statements attacked the credibility of U.S. government officials in a foreign country and had no reasonable connection to labor relations problems. *U.S. Forces Korea*, 17 FLRA at 729.

claim might not have been based on a lie. Tr. 448. In sum, while Rodriguez may have failed to take alternative explanations into account, there is no indication that his claim was knowingly false.²⁷

I am not alone in reaching the conclusion that Rodriguez did not deliberately lie to Agency officials in complaining about Lopez. After making their own reviews of the disputed allegations, both PAIC Arsuaga and Assistant Chief Patrol Agent Torres determined that Rodriguez's allegations did not constitute a lack of candor or any other type of misconduct. *See* Tr. 160, 163-64, 177, 473, 479. Indeed, Arsuaga testified that he "could see how the agents might have . . . interpreted it differently to make it seem like . . . Rudy's got it out for them." Tr. 479. As Torres summarized, "it was more of a miscommunication between everybody involved. Tr. 160; *see also* Tr. 163-64.

The Respondent's related claims are similarly unavailing. The Respondent argues that it was inaccurate for Rodriguez to assert that he was denied assistance because Luera eventually provided assistance. But Rodriguez's assertion was not inaccurate. First, Luera did not provide assistance until sometime after Wells stated he and Narvaez could not provide assistance. Second, the assistance Luera provided was not the type of assistance Rodriguez (or Garza) had requested. Rather, Rodriguez wanted Wells and Narvaez to come to their area to provide a type of backup support that Luera was not providing. Third, Luera understood that Rodriguez was specifically requesting backup assistance from Wells and Narvaez. When Rodriguez asked Luera why he hadn't received assistance, Luera did not say he was providing the type of assistance that Rodriguez had requested. Rather, Luera explained why Wells and Narvaez could not assist, and in doing so Luera demonstrated that he understood that Rodriguez was specifically seeking assistance from Wells and Narvaez. These facts illustrate the reasonableness of Rodriguez's assertion that he did not receive the assistance he requested, and Arsuaga and Torres both understood Rodriguez's claim to be reasonable, even though Luera had assisted Rodriguez and Garza by cutting ahead of them. *See* Tr. 160, 479. As such, and as Rodriguez's assertion was not in any way a deliberate deception, the Respondent's claim that Rodriguez was making a false statement in this regard falls short.

The Respondent also argues that Rodriguez testified that he did not hear any sensors going off and thus improperly implied that Wells was lying when he told Rodriguez that he had to monitor sensors. But Rodriguez was testifying accurately. Specifically, Rodriguez testified that Wells told him he had to respond to "sensor activity or something like that" (Tr. 51), and this is consistent with corroborating evidence indicating that Wells had been directed to stay put and monitor sensors. *See* GC Ex. 13; Tr. 57, 59-61, 114. Moreover, there is nothing contradicting Rodriguez's statement that he did not hear sensors going off. Indeed, Garza confirmed Rodriguez's testimony on that point. Tr. 109, 267-68. Since Rodriguez testified truthfully, I must reject the Respondent's defense that the statements Rodriguez made in his grievance were not protected by the Statute.

²⁷ I emphasize here that I am not expressing any opinion as to whether Lopez did anything wrong on the night of September 17. That is not the issue before me.

The Respondent additionally argues that there was a legitimate reason for Lopez's conduct. These arguments, however, are unpersuasive. The Respondent contends that Lopez was acting in accordance with Agency policy when he reported Rodriguez to the JIC. But if that were true, Arsuaga would have reported Rodriguez to the JIC when he first received conflicting accounts of the events of September 17. Moreover, a review of the Agency's policy and guidance on reporting misconduct suggests that the Lopez-Rodriguez dispute was not the sort of incident that should have been reported to the JIC. *See* GC Ex. 15 at 2; Resp. Ex. 4. Rather, it was the sort of "less-serious misconduct . . . best handled directly by supervisors and managers . . ." *Id.* Indeed, the dispute was already being investigated by PAIC Arsuaga. Lopez was fully aware of that fact, as he and the other protagonists had already been asked to provide statements regarding the events of September 17. While I fully agree with the Respondent that the JIC is an important safeguard to enable the Agency to learn about incidents of possible misconduct, and that employees should not be discouraged from reporting their suspicions to the JIC, the events of September 17 were in no danger of going unreported. On the contrary, Lopez went to the JIC specifically because Rodriguez had already complained to the PAIC about the events of that night. To the degree that Lopez felt that Rodriguez was lying about him, he already had a forum for presenting his views: directly to Arsuaga. Thus, the conclusion remains that Lopez used the JIC to subject Rodriguez (as well as Gonzales and Garza) to the burdens and pressures of a JIC investigation, with the additional potential for disciplinary action.²⁸ For these reasons, the Respondent has failed to demonstrate that there was a legitimate reason for Lopez's conduct.

Because the Respondent has failed to meet its burden of proving the first essential element of its defense, it is unnecessary to consider the second element (i.e., whether Lopez would have reported Rodriguez to the JIC even if Rodriguez had not engaged in any protected activity). *See Davis Monthan AFB*, 58 FLRA at 636-37 & n.2. But in any event, the Respondent's arguments on this point are unconvincing.

First, the Respondent cites Lopez's reporting of Garza to the JIC as proof that Lopez would have reported Rodriguez even if he hadn't engaged in protected activity. But this argument erroneously assumes that Garza did not engage in protected activity. Contrary to Respondent's claim, Garza did engage in protected activity when he submitted a statement (GC Ex. 3), written with Gonzales's assistance, complaining about the Agency's failure to provide assistance during the September 17 shift. *See Patent Office Prof'l Ass'n*, 41 FLRA 795, 826-27 (1991) ("[T]he right guaranteed employees by section 7102 encompasses the right of employees to appear as a witness in arbitration proceedings and give testimony supporting or opposing the Union's interest in that proceeding." (footnote omitted)). Garza also engaged in protected activity when Gonzales named him as well as Rodriguez in the informal grievance submitted to Arsuaga on September 19 (GC Ex. 7; Resp. Ex. 5). And Lopez acknowledged that he reported Garza to the JIC based in part on Garza's complaint. *See* Tr. 415, 437. In other words, this evidence does not help Respondent's case.

²⁸ While the 2016 ALJ decision cited by the GC in its brief, ALJD No. 16-23, is not binding precedent, I do find its reasoning persuasive, insofar as the utilization of the JIC process may constitute unlawful retaliation. *See also U.S. Dep't of Justice, Fed. BOP, FCI Florence, Colo.*, 59 FLRA 165, 173 (2003) (*FCI Florence*), cited by the judge with regard to a similar type of retaliation.

Next, Respondent points to Lopez's testimony that he would have reported Rodriguez's "complaints" to the JIC regardless of how they were raised. Resp. Br. at 12. But complaints about conditions of employment are protected by § 7102 of the Statute, regardless of whether they are filed under a negotiated grievance procedure. Accordingly, by arguing that Lopez was reporting Rodriguez to the JIC in response to Rodriguez's complaints, the Respondent essentially concedes that Lopez was motivated by Rodriguez's protected activity. Moreover, the Respondent does not point to any conduct outside of Rodriguez's and Garza's protected activity as motivating Lopez to report Rodriguez and Garza to the JIC. Respondent like Lopez, argues that Lopez's JIC complaint was legitimate, and that he would have filed it regardless of the Union's involvement, but this is simply another way of arguing that Rodriguez was guilty of flagrant misconduct and thus his actions were not protected; I have already explained why that argument fails. *See FCI Florence*, 59 FLRA at 173. I must, therefore, reject the Respondent's argument.

Third, the Respondent argues that if Lopez had reported Rodriguez to a supervisor, then the supervisor would have reported Rodriguez to the JIC. But this assertion is refuted by Arsuaga's own actions. When Arsuaga was presented with the allegations of Rodriguez, Garza, and Gonzales that Lopez had acted improperly on September 17, he initiated his own investigation of the incident, including a statement from Lopez contradicting the employees' allegations, but he found no reason to report the matter to the JIC. Rather, he continued his own investigation and then handled the Union's grievance under the negotiated grievance procedure. Accordingly, this contention by the Respondent is also misplaced.

Summary

Based on the foregoing, I find that the General Counsel has established a prima facie case of discrimination that the Respondent has failed to rebut. Accordingly, I find that the Respondent violated § 7116(a)(1) and (2) of the Statute as alleged, and 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 Homeland Security, U.S. Customs and Border Protection, Laredo, Texas, shall:

1. Cease and desist from:

(a) Discriminating against Eulalio Rodriguez, or any other bargaining unit employee, by subjecting them to investigations in reprisal for engaging in activities protected under § 7102 of the Statute.

(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.

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

(a) Post at its facilities where bargaining unit employees 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 Chief Patrol Officer, Laredo Sector, and shall be posted and maintained for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

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

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

Issued, Washington, D.C., September 28, 2018



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 Homeland Security, U.S. Customs and Border Protection, Laredo, Texas, 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 discriminate against Eulalio Rodriguez, or any other bargaining unit employee, by subjecting him to investigations in reprisal for engaging in activities protected under § 7102 of the Statute.

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)

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 its provisions, they may communicate directly with the Regional Director, Denver Region, Federal Labor Relations Authority, whose address is: 1244 Speer Blvd., Suite 446, Denver, CO 80204, and whose telephone number is: (303) 844-5224.