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

OALJ 13-17

DEPARTMENT OF VETERANS AFFAIRS VETERANS AFFAIRS MEDICAL CENTER RICHMOND, VA RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2145, AFL-CIO CHARGING PARTY	Case Nos. WA-CA-10-0572 WA-CA-10-0578

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For the Respondent

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For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

Sabrina Muhammad was involved in two incidents with her supervisors in September of 2010, in which she believes that the supervisors discriminated and retaliated against her because of her protected union activity. In the first incident, her immediate supervisor gave her a memorandum of verbal counseling for the manner in which she and another employee repositioned a patient, resulting in the other employee hurting her back. In the second incident, her second-line supervisor asked her about a situation that had occurred the day before; Muhammad understood the supervisor to have asked her to sign another counseling

memo. In the months leading up to these incidents, Muhammad and her union had been meeting with agency representatives in order to effectuate her promotion to the next grade level, and she had also filed an unfair labor practice charge (ULP) alleging that her supervisor had asked whether she was a union member. If indeed the two verbal counseling memos had been motivated by Muhammad's union activity or by her filing a ULP charge, the Agency would have violated the Federal Service Labor-Management Relations Statute (the Statute). But the evidence fails to show that her protected activity was a motivating factor in any of the incidents, and thus I must dismiss the Complaint against the Agency.

I. STATEMENT OF THE CASE

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

On September 10, 2010, the American Federation of Government Employees (AFGE), Local 2145, AFL-CIO (the Union or Charging Party) filed an unfair labor practice charge with the Washington Regional Office of the Authority, against the Department of Veterans Affairs (DVA), Veterans Affairs Medical Center (VAMC), Richmond, Virginia (the Agency or Respondent) in Case No. WA-CA-10-0572. On September 17, 2010, the Union filed a second charge against the Respondent in Case No. WA-CA-10-0578. After investigating the charges the Washington Regional Director, on behalf of the General Counsel (GC), consolidated them in a Complaint and Notice of Hearing issued on May 26, 2011, and alleged that the Respondent violated section 7116(a)(1), (2) and (4) of the Statute by discriminating against bargaining unit employee Sabrina Muhammad because of her protected activity and her prior filing of a complaint against the Agency, by giving her a written memorandum of verbal counseling and by asking her to sign a document reflecting another verbal warning. On June 8, 2011, the Respondent filed its Answer to the Complaint, admitting several factual allegations, but denying that it committed unfair labor practices.

A hearing was held in this matter on July 12, 2011, in Richmond, Virginia.[1] All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. The GC and Respondent filed post-hearing briefs, which I have fully considered.

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

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[1] At the hearing, ¶¶11 and 15 of the Complaint were amended without opposition, to change "Ms. Broadnax" to "Ms. Muhammad" in ¶11 and "September 10" to "September 9" in ¶15. Tr. 11-12.

FINDINGS OF FACT

A. Background

The Respondent is an agency within the meaning of section 7103(a)(3) of the Statute. GC Exs. 1(c), 1(d). AFGE Local 2145 is a labor organization within the meaning of section 7103(a)(4) of the Statute, and is an agent of AFGE for the purpose of representing Respondent's employees. The DVA and AFGE are parties to a collective bargaining agreement (CBA) covering unit employees, including Sabrina Muhammad. Jt. Ex. 1 at 4, 5.

Ms. Muhammad has worked for the Respondent as a licensed practical nurse since January 2006, although she was not a full-time employee until September 2009. Tr. 65, 111. From August 2008 through October 2010, nurse manager Tamara Broadnax supervised her. Tr. 110. In the spring of 2010,[2] Muhammad contacted the Union for assistance in securing a promotion from GS-5 to GS-6. Tr. 49-50, 66-67. The Union's Executive Vice President, Charles Jackson, arranged a meeting with Ms. Broadnax and a human resources representative on June 23 to discuss the promotion. Tr. 47-51, 66, 111. At that meeting, Mr. Jackson stated that Broadnax had effectively recommended Muhammad for promotion to GS-6 in Muhammad's 2009 performance appraisal, yet no such promotion had occurred. Tr. 49-50, 66-67. Ms. Broadnax responded that, notwithstanding the complimentary tone of her 2009 appraisal, she had not supervised Ms. Muhammad for a sufficient time to determine whether she met the requirements for GS-6,[3] and Broadnax requested additional information from Muhammad to evaluate her promotion eligibility. Tr. 50, 52, 67, 112, 157-58. Jackson arranged two or three more meetings with management from June through August to discuss the promotion. Tr. 51-52, 59, 101-03. Broadnax eventually recommended Muhammad for a promotion in October, and the promotion took effect in November. Tr. 39, 67, 139, 159. Muhammad believed that she received her promotion when she did due to the Union's efforts on her behalf. Tr. 95, 106.

B. The (Subsequently-Withdrawn) ULP Charge in Case No. WA-CA-10-0551

In August, Union President Jennifer Marshall received an email from Muhammad stating that in May, Ms. Broadnax had asked Muhammad whether she was a dues-paying member of the Union. Tr. 22-23, 42-44. Muhammad testified that she "immediately sought union help[]" in May 2010 following this exchange with Broadnax. Tr. 69. However, Marshall testified that she first learned of the exchange in August, and Union Vice President Jackson testified that Muhammad never mentioned any such exchange to him during their conversations in June, July, and August. Tr. 46, 61. Moreover, Broadnax testified that she was on leave for surgery in May, and as a result, no such conversation could have occurred that month. Tr. 138-39; *see also* Tr. 188. Thus, the date of this exchange, as well as the timing of Muhammad's notice to the Union about it, is uncertain.

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[2] Hereafter, all dates are 2010, unless otherwise noted.

[3] Ms. Broadnax explained that although Ms. Muhammad had been a full-time employee since September 2009, Muhammad was on extended leave from October 2009 through March 2010, and then Broadnax was herself on leave in May and June 2010. Tr. 113-14, 139.

Upon receiving Muhammad's email describing the Broadnax-Muhammad conversation, Union President Marshall filed a ULP charge (hereinafter, the 0551 charge) alleging that Broadnax's questioning of Muhammad violated the Statute. GC Ex. 2 at 3. Consistent with her usual practice in ULP cases, Marshall faxed VAMC Richmond's Director a copy of the charge on August 24, thereby serving the Agency with notice of it. Tr. 20-21; GC Ex. 2 at 1-2. The charge was subsequently withdrawn by the Union on March 14, 2011, and its merits are not at issue in this case. Tr. 42. But as explained further below, some of the allegations in the present case involve the investigation of the 0551 charge.

C. The ULP Charge in Case No. WA-CA-10-0572

On August 15, Muhammad and fellow employee Theresa Dickerson were required to reposition a patient in bed. Tr. 74-75. On the basis of a psychiatric evaluation, the patient was in behavior restraints tethering his arms and legs to the bed. Tr. 75, 98-99. When Muhammad and Dickerson attempted to move the patient, he resisted. Tr. 74-75. Dickerson later reported that she injured her back during this incident, and she filed a workers' compensation claim based on that injury. Tr. 75, 115-17. As Dickerson's supervisor, Broadnax was responsible for ensuring that the circumstances surrounding the injury were recorded on an electronic form. Tr. 115-18. Broadnax testified that this electronic record could not be completed until the beginning of September, because Dickerson was absent from work for the latter half of August, after her injury. Tr. 115-16, 122; *see* Resp. Ex. 1. After meeting with both Muhammad and Dickerson to get their accounts of the incident, Broadnax (with Dickerson present) prepared an incident report that became a part of Resp. Ex. 1. Tr. 116-17, 150, 161-63. Broadnax electronically signed the form on August 31, and Safety Official Curt Rosenthal electronically signed it on September 2.

The same day that Rosenthal signed the electronic form recording the circumstances of Dickerson's injury, Broadnax verbally counseled Muhammad regarding her participation in the August 15 patient move. Jt. Ex. 2; Tr. 74, 115-16. Broadnax documented this verbal counseling in a memo, a copy of which she provided to Muhammad.[4] The memo stated, in pertinent part:

> 1. You are being issued a verbal counseling for: failing to provide adequate assistance to a fellow employee when assisting with the repositioning of a patient on 15 August 2010 which resulted in an injury to the fellow employee.

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[4] The CBA recognizes "oral counseling" as separate from "written counseling." *See* Jt. Ex. 1 at 46-47 (CBA, Art. 16, § 11). This might lead one to expect that an "oral counseling" would not be put into writing. But Broadnax explained that, as a supervisor of 60 employees, she rarely had work-related conversations with her staff without documenting them, and the memo documenting her verbal counseling of Muhammad on September 2 was consistent with that practice. Tr. 129, 140-41. The GC attacks Broadnax's explanation for creating the September 2 memo as "absurd," (GC Br. at 15), but there is nothing irrational about a supervisor documenting work-related conversations -- especially when the CBA permits employees to file a grievance if they are "dissatisfied" with any oral counseling. Jt. Ex. 1 at 47 (CBA, Art. 16, § 11(B)).

> 2. It is my expectation that in the future that you ensure that you are able to give adequate assistance or use additional safe patient handling equipment when repositioning a patient. This is a serious matter which resulted in an employee injury and potential injury to the patient. You are expected to provide adequate support or incorporate the use of an assistive device when helping your fellow employee. You will receive additional instruction from the Safe Patient Handling Coordinator to meet any additional education needs that you may have.
>
> 3. You are a valued team member and your compliance with policy and procedures is expected.

Jt. Ex. 2.

Muhammad testified that prior to receiving this verbal counseling on September 2, she had not been advised by anyone that her actions on August 15 were viewed as deficient in any respect. Tr. 96-97. She further testified further that, prior to the verbal counseling, Broadnax never asked for her side of the story regarding the August 15 incident. Tr. 75. However, Ms. Broadnax testified that she "talked to both employees about what happened[]" on August 15, and "they both gave the same version of events." Tr. 161-62; *see also* Tr. 163-64.[5]

Of even greater concern to Muhammad, Broadnax did not explain to her "what [she] did wrong" to warrant verbal counseling. Tr. 97, 99. Indeed, Broadnax admitted that she could not identify anything that Muhammad should have done differently on August 15. Tr. 124, 162. She nevertheless issued the verbal counseling because Ms. Muhammad "was in with Ms. Dickerson, and Ms. Dickerson ended up getting hurt." Tr. 124. When asked to explain how she could conclude that Muhammad "fail[ed] to provide adequate assistance[]" to Dickerson without identifying any specific errors, Broadnax asserted that routine tasks like moving a patient should never result in injuries when done properly. Tr. 144-46. Thus, the injury itself demonstrated that proper safety procedures were not followed. Tr. 144-47, 161-63. Broadnax insisted she was not assigning blame to either employee, and she testified without contradiction that she also issued a verbal counseling memo to Dickerson for the incident.[6] Tr. 140, 141, 145, 162.

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[5] I do not need to resolve this particular dispute in the testimony, but Ms. Muhammad's equivocation regarding much of her oral and written communication during this period casts doubt on her ability to state definitively that Ms. Broadnax never asked her *anything* about the August 15 incident prior to the verbal counseling. *See, e.g.*, Tr. 83, 84 (exchange between Respondent's counsel and Ms. Muhammad about whether she told Mr. Jackson that she had been questioned about her union membership).

[6] The GC questions whether Dickerson actually received a memo of verbal counseling, as Broadnax claimed, since the Respondent did not produce a copy of the memo to Dickerson. GC Br. at 9-10. But producing the memo is not the only way of proving or disproving its existence. The GC could just as easily have called Dickerson to testify, if indeed she had not been given a counseling memo. As the record stands, Broadnax's assertion that she counseled Dickerson is unrefuted, and I have been offered no basis to discredit her testimony, either on this specific point or in general.

Muhammad refused to sign the memo of verbal counseling on September 2, and she reported it the Union. Tr. 100. On September 10, 2010, the Union filed a ULP charge, later designated Case No. WA-CA-10-0572 (hereinafter, the 0572 charge), regarding the incident. GC Ex. 1(a). As she had previously done with the 0551 charge, Marshall faxed a copy of the 0572 charge to the VAMC's Director on September 9. Tr. 12, 23-24; GC Ex. 3. At the hearing, Muhammad echoed a sentiment expressed in the charge, that she was unaware of any other employee receiving a verbal counseling memo for failing to adequately assist another employee. Tr. 75. However, the Respondent produced a memo of verbal counseling from Broadnax to LPN LaFonde Getties, dated April 15, 2010, which closely mirrors Muhammad's memo.[7] Tr. 124-27. The four paragraphs of the memos are virtually identical, except the descriptions of the incidents are slightly different. *Compare* Joint Ex. 2 and Resp. Ex. 2. In Getties's situation, a patient was being moved onto a scooter, and a fellow employee was injured. Resp. Ex. 2. Broadnax further testified that she routinely used verbal counseling memos to document many types of conversations she had with employees, including workplace accidents, attendance, and performance issues. Tr. 123, 129, 141, 143, 170-74.

D. The ULP Charge in Case No. WA-CA-10-0578

On September 13 -- i.e., a few days after the Union filed the 0572 charge -- FLRA Acting Regional Attorney Jessica Bartlett emailed VA Labor Relations Specialist James Kielhack to request an hour of official time for Muhammad in connection with the investigation of the 0551 charge. GC Ex. 4. Mr. Kielhack replied that, after a discussion with Muhammad's supervisor, he could confirm that Muhammad would be available to speak with Ms. Bartlett at 10:00 a.m. on September 16. *Id.* Two days later, on September 15, Muhammad had a conversation with Associate Chief Nurse Deborah Hillman, who was Broadnax's immediate supervisor and Muhammad's second-line supervisor. The witnesses' accounts of this conversation are of central importance to the subsequently-filed ULP charge in Case No. WA-CA-10-0578 (hereinafter, the 0578 charge). Because these accounts differ significantly, I will first detail them individually; then I will attempt to resolve the discrepancies among them and ascertain what actually occurred.

1. The September 15 Conversation, According to Ms. Muhammad

Muhammad testified that on September 15, Hillman approached her near the medication room, holding a document "that appeared to be a[n] e-mail type of form." Tr. 79. Hillman told her that an incident had occurred involving a nurse in the telemetry room at the

[7] Oddly, and even though the Respondent *did* offer this document into evidence, the GC asserts that I should nonetheless find that the memo of verbal counseling to Ms. Getties "do[es] not exist." GC Br. at 9. But the GC did not object when the Respondent put the Getties memo in evidence (Tr. 127), and no basis for excluding it is apparent; having been properly admitted in evidence, the memo's existence is clear.

time Muhammad was on duty there,[8] and consequently, Hillman would need to give her "a verbal counseling," and Muhammad would need to complete a "report of contact."[9] Tr. 79, 87, 88. Muhammad asked to read the document in Hillman's hand, or to have a copy of it, but Hillman denied the request. Tr. 79, 88. When Muhammad responded that she would not be signing any documentation, Broadnax -- who was seated at the nearby nurse's station -- interjected that a report of contact was needed so that Muhammad could "tell[] us what you saw and what you heard[]" during the telemetry room incident. Tr. 79. Muhammad estimated that the telemetry room incident happened "maybe a week" prior to this conversation with Hillman and Broadnax. Tr. 80. Explaining at the hearing that this incident occurred "on the heels of them accusing me of causing injury to another patient," Muhammad reiterated to Hillman that she would "not be signing any documents" and "would not be filling out any form" because she "had nothing to do with the incident[]" in the telemetry room. Tr. 79, 89, 93. Hillman did not insist that Muhammad complete a report of contact, nor did she pursue the matter further. Tr. 93-94. Muhammad then "walked off[,]" at which point she observed Hillman heading toward the telemetry room to speak with Janice Archer, the other nurse who had been present during the incident. Tr. 88, 93, 104-05.

Muhammad was neither disciplined nor counseled for refusing to complete a report of contact. Tr. 89, 94. In addition, she never received the verbal counseling that Hillman had mentioned in their September 15 conversation, although Muhammad is unsure why. Tr. 80. When asked whether she followed up with her supervisors about the verbal counseling that she expected but never received, Muhammad initially testified, "I did not." Tr. 81. However, when asked substantially the same question later, she stated that she did ask for clarification regarding the verbal counseling. Tr. 104. Specifically, "a few minutes" after her conversation with Hillman and Broadnax near the medication room, Muhammad walked to the telemetry room, where she knew Hillman was speaking to Archer. Tr. 104-05. She interrupted briefly to ask, "Ms. Hillman, what was that you were saying about giving me a verbal counseling on this incident that occurred with Ms. Archer?" Tr. 105. Hillman responded, "Well, I'm not sure what you're talking about. I didn't say that. It must be all in your head." Muhammad then "just smiled and let it go." Based on Muhammad's description of these conversations, the Union filed the 0578 charge on September 17. GC Ex. 1(b).

2. The September 15 Conversation, According to Ms. Broadnax

Broadnax testified that she was off work for a doctor's appointment for part of the day on September 15, although she came to the hospital afterward and was at the nurse's station when Hillman approached Muhammad. Tr. 131. A physician had filed a complaint about the behavior of a nurse in the telemetry room the previous day, and Hillman needed to talk to the two nurses who had been on duty at the time of incident (Muhammad and Archer)

[8] The "telemetry room" is a centralized area where VAMC staff can monitor the cardiac rhythms of patients who are located throughout the hospital. Tr. 90-91. Muhammad testified that monitoring devices for as many as 54 patients are centrally located in the telemetry room. *Id.* Nurses working there are responsible for monitoring particular machines assigned to them. Tr. 92.

[9] In Muhammad's words, a "report of contact is something that an individual does to list out . . . basically a timeline of an issue or something that transpired." Tr. 79-80.

and get their account. Tr. 131-36. According to the complaint, one of the nurses monitoring patients in the telemetry room had failed to notify the doctor of a patient's arrhythmia, and when the doctor went to the telemetry room to inquire, one of the nurses was rude to her. Tr. 133-34. When Hillman asked Muhammad to provide a summary, "Ms. Muhammad became greatly concerned that Ms. Hillman wanted her to sign some kind of verbal counseling, and Ms. Hillman said it's not a counseling; I just need you to tell me what happened in this incident report." Tr. 132. Upon further questioning, Broadnax clarified at the hearing that Hillman did not ask Muhammad simply to "tell" her what happened in the telemetry room, but rather to document her observations. *Id.* According to Broadnax, in order to rely on an employee's statement for investigatory purposes, it must be written, signed, and dated. *Id.*

As for the "e-mail type" document that Hillman was carrying when she approached Muhammad, Broadnax explained that it would have been a printout of the physician's electronically-filed complaint. Tr. 133. Since the physician did not specify which nurse in the telemetry room prompted her complaint, Hillman and Broadnax had to investigate further. Tr. 134, 136. And that is why, on the day immediately following the complained-of incident, Hillman approached the only two employees who had been on duty in the telemetry room at the time specified in the complaint. Tr. 135, 136. Hillman approached each employee with a printout of the complaint and said, essentially, "I just need to know what happened so that we can close out this investigation." Tr. 135. Nevertheless, Muhammad refused to provide a report of contact, or any other form of witness statement. Tr. 135, 136. After some additional investigation, Broadnax determined that it was Archer, not Muhammad, who had been rude to the doctor, and that Muhammad had simply been in the room when the incident occurred. Tr. 136-38. Archer received a verbal counseling and Muhammad did not. Tr. 137.

3. The September 15 Conversation, According to Ms. Hillman

Hillman testified that she has never provided verbal or written counseling to Muhammad, and furthermore, she has never suggested that Muhammad receive counseling of any kind. Tr. 177. However, she did request that Muhammad provide a report of contact regarding the telemetry room incident that occurred while Muhammad was on duty there on September 14. Tr. 178.

On the morning of September 15, while Broadnax was off work, Hillman received an incident report regarding a nurse in the telemetry room, and Hillman began to investigate the report in Broadnax's absence. Tr. 178, 185-86. As part of the fact-finding for incident reports, "everyone who has knowledge of or who were present during a particular incident [is asked] to give input so that the nurse manager can respond to the incident." Tr. 178. However, providing such input is "not mandatory." Tr. 180.

The incident report regarding the telemetry room did not specify which of the nurses on duty had prompted the complaint, but based on the time of the incident, Hillman determined that only Muhammad and Archer had been working there at that time. Hillman asked both nurses to provide statements regarding the incident. Tr. 179. Although Broadnax

was not present when Hillman requested these statements, Hillman told the nurses to give their statements directly to Broadnax, because as their nurse manager, Broadnax generally collected such statements. Tr. 180. Beyond asking the nurses to provide statements, Hillman "had no other dialogue with either of them" about the telemetry room incident. Tr. 181. For that reason, until she received a request for information related to the 0578 charge, Hillman was not aware whether Muhammad or Archer actually provided statements. Tr. 180.

When asked specifically whether Muhammad had any reaction to her request for a statement, and more particularly whether Muhammad seemed upset by the request, Hillman responded, "Not to my knowledge[.]" Tr. 180-81. In addition, Hillman specifically denied ever telling Muhammad "that there was a counseling memorandum in her head regarding that incident[,]" or saying anything similar. Tr. 182.

4. The September 15 Conversation, All (Relevant) Things Considered

Looking at the demeanor and testimony of the witnesses (regarding not only the September 15 incident but the entire sequence of events in this case), it appears to me that Ms. Muhammad was hypervigilant and suspicious in her dealings with supervisors, an attitude which soon caused miscommunication and misunderstanding. Muhammad herself attributed her refusal to give a report of contact to the fact that she had only recently been "accus[ed] . . . of causing injury[.]" Tr. 79. Regarding that earlier counseling, Muhammad admitted she was "frustrated with Ms. Broadnax and everything that she was doing, trying to do, disciplining me for just exercising my union rights of protection from management, I don't recall what I said to Ms. Broadnax." Tr. 99-100. Thus, Muhammad's apprehensiveness was so strong that it left her unable to recall her own words and actions, beyond her general sense that she had been upset. Similarly, she stated, "Just the whole process of when I saw her [Broadnax] I was anxious. I knew it would [be] -- 'Sabrina, I need to see you in the office.' And that went on for several, several months." Tr. 101. While most of the quoted testimony relates to the September 2 incident, not to September 15, I believe it accurately reflects Muhammad's state of mind (toward Broadnax and Hillman) on the latter date as well. It is clear to me that this attitude infected what should have been a routine and non-threatening exchange with Hillman on September 15.

Looking at the events in hindsight, we can see that management's investigation of the September 14 complaint about an event in the telemetry room[10] revealed that while Muhammad had witnessed that event, she had no part in any improper conduct. It was in her

[10] Consistent with ¶18 of the Complaint, as well as the testimony of Broadnax and Hillman, I find that the telemetry room incident occurred the day before this conversation -- i.e., on September 14 -- rather than "maybe a week" before the conversation, as Muhammad testified. Tr. 80. As a threshold matter, I credit Broadnax's unchallenged testimony that the complaining physician reported the incident on the same day that it occurred. Tr. 135. In addition, Hillman's stepping in to perform a task that is normally within Broadnax's responsibilities -- a task that Broadnax herself could (and likely would) have performed later the same day -- indicates that management wanted to address the physician's complaint quickly. Tr. 131, 135, 185-86 ("[W]e have to turn them around within a 24-hour period[.]" Tr. 186.). For that reason, management would not have allowed a week, or even several days, to pass after the incident without investigating it.

interest to demonstrate that fact to Hillman and Broadnax, but her pre-existing fears (and perhaps a reluctance to implicate the real culprit, Ms. Archer) caused her to clam up and refuse to tell them anything, other than that she knew and saw nothing (which itself turned out to be untrue, as she conceded at the hearing. Tr. 79, 107). This, in turn, might have caused the managers to suspect Muhammad even more, but ultimately they uncovered the truth without Muhammad's help and cleared her of any wrongdoing. Hillman's request that Muhammad submit a report of contact, in these circumstances, was perfectly appropriate, but Muhammad did not see it that way at the time.

Based on the preceding two paragraphs, it is evident that I do not believe Muhammad's perspective and account of the conversations on September 15 were accurate or reasonable, and her testimony cannot be relied on. I do not believe that she lied, but simply that her perspective was clouded and unreliable. Most crucially to the 0578 charge, I do not believe that Hillman told her at any time that day that she was going to be given a verbal counseling. The evidence suggests instead that Hillman (holding the incident report from the physician in her hand as she approached Muhammad) asked her simply to provide a report of contact. Tr. 79, 87, 88, 131-32, 178. Muhammad -- the events of September 2 still fresh in her mind -- misinterpreted the document in Hillman's hand as a counseling memo that was about to be given to her and that she was going to be asked to sign, and as result, did not process the fact that she was simply being asked to provide a description of the telemetry room incident.

First of all, I find it unlikely that at the outset of their conversation, Hillman would tell Muhammad to expect a verbal counseling. Hillman had come to the area for the purpose of obtaining witness statements to address and resolve the incident report, not to counsel or correct the nurses; advising Muhammad immediately that she was being counseled would have been counterproductive toward that goal. Second, even if Hillman had decided at that point that Muhammad should receive verbal counseling, Hillman would not have divulged that information before Muhammad provided a statement regarding the events under investigation, because Muhammad's anticipation of verbal counseling would color any account of the incident that she might later provide. Third, as I noted earlier, Hillman was merely filling in for Broadnax in conducting the early stages of the investigation into the telemetry room incident. I do not believe that during a temporary assumption of Broadnax's normal duties, Hillman would also take it upon herself to decide, in the first instance, that one of Broadnax's employees should be counseled. Hillman surely possessed the authority to take such an action, but it would have been contrary to the normal procedure of following the chain of command, and contrary to the tenor of Hillman's testimony regarding her role that day. (After all, it was Broadnax who later decided to verbally counsel Archer concerning the incident, a fact that Hillman was unaware of.) Fourth, if Hillman had told Muhammad to expect verbal counseling, it makes no sense that, without an intervening event to prompt her to change course, Hillman would not only reverse herself just minutes later, but also deny that that she had ever mentioned verbal counseling. Indeed, the entire sequence of events and statements, as narrated by Muhammad, makes no sense. It would be bizarre for Hillman to tell Muhammad one minute that she's going to be counseled and then to deny she ever mentioned such counseling the next minute. While Muhammad may generally view her supervisors as irrational or hostile, the evidence suggests that Broadnax and Hillman were acting rationally throughout the events of this case, and that Hillman referred only to a

physician's incident report and told Muhammad only that she needed her to submit a report of contact about that incident. For all these reasons, I credit the testimony of Broadnax and Hillman that Hillman never told Muhammad that she would receive verbal counseling in connection with the telemetry room incident. *See* Tr. 132, 177.

II. DISCUSSION AND CONCLUSIONS

A. Positions of the Parties

General Counsel

The General Counsel argues that the Respondent discriminated against Muhammad on the basis of her protected activity, in violation of section 7116(a)(1) and (2) of the Statute, and improperly threatened her in violation of section 7116(a)(1) and (4). As to the latter allegation, the General Counsel alternatively asserts that the Respondent's threats constituted an independent violation of section 7116(a)(1). Applying the *Letterkenny* burden-shifting test[11] for analyzing claims of discrimination under both section 7116(a)(2) and (4), the GC insists that the Agency's treatment of Muhammad in both the September 2 and September 15 incidents violated the Statute.

With respect to the September 2 incident, the General Counsel notes initially that the Agency does not dispute that Muhammad engaged in protected activity in the months immediately before she was given the memo of verbal counseling on September 2: she participated in an informal grievance process, with the Union's assistance, in order to secure her promotion, and she assisted in the filing of the 0551 charge. The GC then argues that

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[11] The Authority outlined the analytical framework for resolving discrimination allegations under section 7116(a)(2) in *Letterkenny Army Depot*, 35 FLRA 113, 117-18 (1990), and subsequently held that the same analysis is applicable to allegations under section 7116(a)(4). *Dep't of Veterans Affairs Med. Ctr., Brockton and W. Roxbury, Mass.*, 43 FLRA 780, 781 (1991)(*VA Brockton*). This analytical framework places the initial burden on the General Counsel to establish by a preponderance of the evidence that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment. The "motivating factor" analysis may include considerations such as the timing of an action (*U.S. Dep't of Transp., FAA*, 64 FLRA 365, 368 (2009)), or the disparate treatment of an employee (*Dep't of the Air Force, AFMC, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 55 FLRA 1201, 1205 (2000) (*Warner Robins*)). In addition, "[t]he absence of any legitimate basis for an action," may form part of the proof of the GC's case. *U.S. Dep't of the Air Force, Aerospace Maint. & Regeneration Ctr., Davis Monthan AFB, Tucson, Ariz.*, 58 FLRA 636, 650 (2003) (*Davis Monthan*). Whether the GC has established a prima facie case is determined by considering the evidence on the record as a whole, not just the evidence presented by the GC. *Warner Robins*, 55 FLRA at 1205. If the GC makes the required prima facie showing, the respondent may rebut it by demonstrating that: (1) there was a legitimate justification for the action; and (2) the same action would have been taken in the absence of the protected activity. In addressing an agency's affirmative defense, the GC may seek to establish that the respondent's asserted reasons for taking the action were pretextual.

Broadnax's retaliatory motivation for counseling Muhammad is demonstrated by two factors: the suspect timing of the memo, and the absence of any legitimate basis for giving Muhammad the memo.

Broadnax had no legitimate basis for advising Muhammad that she "fail[ed] to provide adequate assistance to a fellow employee . . . which resulted in an injury to the fellow employee[,]" (Jt. Ex. 2) because Broadnax did not even purport to determine whether Muhammad had actually failed to do something, and whether that failure resulted in Dickerson's injury. In addition, Broadnax's conclusion that Dickerson and Muhammad were somehow equally responsible for Dickerson's injury is illegitimate, given the absence of supporting evidence or investigation. Since the incident occurred in the midst of Muhammad's efforts to get promoted and a few days after the 0551 charge (accusing Broadnax of interrogating Muhammad) was filed, this strongly suggests that Broadnax counseled Muhammad in retaliation for her protected activity.

Neither the counseling memo allegedly given to Dickerson, nor the memo given to Getties, bolsters the legitimacy of the September 2 counseling memo issued to Muhammad. As an initial matter, due to the Respondent's failure to offer a copy of the supposed Dickerson memo into evidence, the GC urges me to draw an adverse inference and to conclude that the memo never existed. Similarly, the GC asks me to find that the Getties memo "do[es] not exist" because the Respondent failed to produce the more-relevant Dickerson memo. GC Br. at 9. Further, the Getties memo is not comparable to Muhammad's memo because Getties's failure to assist in transferring a patient from a toilet to a scooter presented inherently greater risks to the patient than any supposed failures by Muhammad in repositioning an already-restrained individual in bed.

It has been said that "timing is everything" and may alone establish unlawful motivation. *See VA Brockton*, 43 FLRA 780, 787 (1991) (ALJ's Decision). Here, not only was Broadnax aware (because of her own participation) that Muhammad was pursuing an informal grievance process to obtain her promotion, but this counseling also occurred just nine days after the Union filed the 0551 charge, which identified both Muhammad and Broadnax by name.

The GC next argues that the memo of verbal counseling constitutes adverse treatment for purposes of section 7116(a)(2). The statement in the memo that Muhammad failed to perform her duties was not merely a reminder of safe patient handling procedures, as Broadnax claimed, but it reflected negatively on her performance. Moreover, although the parties' CBA specifies that counseling is not discipline, section 7116(a)(2) of the Statute prohibits discriminatory *treatment*, regardless of whether that treatment is disciplinary. That the CBA permits employees to grieve counseling is a recognition that counseling may adversely affect employees.

Because the GC has (in its view) established a prima facie case on the 0572 charge, the burden shifts to the Respondent to establish an affirmative defense. The first element of such a defense requires the Respondent to demonstrate that it had legitimate justification for

counseling Muhammad. But as discussed earlier, Respondent failed to make such a showing. Since *Letterkenny* requires that both elements of an affirmative defense be met, the Agency's failure to satisfy the first element is fatal to its case. But even if the Respndent's justification for the September 2 counseling memo is accepted, the sheer absurdity of Broadnax's explanations -- both for issuing a written memo for a "verbal" counseling, and for concluding that Muhammad failed to provide adequate assistance without conducting any actual investigation -- demonstrates that the proffered justifications are pretextual. GC Br. at 15.

With regard to the events of September 15 and the 0578 charge, the GC argues that the Respondent again failed to offer a legitimate justification for Hillman's actions; accordingly, the GC simply needs to establish a prima facie case of discriminatory treatment in order to prove that the Respondent violated section 7116(a)(4).

In addition to the protected activity that Muhammad engaged in prior to September 2, further protected activity occurred between September 2 and 15. On September 9, the Agency received notice of the filing of the 0572 charge and on September 13, the FLRA arranged with Agency officials to interview Muhammad on September 16 in connection with the 0551 charge. Thus, not only was Muhammad engaged in activity protected by section 7116(a)(4), but management was also undoubtedly aware of this activity, since Kielhack's email confirms that he cleared Muhammad's official time and the scheduling of her interview with "Muhammad's supervisor." GC Ex. 4.

Although Muhammad never actually received verbal counseling on September 15, Hillman's actions nonetheless constituted discrimination under section 7116(a)(4). As noted already, verbal counseling can adversely affect an employee, and a threat of verbal counseling is essentially a threat to hinder Muhammad's chances of advancement. *See, e.g.*, *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Florence, Colo.*, 59 FLRA 165, 166 (2003) (finding that investigating and proposing to suspend employee for protected activity violated section 7116(a)(2), even though no actual suspension occurred).

The timing of the threat makes it obvious that Hillman acted in response to Muhammad's protected activity. The threat occurred the day before Muhammad's scheduled interview, and only two days after Bartlett contacted the Respondent. In addition, given Hillman's testimony that she is not typically involved in the investigation or discipline of line nurses, the presence of both Broadnax and Hillman when the threat of verbal counseling was made supports an inference of discriminatory treatment, because it marks a departure from normal procedures that would amplify any threat communicated. GC Br. at 18.

Alternatively, the GC argues that Hillman's September 15 threat of verbal counseling constituted an independent violation of section 7116(a)(1), even if it didn't violate section 7116(a)(4). The standard for determining whether a manager's statement or conduct is coercive under section 7116(a)(1) is an objective one. The question is whether, under the circumstances, the statement or conduct tends to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement or conduct. *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Elkton, Ohio*, 62 FLRA 199, 200 (2007) (*FCI Elkton*).

Just two weeks before her encounter with Broadnax and Hillman, Muhammad had received a wholly unwarranted memo of verbal counseling. And then, on the day before her scheduled FLRA interview, they confronted her to threaten another wholly unwarranted counseling. With the events leading up to September 15 as context -- and especially considering how close it was to a scheduled FLRA interview -- being confronted by two managers who had teamed up to question an individual employee, in a departure from normal procedures, supports an objectively reasonable inference of coercion. "[E]ven [if] Hillman were truly only asking Muhammad for a report of conduct and Muhammad were somehow confused about" the counseling memo, such circumstances would tend to coerce or intimidate a reasonable employee. GC Br. at 19.

As a remedy for these unfair labor practices, the GC requests: (1) an order requiring the Respondent to remove the September 2 memo of counseling from all personnel records, supervisory files, and related systems of record, to the extent that the memo is still contained there; and (2) a Notice to All Employees to be posted and electronically distributed.

Respondent

Initially, the Respondent asserts a due process violation. The Complaint and the GC's pre-hearing disclosures not only suffer from a complete lack of specificity, but also contained so many inaccuracies, omissions, and misstatements that the Respondent was effectively denied fair notice of the charges against it. Due to these myriad deficiencies, the GC's factual allegations and legal theories evolved as the case progressed, thereby seriously prejudicing the Respondent's defense.

Testimony from the GC's own witnesses contradicted central factual allegations in the Complaint, and yet the GC did not attempt to correct -- or even acknowledge -- these errors. For example:

- Although ¶9 of the Complaint states that Muhammad's protected activity began in "late 2009 and early 2010" when she "sought the assistance of the Union," Muhammad, the Union's President, and the Union's Vice President all testified that Muhammad first sought the Union's assistance in June of 2010.

- Despite ¶9's allegation that Muhammad's protected activity included "filing a grievance about her performance appraisal," both Muhammad and Jackson unambiguously testified to the contrary. In fact, they said they were working to *prevent* filing a grievance, and the issue was Muhammad's promotion, not her performance appraisal.

- Whereas ¶18 alleges that, on September 15, Hillman asked Muhammad to sign "a written document reflecting a verbal warning," Muhammad testified in no uncertain terms that she never saw any document reflecting a verbal counseling, and she did not know why.

- The Complaint cites the Union's filing of the 0551 charge as part of Muhammad's protected activity but fails to note that this charge was later withdrawn by the Union.

The GC's prehearing disclosures did nothing to alleviate the defects of the Complaint. Because the Complaint was so inaccurate, the facts elicited at the hearing were substantially different than the assertions in the Complaint, and this deprived the Respondent of a meaningful opportunity to litigate the underlying issues. *See U.S. Customs Serv., S. Cent. Region, New Orleans Dist., New Orleans, La.*, 53 FLRA 789, 795 (1997) (*Customs*).

Moving to the substance of the 0572 charge, the Respondent argues that Broadnax issued the September 2 memo in the regular course of business, as a response to an employee injury and as a precautionary advisement to Muhammad. Nothing in the record indicates that Broadnax harbored any ill will toward Muhammad for seeking the Union's assistance or for being involved in filing the 0551 charge. If anything, Broadnax's voluntary participation in the informal meetings with the Union -- despite the absence of either a legal or a contractual obligation to do so -- supports the opposite conclusion. In addition, Jackson testified that Broadnax never seemed angry or upset about the meetings (Tr. 62), and Muhammad testified that Broadnax never opposed her promotion at the meetings (Tr. 102-03), all of which belies any claim that Broadnax retaliated against Muhammad because of those very meetings.

Even assuming that there was evidence that Broadnax's issuance of the memo had been motivated in some way by Muhammad's protected activities, the Respondent established an affirmative defense. Specifically, there were legitimate reasons for issuing the memo: to follow up on a workplace injury and to provide a precautionary advisement. Broadnax's issuance of substantially the same memo to Getties five months earlier, under nearly identical circumstances, demonstrates that Broadnax would have taken the same action in issuing a memo to Muhammad regardless of her protected activity.

With regard to the 0578 charge and the events of September 15, the Respondent notes that one of the factual allegations underlying the alleged ULP -- specifically, that Hillman asked Muhammad to sign a "written document reflecting a verbal warning" -- was refuted by Muhammad's own testimony. Resp. Br. at 15-16 (quoting Tr. 81). And as in the 0572 case, the testimony offered to demonstrate that a ULP occurred on September 15 actually proves the *absence* of any anti-union animus or discriminatory intent. Muhammad refused to cooperate in a legitimate workplace investigation concerning an event which she (eventually) admitted witnessing. Tr. 107. Her earlier protestations that she "had no idea" what had occurred and "had nothing to do with the incident," were therefore completely untrue. Tr. 79, 93, 107. If Hillman or Broadnax harbored any retaliatory motives, they quite legitimately could have disciplined Muhammad for her refusal to cooperate. That they did not, despite ample grounds to do so, establishes that their only concern on September 15 was completing an investigation, not finding ways to retaliate or discriminate against Muhammad.

Therefore, either on due process grounds or the lack of evidence supporting the GC's allegations, the Complaint in this case should be dismissed.

B. Analysis

1. No Denial of Due Process

Although it is true that some of the factual allegations of the Complaint turned out to be inaccurate, I do not agree that the Respondent's due process rights were violated here. The *Customs* decision (the only precedent cited by the Respondent on this issue) is not applicable to the facts of our case. The GC described the events of September 2 and 15 in the Complaint and alleged that the actions of Broadnax and Hillman (giving Muhammad a memo of verbal counseling and asking her sign a second one) violated section 7116(a)(1), (2), and (4) of the Statute. This is precisely what the GC argued at the hearing, even if the actual proof may not have matched the GC's allegations. I am not being asked to find any violations except those which were alleged. This is in sharp contrast with the facts of the *Customs* case, 53 FLRA at 795-97. Moreover, the Respondent's assertion that its defense was seriously undermined by the inaccuracies of the GC's allegations is rebutted by the fact that it has prevailed on the merits of the case. Respondent was able to address, and to successfully rebut, the allegations made against it.

2. No Prima Facie Case Established Under Section 7116(a)(2) or (4)

Section 7116(a)(2) of the Statute makes it an unfair labor practice for an agency "to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment." Section 7116(a)(4) makes it an unfair labor practice "to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter[.]" The Authority uses the *Letterkenny* test, as set forth earlier, to assess allegations of discrimination under both section 7116(a)(2) and (4). *See VA Brockton*, 43 FLRA at 781. Applying that framework, I find that the GC has not established a prima facie case of discrimination under either section 7116(a)(2) or (4), for either the September 2 or the September 15 incident.

As outlined earlier, the *Letterkenny* framework puts the initial burden on the GC to establish by a preponderance of the evidence that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the Agency's treatment of her in connection with hiring, tenure, promotion, or other conditions of employment.

The GC presented more than sufficient evidence to establish that Muhammad had engaged in protected activity under both section 7116(a)(2) and (4). Indeed, the Agency does not contest that Muhammad's participation in informal meetings to secure her promotion and her filing of unfair labor practice charges were protected. *See, e.g., U.S. Dep't of Veterans Affairs, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 58 FLRA 44, 55-56 (2002); *VA Brockton*, 43 FLRA at 787. I also accept the GC's assertion that the type of discrimination that the Respondent is charged with -- giving Muhammad a non-disciplinary notice of verbal counseling -- is an action "in connection with . . . [Muhammad's] conditions of employment." *Letterkenny*, 35 FLRA at 118. If Broadnax gave her the notice for improper reasons (her protected activity), it would violate section 7116(a)(2) and (4).

However, the GC's prima facie cases under both section 7116(a)(2) (the September 2 incident) and 7116(a)(4) (the September 15 incident) run aground on the second prong of the *Letterkenny* test. The GC has not demonstrated that the actions taken by Broadnax on September 2 and by Hillman on September 15 were motivated, even in part, by Muhammad's protected activity.

The September 2 Memo

The GC argues that timing, disparate treatment, and the absence of a legitimate justification show that Muhammad's protected activity prompted the September 2 memo. I find the timing argument unconvincing, and I reject the premise of the other two arguments entirely. To start, it is worth noting that there is no direct evidence linking Broadnax's action to Muhammad's protected activity: that is, there is nothing about the wording or some other aspect of the counseling memo that suggests Broadnax was angry at Muhammad for utilizing the Union to help her get promoted or for filing the 0551 charge. Although direct evidence of animus is not required to prove discrimination, and many successful discrimination prosecutions have been based solely on indirect or circumstantial evidence, it is, of course, more convincing to offer statements or actions of an agency official which demonstrate retaliation.

The timing of the memo does not correspond with Muhammad's protected activity nearly so well as it does with the completion of the incident report on Dickerson's injury. The likely reason that Muhammad was counseled on September 2 was that Broadnax was completing the paperwork related to Dickerson's workplace injury at that time. Broadnax had signed the Incident Report (Resp. Ex. 1) on August 31, and the hospital's safety officer signed it on September 2; the latter's action likely alerted Broadnax that she needed to "close the case" as soon as possible. Tr. 116. In contrast, Broadnax, Muhammad, and the Union had been engaged in meetings regarding Muhammad's promotion for a few months, and nothing in Union Vice President Jackson's testimony about those meetings supports the idea that Broadnax was upset with Muhammad. On the contrary, it appears that Broadnax was supportive of Muhammad's promotion, but the technical requirements for that promotion had not yet been completed. Indeed, Muhammad was promoted, on Broadnax's recommendation, in October. Moreover, while the Union had faxed a copy of the ULP charge in the 0551 case to the hospital director on August 24, there is no evidence to refute Broadnax's testimony that she was unaware of that charge until mid-September. Tr. 129. Thus, the timing of the September 2 memo was most plausibly dictated by the administrative imperative to process the paperwork relating to Dickerson's injury.

The General Counsel is correct that "[t]he absence of any legitimate basis for an action, . . . may form part of the proof of the General Counsel's case." *Davis Monthan*, 58 FLRA at 650. But here, the explanation that Broadnax articulated for issuing counseling memos to both Muhammad and Dickerson appears to be based on Broadnax's sincere and non-discriminatory convictions and practices regarding her supervisory oversight of her employees. Broadnax explained in her testimony that nurses should not suffer workplace injuries when moving patients if they execute their duties properly, and that since Muhammad was assisting Dickerson when Dickerson hurt her back, Muhammad needed to be counseled (along with Dickerson) "to be more careful." Tr. 124, 141-48. Broadnax did

not view her action as a value judgment on Muhammad's overall performance, nor did she view her role as assigning blame for the injury. The counseling memo was not a form of disciplinary action, but simply an attempt by Broadnax to make both Muhammad and Dickerson more aware of proper safety practices in the future.

As reflected in my questioning of Broadnax at the hearing (Tr. 141-48), it does appear that Broadnax's statement in the memo ("failing to provide adequate assistance to a fellow employee") assigns some degree of blame to Muhammad. But in light of the nondisciplinary context of the counseling memo, I consider it a legitimate, nondiscriminatory decision on Broadnax's part. It is not my role to micro-manage Broadnax or second-guess her choice of counseling techniques, but rather to determine whether Broadnax's issuance of the memo was motivated by Muhammad's protected activity. The amount of investigation warranted in a given situation should be proportionate to the seriousness of the action being taken. If Muhammad were being formally disciplined for the August 15 incident, I would likely consider it necessary for her supervisor to engage in a more detailed investigation of the workplace injury than Broadnax performed, and to assess whether Muhammad had actually contributed to the injury. But when, as here, the supervisor is simply trying to counsel the two employees to be more careful in order to avoid future injuries, and perhaps to assess whether they need additional safety training, I do not believe that a full investigation is necessary, nor that a superficial investigation is evidence of animus or pretext. Broadnax viewed her role on September 2 not as an investigator assigning blame, but as a head nurse trying to ensure the safety of her employees, and in this context, her manner of handling the incident was justifiable and unrelated to Muhammad's protected activity.

As for the GC's argument that Muhammad suffered disparate treatment, it is rebutted by the counseling memos issued to Dickerson and Getties, and by Broadnax's more general statement that she routinely used verbal counseling memos to document a wide variety of incidents that occurred under her supervision. While the GC tries to distinguish the Getties incident from the one involving Muhammad and Dickerson, on the basis that the moving of the patient in the Getties case posed a greater risk to the patient, the two incidents are actually quite comparable. The Getties memo primarily concerned the injury suffered by a fellow employee, much like the memos issued to Muhammad and Dickerson in our case; and regardless of the details of the two incidents, the Getties memo supports Broadnax's testimony that she issued such counseling memos as a routine technique to advise her employees of important issues. There is, therefore, no indication from the evidence that Broadnax singled out Muhammad for different treatment on September 2.

Looking at all of the evidence offered by both parties, I conclude that the General Counsel has not shown that Muhammad's protected activity was a motivating factor in the issuance of the September 2 memo. Accordingly, the GC has not made a prima facie case of discrimination, and as the Authority stated in *Letterkenny*, in such situations "the case ends without further inquiry." 35 FLRA at 118. Since the evidence does not establish that the Agency's treatment of Muhammad on September 2 violated section 7116(a)(2), the allegations in the Complaint stemming from Case No. WA-CA-10-0572 must be dismissed.

The September 15 Encounter

In Section II.D.4 of this decision, I evaluated the various accounts of the September 15 encounter and explained what I believe actually occurred and what was said there. Most importantly, I explained my conclusion that Muhammad was not told that she would be given a verbal counseling memo, nor was she threatened with receiving one. Hillman simply asked Muhammad to provide a written statement of what transpired the day before in the telemetry room -- a request that was perfectly appropriate under the circumstances. Hillman did not indicate or suggest that Muhammad would be counseled; when Muhammad expressed concern that she was being counseled, Hillman corrected her and said she just needed to explain what happened. Tr. 132. Although Muhammad may have been justifiably concerned that she might subsequently be counseled or disciplined if she had done something wrong the day before,[12] Hillman was certainly not making such a judgment at the time of this conversation. Muhammad simply misunderstood Hillman, and Muhammad's misunderstanding cannot be converted into Hillman's discrimination.

The GC's reliance on Hillman's personal involvement as a sign of the Agency's effort to intimidate Muhammad is misplaced. Hillman explained that while she, as the second-level supervisor, does not normally investigate incident reports such as the one filed on September 14, she needed to do so on this occasion, since Broadnax had been off duty that morning,[13] and such incident reports must be followed up within 24 hours. Tr. 131, 178, 185-86. After Hillman asked both Muhammad and Archer to submit statements, she turned the matter back over to Broadnax. Tr. 136-37, 180-81. Hillman did not threaten or coerce Muhammad, nor did she discriminate against Muhammad in any way. Hillman asked Archer to provide a report of contact regarding the September 14 incident, just as she asked Muhammad. Indeed, if the Agency had been looking for pretexts to counsel Muhammad, the latter's refusal to cooperate in the investigation of the incident presented a perfect opportunity to do so. Broadnax's decision to overlook Muhammad's refusal is a further rebuttal of any discriminatory or retaliatory motive on the Respondent's part.

Because I have found that no threat of counseling or other form of discrimination occurred, all of the General Counsel's other arguments necessarily fail. Since there was no discrimination, the discrimination could not have been motivated by Muhammad's protected activity. As the GC has not satisfied the second element of a prima facie discrimination case under *Letterkenny*, I find that the GC has failed to establish that the Respondent's treatment of Muhammad on September 15 violated section 7116(a)(4). Consequently, the allegations in the Complaint stemming from Case No. WA-CA-10-0578 must be dismissed.

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[12] Indeed, Ms. Archer was given a counseling memo for her conduct in the telemetry room incident. Tr. 137.

[13] Although Broadnax had arrived at the hospital and was at the nursing station when Hillman spoke to Muhammad, Hillman did not realize that Broadnax was present. This does not detract from Hillman's credibility regarding what she asked of Muhammad.

3. No Independent Violation of Section 7116(a)(1)

With regard to the September 15 encounter, the GC argues in the alternative that even if the Respondent did not violate section 7116(a)(4), the conduct of Broadnax and Hillman on that date constitutes an independent violation of section 7116(a)(1). As mentioned in the statement of the GC's position, the standard for determining whether management's statements or conduct violates section 7116(a)(1) is an objective one. The question is whether, under the circumstances, the statement or conduct tends to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement or conduct. *See FCI Elkton*, 62 FLRA at 200; *Dep't of the Army Headquarters, Wash., D.C.*, 29 FLRA 1110, 1124 (1987). Most of the GC's arguments for finding an independent violation of section 7116(a)(1) are dependent upon Hillman having "threatened" Muhammad with verbal counseling. As I have already found that no such threat occurred, I need not reanalyze any of the GC's arguments regarding an independent violation of section 7116(a)(1) -- except for one.

The GC argues that "even [if] Hillman were truly only asking Muhammad for a report of conduct and Muhammad were somehow confused about" the counseling, the circumstances of this conversation would tend to coerce or intimidate a reasonable employee. GC Br. at 19. This argument requires closer evaluation. Applying the objective standard for evaluating 7116(a)(1) allegations, I must determine whether Hillman's requesting a report of contact -- with Broadnax nearby, just two weeks after Broadnax issued the September 2 memo of verbal counseling -- would tend to coerce or intimidate a reasonable employee in Muhammad's position. Although I stated earlier that, in this situation, Muhammad did indeed feel intimidated and threatened by Hillman's request, it is precisely for this reason that an objective, rather than a subjective, legal standard is used for assessing such charges.

As I indicated in Section II.D.4 above, I do not find Muhammad's reaction or response to Hillman's request to be reasonable. Some employees may be intimidated by the mere sight of a second-level supervisor on the nursing floor, but this doesn't make her presence unlawful. It is evident that the September 2 counseling memo from Broadnax and the ongoing discussions regarding Muhammad's promotion had left Muhammad feeling "anxious" and that management was "constant[ly] calling me in the office for one thing or another." Tr. 101. But supervisors are entitled, indeed required, to oversee the work of their employees and to follow up on outside complaints such as the one received on September 14. Every supervisory inquiry is not the Inquisition. The GC's repeated attempts to make the efforts of Broadnax and Hillman to do their routine work appear ominous and overbearing are unpersuasive. In the circumstances of this case, it is Muhammad's reaction that appears unreasonable, not Hillman's. While Muhammad may have been entitled to request the presence of a Union representative if Hillman had tried to interview her about the events of September 14, there was nothing coercive or improper in Hillman's simple request that Muhammad write a report of contact about the incident. To infer coercion from a

supervisor's mere request to provide a witness statement would seriously complicate a routine (and often essential) management endeavor, while providing no appreciable gain in protecting rights under the Statute. Therefore, I find that the portion of the Complaint alleging an independent violation of section 7116(a)(1) must also be dismissed.

Based on the above findings and conclusions, I conclude that the General Counsel has not proven that the Respondent violated § 7116(a)(1), (2), or (4) of the Statute. Accordingly, I recommend that the Authority issue the following Order:

ORDER

IT IS ORDERED that the Complaint be, and hereby is, dismissed.

Issued Washington, D.C., May 24, 2013

RICHARD A. PEARSON
Administrative Law Judge