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

OALJ 15-25

FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
FORREST CITY, ARKANSAS

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 0922

CHARGING PARTY

Case Nos. DA-CA-12-0338
DA-CA-12-0339
DA-CA-12-0340
DA-CA-12-0341
DA-CA-12-0342
DA-CA-12-0343

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For the General Counsel

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Ricky Galloway
For the Respondent

Jay Westbrook
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

When Chaplain John Johnson came to the Federal Correctional Complex at Forrest City to supervise the Religious Services Department, he thought that it would be most efficient for the religious services assistant to work in the same part of the complex as he did. Norman Vaden, the incumbent religious services assistant who had been working for several years in a different part of the complex, thought that a locally negotiated agreement restricted management's ability to change his work location and shift. Over several months, Johnson delayed forcing a change, but he sought several times to convince Vaden to accept a voluntary transfer. When Vaden continued to resist a voluntary move, citing the negotiated agreement and enlisting the Union to aid him, Johnson finally ordered him to move involuntarily.

In the wake of Vaden's reassignment, his Union alleged that Johnson made unlawfully coercive statements in trying to persuade him to transfer, and that Johnson ordered the transfer in retaliation for Vaden's protected activity. While I agree that Johnson improperly threatened Vaden, the charge of retaliation confuses cause and effect. Vaden engaged in protected activity in order to resist a personnel action that Johnson had sought all along. The threats were unlawful, but the reassignment was not.

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 May 24, 2012, the American Federation of Government Employees, AFL-CIO, Local 0922 (the Union, Charging Party, or Local 0922) filed six unfair labor practice (ULP) charges against the Federal Bureau of Prisons, Federal Correctional Complex, Forrest City, Arkansas (the Agency, FCC, or Respondent). After investigating the charges, the Dallas Regional Director of the FLRA consolidated the charges and issued a Complaint and Notice of Hearing on September 27, 2012, alleging that on three occasions the Respondent violated § 7116(a)(1) of the Statute by making statements to employee Norman Vaden that interfered with Vaden's right to engage in protected activity, and that the Respondent violated § 7116(a)(2) of the Statute by reassigning Vaden in reprisal for his protected activity. The Respondent filed a timely Answer to the Complaint on October 22, 2012, admitting some of the factual allegations but denying that it had committed an unfair labor practice.

A hearing was held in this matter on December 6, 2012, in Memphis, Tennessee. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The FLRA's General Counsel (GC) and the Respondent filed post-hearing briefs which I have fully considered.

Based on the entire record,[1] including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent, an activity within the U.S. Department of Justice, operates a correctional complex in Forrest City, Arkansas, which houses over 4,000 inmates in medium-security, low-security, and minimum-security facilities (commonly known as the Medium, the Low, and the Camp, respectively). Tr. 168. The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. GC Exs. 1(i), 1(k). The American Federation of

[1] Although no motion was made to correct the transcript, I note that at line 3 of page 173 of the transcript, "supervisor" should actually be "predecessor"; at line 16 of page 196, "March" should be "May"; at line 4 of page 230, "I" should be "it"; and I hereby correct the transcript.

Government Employees, AFL-CIO (AFGE), is the exclusive representative of a nationwide bargaining unit of employees of the Federal Bureau of Prisons (BOP); AFGE and BOP are parties to a collective bargaining agreement covering the nationwide unit. The Charging Party, a labor organization within the meaning of § 7103(a)(4) of the Statute, is an agent of AFGE for the purpose of representing employees at the FCC. *Id.*

This case involves employees in the Religious Services Department of the FCC, and the events played out primarily between September 2011 and May 2012. In September 2011, John Johnson was transferred to the FCC as its new supervisory chaplain, who supervises the other chaplains and one religious services assistant, Norman "Trey" Vaden. The religious services assistant performs clerical and administrative duties, helping the chaplains in their work, ordering and paying for supplies, but performing no pastoral care or preaching. Tr. 13, 171. When Chaplain Johnson came to Forrest City, there were only two other chaplains at the complex: one (Chaplain Collier) was assigned to the Medium and the other (Chaplain Ford) worked at the Low and also covered the Camp.[2] Vaden was also working at the Low.[3] Tr. 24. In Johnson's experience, the supervisory chaplain normally worked at the highest-security facility in the complex, so he set up his office at the Medium.[4] Tr. 168-69.

In January of 2008, a couple of months before Vaden was hired, Local 0922 and Forrest City management signed a Religious Services Department Compressed Schedule Agreement (Compressed Schedule Agreement). Jt. Ex. 1 at 1. Among other things, it gives bargaining unit employees in the department (including nonsupervisory chaplains) the option of working four ten-hour days or five eight-hour days a week. It provides that "[B]argaining Unit Staff will be assigned to either the MEDIUM, LOW, or the CAMP. Staff will be maintained at their assigned location . . . with rotating schedules." *Id.* As reflected in the sample schedule that was attached to the agreement, when two employees are assigned to a facility, they have different shift hours and days off, which they rotate every six months.[5] *Id.* at 2; Tr. 14-16.

The crucial issues in this case focus on several conversations that Johnson and Vaden had over the first eight months of Johnson's tenure at Forrest City, and Johnson's ultimate decision to reassign Vaden from the Low to the Medium. Since the two protagonists gave starkly different accounts of those conversations, I will first identify those facts on which they essentially agree, and then I will compare their respective testimony to highlight how they differ.

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[2] The Low and the Medium are in separate buildings, about 4000 feet apart. Tr. 104. It is about a five-minute walk from one to the other, or a two-minute van ride. Tr. 43, 44.

[3] Vaden was hired in 2008 and worked at the Low continuously until May 2012. Tr. 12, 14, 16.

[4] According to Johnson, the previous Supervisory Chaplain at the FCC had worked primarily out of the Low, because of some personality issues in the department, but this was not the norm within the Bureau of Prisons. Tr. 172-73, 234.

[5] Since Vaden worked with one bargaining unit chaplain at the Low, he was slotted (at least for scheduling purposes) in either the "Chaplain 1" or "Chaplain 2" position, even though he is not actually a chaplain, and he rotated schedules with Chaplain Ford every six months. Tr. 14-15; Jt. Ex. 1 at 2.

Undisputed Testimony

Between October 2011 and April 2012, Johnson met with Vaden and discussed the possibility of moving Vaden from the Low to the Medium on at least two (and more likely at least three) occasions. The first was in approximately early October, shortly after Johnson arrived at Forrest City. Johnson said he made a point of spending time talking to all of his employees, in order to get to know them and learn what concerns they had. Tr. 17, 174. He asked Vaden why he was working at the Low, rather than with the supervisor at the Medium, and Vaden explained that the prior supervisory chaplain had spent most of her time at the Low and wanted him there too. Tr. 173-74. Johnson raised the possibility of moving Vaden to the Medium at a later time, once a new chaplain was added to the department, but this was not an immediate possibility, and Vaden said that he would "entertain the idea . . . when the time came." Tr. 20-21, 175-76.

By March, employees in the Religious Services Department not only knew that a third nonsupervisory chaplain was coming to Forrest City, but they knew his name. *See* GC Ex. 2. Johnson had mentioned to the other chaplains that when the new chaplain arrived, he might move Vaden from the Low to the Medium, and move Chaplain Collier from the Medium to the Low, but he had not advised Vaden of this plan. Tr. 32-34, 214-16. Vaden heard about this from an inmate who worked in the chapel, and he became upset that he had been left out of the discussion of the issue. Tr. 32-34. He sent an email to Johnson on March 9, complaining of the discourtesy and stating, "I would like to sit down and talk to you at your earliest convenience to discuss this at length, prior to officially being moved. Again I'm not opposed to switching as we had previously discussed, but would like to get clarification and assurance of a few things first." GC Ex. 2. Johnson sent Vaden a response on March 11, apologizing for allowing his "thoughts" to become a topic of staff discussion before any decision had been made, and agreeing to "talk more soon." GC Ex. 3. Vaden sent the Union President, Jeff Roberts, a copy of the two emails; expressed his concern at being reassigned to the Medium; and said he would let Roberts know if he needed Union representation. Tr. 37, 100. Roberts, in turn, advised Vaden to show Johnson the Compressed Schedule Agreement with regard to the issue of reassignment. Tr. 100.

Johnson and Vaden did meet to talk about the reassignment on or about April 4 and again on or about April 25. Tr. 39, 56. Johnson could not recall the dates or number of such discussions, or precisely what was said, but he agreed that at least one such meeting occurred in April, and that Vaden had asked if he could "go to the Union" to discuss the possible reassignment. Tr. 182-84. Vaden phoned the Union president immediately after his April 4 meeting with Johnson and complained that Johnson was planning to reassign him in contradiction to the Compressed Schedule Agreement. Tr. 54-55, 100-02. Both Vaden and Roberts then sent emails to Johnson explaining that the Union was representing Vaden concerning this matter. Tr. 55, 102.

On April 10, Johnson and Associate Warden Harold Taylor sent a letter to Union President Roberts, notifying him of the Agency's intention to reassign Vaden to the Medium and to reassign Chaplain Collier from the Medium to the Low, as of May 14. R. Ex. 1. The letter also advised the Union to "provide any concerns with the Agency's decision" to the

Human Resources Manager by April 27. *Id.* The letter was delivered by email to Roberts on April 10, but it does not appear that Roberts ever read it.[6] R. Ex. 2. The Union did not respond to the letter. Tr. 194.

On approximately April 25, Johnson met with Vaden to discuss the employee's annual performance appraisal. Tr. 56, 196. After Johnson explained the criteria that he uses for rating employees, Vaden recalls that Johnson returned to the subject of reassigning him to the Medium. Tr. 57-58. Johnson could not recall what, if anything, they discussed at that time, other than Vaden's performance appraisal. Tr. 196. Vaden again contacted Roberts immediately after this conversation. Tr. 60, 102-03.

On May 15, Johnson came to Vaden's office and told him he needed to move his office to the Medium by the next day. Vaden complied with the order and has worked at the Medium since that date. Tr. 61, 63-64.

Vaden's Testimony

When Johnson first met Vaden in early October 2011, they discussed the different assignments and work schedules of the employees in the department, and it appeared to Vaden that Johnson was unaware of the Compressed Schedule Agreement. Tr. 18. He showed Johnson the first page of the agreement (Jt. Ex. 1 at 1), and Johnson expressed his dissatisfaction with several aspects of it. Tr. 18-22. Johnson said he didn't like that it restricted his ability to assign employees to different areas of the FCC, he didn't like a four-day workweek, and he didn't think that chaplains should belong to a union. *Id.* He felt that when employees work a compressed schedule, it is more difficult to provide adequate coverage to the institution; that all chaplains should be required to work Sundays to cover the religious services; and that chaplains are "held to a higher standard and shouldn't be tied to a union." Tr. 19, 21, 22. Johnson also said that he would like to transfer Vaden to the Medium. Tr. 19. When Vaden referred to the Compressed Schedule Agreement, Johnson said that "there was always a technicality or a loophole and that ultimately he would win, that it was in my best interest to go along with him, and I needed to be a team player and sometimes that meant doing what was best for the department, not myself as an individual." Tr. 19-20. Johnson told him "that he didn't want to fight, but if there was a fight that the Union wanted that he was ready to go and prepared to go for the jugular." Tr. 20. Vaden felt that Johnson was pressuring him to change his schedule and agree to transfer to the Medium. Vaden didn't agree to a transfer, but he indicated he'd be willing to entertain the idea at a later time. *Id.*

[6] The Union appears to have had an ongoing disagreement with management about sending official notices to the Union from a "generic" Human Resources email box (as R. Ex. 2 was sent), rather than from an identified management official. Tr. 142-51. Although the record is not clear on this point, this may explain why Roberts apparently did not read the April 10 letter. Tr. 150-51.

According to Vaden, his April 4 conversation with Johnson began in a relaxed manner but eventually became more threatening. Johnson said he'd had time to think about their initial conversation, and he wanted to know "what it would take for me to be willing to transfer to the Medium." Tr. 40. When asked what he meant, Johnson said, "what would be your ideal schedule irregardless of rotating and the agreement[?]" Tr. 46. When it was clear that it was not feasible to have Friday through Sunday off, Vaden was receptive to having Saturday through Monday off, but he believed that the Compressed Schedule Agreement required everyone to rotate days off. Tr. 47. Johnson said, "let [me] worry about that . . . that the Union didn't run his department, that he did." Tr. 47-48. Vaden replied that he still needed to speak to the Union about it, prompting Johnson to tell him he didn't need to get the Union involved. Tr. 48. Initiating his next comment with "Off the record[,]" Johnson told Vaden that he was "going to make the wrong people mad by pursuing this and that I didn't want to be seen as a troublemaker." Tr. 48-49. Johnson posed a "hypothetical" situation in which two employees applied for a job "and one was seen as a troublemaker by going to the Union and causing problems and one was a team player, so to speak, who did I think would get the job?" Tr. 49. When Vaden still appeared intent on consulting the Union, Johnson told him "if I was insisting on going to the Union to not go to Jeff Roberts. . . because Jeff had it out for him." Tr. 48.

On April 25, Johnson gave Vaden his performance appraisal, and after discussing it, Johnson changed the subject to transferring Vaden to the Medium. Tr. 57. Vaden reminded him that Union President Roberts had asked Johnson to deal with the Union on this issue, but Johnson related another hypothetical situation, in which an outside employer contacts him about an employee. In such a situation, Johnson said he could not, in good faith, give an employee a good recommendation if the employee was a "troublemaker" or someone who "hadn't done everything that he had asked of him." Tr. 58-59. Johnson also made reference to being a "team player" and that Vaden needed to do what was best for his career. Tr. 59. The meeting ended at that point, and Vaden reported what Johnson had said to Roberts. He learned subsequently that Roberts had met with Associate Warden Taylor about Johnson's conduct. Tr. 60.

Vaden didn't hear anything further about being reassigned until May 15, when he was ordered by Johnson to move his things to the Medium by the following day. Vaden was unaware that Agency management had sent a notice to the Union on April 10 regarding his reassignment. Tr. 81-82. Vaden asked Johnson "what about the [Compressed Schedule] agreement?" Johnson simply responded, "Per management, you have 24 hours to report to the Medium or else." Tr. 61. Then, as he was leaving the area, Johnson told Vaden "that this had became [sic] personal." *Id.*

Johnson's Testimony

Johnson testified that when he first arrived at Forrest City, his intent was simply to listen to employees and "assess the situation," but not to make any immediate changes. Tr. 174-75. He found it "a little odd[]" that Vaden was working at the Low, but Vaden explained that the previous supervisory chaplain had also worked at the Low. Tr. 173-74,

206-07. Vaden further told him, "I don't have any problem going to the Medium."[7] Tr. 175. According to Johnson, Vaden did not show him the Compressed Schedule Agreement at that initial discussion. Tr. 207-08. Not long afterward, Johnson mentioned his discussion with Vaden to his own supervisor, Associate Warden Taylor. Taylor advised Johnson that if he wanted, he could move Vaden to the Medium "today." Tr. 176. But Johnson said he wanted to "see what's what, how things are working," before making any changes. *Id.*

In the ensuing months, Vaden complained to Johnson "that he felt like he never had a chance to talk to me. That I was always 'coming and going,' because my office was at the Medium and he was at the Low." Tr. 182. As a result of their intermittent contact and discussions, Johnson was unable to recall how many times he discussed with Vaden the possibility of reassigning him to the Medium, nor could he recall precisely what he said in which conversation. *Id.*

Notwithstanding the vagueness of his memory of specific conversations, Johnson was emphatic that he never discouraged Vaden from contacting the Union or Jeff Roberts. He recalled one occasion when Vaden asked if he could "go to the Union" regarding an issue, and Johnson told him, "No, there's no problem with that. You're free to do so." Tr. 184. When asked, more generally, whether he ever made "any anti-Union comments whatsoever to Mr. Vaden[,]" Johnson said, "No, I would not do so. The master agreement says we're supposed to have a constructive and collaborative arrangement between management and Union . . . and I believe we should." *Id.*; *see also* Tr. 186. At another point in his testimony, Johnson said, "I haven't threatened anybody, nor would I. It's just not who I am." Tr. 219. He also denied telling Vaden that he needed to be a "team player" if he wanted a good recommendation or other assistance. Tr. 241-42. While he had told Vaden that his goal was for the department staff to work together as a team, and he had offered to help Vaden in career advancement, "[t]here was never tit for tat; if you do this, I'll do this." Tr. 242.

Johnson did, however, recall telling Vaden that he would "go for the jugular." Tr. 199. Johnson explained that it was "in the context of in the rough and tumble, I'm not the kind of person to back down. I'll go for the jugular. It was not meant in a physical realm." *Id.* He believes he made the comment when Vaden said "something about you're going to get into it with the Union or something. And it was like, okay, I'm not afraid of the rough and tumble, you know, and if I do, I'll go for the jugular." Tr. 210.[8] Subsequently, Johnson's words were relayed to Roberts who apparently took them as a personal threat. When Associate Warden Taylor later met with Johnson and Roberts about Johnson's alleged

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[7] Johnson could not be certain whether Vaden said this in their initial conversation or a later one. Tr. 175.

[8] Johnson could not recall the subject of the discussion in which Vaden said he might "get into it with the Union[.]" Tr. 210-12. He didn't think it related to reassigning Vaden to the Medium, but more likely "it was in reference to his personal schedule." Tr. 212. He explained, "when it really looked like the move was going to become a reality, Mr. Vaden began to be concerned about the schedule, which is why we put . . . in this Notice . . . that his schedule would not change . . . ." *Id.*; *see also* Tr. 238-39.

comments, Roberts told Johnson, "We can step outside, the two of us." Tr. 199-200. This exchange prompted Taylor to issue "cease and desist" letters to both of them, to stop "this kind of activity and we weren't to have any contact with each other for a while." Tr. 200.

In April, Johnson made the decision to reassign Vaden from the Low to the Medium and conveyed that decision in the April 10 notice to the Union. R. Ex. 1. He explained his rationale as follows:

> [P]art of the goal here was to try and have the assistant with the supervisor, because the supervisor does the majority, 90, 95 percent, biggest bulk of the administrative work is done by the supervisor. So it made sense to have the religious services assistant wherever the supervisor was because you could give work, receive work back, and know the status of anything as opposed to having to go over to another location to find out. It just made good, efficient sense and Mr. Vaden seemed to agree in our initial conversation.

Tr. 193. Elsewhere, Johnson explained the decision-making process regarding the reassignment as follows:

> We looked at it upon arrival, mentioned it to see Mr. Vaden's feelings, mentioned it to Mr. Taylor to get his input, did a little homework. I can't honestly say when the definitive decision was made, but it kind of kept progressing. Every light seem[ed] to be green; this seemed to be good all the way around, so we just kept moving forward.

Tr. 204-05. Chaplain Collier had also requested to move from the Medium to the Low, and a new chaplain was arriving, so Johnson decided to have all the changes occur at the same time. Tr. 190. When the Union submitted no response to the April 10 letter, Johnson prepared to implement the changes in May, as he had indicated in the letter. In his testimony, Johnson indicated that on May 17 or 18, he stopped in to Vaden's office at the Low and instructed him to report to the Medium as of the next day, and that Vaden complied.[9] Tr. 198.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel asserts that this case involves "a classic violation of Section 7116(a)(1)." GC Br. at 13. In addition to making comments to Vaden in the past that he didn't believe religious services employees should belong to a union and that he wouldn't

[9] At the hearing, Johnson was not asked whether he told Vaden that this had become "personal," as Vaden had testified. Tr. 61.

hesitate to go for the jugular if the Union challenged him on his decisions, Supervisory Chaplain Johnson committed an unfair labor practice when he made it clear that Vaden should not go to the Union and that going to the Union would have negative repercussions on Vaden's career. While some of Johnson's comments may have been worded in the form of analogies, the meaning of those comments was nonetheless clear and coercive. *U.S. Customs Serv., Pacific Region*, 47 FLRA 459, 465-66 (1993); *Dep't of the Treasury, Internal Revenue Serv., Louisville Dist.*, 11 FLRA 290, 298 (1983). A reasonable person hearing Johnson's comments to Vaden would understand that Johnson would be more responsive to assisting Vaden in his career goals if he went along with Johnson's plans and avoided the Union. In other words, Johnson interfered with Vaden's statutory right to consult the Union. Not only did Johnson make unlawful, coercive statements to Vaden, but the GC asserts that he also reassigned Vaden to the Medium in retaliation for retaining the assistance of the Union, in violation of § 7116(a)(2) of the Statute.

The GC argues that Vaden's testimony was corroborated by Roberts, that it was more credible than Johnson's testimony, and that I should not believe Johnson's denial of making the coercive comments attributed to him. While the former two witnesses testified consistently and clearly, Johnson's testimony "is riddled with holes, memory lapses, inconsistencies, and implausible explanations." GC Br. at 8. For instance, Johnson's descriptions of his meeting with Roberts and Taylor were evasive (*see, e.g.*, Tr. 200, 231) in attempting to portray the meeting as an exchange of cross-complaints between Roberts and Johnson (i.e., Roberts taking offense at Johnson's "jugular" comment and Roberts challenging him to "step outside" to settle their differences). According to the GC, these were two separate incidents, and Johnson simply merged them together to justify his own improper statements. GC Br. at 9. In contrast to Johnson's testimony, Vaden and Roberts's "flow naturally together[]" and establish a logical and coherent timeline of events and causation. *Id.* at 11.

Applying the analytical framework of *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*), the GC asserts that Vaden had engaged in protected activity prior to being reassigned from the Low to the Medium; that Vaden's protected activity was a motivating factor in Johnson's decision to reassign him; and that the Respondent failed to establish either that it had a legitimate justification for moving him or that it would have taken the same action in the absence of his protected activity. Therefore, the reassignment constituted unlawful discrimination.

Vaden engaged in protected activity when he invoked the Compressed Schedule Agreement as limiting Johnson's ability to reassign him and when he then took his concerns to Union President Roberts. Johnson himself acknowledged that Vaden had asked if he could consult the Union, and that Roberts subsequently advised him in writing that he was representing Vaden concerning the reassignment. Tr. 226. The GC argues that Vaden's resistance to the reassignment "antagonized Johnson." And "[s]ince Vaden did not volunteer to move as Johnson desired, he made it a personal issue and made sure that Vaden knew he could make good on his previous threats." GC Br. at 15. According to the GC, Johnson

departed from normal procedure in drafting the April 10 notice letter to the Union himself, an action that occurred days after his April 4 meeting with Vaden, when Vaden insisted on consulting the Union and Johnson warned him that this would mark him as a troublemaker. Johnson's unlawful motivation was even more clearly demonstrated by his remark to Vaden on May 15 that the issue had become "personal." Tr. 61.

Finally, the GC submits that despite Johnson's stated rationale for the reassigning Vaden, the Respondent never showed why it was necessary to do so. Rather, the "evidence demonstrates that the work assignments worked fine. Any assertion that Vaden's location at the Medium was a necessity is negated by the length of time that Vaden worked at the Low before he was moved." GC Br. at 16. The Respondent thus failed to carry its burden of rebutting the GC's prima facie case.

Respondent

The Respondent contends that the GC failed to prove that Johnson made coercive statements or that he discriminatorily reassigned Vaden. Respondent submits that Johnson's account of the disputed facts should be believed over Vaden's, because his "account of the events was convincing, straightforward, and truthful." R. Br. at 8. Johnson had no motive to threaten Vaden or to retaliate against him for Union activity. Moreover, Johnson's testimony was corroborated in part by Vaden's own account and by the April 10 notice to the Union, which demonstrated that the decision to reassign Vaden was the product of long deliberation.

Regarding the reassignment itself, the Respondent asserts that Vaden was moved from the Low to the Medium for no reason except the needs of the department. R. Br. at 6. Vaden himself agreed that the subject of moving him to the Medium had come up in his first conversation with Johnson, in October 2011, and that they had discussed it several times before it was effectuated. Rather than being a hasty decision triggered by Vaden consulting the Union, it was "the result of a slow and deliberate seven-month thought process." *Id.* Most of Vaden's workload flows directly from the supervisory chaplain, and because of this, Johnson felt it made more sense to have Vaden's office near his own. Finally, there is no evidence that Johnson retaliated against Vaden in any other manner. Specifically, Johnson gave Vaden a favorable performance evaluation in April and never expressed any problems with Vaden's work. Therefore, Johnson's explanation of the move should be credited.

ANALYSIS AND CONCLUSIONS

Johnson Made Coercive Statements to Vaden to Discourage Him from Consulting the Union

This portion of the case turns almost entirely on the credibility of the witnesses. If Johnson indeed made the comments attributed to him by Vaden, then I have little choice but to find that Johnson (to paraphrase the text of § 7116(a)(1) of the Statute) "interfered with, restrained, and coerced" Vaden in the exercise of his right to consult the Union and obtain its assistance regarding his possible reassignment. As the GC notes, and the Respondent doesn't dispute, the test for evaluating a supervisor's statements under this subsection is an objective

one; in other words, it doesn't depend on either the subjective intent of the speaker or the subjective interpretation of the person to whom the words are directed. "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." *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Elkton, Ohio*, 62 FLRA 199, 200 (2007).

Under this standard, several of Johnson's alleged comments (if made) violate the Statute. On April 4, Johnson asked Vaden what schedule would be attractive enough to convince him to transfer voluntarily to the Medium. When Vaden suggested that the Compressed Schedule Agreement might restrict their actions, Johnson allegedly advised him to "let him worry about that, that he would deal with the Union and that the Union didn't run his department, that he did." Tr. 47-48. When Vaden said he wanted to talk to the Union anyway, Johnson pressed the point: "he questioned me on why I was wanting to get involved – get the Union involved. He told me that it wouldn't be a Union issue, that this was something we could work out." Tr. 48. When this approach was unsuccessful, Johnson "told me if I was insisting on going to the Union to not go to Jeff Roberts. . . because Jeff had it out for him." *Id.* Johnson continued by saying that Vaden "was going to make the wrong people mad by pursuing this and that I didn't want to be seen as a troublemaker." Tr. 48-49. Johnson did not use analogies or hypotheticals[10] to make his point here; rather, he directly discouraged Vaden from going to the Union at all, and from going to Roberts in particular. Going to the Union would get Vaden branded as a troublemaker. The Respondent does not even attempt to defend these statements, but instead it insists that Johnson did not make them. This was a prudent choice by the Respondent, because the statements cannot be defended. If Johnson said them, he and the Agency committed an unfair labor practice.

The same can be said of the statements Johnson allegedly made on April 25 and May 15. After giving Vaden his annual performance appraisal, Johnson explained the criteria he used for appraisals. He gave a hypothetical situation in which an outside employer contacted him about "someone who went to the Union and caused problems." Tr. 58. Johnson allegedly said "he couldn't in good faith . . . give that person a good recommendation because that person hadn't done everything that he had asked of him." Tr. 58-59. As with the hypothetical situation posed on April 4, this comment clearly labels employees who go to the Union as troublemakers, and it threatens such employees with less favorable treatment in relation to career advancement. Finally, when Johnson ordered Vaden on May 15 to begin reporting to the Medium the next day, he left the room telling Vaden that the dispute had become "personal." Tr. 61. If indeed Johnson made this comment, it can only be objectively viewed as a reference to Vaden's attempts to protest his reassignment, and as a statement that such attempts had personally angered Johnson. In this context, they were a further warning to Vaden to be more cooperative and to avoid the Union.

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[10] Vaden does say that Johnson went on to hypothetically ask him which person would be more likely to get a job, if the choice was between a "team player" and a "troublemaker[.]" Tr. 49.

In evaluating Johnson's alleged statements as possibly violating § 7116(a)(1), I have looked only at those statements attributed to him within the six months prior to May 24, 2012, when the ULP charges were filed. Although Vaden described comments made by Johnson in their initial discussion in October 2011, which could be interpreted as showing anti-union hostility (specifically, the "go for the jugular" remark and his statement that religious services employees shouldn't be tied to a union), those comments are too distant in time to be the basis for a complaint or an unfair labor practice finding. 5 U.S.C. § 7118(a)(4)(A). While those statements may be relevant in evaluating whether Johnson made subsequent coercive statements, they themselves cannot be considered as a ULP.

The first and most obvious difference between Vaden's testimony and Johnson's is that Vaden's testimony is at least partly corroborated by Union President Roberts. Roberts first heard from Vaden and about his possible reassignment in March, when Vaden spoke to him and copied him on the emails between himself and Johnson. GC Exs. 2 & 3; Tr. 37, 100. When he spoke to Roberts in March, it does not appear that Vaden mentioned anything to him about any coercive comments by Johnson; instead, the conversation seemed to focus on Vaden's potential transfer and the Compressed Schedule Agreement. Tr. 37, 100. Roberts testified that he next heard from Vaden on April 4, when Vaden told him that Johnson: (1) was still trying to convince him to transfer to the Medium; (2) claimed he didn't need to follow the Compressed Schedule Agreement; (3) told Vaden not to go to the Union and especially not to go to Roberts; and (4) "said he's going to go for my jugular."[11] Tr. 100-01. In addition to advising Vaden how to respond to Johnson, Roberts told Vaden that he would notify Johnson in writing that the Union was representing him in this matter, and Roberts did so. Tr. 102. Johnson confirmed that he received this email from Roberts. Tr. 226. Roberts testified that he next heard from Vaden on April 25, immediately after Vaden had met again with Johnson. In that phone conversation, Vaden told Roberts that Johnson had described two hypothetical situations: one suggesting that he could not give a good job reference to an employee who goes to the Union, and the other suggesting that if two people apply for a position, the employee who had gone to the Union would not get it. Tr. 103. The April 25 phone call from Vaden caused Roberts to contact Associate Warden Taylor and request a meeting about Johnson's conduct. The three men did meet within a day or two, and Roberts objected to Johnson refusing to follow the Compressed Schedule Agreement and making the "jugular" comment. Johnson conceded that he did say this, but said that Roberts was taking it out of context. Tr. 104-05. Hearing this, Taylor took Johnson out of the room and yelled at him separately; Taylor then returned to Roberts alone and told him that Johnson would apologize to him later. Tr. 106-07. Johnson did go to Roberts's office later that day and apologized. Tr. 108, 210-11. Finally, Roberts corroborated that immediately after Johnson told Vaden on May 15 to move his office to the Medium, Johnson said, "This has become personal." Tr. 110.

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[11] It's not clear from Roberts's testimony here whether he understood Johnson to be threatening to go for Vaden's jugular or Roberts's. It is evident from both Vaden's and Johnson's testimony that Johnson was not referring to Roberts at all, but it appears that Roberts may have subsequently interpreted it as referring to him. This may explain some of the animosity between Roberts and Johnson, but for purposes of the issues in this case, it is not material.

In other words, immediately after each of the conversations in which Johnson allegedly made unlawful comments to Vaden (i.e., April 4, April 25, and May 15), Vaden phoned Roberts and reported what Johnson had said. I recognize that Roberts's testimony about Johnson's statements is hearsay, and thus it should only be accepted with great caution. He did not hear Johnson make those statements directly; he was simply describing what Vaden told him. But what is significant about Roberts's testimony is that it confirms that Vaden was sufficiently upset about what Johnson had said and that he felt the need to report those comments to a Union official. Roberts's testimony does not prove that Johnson used the precise language ascribed to him, but it corroborates the essential outline of Vaden's testimony and shows that Vaden was upset at Johnson's comments at the time they were made, not simply later, after Johnson forced him to move to the Medium. In fact, Vaden and Roberts differed slightly in their description of Johnson's comments in some respects – the "jugular" comment was not made about Roberts; Roberts said that Johnson posed two hypothetical situations to Vaden on April 25, while Vaden said one hypothetical was used on April 4 and one on April 25 – but these are minor and do not undermine the credibility of Vaden's testimony. It is Vaden's testimony that must be weighed directly against Johnson's, but the fact that Vaden was telling Roberts about Johnson's threats immediately after they were made, and that Vaden described Johnson's comments to Roberts in essentially the same terms as Vaden's testimony at the hearing, buttresses the credibility of Vaden's account significantly.

Roberts also offered direct testimony about statements made to him by Johnson, and this further supports the General Counsel's case. While Roberts did not hear Johnson's comments to Vaden, he did speak to Johnson at least once, a day or two after April 25. Vaden had just told him about Johnson's latest statements, and Roberts asked the Associate Warden to correct the problem. Roberts testified that during the meeting with Johnson and Taylor, Johnson first denied that there was a Compressed Schedule Agreement, then insisted that chaplains should not be in a union, because they had a higher calling. Tr. 104-05. Then, after admitting that he had made the "jugular" remark and apologizing to Roberts, Johnson largely negated that apology by saying, "I do not apologize for what I said. I apologize for the words that I chose." Tr. 108. Johnson defended his resistance to the Compressed Schedule Agreement by repeating that "I don't believe that staff assigned to the chaplaincy should be allowed to be in the Union, nor be beholden to a Union. They have a higher calling. And that's the work of their worship, their faith." Tr. 109.

In the face of these statements and admissions, Johnson's testimony at the hearing rings hollow. He insisted that he never discouraged Vaden from going to the Union; on the contrary, he told Vaden he was free to do so. Tr. 184. He said he would never threaten an employee, and he believes in having a constructive relationship with the Union. Tr. 184, 186, 219. And while he had offered assistance to Vaden in advancing his career, he never made it conditional on Vaden doing anything. Tr. 241-42. I simply cannot accept these denials. Johnson never disavowed saying that union membership was inconsistent with the religious obligations of chaplains and their assistants, and he used his views on this point to refuse to follow a collective bargaining agreement. And while Johnson's "jugular" comment was

likely made more than six months before the filing of the charges, it is clear that he continued to follow that philosophy. I fully accept Johnson's insistence that he never meant the comment literally, "in a physical realm" (Tr. 199); but even interpreting it metaphorically, it still reflects an inappropriately aggressive response to a union's objection to his decisions.[12] *See* Tr. 210. Supervisors and managers are free to oppose the claims of a union, but they are not free to go for an employee's (or a union's) "jugular" when they invoke a labor agreement. Unfortunately, this attitude seems to have carried over to Johnson's response to Vaden's refusal to accept a transfer. It suggests to me that when Vaden told him the agreement restricted his ability to move employees or change their schedules permanently, Johnson encouraged him to be a "team player," to do what was asked of him, and that the failure to do so would make the wrong people mad. After having told Vaden that he would respond vigorously to any attempt by the Union to oppose his moves, I don't believe that Johnson told him he was free to consult them. Especially in light of the antagonism that already existed between Johnson and Roberts, I think it was fully in character for Johnson to discourage Vaden from going to the Union, and particularly to avoid Roberts.[13]

Similarly, Johnson's negative approach to challenges to his authority was reflected in his attempts to explain his statement that in "the rough and tumble" he would "go for the jugular." Tr. 210. He related his remark to the fact that after having "a pleasant conversation" with Vaden, "all of a sudden I get a ULP." Tr. 208. But the ULP charges were filed on May 24, long after the crucial conversations with Vaden on April 4 and 25; whatever resentment Johnson may have incurred by the filing of the charges cannot explain why he viewed union-management exchanges as reasons to go for the (metaphoric) jugular. In the same vein, Johnson described the issue of the Compressed Schedule Agreement as "explosive." Tr. 207-08. Nowhere else in the record is there any indication that the existence or binding nature of this agreement was opposed by the Respondent, but when Vaden and Roberts used it as a basis for opposing Vaden's transfer, Johnson first noted that there are always technicalities for evading such agreements (Tr. 19); he then argued that he didn't have a signed copy (Tr. 104-05); and he finally claimed the agreement was five pages rather than two[14] and "became an explosive issue later on." Tr. 207-08. The only reason I can find on the record for Johnson describing the agreement as "explosive" is that he viewed any challenge to his decision as explosive.

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[12] Although Chaplain Johnson is Protestant (Tr. 181), he might benefit from the Catholic doctrine of transubstantiation and convert the blood of his enemy into the wine of fellowship. But it is not my job to preach.

[13] I credit Johnson's testimony that at a meeting with Roberts, Roberts challenged him to go outside and fight. Tr. 200. The record makes it impossible to pinpoint a date for this incident, especially since Johnson himself was so vague and uncertain about the dates of any of the events in this case. I do not believe that it occurred in the late April meeting with Taylor, but at an earlier date, and the pre-existing hostility between Johnson and Roberts influenced Johnson's response when Vaden said he wanted to consult the Union concerning any reassignment. While Roberts's own aggressive conduct toward Johnson was improper, it did not give Johnson license to steer employees away from the Union in general or Roberts in particular.

[14] The agreement was admitted as Joint Exhibit 1 and is two pages in length. Since this is a joint exhibit, I interpret that as a recognition by the Respondent that the agreement did not have five pages.

For all these reasons, I credit Vaden's testimony that Johnson: (1) discouraged him from going to the Union in general and to Roberts in particular; (2) suggested to Vaden that going to the Union or otherwise resisting a transfer would anger management and brand him as a troublemaker, which in turn would adversely affect his career prospects; and (3) told Vaden, once the transfer was effectuated, that Vaden had made the dispute "personal." All of these statements would reasonably intimidate an employee and deter that employee from seeking the assistance of a union. By making these statements, Johnson and the Respondent violated § 7116(a)(1) of the Statute.

Johnson's Reassignment of Vaden Was Not Discriminatory

After having gone to such lengths to explain why I credit Vaden's testimony over Johnson's, and why I find that Johnson tried to prevent Vaden from consulting the Union or otherwise resisting reassignment, it may seem paradoxical for me to find that the reassignment itself was lawful. But any skepticism on this point is erased upon noting just how long a time Johnson spent in trying to convince Vaden to go along with the move voluntarily. A proper consideration of all witnesses' testimony makes it clear that Johnson came to believe, almost as soon as he arrived at Forrest City, and before Vaden had engaged in any protected activity, that Vaden should be moved to the Medium. He felt it was prudent to wait and consider the views of his employees, to consult the Associate Warden, and to see "how things are working" before making a final decision, but it is clear that Johnson favored moving Vaden from the start, and that he ultimately carried out that decision independent of Vaden's consultation with the Union.

The parties recognize that the *Letterkenny* framework is applicable here. In *Letterkenny*, the Authority explained first that the General Counsel always bears the burden of establishing, by a preponderance of the evidence, that an unfair labor practice has been committed. 35 FLRA at 118. In cases brought under 7116(a)(2), the GC must demonstrate (1) that the employee against whom allegedly 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. If the GC does so, it has established a prima facie case of unlawful discrimination. The Respondent, in turn, can rebut the prima facie case by establishing, by a preponderance of the evidence, the affirmative defense that (1) there was a legitimate justification for its actions, and (2) the same action would have been taken in the absence of protected activity. *Id.* at 118-19.

The GC has undoubtedly proven that Vaden engaged in protected activity. On several occasions, Vaden showed Johnson the Compressed Schedule Agreement and cited it as restricting management's ability to change an employee's assigned location, shift schedule, or days off. The Authority has held that when an individual employee asserts a right emanating from a CBA, the employee is engaging in protected activity under § 7102 of the Statute. *U.S. Dep't of Labor, Emp't & Training Admin., S.F., Cal.*, 43 FLRA 1036, 1039 (1992). On

April 4, Vaden went further and told Johnson he intended to talk to the Union about a potential reassignment, and he then did so. Both Vaden and Roberts notified Johnson in writing on April 4 that the Union would be representing him in this matter. The GC has thus satisfied the first element of its burden.

As for the second element – showing that Vaden's protected activity was a motivating factor in Johnson's treatment of him – that is a question fraught with considerable doubt. As is evident from my analysis of Johnson's anti-union (and anti-Roberts) sentiment in the preceding section of this decision, Johnson didn't think employees in his department should be members of a union; he advised Vaden that employees were more likely to get good treatment from him if they didn't get a reputation as troublemakers by going to the union; and after he finalized the decision to transfer Vaden, he told Vaden that this was "personal." On the other hand, I have already noted that Johnson had felt from the start of his tenure that Vaden should work near him at the Medium, and he proceeded slowly but inexorably toward effectuating that plan. He wanted Vaden to transfer voluntarily, but when Vaden resisted Johnson's inducements, I don't see any evidence that Johnson accelerated his decision or did anything retaliatory to punish Vaden for his resistance. Thus, it isn't clear that Vaden's protected activity was a motivating factor at all in Johnson's decision-making process. But because Johnson so clearly acted improperly in making coercive statements to Vaden and in trying to intimidate Vaden from resisting him, I must give the General Counsel the benefit of the doubt here. Vaden's resistance clearly annoyed Johnson – his *coup de grace* of telling Vaden "this is personal" drove home Johnson's animosity. Since this statement was made as Johnson directed Vaden to move his office, it is impossible to entirely separate Vaden's protected activities from Johnson's decision. Accordingly, I find that those protected activities were a motivating factor in the decision.

The burden then shifts to the Respondent to show that it had a legitimate justification for moving Vaden and that it would have taken the same action in the absence of any protected activity. I believe the Respondent has met this burden.

The legitimate justification for Johnson's decision is obvious. The religious services assistant works under the direct supervision of the supervisory chaplain. While the assistant performs many duties in helping the other chaplains conduct and arrange religious services, he still works most closely with the supervisor, and it is most logical and efficient for the supervisor to be immediately available to the assistant, and vice versa. Tr. 193. Johnson testified that the assistant and the supervisor work in close proximity to each other in most BOP facilities, and this corresponds with the way organizations function in most employment settings. Indeed, Vaden worked in the Low from 2008 to 2011 because the supervisory chaplain was also located there. It was unusual for the supervisory chaplain to have her primary office anywhere except at the facility with the highest security, so Vaden's arrangement from 2008 to 2011 was the exception, not the norm.[15] When Johnson came to

[15] Not insignificantly, even when the supervisory chaplain deviated from the norm in working out of the Low, she seems to have made sure that her assistant was near her.

Forrest City in 2011, he returned to the normal agency practice of locating himself at the Medium, so it should have come as no surprise to anyone in the Religious Services Department that Vaden might have to move to the Medium.

The General Counsel offered no evidence whatever to rebut Johnson's explanation for his decision. The GC perfunctorily asserts that the "evidence demonstrates that the work assignments worked fine." GC Br. at 16. But it offers no evidence to support that assertion. Indeed, as I just noted, for most of the time that Vaden worked at the Agency, he worked in the same location as the supervisory chaplain. The only time the assistant and the supervisor worked in separate locations was from September 2011 to May 2012, and there is no evidence to suggest that this arrangement "worked fine." Johnson testified that Vaden complained on several occasions that Johnson was always "coming and going," preventing them from interacting meaningfully. Tr. 182, 236-37. Vaden did not dispute this assertion in his own testimony. The two facilities are nearly a mile apart. I therefore accept the Respondent's explanation for wanting to move Vaden and find that it has met the first portion of its burden of proof.

I also conclude that even if Vaden had engaged in no protected activity whatever, Johnson would have transferred him to the Medium – probably even earlier than May 15. Vaden himself recognized, in his very first introductory conversation with Johnson, that Johnson was already preparing him for the possibility of moving to the Medium. Vaden testified that by the end of that first conversation, he "felt that [Johnson] was coercing me or really pressuring me to change my schedule and agree to go to the Medium." Tr. 20. In his own testimony, Johnson suggested that initially he simply "mentioned it to see Mr. Vaden's feelings," without actually suggesting any action at that time (Tr. 204-07), but I think Johnson was down-playing his assertiveness on this point. More importantly, I believe Vaden and Johnson were saying essentially the same thing here – that Johnson planted the idea of a transfer in their initial conversation, but he consciously wanted to wait awhile and observe how things were working, before making a decision, even though both men knew Johnson's preference. Additionally, it made the most sense to move Vaden to the Medium when the new chaplain arrived, and for a few months nobody knew quite when that would happen. Tr. 239. By March, however, it was clear to Vaden that Johnson had decided to move him to the Medium, because even inmates were talking about Vaden going to work at the Medium. GC Ex. 2. Johnson discussed the subject with Vaden again, in more detail, on April 4, and it was six days after this meeting that he sent written notice to the Union that Vaden would be reassigned. R. Ex. 1. As Johnson described in his testimony, "I can't honestly say when the definitive decision was made, but it kind of kept progressing. Every light seem[ed] to be green; this seemed to be good all the way around, so we just kept moving forward." Tr. 205. Rather than rebutting Johnson's explanation, Vaden actually confirms it.

The question then arises whether the proximity in time between Vaden's declaration on April 4 that he would consult the Union about his transfer and the Agency's notification on April 10 that it intended to reassign Vaden is itself evidence of Johnson's unlawful intent. The Authority has long held that the proximity of a personnel action to protected activity may support an inference of unlawful motivation, but it has also stated that such proximity is not

conclusive proof of a violation. *See U.S. Dep't of Veterans Affairs Med. Ctr., Leavenworth, Kan.*, 60 FLRA 315, 319 (2004), and cases cited therein. I see no persuasive evidence in our case, however, that Johnson acted in any way differently once Vaden told him he would be contacting the Union. Vaden's protected activity did not spur Johnson to retaliate by transferring him; instead, it was Johnson's stated desire to transfer him that spurred Vaden to engage in protected activity.

It is important to note here that many of the coercive comments made by Johnson occurred after April 10, the date the Agency officially notified Vaden and the Union of its intent to transfer him. The General Counsel introduced evidence regarding Johnson's conversation with Vaden on April 25, but by that time Johnson had already made his decision to transfer Vaden and had notified him of the decision; so Vaden's protected activity on April 25 certainly did not influence Johnson's decision.[16] Moreover, prior to the April 4 conversation, the only protected activity Vaden had engaged in was showing Johnson the Compressed Schedule Agreement. The most significant change that had occurred between October and April was that it had become official by late March that Chaplain Hall had been selected as the new hire; his arrival date had been determined, and the department could therefore begin to be organized with a relatively full complement of employees. *See* GC Exs. 2 & 3. Chaplain Collier clearly had been waiting to move from the Medium to the Low, an action that would be offset by Vaden's move in the opposite direction, and it is apparent that accommodating Collier's request was a significant factor in Johnson's decision as well. When Vaden sent his email to Johnson on March 9, it appeared to him that Johnson had already made the decision to have Vaden and Collier switch locations. GC Ex. 2. Indeed, Vaden did not directly oppose the move. He said, "Per our conversation when you first arrived I'm not opposed to going to the Medium, but I do have several reservations and I'm currently having second thoughts." *Id.* He detailed his reservations and asked to meet directly with Johnson to discuss them further. He closed by repeating that he was not against moving, "but would like to get clarification and assurance of a few things first." *Id.* Johnson replied by email two days later, apologized that some "thoughts off the top of my head" had been repeated prematurely as finalized decisions, and promised to involve Vaden "before decisions of significant magnitude are made." GC Ex. 3.

When Johnson met with Vaden on April 4, Johnson opened by asking "what it would take for me to be willing to transfer to the Medium." Tr. 40. When Vaden asked what he meant, Johnson "referenced my schedule. He said what would be your ideal schedule irregardless of rotating and the agreement; what would be the schedule you would want?" Tr. 46. After Vaden identified a schedule that he would like, Johnson tried to get him to commit to accepting a transfer on that basis, but Vaden indicated he still wanted to discuss it with the Union, because he thought the agreement might not permit this. Tr. 47-48.

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[16] It appears that Vaden was still unaware on April 25 that Johnson had sent the Union notice of his reassignment. Tr. 81-82.

This evidence demonstrates to me that while Johnson had not made a final decision by March 11 to reassign Vaden, it was a virtual certainty. Johnson did not want to admit to Vaden that the decision had been made without involving him directly, but it was clear not only to Johnson but also to Vaden that the move was going to take place. Significantly, at this crucial moment when both employees and inmates seemed to "know" that Vaden was moving to the Medium, Vaden did not choose to object to the move itself: he said he was not opposed to the move but had "reservations" and "second thoughts," which focused on his schedule, his duties at the new location, and whether he might be able to go back to the Low in the future. GC Ex. 2. When they met to discuss these issues on April 4, Johnson wanted to nail down the deal, to iron out the remaining details that would enable Vaden to accept the decision voluntarily. The question was not "if" Vaden would move, but under what conditions. Vaden continued to hesitate and wanted to consult the Union, but there is no indication in the record that the final outcome was going to be anything other than his transferring to the Medium.

In this light, Johnson's notification letter to the Union on April 10 was the next logical step in the process, especially if Vaden was still hesitating to give his consent. It is quite clear that the wheels had been steadily moving, from the time Johnson arrived at the institution until April 4, in the direction of transferring Vaden. Vaden was indeed free to get the Union involved at that time, in order to file a grievance or take any other action they deemed appropriate, but there was nothing left for Johnson to consider. It does not appear to me that Vaden's involvement of the Union on or before April 4 played any meaningful part in Johnson's decision. Johnson clearly wanted to obtain Vaden's consent to the move, but he was prepared to act on the decision with or without that consent. To the extent that Johnson may have believed the Compressed Schedule Agreement did actually restrict his authority to reassign Vaden or give him a fixed schedule, getting Vaden's consent in advance would have certainly been preferable.[17] But if Vaden was not prepared to agree, there was no reason for Johnson to hesitate further. Chaplain Hall was going to be arriving at Forrest City in the near future, Collier was interested in switching locations, and Vaden's transfer was the missing piece of this puzzle. Vaden's invocation of the Compressed Schedule Agreement and consultation of the Union did not cause Johnson to change his decision or to accelerate his decision-making process. Johnson likely would have finalized the decision in March or on April 4, if Vaden had consented to the move; Vaden's hesitation simply required Johnson and the Respondent to provide the Union with notice and an opportunity to bargain – an opportunity that the Union failed to take advantage of.

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[17] I have not commented on the meaning of the Compressed Schedule Agreement, because it is not material to the outcome of the case. Looking at the face of the document ("Staff will be maintained at their assigned location . . . with rotating schedules.") (Jt. Ex. 1 at 1), Vaden may indeed have had a legitimate reason to believe that he could not be involuntarily reassigned or given a fixed schedule. But that was an issue to be resolved between the Union and the Respondent. In this case, the Respondent is charged with discriminatorily reassigning Vaden, not with making a unilateral change in the conditions of his employment.

Accordingly, I conclude that the Respondent has demonstrated that it would have reassigned Vaden from the Low to the Medium even if Vaden had not engaged in protected activity. Therefore, it has established an affirmative defense to its action, and this portion of the Complaint is dismissed.

REMEDY

Having found that the Respondent violated § 7116(a)(1) of the Statute by making coercive statements, it is appropriate that the Respondent be ordered to cease and desist from such activity and to post a Notice to Employees. The Authority held in *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014), that such notices should ordinarily be distributed electronically, as well as posted on bulletin boards, and this remedy is appropriate in this case.

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

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Federal Bureau of Prisons, Federal Correctional Complex, Forrest City, Arkansas, shall:

1. Cease and desist from:

(a) Making statements to bargaining unit employees which interfere with, restrain, or coerce employees in the exercise of their rights to form, join, or assist any labor organization, including the right to act on behalf of the American Federation of Government Employees, AFL-CIO, Local 0922 (the Union), in the resolution of employment problems, freely and without fear of penalty or reprisal.

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

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

(a) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Warden, and posted and maintained for 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. In addition to physical posting of paper notices, the Notice shall be distributed to bargaining unit employees electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with employees by such means.

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

Issued, Washington, D.C., April 14, 2015

RICHARD A. PEARSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

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

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT make statements to bargaining unit employees which interfere with, restrain, or coerce employees in the exercise of their rights to form, join, or assist any labor organization, including the right to act on behalf of the American Federation of Government Employees, AFL-CIO, Local 0922 (the Union), in the resolution of employment problems, freely and without fear of penalty or reprisal.

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

_____
(Agency/Activity)

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

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Dallas Regional Office, Federal Labor Relations Authority, whose address is: 525 Griffin Street, Suite 926, Dallas, TX 75202, and whose telephone number is: (214) 767-6266.