



FEDERAL LABOR RELATIONS AUTHORITY
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DEPARTMENT OF VETERANS AFFAIRS
CHARLES GEORGE VETERANS AFFAIRS MEDICAL
CENTER, ASHEVILLE, NORTH CAROLINA

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 446, AFL-CIO

CHARGING PARTY

Case No. WA-CA-12-0731

Melissa K. Owens
For the General Counsel

Winnie Jordan Reaves
For the Respondent

Philip A. Player
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

Three Agency officials and a Union steward are gathered at the back of a large room during a break in a regional labor-management training conference. They are “chitchatting . . . a nothing conversation. . . [t]rying to make time,” as one participant described. Tr. 172. The conversation drifts to how their work lives tend to spill over into their home lives, and one participant mentions that he’s taking courses so that he can apply for promotion to Nurse III. A manager says that that will be difficult, since he spends most of his time on Union work. He asks her what she means by that, and she cites the difficulty of meeting the Agency’s qualification standards for the position.

Was this an unlawful threat to the employee, a warning that continued Union activity would jeopardize his nursing career? Or was it a lawful statement of fact, an appropriate explanation that the Agency's standards for promotion are difficult to meet if you are not devoting most of your work time to nursing? That is the central issue posed by this case. After sifting through the various accounts of exactly what was said, and the context of those words, I conclude that the employee could not reasonably have drawn a coercive inference from them. Therefore, they were not unlawful.

STATEMENT OF THE CASE

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

The American Federation of Government Employees, Local 446, AFL-CIO (the Union), initiated this proceeding by filing an unfair labor practice charge on August 27, 2012, against the Department of Veterans Affairs, Charles George Veterans Affairs Medical Center, Asheville, North Carolina (the Agency or Respondent). GC Ex. 1(a). After investigating the charge, the Regional Director of the FLRA's Washington Region, on behalf of its General Counsel (GC), issued a Complaint and Notice of Hearing on February 15, 2013, alleging that an Agency manager violated § 7116(a)(1) of the Statute by telling an employee that he would never be eligible for promotion to Nurse III as long as he was a Union official. GC Ex. 1(b). The Respondent filed its Answer to the Complaint on March 8, 2013, denying that the manager made the statement attributed to her, or that her statement violated the Statute. GC Ex. 1(c). Both the GC and Respondent filed motions for summary judgment, which were denied. GC Exs. 1(g), 1(h) & 1(l).

A hearing in this matter was held on April 23, 2013, in Asheville, North Carolina. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The GC and Respondent filed post-hearing briefs,¹ which I have fully considered.

Based on the entire record,² including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

¹ Respondent's motion to substitute a corrected page 30 of its brief is granted.

² After the hearing, counsel for the Respondent submitted two affidavits from witnesses (one as an attachment to its brief and one filed subsequently) to show errors in the transcript. The General Counsel did not dispute the proposed corrections; I treat the affidavits as a motion to correct the transcript, and I hereby grant the motion, correcting the transcript as follows:

Page 191, line 25 is corrected to read, in pertinent part, "That's not what I heard."
Page 218, line 2 is corrected to read, in pertinent part, "No."

FINDINGS OF FACT

The Respondent is an agency under § 7103(a)(3) of the Statute. GC Exs. 1(b) & 1(c). The American Federation of Government Employees (AFGE) is a labor organization under § 7103(a)(4) of the Statute and is the exclusive representative of a nationwide bargaining unit of employees of the Department of Veterans Affairs (VA). *Id.* The Union is an agent of AFGE for the purpose of representing bargaining unit employees of the Respondent. *Id.* The AFGE and the VA are parties to a nationwide collective bargaining agreement that covers Respondent's employees.

Thomas Jeffery has worked for the Agency as a Registered Nurse since 2007. He was hired by the VA as a Nurse I, and in 2009 he was promoted to Nurse II, based on the review and recommendation of the Nurse Professional Standards Board (NPSB).³ Tr. 67, 70; R. Ex. 6. Since 2011, he has served as chief nursing steward for the Union, and in this capacity he is designated to work 100% official time; but in order to maintain his nursing certification and competency, he teaches one class per month and works one eight-hour shift per pay period on the Medical Intensive Care Unit, where he is supervised by Nurse Manager Linda Bugg. Tr. 68, 90-91, 158-59.

The career path for registered nurses runs from Nurse I (Levels 1, 2, and 3) to Nurse V, but since the Nurse IV and V grades are for managerial positions and by appointment, nearly all nurses at a VA hospital are in the Nurse I through III grades. Tr. 40-45, 50; *see also* R. Ex. 2 (the portion of the VA Handbook that contains the qualification standards for each grade) and R. Ex. 16 (training slides showing the RN career path and qualification standards). Unlike at most organizations, professional employees (such as registered nurses and physicians) at the VA are not promoted on the recommendation of their supervisor or immediate chain of command, but rather by peer review committees like the NPSB: Tr. 225-26; R. Ex. 4 at 1. Nurses do not compete for promotion to Nurse II and III, but rather they are evaluated individually by the Board to determine whether they meet the qualification standards for the next grade. Tr. 39-40, 49, 225-26, 227-29.

The Asheville medical center's NPSB consists of about fifteen members: it is chaired by one of the hospital's Chief Nurses (Nurse IV), has about five or six Nurse IIIs as members, several Nurse IIs, and sometimes a few Nurse Is, Level 2 or 3. Tr. 46-47, 227. A subcommittee of three to five members is then appointed to consider each applicant. Tr. 11.

³ The NPSB is a peer review system that evaluates (among other things) the professional conduct and competence of registered nurses, pursuant to 38 U.S.C. §§ 7421-7422, and reviews the applications of all registered nurses eligible for promotion. Tr. 11, 16-18; R. Ex. 4 at 1. Pursuant to 38 U.S.C. § 7422(b) and (d), the actions of boards such as the NPSB are not subject to collective bargaining, and the FLRA lacks jurisdiction to review such actions. *See, e.g., U.S. Dep't of VA, Veterans Affairs Med. Ctr., Asheville, N.C.*, 57 FLRA 681 (2002).

The primary document considered by the Board is the nurse's annual "proficiency," which is the functional equivalent of a performance appraisal but uses criteria and methods unique to the VA, and which is prepared collaboratively by the nurse and his or her supervisor. Tr. 39-40, 56-58, 157, 195, 225-26. In the proficiency, the employee has the opportunity to include specific information and data demonstrating how he or she meets the qualification standards for each grade. Tr. 24-26, 227-28; R. Ex. 2 at 4-12; R. Ex. 3 at 2-5. That document is reviewed and approved by the Chief Nurse in the employee's chain of command. Tr. 157. When a nurse is considered for promotion to the next grade, the NPSB evaluates whether the nurse meets the qualification standards for that grade, and its recommendation is forwarded to the Nurse Executive and the Medical Center Director for final approval. Tr. 228-29. A nurse who is not promoted is given the opportunity to submit additional information and to appeal back to the Board. Tr. 11.

On August 1, 2012, several employees and managers from the Respondent attended a regional labor-management training conference in Charlotte, N.C., on the topic of how 38 U.S.C. § 7422 affects labor-management partnerships. Tr. 73-75, 140-41. Mr. Jeffery attended with two other nursing stewards; the Agency officials attending were Cynthia Griffin, Chief Nurse of Operations and Acute Care; Ms. Bugg, Nurse Manager of the Medical ICU; and Human Resource Specialist Linda Johns. Tr. 75, 142. The conversation that is the focus of this case occurred during a break between two sessions of the training. While the four witnesses agree on the general contours of that conversation (that during the session Jeffery had been sitting near the front of the room with other employees, and that during the break he had gone to the back of the room, where the management officials had been sitting), each of them described it slightly differently. I will, therefore, summarize separately the testimony of each of the four participants in the discussion.

Jeffery's Version: Jeffery testified that he was standing at the back of the room during the break, having a conversation with Bugg about the difficulties of taking work problems home. Tr. 77-78. He said he was taking some courses for his bachelor's degree, so that he could apply for Nurse III. Tr. 78. At that point, Chief Nurse Griffin, who was standing nearby, said:

[A]s long as, you know, I worked in the Union that I couldn't get my Nurse III. So I just kind of looked at her quizzically like, what do you mean? She said, "Well, as long as you're a union official, you'll never get your Nurse III."

Id.; see also Tr. 104-05. Shortly thereafter, Jeffery and Bugg left the room, at which time Bugg said to him, "I can't believe she said that to you." Tr. 78.

Griffin's Version: Griffin testified that during the break, she was talking to Bugg and Johns about how their work lives spill over into their home lives, when Jeffery walked over and joined the conversation. Tr. 147-48, 180. Jeffery commented that he would like to be promoted, prompting Griffin to say:

[W]ell, that would be difficult in that you – most of your time is spent doing union work. And he said, so you're saying that I can't be promoted? And I said no. I clarified, I said no. I said you would have to make the qualification standards and also show competency, but it's possible.

Tr. 143. The training session resumed shortly after this exchange, and everyone returned to their seats. Tr. 181.

Bugg's Version: Bugg testified that during the break, she was standing with Griffin, Johns, and Jeffery, talking about their work and home lives, when Jeffery indicated that he'd like to get promoted. Tr. 190-91. Griffin responded:

[T]hat would be difficult in that role, in your role. And Mr. Jeffery said, "Are you saying I can't be promoted?" And she said, "No, I didn't say that. I said it would be difficult in your role due to competencies and the work that's needed to be done to get promoted."

Tr. 191. Immediately after this exchange, according to Bugg, the lecturer called the class back to order and they all sat down. *Id.* Either at the end of the training or during a subsequent break, Jeffery came over to Bugg and said:

"Can you believe that she said that to me?" Talking about Ms. Griffin. And I said, "What?" And he said, "I can't be promoted." And I said, "That's not what I heard." [see footnote 2.] I said, "I heard her say that in your role it would be difficult, not that you specifically could not be promoted."

Tr. 191-92. Bugg denied that she brought up the subject of Griffin's statement to Jeffery, insisting that Jeffery raised the subject to her when they were outside the training room. Tr. 210.

Johns's Version: Finally, Ms. Johns testified that she, Griffin, and Bugg were still sitting at their table during the break in training, when Jeffery walked over and sat down with them. Tr. 214. The conversation turned to family, finances, and promotions. At that point:

Cynthia mentioned that it would be difficult to get a promotion because you have to demonstrate certain competencies, and Mr. Jeffery got a little upset and he abruptly responded, "Are you saying I can't get a promotion?" And Cynthia said, "No, that is not what I'm saying. I'm saying that in your position it might be difficult to get one because you have to be able to demonstrate competencies."

Tr. 214-15. Johns felt that Jeffery had misunderstood Griffin's words, "because it was so different from what she had said. She had never mentioned him. She was talking about having to demonstrate competencies for promotion." Tr. 215, 221. Johns insisted that Griffin "didn't say anything about him being a union official that I recall." Tr. 221.

Several Agency witnesses testified about the difficulty of getting promoted to Nurse III. Both Melissa Edwards, Chairperson of the NPSB at Asheville, and Alan Bernstein, a Nurse V who served as national program director of the NPSB program and had revised the qualification standards and training materials, explained that the qualification standards for the various Nurse I levels are focused on the employee's growth in learning how to care for patients. Tr. 40-41, 230-31. For the Nurse II grade, the Board is looking for some leadership from employees, and the focus shifts to the employees' understanding of the systemic issues related to the specific units where they work. Tr. 42, 163, 196, 231-32. For Nurse III, the Board wants to see that employees understand how their patients and their unit fit within the entire organization, and that they are implementing changes which have been demonstrated to improve patient care and which can be sustained over time. Tr. 23, 43, 60, 163, 196, 232-33; R. Ex. 16 at 11-13, 21, 27-33. Some nurses never make it beyond Nurse I, and many never make it to Nurse III. Tr. 42, 43, 206, 232, 243.⁴ Griffin, Bugg, and Bernstein gave examples of the types of projects that nurses have conducted and documented, which have improved nursing care in their facilities and which have in turn formed the basis for their promotion. Tr. 163-65, 197-99, 235-38. Such projects require a considerable amount of time, in addition to the nurse's regular duties, thus making it very difficult for someone working in nursing care part-time to meet the qualification standards for Nurse III. Tr. 23-24, 61-62, 165-72, 197-99, 207.

Edwards and Bernstein also testified that nurses are trained at their hospitals regarding the qualification standards for each grade level, so that they will take the initiative to document their work and accomplishments, to participate actively in writing their proficiencies, and to maximize their chances for promotion. Tr. 11-12, 30-32, 58, 229, 232. Edwards meets one-on-one with nurses on a regular basis to explain the qualification standards and the NPSB process to them. Tr. 11-12. The materials in Respondent's Exhibit 16 were specifically developed to make nurses aware of what they need to do to meet the qualification standards for each grade. Tr. 229.

After Mr. Jeffery returned to Asheville from the labor-management training, he arranged a meeting with Ms. Edwards, to discuss Griffin's comments. Tr. 13, 79. Jeffery thought he understood the qualification standards and believed he would be able to do what was needed to get promoted to Nurse III while performing his Union duties, but in light of Griffin's statements to him, he wanted to discuss this with the NPSB chairman. Tr. 79-80. Jeffery told Edwards that he understood Griffin "to say that he could not get his Nurse III." R. Ex. 1; *see also* Tr. 22, 80. Edwards assured him that he was eligible for Nurse III, but that he would first need to obtain his bachelor's degree in nursing, a fact Jeffery was already aware of. Tr. 16, 22-23. She said that since he was working as a nurse only one day every two weeks, it "might be a little difficult, but that we would be more than willing to provide him more time, and that it's hard, it's very difficult to obtain a Nurse III." Tr. 23. She

⁴ In the most recent fiscal year for which data was available, 22% of all VA nurses were at Nurse I, 52% at Nurse II, and 24% at Nurse III. R. Ex. 16 at 13.

explained what Jeffery would have to demonstrate to meet the standards, and she suggested "he would likely need to consider working in Nursing more in order to meet those criteria." R. Ex. 1; Tr. 28. According to Jeffery, Edwards indicated to him "that Ms. Griffin's statement was not accurate, but that [getting promoted] would be more difficult." Tr. 80.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel alleges that Griffin's statements to Jeffery at the conference violated § 7116(a)(1) of the Statute. In this regard, the GC leans heavily on the facts and the rationale of the Authority's decision in *U.S. Dep't of Agric., U.S. Forest Serv., Frenchburg Job Corps, Mariba, Ky.*, 49 FLRA 1020, 1034-35 (1994) (*Forest Service*). In that case, a supervisor (Henry) explained her denial of official time to an employee (Roach) by linking the employee's increased use of official time to a lack of timeliness in getting her work done. The Authority stated that while an agency is entitled to manage its workforce efficiently, it must seek to accommodate that interest with an employee's right to engage in protected activity. Evaluating the supervisor's comments, the Authority stated:

By linking Roach's protected activity with Henry's perception of her performance, Henry effectively discouraged Roach from engaging in further protected activity. That is, in these circumstances, it would be reasonable for an employee in Roach's position to infer from Henry's statement that her performance would be perceived as deficient so long as she spent time on protected activity.

Id. at 1035. Looking at the context and timing of the statements, and the absence of any suggestion to the employee as to how to avoid future problems, the Authority found that the statements constituted "an after-the-fact criticism of Roach's protected activity," rather than a sincere attempt to resolve a conflict between the interests of management and employee. *Id.*

Summarizing the testimony regarding Griffin's statements to Jeffery at the conference, the General Counsel asserts that "Griffin irrefutably drew a connection between Jeffery's protected activity and his eligibility for promotion," by saying that "Jeffery would not get his Nurse III as long as he remained a Union official." GC Br. at 7. The GC notes that Griffin herself "does not dispute that she referenced Jeffery's Union activity in her remarks. Her remarks drew a connection between his Union activity and his eligibility for promotion." *Id.* The GC argues that "[a] reasonable bargaining unit employee" who heard Griffin's statements "would think twice before exercising his rights under the Statute." *Id.* In this regard, the GC also cites *Dep't of the Air Force, Scott AFB, Ill.*, 34 FLRA 956, 962 (1990), and *Dep't of the Treasury, IRS, Louisville Dist.*, 11 FLRA 290, 298 (1983). Accordingly, Griffin's statements violated § 7116(a)(1) of the Statute.

Respondent

The Respondent makes a two-fold argument in denying that it committed an unfair labor practice: it first argues that Jeffery's description of the events of August 1 is not accurate, and it further insists that Griffin's statements to Jeffery (as described by Griffin and other Agency witnesses) were not threatening or coercive.

The Agency notes that the circumstances in which the August 1 conversation occurred – during “idle ‘chit chat’” at a conference, with many witnesses standing nearby – make it unlikely that Griffin directly threatened Jeffery. R. Br. at 27. Moreover, all the other witnesses supported Griffin's description of the conversation, not Jeffery's. Respondent also suggests that Jeffery may simply have heard Griffin incorrectly, as he himself admitted he cannot hear in his left ear. Tr. 246.

Analyzing the statements made by Griffin, the Respondent insists that there was nothing coercive in pointing out to Jeffery that the amount of time he spent on nursing duties might make it more difficult for him to get promoted. R. Br. at 36. Respondent devoted a significant portion of its testimony at the hearing to explaining the peer review process for nurse promotions at the VA, and the stringency of the Nurse III qualification standards in particular. In this context (which was widely known to VA nurses), Griffin could not reasonably be understood to have threatened to prevent Jeffery from being promoted, because she had no involvement in the NPSB's decisions, and because it was clear she was advising Jeffery that it was the qualification standards themselves that were the obstacles to promotion that he would have to overcome.

Respondent compares the facts of our case to those of *Dep't of the Navy, Portsmouth Naval Shipyard*, 6 FLRA 491 (1981) (*Portsmouth*), where a manager told a union steward, at the end of a grievance meeting, that he was “more adamant” in his position after the meeting than he had been previously. *Id.* at 495. When the steward asked the manager if he was punishing an employee for going to her union, the manager said that was not what he said. The manager's initial statement was found by the ALJ to be “highly ambiguous” and equally susceptible of a coercive or a non-coercive interpretation, but the judge (affirmed by the Authority) was persuaded to interpret it as lawful, based on the manager's denial of any retaliatory intent. *Id.* at 496. Similarly, in our case, Respondent argues that any possible coercive interpretation of Griffin's initial comment was unequivocally dispelled by her subsequent statement that Jeffery could get promoted as long as he met the qualification standards. R. Br. at 30-31. It also cites *U.S. DOJ, Fed. Bureau of Prisons, Fed. Corr. Inst., Elkton, Ohio*, 62 FLRA 199 (2007), for the proposition that Griffin's comments cannot reasonably be interpreted as coercive.

ANALYSIS AND CONCLUSIONS

There are two underlying questions that I must answer in this case: what did Griffin say to Jeffery, and were those statements coercive? If I find that Jeffery's account of the conversation is accurate, then the answer to the second question is clear: if Griffin used the words attributed to her by Jeffery, she unlawfully threatened him by linking his status as a

Union official to an inability to get promoted, and by indicating a cause-and-effect relationship between the former and the latter. If, however, I find that Griffin's statements more closely resemble the versions given by Griffin, Bugg, and Johns, then interpreting their lawfulness is more difficult, because her comment about the difficulty of promotion was linked to the lack of time he was spending doing nursing work, and to the competency requirements that are the focus of the qualification standards for promotion. The first portion of Griffin's comments was ambiguous as to why she thought it would be difficult for him to get promoted, but the second portion clarified that his chances for promotion were linked to whether he could meet the competencies, not to his status with the Union.

What did Griffin say?

Regarding the first question, I consider it much more likely, and the evidence more persuasive, that Griffin used some variation of the words cited in the testimony of Bugg, Johns, and Griffin, rather than the words described by Jeffery. While the three Agency witnesses all quoted Griffin slightly differently, the differences in these three accounts were minor, and they contrast significantly with the words cited by Jeffery. Thus, in a simply quantitative sense, the issue boils down to three witnesses against one, and that is a significant factor in evaluating the "preponderance of the evidence," especially when we don't have a tape recording of the actual conversation, or some other mechanical method of determining precisely what Griffin said. Everyone's memory is fallible, and it is impossible for a fact-finder in a case such as this to determine exactly what Griffin said. But when three witnesses testify that Griffin related Jeffery's chances for promotion to his meeting the competencies or qualification standards, and only one says he'll "never" get promoted "as long as you're a union official," it is more likely that one witness is mistaken than three.

I could perceive nothing in the demeanor of any of the witnesses that would lead me to believe any of them were lying or incredible. I believe that each of the four witnesses was trying to describe the August 1 conversation as accurately as possible, but their memories do not "play back" the conversation in the manner of a tape recorder; rather, those memories are filtered through their own personal emotions and expectations. The memories are more akin to a photocopy that is recopied over and over – not simply getting less legible each time, but getting slightly altered as they recount the incident to themselves and to other people. Jeffery (as the accuser) and Griffin (as the accused) have the most direct interest in justifying their own actions. While Bugg and Johns are management officials and thus may have an interest in defending Griffin, I believe they were the most disinterested of the witnesses, and the most likely to give the most unfiltered description of the conversation. The only justifiable explanation for crediting Jeffery over Griffin, Bugg, and Johns would be if I believed they had colluded to testify falsely and deny Jeffery's accusation. But based on my observation of the witnesses and my review of the testimony itself, I do not believe that Bugg and Johns slanted their testimony in order favor Griffin.⁵

⁵ For one thing, the slight differences in the words quoted by each of the management witnesses suggests that those words represent their personal recollections, rather than a rehearsed script.

Looking at some of the circumstantial aspects of the evidence, I find that these tend to undermine the reliability of Jeffery's account. A seemingly trivial, but potentially telling, detail is Jeffery's testimony that he and Bugg "were having a conversation between the two of us" and that Griffin then "stepped into the conversation" to comment on his chances for promotion. Tr. 77-78. The other three witnesses described a conversation in which they all were mutually participating. Tr. 143, 190-91, 214. Jeffery's suggestion that Griffin was an interloper in the conversation denotes hostility to her, and it is inconsistent with the other evidence regarding the way in which the conversation occurred. During the training, Jeffery had been sitting separately from the Agency officials, and he took the initiative to join them at the back of the room. It is most likely that the people at the back of the room started their conversation as soon as the class ended, and before Jeffery joined them. Jeffery's incongruent account makes it seem as if he was looking for an excuse to be suspicious of Griffin. This conclusion is reinforced by the disparity between Bugg's testimony and Jeffery's regarding their subsequent conversation about Griffin's remarks. If indeed Bugg told him privately, "I can't believe she said that to you," (Tr. 78) that would certainly suggest that Bugg understood that Griffin had said something improper. But Bugg testified that it was Jeffery who expressed disbelief in what Griffin had said, and that Bugg had told Jeffery he was remembering Griffin's words incorrectly. (Tr. 191-92). I credit Bugg's testimony here, as it again appears that Jeffery was projecting his own disapproval of Griffin's comments onto Bugg. I do not believe Bugg would falsify her testimony on this point in order to support Griffin - if she had disapproved of Griffin's remarks sufficiently to volunteer her disapproval privately to Jeffery, I don't think she would have lied publicly to defend Griffin at the hearing.

Moreover, I do not believe that Griffin would make the sort of blatant and direct threat to a Union official that Jeffery's testimony suggests, in this particular setting. This was a regional training conference, sponsored jointly by the VA and the AFGE, on labor-management issues. The room was filled with managers from various VA hospitals and with representatives of many AFGE locals. In such a setting, and while a heterogeneous group of such people were making casual conversation about how their work lives and family lives overlapped, it strikes me as very unlikely that a high-ranking manager such as Griffin would openly tell a Union official that he would "never get" promoted as long as he remained a Union official. That type of threat tends to be made in the privacy of an office, behind closed doors. But in this public setting, it is more likely that Griffin would have made an ambiguous comment that could be interpreted in different ways, and that is the sort of comment that Griffin, Bugg, and Johns described.

While I reject Jeffery's recollection of the crucial conversation of August 1, I must still determine what Griffin said, as precisely as possible. This requires that I choose between the accounts given by Bugg and Johns, and by Griffin herself. Ironically, Griffin's description of her comments is, at least superficially, more "incriminating" than the descriptions given by Bugg and Johns. By her own account, Griffin explicitly linked the

difficulty of Jeffery getting promoted to his Union work (“most of your time is spent doing union work”) (Tr. 143), whereas Bugg (“that would be difficult . . . in your role”) (Tr. 191) and Johns (“in your position it might be difficult”) (Tr. 214) recalled Griffin using language that didn’t refer specifically to the Union. I am inclined to credit Griffin’s account of the conversation, however, because she made a Report of Contact of the conversation almost immediately after the incident. *See* R. Ex. 8. Although Bugg and Johns also filed Reports of Contact (R. Exs. 12 & 15, respectively), they did so a few weeks later; therefore, Griffin’s account in her Report of Contact (which is consistent with her testimony at the hearing) is more likely to be accurate, as it was still fresh in her mind when she wrote it down.⁶ Tr. 144. While my evaluation of the lawfulness of Griffin’s comments would be the same, regardless of whether Griffin’s, Bugg’s, or Johns’s account is credited, I will assume that the exchange between Griffin and Jeffery occurred as quoted in “Griffin’s Version” in the Statement of Facts.

Were Griffin’s words unlawful?

The legal framework for evaluating Griffin’s comments was set forth by the Authority in *U.S. Dep’t of Transp., FAA*, 64 FLRA 365, 370 (2009):

The standard for determining whether management’s statement or conduct independently violates § 7116(a)(1) is an objective one. The question is whether, under the circumstances, the statement or conduct tends to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement. Although the circumstances surrounding the making of the statement are considered, the standard is not based on the subjective perceptions of the employee or on the intent of the employer.

(internal citations omitted). In *U.S. DOJ, Fed. Bureau of Prisons, FCI, Safford, Ariz.*, 59 FLRA 318, 322 (2003), the Authority paraphrased the central question as whether the statement “would tend to interfere with, restrain, or coerce a reasonable employee in the exercise of rights under the Statute.”

A frequent source of dispute in this type of case is an employee’s use of official time. The Authority recognizes that an agency’s legitimate interest in managing its workforce will sometimes conflict with an employee’s equally legitimate right to official time for representational duties; but it counsels both sides to “seek a reasonable accommodation”

⁶ Jeffery testified that he also wrote a Report of Contact, after he returned from the training and told Union President Terry Wyatt about his conversation with Griffin. Tr. 72. Wyatt then filed the unfair labor practice charge on August 27, 2012. GC Ex. 1(a). Jeffery’s Report of Contact was not entered into evidence, and it is unclear when exactly he prepared it, but I have already explained why I discount the accuracy of Jeffery’s account of the incident.

of such conflicts. *Dep't of the Air Force, Scott AFB, Ill.*, 20 FLRA 761, 764 (1985) (*Scott AFB*) (citing, *inter alia*, *Dep't of the Navy, Norfolk Naval Shipyard, Portsmouth, Va.*, 15 FLRA 867, 867-68 (1984)). Thus, in *Veterans Admin. Med. Ctr., Leavenworth, Kan.*, 31 FLRA 1161, 1170-71 (1988) (*VA Leavenworth*), and in *Scott AFB*, 20 FLRA at 766, the Authority found that the supervisors' comments – counseling one employee to utilize his official time when he was not needed for critical inspections, and instructing another employee to spend more time on an urgent project and less time on union business – constituted legitimate expressions of management's interest in ensuring that important work be performed and did not violate § 7116(a)(1). But in *Forest Service* and in *Dep't of the Air Force, Ogden Air Logistics Ctr., Hill AFB, Utah*, 35 FLRA 891 (1990) (*Hill AFB*), the Authority found that the supervisors' comments – that one employee's use of official time was adversely affecting the timeliness of her work, and that the other employee had been given a lower performance appraisal because he'd been gone a lot on union business and couldn't be counted on – were unlawful, as they would lead a reasonable employee in that position to believe that his or her performance would be viewed by management as deficient as long as the protected activity continued. *See, e.g., Forest Service*, 49 FLRA at 1035.

In *VA Leavenworth* and *Scott AFB*, the content and context of the supervisors' statements demonstrated a recognition of the employees' right to use official time and an attempt to meet the employees halfway, whereas in *Forest Service* and *Hill AFB*, the supervisors improperly linked the use of official time to management's perception of the employees' performance and did not attempt to accommodate the employees' right to use official time. *See, e.g., Forest Service*, 49 FLRA at 1035. As the Authority explained, this linkage would lead a reasonable employee in that position “to infer . . . that her performance would be perceived as deficient so long as she spent time on protected activity.” *Id.*

Indeed, in our case, that is precisely how Jeffery characterized Griffin's comments: “[A]s long as you're a union official, you'll never get your Nurse III.” Tr. 78. If Griffin had actually said those words to Jeffery, I would agree with the General Counsel that Griffin was improperly threatening to prevent his promotion as long as he remained a Union official. As I have already explained, however, Griffin's statement was much more nuanced than Jeffery understood. While Jeffery clearly drew a coercive inference from Griffin's comments, I believe his subjective understanding was not reasonable under the circumstances. A reasonable Nurse II at the Agency would understand that Griffin was not suggesting that she (or anyone else in management) would respond negatively to his promotion because of his Union position; rather, she was advising him that the qualification standards for Nurse III are very difficult to meet for anyone who works only eight hours a pay period as a nurse. His chances for promotion were not unlawfully linked to his protected activity, but to the minimal time, he was devoting to nursing work, which constitutes the basis for the NPSB's promotion decisions.⁷

⁷ I emphasize again that neither I nor the FLRA have any authority to review the qualification standards of the NPSB. *See* note 3, above.

Nurses at the Agency understand the process of career advancement at the VA, and the standards and criteria utilized by the NPSB for promoting nurses on the career ladder; more particularly, they understand that the qualification standards for Nurse III are more demanding than merely performing competently as a Nurse II, and require them to demonstrate their improvements to patient care on an organizational level over a sustained period of time. The testimony of Mr. Bernstein and Chief Nurse Edwards established that the Agency expends a considerable effort in educating the nurses on the promotion process and in making the nurses aware of their own role in helping to write their proficiencies. Thus, when Griffin spoke to Jeffery on August 1, 2012, about the need for him to meet the "qualification standards" and "show competency," he reasonably should have understood that these were the uniform requirements the NPSB applies to all nurses, regardless of whether they are active in the Union or not. He also should have understood that these qualification standards would require him to devote a considerable amount of time and effort in order to get promoted to Nurse III. Indeed, Jeffery indicated at the hearing that he felt he understood what he needed to do to get promoted, and that this would require extra work on his behalf. Tr. 79-80. In that context, Griffin's statements to him on August 1 should not reasonably have represented a threat that he'd never be promoted as long as he was a Union official. Instead, her statements should simply have advised him that he would have to perform nursing work for more than eight hours a pay period to get promoted. In other words, it was not his Union work that would be an obstacle to promotion, but his lack of high-level nursing work.

Griffin's statements are analogous in some respects to those of a supervisor in *Fed. Mediation & Conciliation Serv.*, 9 FLRA 199 (1982). In that case, one of the union's officers worked for the agency in a position that the agency contended was confidential, and thus outside the bargaining unit. During contract negotiations, a supervisor advised the employee that if the FLRA ultimately ruled that her position was outside the bargaining unit, she would have to repay any official time she had used. *Id.* at 205. Although the employee took the remark as a threat, the ALJ (affirmed by the Authority) ruled that the supervisor was "merely . . . informing [the employee] of the potential consequences of" using official time. *Id.* at 211. The judge went on to state, "Speech is not coercive if it does not convey a threat of economic reprisal taken solely on the employer's volition and if it has some basis in objective fact." *Id.* at 212 (footnotes omitted). In our case, Griffin could not reasonably have been understood to be threatening to personally prevent Jeffery from getting promoted; rather, she was referring to a promotion decision that would be made by the NPSB, which she was not a part of, and to qualification standards that are not subject to challenge.

I recognize that the first portion of Griffin's comments (that promotion to Nurse III "would be difficult in that you – most of your time is spent doing union work") was ambiguous enough to lend itself to differing interpretations, and might lead a reasonable person to interpret them as a threat. If the conversation had ended with this comment, I would be more inclined to find that Griffin committed an unfair labor practice, as it suggests that the obstacle to promotion is the time he spent working on behalf of the Union. But the remainder of the conversation effectively clarified Griffin's meaning and should have eliminated (to a reasonable employee) any suspicion that the Agency would prevent a Union

official from being promoted. Upon hearing Griffin's initial comment, Jeffery did what a reasonable person would do: he asked her whether she was saying that he couldn't get promoted.⁸ Griffin promptly and unequivocally said "no," and she linked his chances for promotion to his ability to "make the qualification standards and also show competency." Tr. 143. She conceded that promotion would be difficult in that situation, "but it's possible." *Id.* Any reasonable person familiar with the NPSB would have to agree that this latter assessment by Griffin is true, that promotion to Nurse III would be difficult for someone doing as little nursing work as Jeffery was at that time. The important factor is that Griffin unlinked Jeffery's promotion from his Union work and attached it explicitly to his meeting the qualification standards for Nurse III.

An analogy can also be made (as the Respondent does) to the decision in *Portsmouth*, where a supervisor's initial, ambiguously coercive comment was mitigated by his subsequent disavowal of any retaliatory intent, resulting in a finding of no unfair labor practice. In our case, however, the facts are stronger in favor of the Respondent. When the supervisor in *Portsmouth* was asked if he was threatening an employee for going to the union, he simply said "no," that wasn't what he meant. 6 FLRA at 495. In our case, Griffin did not simply deny that Jeffery's Union activity would be held against him. Rather, she affirmatively explained that he could get promoted if he met the qualification standards and showed competency, thereby recasting her comment in terms that were competency-based and not Union-based. Accordingly, when the conversation between Griffin and Jeffery ended, it would have been unreasonable to infer that Griffin was in any way threatening Jeffery for his Union work.

Griffin's statements must be evaluated within the full context of the entire conversation, and the circumstances in which the conversation occurred. It was a casual conversation of several individuals in a crowded room with management and Union officials all around. The people engaged in the conversation were all quite familiar with the qualification standards for the various positions on the VA nursing career ladder and with the role of the NPSB in making promotion decisions. In this context, a reasonable person would have understood that Griffin was advising Jeffery that he would need to devote additional time to nursing work and to meeting the qualification standards for Nurse III, if he wanted to get promoted; a reasonable person would not have understood Griffin to be telling Jeffery that Union officials don't get promoted. Any possible coercive inference that might have been drawn from Griffin's first comment was erased by her second comment. Therefore, I conclude that the Respondent did not violate § 7116(a)(1).

⁸ While Jeffery denied that he responded verbally to Griffin's comment, he did testify that he "looked at her quizzically like, what do you mean?" Tr. 78. It is, therefore, clear that Jeffery sought clarification from Griffin, and that Griffin offered an additional explanation of what she meant.

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

ORDER

It is ordered that the Complaint be, and hereby is, dismissed.

Issued, Washington, D.C., June 18, 2015

A handwritten signature in black ink, appearing to read "Richard A. Pearson", written over a horizontal line.

RICHARD A. PEARSON
Administrative Law Judge