UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION ELKTON, OHIO RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 0607, AFL-CIO CHARGING PARTY	Case No. CH-CA-21-0348

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been submitted to the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Federal Labor Relations Authority (Authority), the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions is governed by 5 C.F.R. Part 2423, Subpart D.

Any such exceptions must be filed on or before **MAY 22, 2023**, electronically at **www.flra.gov**. by selecting **eFile** under the **Filing a Case** tab and following the instructions, or by U.S. Mail to:

Office of Case Intake & Publication
Federal Labor Relations Authority
1400 K Street, N.W., 2nd Floor
Washington, DC 20424-0001

David L. Welch, Chief Judge
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Date: 2023.04.19 14:15:36 -04'00'

DAVID L. WELCH
Chief Administrative Law Judge

Dated: April 19, 2023
Washington, D.C.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY OALJ 23-05
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U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION ELKTON, OHIO RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 0607, AFL-CIO CHARGING PARTY	Case No. CH-CA-21-0348

David Mithen
For the General Counsel

Kara Berlin
For the Respondent

Kenneth Pittman
For the Charging Party

Before: DAVID L. WELCH
Chief Administrative Law Judge

DECISION

There are two issues in this case. The first is whether or not the Associate Warden essentially told the Union's Vice President, in violation of § 7116(a)(1) of the Statute, that if a represented employee had brought her reasonable accommodation request to the Associate Warden rather than to the Union, then there might have been a different outcome. The undersigned credits the Associate Warden's account of what was said and finds, for the reasons discussed below, that the Associate Warden did not say anything that was coercive or otherwise unlawful. Accordingly, the undersigned concludes that the Respondent did not commit an independent violation of § 7116(a)(1).

The second issue is whether the Respondent denied the employee's reasonable accommodation request because she engaged in protected activity, in violation of § 7116(a)(1) and (2) of the Statute. For the reasons detailed below, the undersigned finds that the employee's protected activity was not a motivating factor in the Respondent's treatment of the employee. Hence, the undersigned finds that the Respondent did not violate § 7116(a)(1) and (2) of the Statute.

STATEMENT OF THE CASE

This is an unfair labor practice (ULP) 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 Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. part 2423.

On June 25, 2021, the American Federation of Government Employees, Local 0607, AFL-CIO (the Union), filed an unfair labor practice charge against the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Elkton, Ohio (the Agency, Respondent, or FCI Elkton). GC Exs. 1(c) & 1(e).[1] After investigating the charge, the Acting Regional Director of the FLRA's Chicago Region issued a Complaint and Notice of Hearing on October 13, 2022, on behalf of the FLRA's Acting General Counsel (GC). The Complaint alleges that the Respondent independently violated § 7116(a)(1) of the Statute by stating that the employee's reasonable accommodation request would not have been denied if the employee hadn't sought assistance from the Union. And further, that the Respondent violated § 7116(a)(1) and (2) of the Statute by denying an employee's reasonable accommodation request because the employee engaged in protected activities and to discourage employees from engaging in protected activities. GC Ex. 1(c). The Respondent filed its Answer to the Complaint on November 7, 2022, denying it violated the Statute. GC Ex. 1(e).

A hearing was held in this matter on January 11-12, 2023, via the Microsoft Teams video platform. All parties were represented and afforded the opportunity to be heard, to introduce evidence, and to examine witnesses. The GC and the Respondent filed post-hearing briefs, which have been thoroughly reviewed and fully considered.

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[1] The transcript reveals ambiguity as to whether certain exhibits introduced at the hearing—specifically, GC Exhibits 1 (formal papers) and 4 (Affidavit of Shaun Faulkner), and all the Joint Exhibits—were admitted. Because it is clear from context and the subsequent actions of the parties that these exhibits were intended to be, and understood to have been, admitted (*see, e.g.*, Tr. 7-8, 159; GC Br. at 7, 10, 11 n.6; Resp. Br. at 2), and because no objections were raised with respect to these exhibits, the undersigned clarifies that these exhibits were and are admitted. *Cf. Portsmouth Naval Shipyard, Portsmouth, N.H.*, 49 FLRA 1522, 1537 n.2 (1994) (judge substituted amended exhibit for exhibit received at hearing, on General Counsel's unopposed motion); *VA Cent. Off., Wash., D.C.*, 23 FLRA 512, 522 n.1 (1986) (after having reserved ruling on the admissibility of two documents, judge noted in his decision that he was admitting those documents as exhibits).

Based on the entire record, including my observation of the witnesses and their demeanor during the hearing, the undersigned makes the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. The American Federation of Government Employees, Council of Prison Locals (AFGE) is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the certified exclusive representative of a nationwide unit of employees of the Respondent (the unit). The Union is an agent of AFGE for the purpose of representing the unit employees employed at the Respondent. GC Exs. 1(c) & 1(e). AFGE and the Respondent are parties to a collective bargaining agreement (CBA), known as the Master Agreement. Jt. Ex. 1.

In November 2015, Dr. Bethanie Cavalier reported to work for FCI Fairton, a Bureau of Prisons (BOP) institution in New Jersey. Cavalier suffered (and continues to suffer) from a medical condition whose symptoms, when they arise, are particularly severe in the morning. In response, management at FCI Fairton determined in 2019 to allow Cavalier to work a flexible (or "flex") schedule, a schedule where she could start work as early as 6:00 a.m. and complete her daily work as late as 6:00 p.m. The flexible schedule meant that on mornings when she was experiencing symptoms, Cavalier could commence work an hour or two later than her regularly scheduled start time and work a complete day without having to take any leave. Cavalier did not formally apply for a reasonable accommodation while working at FCI Fairton. Also in 2019, FCI Fairton approved Cavalier's request to take leave under the Family and Medical Leave Act (FMLA). Cavalier has applied for FMLA leave annually ever since. Tr. 20-23, 40-41, 54.

In March 2020, Cavalier joined FCI Elkton as a staff psychologist. Tr. 21. Towards the end of April 2020, Cavalier met with Dr. Paul Clifford, her supervisor and Chief of Psychology Services, and Steven Brown, the Human Resources Manager at FCI Elkton, to discuss the possibility of Cavalier obtaining a flexible schedule as she had at FCI Fairton. Tr. 21, 23, 122, 179. Clifford and Brown agreed that Cavalier could do so, but with the understanding that this would be a temporary measure, and that Cavalier would ultimately return to working on a traditional, non-flex schedule. Tr. 23, 42. Clifford and Brown also agreed to let Cavalier use FMLA hours when her medical condition prevented her from working a full workday. After this discussion, Cavalier first used her flexible schedule at FCI Elkton on May 7, 2020, working later to account for hours she missed earlier that morning due to her condition. Tr. 23.

For a year Cavalier was able to work using flexible start and stop times as needed. Later, though, Clifford told Brown that he was concerned that his discretionary ability as a manager regarding Cavalier's schedule was being abused. Brown advised Clifford that there were "not . . . any flex schedules in the Bureau of Prisons and that it needs to stop." Tr. 185-86, 195-96.

On Friday March 19, 2021,[2] towards the end of the day, Clifford told Cavalier that while she could continue to work a regular "4/5-9" schedule where Cavalier worked 7:00 a.m. to 4:00 p.m. (and to 3:00 p.m. every other Thursday, with every other Friday off), but that she could no longer work on a flexible schedule, i.e., she had to start and end work at her normally scheduled times and would no longer have the option of working until 6:00 p.m. on days when her medical condition prevented her from starting work at her regularly scheduled start time. Tr. 21-24; Jt. Ex. 2.

Subsequently, Cavalier called Union President Joseph Mayle to request Union assistance in her attempt to maintain her flexible schedule.[3] Mayle told Cavalier that he would assign Kenneth Pittman, a correctional counselor and the Union's Vice President, to her case, and that she should call Mayle if any issues arose over the weekend. Tr. 24, 77, 123.

At some point over the next several days, Pittman and Mayle convinced Clifford to allow Cavalier to continue her flexible schedule while management and the Union discussed the matter further. Tr. 80-81, 103, 122. Mayle noted that Clifford told him that Cavalier's schedule was being changed due to "departmental needs." Mayle discussed the issue with Brown as well. Tr. 122.

Meanwhile, Cavalier determined on her own that her medical condition might qualify as a disability, so she filled out a form, Form 100A, to officially request a reasonable accommodation. Tr. 26. In her request, Cavalier asked that she be allowed to deviate from her regular schedule—again, 7:00 a.m. to 4:00 p.m. Monday through Friday (and to 3:00 p.m. every other Thursday, with every other Friday off)—by being allowed to extend her workday until 6:00 p.m. on days when her medical condition caused her to arrive at work after her regularly scheduled start time. Alternatively, Cavalier asked to work a modified schedule: 9:00 a.m. to 6:00 p.m., Monday through Friday (and to 5:00 p.m. every other Thursday, with every other Friday off). Jt. Ex. 2.

Let's digress for background information about how reasonable accommodation requests are made and processed at FCI Elkton. Usually, a reasonable accommodation request is submitted to an employee's first-line supervisor, although other management officials can also assist. Tr. 96, 182. Then, the request is brought to Brown, who serves as FCI Elkton's reasonable accommodations coordinator. After reviewing a request, Brown always, or nearly always, forwards the request to a BOP office outside of FCI Elkton, referred to as "the region" or the "central office." Tr. 27, 153, 192. There, requests go to the BOP's National Reasonable Accommodations Coordinator (NRAC), who at that time was Kurt Nance. Tr. 182, 192. Upon receiving the request, the NRAC—after asking the employee for medical documentation if needed, and consulting with colleagues, including those in the Office of Employee Health, which is overseen by a medical doctor—makes a recommendation on the request and submits it to the decision maker at the requesting employee's institution for the decision maker's

[2] All dates hereafter are in 2021, unless otherwise noted.

[3] At the hearing, Mayle noted that he had retired from the Agency and served as the Union's Vice President. Tr. 118.

consideration. Tr. 182-84, 197. The recommendation (and ultimate decision) can be a denial, a denial with an alternate effective accommodation (sometimes also referred to as an alternate effective solution), or an approval. Tr. 188; Jt. Ex. 6. Historically, the decision maker at FCI Elkton has followed the NRAC recommendation, even when the recommendation differed from FCI Elkton management's preferences. Managers at FCI Elkton have deferred to the NRAC, Brown testified, because the NRAC's recommendations are informed by the medical expertise of the Office of Employee Health. *See* Tr. 193.

This process is also enlightened by the BOP's Program Statement on its Reasonable Accommodation Program (Program Statement). The Program Statement provides that an employee's need for an accommodation "should begin an interactive . . . process" between the employee and supervisor to find an accommodation. Jt. Ex. 7 at 5. The interactive process includes: an analysis of the job's essential functions; an ascertainment, in consultation with the employee, of the employee's job-related limitations and how those limitations can be overcome; and a consideration of an accommodation that meets the needs of the employee and the BOP. *Id.*

Once a reasonable accommodation request has been made, the Program Statement states, "the supervisor or the HRO [Human Resources Office] must begin the interactive process using . . . Form 100A." *Id.* at 6. The HRO may request medical documentation from the employee, though only when the need for accommodation is not apparent, and there is no other medical information already on record for the employee that demonstrates the current need. *Id.* The Program Statement provides that approvals of accommodation requests are made "on a case-by-case basis" and "after consultation with the NRAC." *Id.* at 7. Likewise, the NRAC is to be consulted "[p]rior to denying a reasonable accommodation request." *Id.*

On Monday, March 22, having only briefly discussed the matter with Brown earlier, Cavalier emailed him asking for feedback on her reasonable accommodation request. Tr. 26, 59, 186-87. Cavalier did not inform Brown that she had sought the Union's assistance with respect to a flexible schedule, and up to this point in time Cavalier had not asked the Union for support with her reasonable accommodation request. Tr. 27, 42, 44, 58. Later that day, Brown informed Cavalier that he had forwarded her reasonable accommodation request to the NRAC. Tr. 27, 154, 181. Brown testified that the interactive process began when Cavalier submitted her reasonable accommodation request, and that the process entailed Brown reviewing Cavalier's request and forwarding it to the NRAC. Tr. 181-82.

Also on March 22, during his weekly meeting with Mark Williams, FCI Elkton's Warden, Mayle told Williams about Cavalier's scheduling issues, asserting that Clifford had not provided a substantive reason why Cavalier's schedule needed to be modified. Tr. 124.

On March 24, Cavalier was not feeling well and arrived at work late that morning. Tr. 27-28. Upon her arrival, Cavalier was told to see Clifford in the Warden's conference area. There, Clifford asked Cavalier to sign a form. Cavalier assumed, incorrectly, that the form was a denial of her reasonable accommodation request. Cavalier asked Clifford if she could

have Union assistance. Clifford denied the request, and Cavalier left the meeting, form in hand, to discuss the matter with Brown in his office. Tr. 28.

Once there, Cavalier realized that the form Clifford had given her was merely a routine request for medical documentation to support her reasonable accommodation request. Having so realized, Cavalier signed the form and did so without Union assistance. Tr. 28, 43, 62-63.

Cavalier mentioned to Brown that she was upset that Clifford had denied her request for a Union representative. Tr. 43. She also asked Brown whether it was likely her reasonable accommodation request would be approved. According to Cavalier, Brown said he didn't see any reason why it would be denied. Tr. 29, 45. At the hearing, Brown did not recall making such a statement. Tr. 187. Instead, he recalled telling Cavalier that a flexible start and stop time could not be entertained in an institution setting. Tr. 186. Brown testified that flexible schedules are not allowed at "[BOP] and at least at the institution level," because "[t]here's too many things going on, too many lives on the line for people not being where they're supposed to be, and it's definitely not something that we can offer everybody at the institution." Tr. 196.[4]

After meeting with Brown, Cavalier emailed Mayle and Pittman to communicate that she did not appreciate Clifford denying her request for a Union representative. Tr. 28; Jt. Ex. 3.

The evidence presented at the hearing also revealed that around this time, Cavalier called Nance to ask about the reasonable accommodation process. Nance told Cavalier that he was busy and would not discuss the matter, but that she could inquire of Brown about the process. Cavalier did not discuss her reasonable accommodation request or preferences with Nance. Tr. 30.

Meanwhile, Pittman told Clifford that "anytime that you're talking about someone's reasonable accommodation . . . [and] they ask for a union rep, you have to stop the conversation and let her have a union rep." Tr. 82-83. Pittman had a similar conversation with Brown. Tr. 83. Pittman also scheduled a March 30 meeting with management to discuss Cavalier's situation. Tr. 32, 83.

At their weekly meeting on March 29, Mayle told Williams that he expected managers to agree to employee requests for a union representative. Williams told Mayle he'd talk to Clifford about it. Tr. 125-26.

On March 30 Cavalier, Brown, Clifford, and Pittman met as planned. Tr. 32. At the meeting, Cavalier asked Clifford about medical documents he had requested. Also, Cavalier testified, Clifford shared some "bogus" reasons for why he thought her flexible schedule

[4] When asked whether telling Cavalier that he didn't see any reason her request would be denied is something Brown would say, Brown testified "That's something I would say." Tr. 187. However, this is an anomaly given that he consistently testified that the BOP does not allow any employee to work on a flexible schedule, including as part of a reasonable accommodation. Tr. 185-87, 196.

should be discontinued. Tr. 32. Asked why she felt Clifford's reasons were bogus, Cavalier testified

> He [Clifford] said vague things such as that I pushed the boundaries of the flexible schedule that was never clarified. And to my understanding, the only boundaries were between 6:00 a.m. and 6:00 p.m. And I didn't violate those. He also said something about needing me to answer inmate emails in the mornings, but there's no policy supporting what time inmate emails need to be responded to. And it's not even a duty I do.
>
> And then he said something about needing me to respond to the higher rates of suicidal inmates in the mornings. But I checked and there's almost 50 percent between 12:00 a.m. and 12:00 p.m., and 12:00 p.m. and 12:00 a.m. of suicidal inmate reports during the day.

Tr. 46-47.

It was confirmed at the meeting that Cavalier would continue working on a flexible schedule, starting as early as 6:00 a.m. and ending as late as 6:00 p.m., until a decision was made on Cavalier's reasonable accommodation request. Tr. 32.

Brown emailed Cavalier a letter, dated March 30, informing Cavalier that management had approved her working on a flexible schedule on a temporary basis pending receipt of medical documentation and review by the Agency. Brown advised Cavalier that her flexible schedule could be altered or rescinded at any time should the Agency determine that such an offer was no longer indicated. Jt. Ex. 4.

On April 5, Shaun Faulkner, the Associate Warden at FCI Elkton, returned to the office after having been on sick leave. He learned that day that there were "some issues going on as far as Dr. Clifford and the [U]nion." Tr. 152.

On April 8, in the early afternoon, Brown sent Cavalier an email stating that her flexible schedule would end on April 12, and that there was a request for additional medical documentation from Cavalier's doctor. Brown added that the medical documentation "will be for the NRAC to review for RA [reasonable accommodation] purposes." Jt. Ex. 5.

This came as a surprise to Cavalier, who had assumed that her flexible schedule would remain while her reasonable accommodation request was pending. *See* Tr. 33-34. Cavalier called Brown to inform him that she would not sign the document attached to the email indicating that Cavalier's flexible schedule would terminate. Brown replied that it was enough of an acknowledgement by Cavalier that there was a record of her having opened the email. *See* Tr. 33. According to Cavalier, Brown added that he felt "too close to the case" and would be "pulling back." Tr. 33. At the hearing, Brown did not recall relaying to Cavalier that he felt too close to the case, and he testified that he had never withdrawn from working on a reasonable accommodation request. Tr. 187-88.

Cavalier later told Pittman that management was planning to discontinue her flexible schedule. Tr. 34. Pittman replied that he'd bring up the issue with Faulkner at their weekly meeting later that day. Tr. 85.

That day's meeting between Faulkner and Pittman (the April 8th meeting) was held over the phone, not in person face to face. The meeting began with some informal chatting about Faulkner's time off. Tr. 86. Pittman brought up Cavalier's reasonable accommodation request, which Faulkner acknowledged. Tr. 86. Asked to describe what he then told Faulkner, Pittman testified, "I didn't think it was being handled right. . . . I was told that we were going to wait until their final decision [was] made," but "there was not at this time a final decision made." Tr. 86. Asked what he and Faulkner discussed with respect to Cavalier's reasonable accommodation request, Pittman testified

> Well, me and Mr. Faulkner kind of went back and forth on a little bit. I sat there and said that, "Mr. Faulkner, you always say that we're a bureau of family and everything. Family does not treat family like this.["] . . . He says that it went out to [the r]egion. I said, "I kind of was told that, that [the r]egion was making a decision on it."
>
> They had a subject matter expert, I think. I'm not sure if he told me at that time, but I did know it was Nance from the region [who] was going to make the determination. He said he's got to follow what that man said, except that we're the final decision here. And we got into a conversation about that, and towards the end of the conversation he made a statement that, "Well, if she would have went to me instead of the [U]nion, it might have been a different—it might have been a different outcome."

Tr. 87-88.

Pittman testified that he then told Faulkner, "'You can't make a comment like that. [I]t's against the union rights and it's a ULP charge. You can't do that.' And he said yes and said it again. He just repeated exactly what he said the first time." Tr. 88. Pittman then told Faulkner that the meeting was over. Tr. 88.

Faulkner recalled the exchange very differently. Asked whether he had said something to the effect of, 'If Cavalier hadn't gone to the Union, things would've been different,' Faulkner testified, "What I said was, had she not gone to the central office level, there may have been a different outcome because then it wouldn't have been out of our hands." Tr. 154. Faulkner also testified that "my response was really just once it's at that level, it's out of our hands. So there's really not much for us to talk about." Tr. 153. Explaining his statement further, Faulkner testified

> I always like to keep things at the institution level. Man, I felt that that was something we could have kept at the institution level as well. But once it goes to the central office level, it gets to a point where we're sending it to the subject

> matter experts. And once they issue their recommendation, we're going to go with whatever they recommend.

Tr. 153.

Asked to describe Pittman's reaction, Faulkner said

> I don't recall exactly, but I mean, our typical back and forth questions and answers and why this, why that, again, I'm sorry, I don't recall exactly how it went. But I know he did question what I said about going to the [U]nion. And I said, "That's not what I said."
>
> What I said was, "If it hadn't gone to the central office, I don't care if she goes to the [U]nion, it does not matter to me if she wanted to be in there. I don't care." It's never mattered to me. But again, once it goes to the central office, we're not going to go against the subject matter expert.

Tr. 169.

Faulkner did not recall whether he and Pittman discussed matters unrelated to Cavalier, or how long the meeting was. Tr. 167-69.

After the phone meeting ended, Pittman told his supervisor that he was taking official time and asked Cavalier to meet him at the Union office. Tr. 88.

Pittman, Cavalier, and Mayle had similar recollections as to what happened at the Union office.

Pittman remembered entering the Union office and telling Cavalier that the meeting with Faulkner "didn't go well." Tr. 88. Then, Pittman stated, Mayle came out of his office and asked Pittman how the meeting went, and Pittman told Mayle that Faulkner said if Cavalier "went to him instead of the Union first, maybe a different outcome would came [*sic*] out." Tr. 89. Pittman testified, "I've never been talked to like that before, even by him. . . . No one's ever made a statement like that to me in my whole career." Tr. 92. Pittman noted in this regard that Faulkner's statement was out of character, and that Faulkner didn't have an anti-union view of things. Tr. 111.

Pittman added that Faulkner told him, either during the April 8th meeting or at another time, that Faulkner was "not going to go against the region. That's their subject matter expert." Tr. 94. Brown too had said that to Pittman. Tr. 94.

Cavalier similarly testified that Pittman was "very angry" and "[h]is face was red." Tr. 34, 51. She asked him what was going on and Pittman replied that Faulkner said that "if I hadn't gone to the [U]nion, I might have gotten a different result." Tr. 34.

Mayle similarly testified that Pittman came to the Union office looking "perturbed" and "just kind of angry." Tr. 127. Asked to describe the discussion that ensued, Mayle further testified

> I said, "Hey, Ken, so how did that meeting go with Faulkner?" Well, he said "I just had the meeting with Faulkner."
>
> And he was like, "And you won't believe what he said." . . . I was like, "So what did he say?" . . . So he's like, "I was talking to him about Dr. Cavalier's issue, her schedule. And when I was talking about the schedule, he told me that if Ms. Cavalier had come to him instead of the [U]nion, that there might have been a different outcome."
>
> And then I said, "Are you kidding me? Like, he said that to you?" And he said, yeah. . . . I was like, "Well, doesn't he understand that he can't say that, that that's a ULP charge?" He said, "That's exactly what I told him." He said, "And then after I told him that, he looked at me and said it again."

Tr. 127-28.

Mayle then told Pittman that he'd call Faulkner and see what he had to say. Shortly thereafter on April 8, Mayle called Faulkner. Tr. 128.

Faulkner and Mayle have different recollections as to what was said during their conversation. Mayle testified that he called Faulkner, engaged in small talk, and then said, "Hey, the reason for the call is Pittman came down here, said he had a meeting with you. And then during this meeting that you told him that if Ms. Cavalier had [come] to you instead of the Union that there may have been a different outcome." Tr. 129.

Asked how Faulkner responded, Mayle testified

> He just was silent like he was waiting for me to continue, so I did. And I told him, I said, "Look, Faulkner." I was like, "You can't say stuff like that." I said, "Especially to my union representative. You claim that we're in a partnership. You're claiming that we're working together and for you to say something like that."
>
> I said, "Pretty much what you're trying to say is, is that the reason why she's not getting her reasonable accommodation is because someone is upset that she went to the [U]nion and requested . . . representation instead of just doing what Dr. Clifford wanted her to do." And then he was like, "Well, you know, pretty much it is what it is."
>
> And I said, well—oh no, he said, "Well, I'm going to tell you something." He goes . . . "I just got back." He said, "I'm really not aware of the whole situation." And then I said, "Well, how are you making a decision whether or not she should have a flexible work schedule if you don't even know all the facts, if you haven't even talked to Dr. Clifford.

> And he said, "You know what, just tell her to stay on her schedule and . . . . I'm going to talk to Dr. Clifford, and then I'll get back with you probably the following week."

Tr. 129-30.

Faulkner remembered his conversation with Mayle differently. Faulkner testified

> Pittman and I, we've always gotten along well. I don't know. I haven't had . . . a bad situation with Mr. Pittman. Quite honestly, I believe he thought he heard something else. But even when he went down and spoke with, at the time, the [U]nion president Joe Mayle, Mayle called me and asked me if I said that. And emphatically I denied it. I said "Absolutely not. And I would never say that."

Tr. 166-67.

Faulkner also testified that he and Pittman spoke again about Cavalier's reasonable accommodation request "a few times" after the April 8th meeting, "but at that point, once it leaves the institution, I told Mr. Pittman that it's a moot point for us to even talk about it because it's already above our heads and someone else is going to decide on it." Tr. 170.

At the hearing, Faulkner acknowledged that the Warden has the authority to go against the recommendation provided by NRAC. Tr. 156. But as a practical matter, Faulkner stated, "we're not going to go against the subject matter expert." Tr. 161-62. "I don't recall us having gone against them," he added. Tr. 156.

At his weekly meeting with Williams on April 12, Mayle mentioned what Pittman had told him about his conversation with Faulkner about Cavalier and Williams said he'd talk to Faulkner about it. Tr. 131. Mayle testified that Williams talked to Faulkner and later told Mayle, "Faulkner is a big boy and he's going to have to live up to what he said. He's going to have to own up to what he said." Tr. 133. Regarding Cavalier's reasonable accommodation request, Williams told Mayle that "whatever [the r]egion's decision was for her schedule is what they were going to go with." Tr. 133.

On April 12, Cavalier provided Brown additional medical documentation regarding her reasonable accommodation request. Tr. 35.

On April 20, Faulkner and Brown met with Cavalier and Pittman (and possibly Clifford) and gave Cavalier a document, Form 100C, from the NRAC, which formally denied Cavalier's reasonable accommodation request. GC Ex. 4 at 5; Jt. Ex. 6; Tr. 36, 74, 90. The document, which Faulkner signed and had Cavalier sign, stated that Cavalier's request was being denied because an "[a]lternate effective solution" was available in which Cavalier could use up to 480 hours of FMLA leave in a 12-month period, as needed, when she determined that her health prevented her from arriving to work at her scheduled start time. Tr. 155; Jt. Ex. 6. Cavalier could use leave, including annual, sick, and leave without pay, for her FMLA hours. Tr. 189.

Cavalier testified that Faulkner did not make any comments at the meeting suggesting there would have been a different outcome had Cavalier not gone to the Union. Tr. 57.

Also, it is noted that Brown did not discuss Cavalier's reasonable accommodation request with Faulkner until near the end of the process when Faulkner denied the request. Tr. 183.

Asked to describe her reaction, Cavalier testified

> Pittman kind of mentally prepared me, so I was calm, but it was very disappointing. I remember telling Faulkner that this was my livelihood, and that, while I didn't want to cause problems, I did have to file an EEO grievance. His response was that he hoped I won because he didn't agree with the decision that was made by [the r]egion about my reasonable accommodation request. Pittman said, "I wish he wouldn't say things like that. You can't say things like that.' And . . . Faulkner just repeated himself word for word what he said before.

Tr. 37.

On April 28, Cavalier contacted Jennifer Regal, an EEO counselor, for advice regarding the denial of her reasonable accommodation request. Regal told Cavalier that it "wasn't an EEO issue." Tr. 27, 38. According to Faulkner, there was an EEO complaint filed subsequently at some point. Tr. 155.

Cavalier testified that she has been negatively impacted by the Agency's denial of her reasonable accommodation request. Since the denial, Cavalier has had to use about 550 hours of FMLA time. She has nearly depleted her annual and sick leave hours, and she has had to take 135 hours as leave without pay. Tr. 38-39. Moreover, because she no longer has flexibility to work past her regularly scheduled stop time, Cavalier testified, "I either overwork myself and try to get everything done in the hours I do have or let my supervisor, Dr. Clifford, know what duties didn't get done because I didn't have enough hours." Tr. 39. As a result, Cavalier stated, "[M]y stress level has been very high." Tr. 40.

With respect to labor relations at FCI Elkton, Pittman testified that he had worked with Faulkner on at least six or seven cases, that the two were able to find common ground and resolve cases, and that their interactions were generally civil. Tr. 106. Pittman served as a Labor-Management Relations (LMR) chair during the time in question. Tr. 104-05.

Faulkner also served as an LMR chair during this time. Tr. 151. Faulkner testified that he had a history of telling his department to grant employees' requests for union representation, even in circumstances where it wasn't required, because "[W]hat does it hurt? Why wouldn't you want the union there." Tr. 167. Faulkner noted that he was "in the union a couple different times" and served on the union's executive board as the first secretary treasurer when he worked at another institution, USP McCreary. Tr. 150.

With respect to Cavalier's union activity, Faulkner denied that Cavalier's involvement with, or membership in, the Union played a role in the decision to deny her reasonable accommodation request. Tr. 154-55.

Brown testified that he did not recall Faulkner making any comments regarding union involvement and any effect it may have had. Tr. 183-84. Brown testified as well that in his experience, he had never noticed any difference in outcomes if the Union was involved or not involved in an employee's reasonable accommodation request. Tr. 184. Brown did not recall discussing Cavalier's involvement with the Union with Clifford, and Brown did not recall Clifford ever making a comment to the effect of there being a different outcome because of Union involvement. Tr. 186.

Asked to describe his role in the reasonable accommodation process, Brown testified

> For the most part, I pass the paperwork along, I would receive kind of a template to issue. Like the employee in case there was a request for additional medical documentation or information on how to complete [forms] . . . for tracking purposes and issuance. We would discuss it, but mainly more them telling.

Tr. 194-95.

When Pittman was asked at the hearing whether Nance was aware Cavalier had sought assistance from the Union, Pittman testified, "I don't know if he knows." Tr. 94.

POSITIONS OF THE PARTIES

General Counsel

With respect to the April 8th meeting, the General Counsel asserts that Faulkner told Pittman that there might have been a different outcome had Cavalier gone to Faulkner instead of the Union. GC Br. at 3. The GC urges the undersigned to credit Pittman's testimony as to what Faulkner said at that meeting, arguing that Pittman's testimony was internally consistent and was confirmed by Cavalier and Mayle. Further, the GC asserts, Faulkner did not deny making an anti-union statement in his April 8 conversation with Mayle. *Id.* at 11-12. The GC adds that Faulkner himself admitted that there were "issues" between Clifford and the Union. Given all this, and the objections the Union raised to Clifford, Brown, and Williams regarding Cavalier's reasonable accommodation request, the GC submits that it was "certainly plausible" that Cavalier's decision to involve the Union "ruffled someone's feathers and adversely affected the outcome of her accommodation request[.]" Id. at 3, 11-12.

The GC asks that the undersigned not credit Faulkner's version of what was said at the April 8th meeting. According to the GC, Faulkner's testimony was inconsistent. For example, Faulkner admitted mentioning the Union's involvement to Pittman at one point in his testimony but seemed to deny saying anything about the Union's involvement at other points in his

testimony and in his affidavit. Moreover, the GC argues, Faulkner could not recall details about the meeting, including its length and whether any other topics discussed. *Id.* at 12.

With respect to the § 7116(a)(1) allegation, the GC contends that the statement Faulkner allegedly made to Pittman at the April 8th meeting is objectively coercive. *Id.* at 18 (citing *U.S. Dep't of Transp., FAA*, 64 FLRA 365, 370 (2009) (*FAA*); *U.S. Customs Serv., Region I (Bos., Mass.)*, 15 FLRA 309, 310 (1984); *Navy Resale Sys. Field Support Off., Commissary Store Grp.*, 5 FLRA 311, 315-16 (1981)). In this regard, the GC asserts that Faulkner directly connected Cavalier's involvement with the Union to the outcome of her reasonable accommodation request, and that Faulkner's statement could make the Union "think twice" about assisting employees with reasonable accommodation requests. *Id.*

With regard to the § 7116(a)(1) and (2) allegation, the GC asserts that Cavalier engaged in protected activity when she solicited the Union's assistance in connection with her reasonable accommodation request, that the Respondent was aware of the Union's involvement when it denied Cavalier's request, and that the Respondent denied Cavalier's request based on her protected activity, as Faulkner indicated in his alleged statement at the April 8th meeting. *Id.* at 13-14 (citing *Indian Health Serv., Crow Hosp., Crow Agency, Mont.*, 57 FLRA 109, 125 (2001)). Timing also shows unlawful motivation, the GC argues, for while Brown initially told Cavalier he saw no reason her request would be denied, the Respondent, after much Union advocacy on Cavalier's behalf, ultimately denied the request. *Id.* at 14.

The GC denies the Respondent had a legitimate justification for its action, or that the same action would have been taken in the absence of Cavalier's protected activity. *See id.* at 14-15, 17. The Respondent's defense is unsupported, the GC claims, as the Respondent failed to call Nance or Tiffany Scion, the current NRAC, as witnesses, and failed to provide documentary evidence showing FCI Elkton always follows the recommendation of the NRAC. Indeed, the GC notes, the BOP's Program Statement indicates generally that it is an employee's first-line supervisor (or other official in the employee's chain of command), rather than the NRAC, who decides the employee's reasonable accommodation request. *Id.* at 14-15, 17.

The Respondent's defense is further undermined by what Faulkner allegedly told Pittman at the April 8th meeting, by the Respondent's failure to engage in the interactive process required by the BOP's Program Statement, and by the fact that the Respondent's alternate effective solution resulted in Cavalier working fewer hours and providing less coverage. *Id.* at 16. Furthermore, the GC suggests, the "Respondent . . . did not follow . . . federal law" in providing Cavalier an alternate effective solution because "providing an employee with unpaid leave under FMLA is simply not equivalent to providing a modified, full-time schedule as an accommodation." *Id.* (citing *Morin V. Hannaford Bros. Co., LLC*, No. 1:17-CV-50-GZS, 2018 WL 2746570, at *12 (D. Me. June 7, 2018); *Reilly v. Revlon, Inc.*, 620 F.Supp. 2d 524, 543 (S.D.N.Y. 2009)). That Faulkner claimed Cavalier's reasonable accommodation request was denied "because she . . . raised it with the 'central office'" rather than with Faulkner is, the GC argues, "more akin to EEO retaliation" than a legitimate justification. *Id.* In addition, the GC characterizes the claim that FCI Elkton never grants flexible schedules as a shifting rationale that supports a finding of pretext. *Id.* at 16 n.7 (citing

IRS, Phila. Serv. Ctr., 54 FLRA 674 (1998) (*IRS*); *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 782 (8th Cir. 2013)).

Regarding the remedy, the GC requests that the Respondent be ordered to rescind its denial of Cavalier's reasonable accommodation request and pay Cavalier backpay for the unpaid time she used in connection with her medical condition. *Id.* at 18.

Respondent

The Respondent asserts that it did not violate the Statute and argues that Faulkner did not make any statements indicating that Cavalier might have had a different outcome if she hadn't gone to the Union. Resp. Br. at 1-2. Rather, the Respondent submits, Faulkner told Pittman that once Cavalier's request was sent to the central office, the matter was out of his control. *Id.* at 3. The Respondent additionally contends that the decision to deny Cavalier's reasonable accommodation request was not based on the Union's involvement in Cavalier's request or on Cavalier's membership in the Union. *Id.* The Respondent also asserts that it was recognized practice at FCI Elkton to follow the recommendations of the NRAC. *Id.* at 2.

ANALYSIS AND CONCLUSIONS

Faulkner's Account of the April 8th Meeting Is Credited over Pittman's

The parties dispute what was said at the April 8th meeting. The GC argues that Pittman's account—that Faulkner said there might have been a different outcome if Cavalier had gone to him rather than the Union—should be credited. The Respondent counters that Faulkner's account—that Faulkner said only that Cavalier's submission to the NRAC meant the matter was out of his hands—should be credited. For the following reasons, the undersigned credits Faulkner's account over Pittman's.

This finding is based in large part on the improbable nature of the exchange described by Pittman. Put simply, it is hard to believe that Faulkner—a former member of his union's executive board and a current LMR chair; a person who had had a productive labor-relations relationship with Pittman and who instructed managers to be accommodating when an employee asks for a union representative—would not only make a nakedly anti-union statement to Pittman, but would then double down and repeat the statement after being told by Pittman it was a "ULP charge." Tr. 88. Adding to the improbability is the fact that Faulkner's alleged statement comes out of nowhere. It conveys an anti-union sentiment that Faulkner obviously did not hold (*see* Tr. 111, 154-55, 183-84, 186), and it was allegedly made without clear provocation from Pittman. Further, even Pittman and Mayle tacitly acknowledged that Faulkner's alleged statement was unusual, if not unlikely. Pittman allowed that what he heard Faulkner say was out of character for Faulkner (Tr. 111), and Mayle indicated that when

Pittman recounted what had happened, Pittman had to begin by saying, "[Y]ou won't believe what he [Faulkner] said." Tr. 127.

An additional reason for questioning Pittman's account is the stark contrast between Faulkner's statement (as described by Pittman) and the facts. According to Pittman, Faulkner said that there might have been a different outcome if Cavalier "went to me instead of the [U]nion." Tr. 88. But Cavalier did not go to the Union, at least not initially. Rather, Cavalier filled out form 100A herself and consulted with Brown (who forwarded the request to the NRAC later that day) before telling the Union about the request. As for timing, Cavalier's request was still pending at the time of the April 8th meeting (Tr. 86), so it is unlikely that Faulkner would have said there "might have been a different outcome," as if a decision had already been made.

Faulkner's account of the meeting is far more credible and shows that Faulkner did not make an anti-union remark. While it is apparent that Faulkner said *something* about the Union, and that Pittman perceived what Faulkner had said to be objectionable, there is no indication that Faulkner said anything that was problematic. Indeed, when Pittman suggested to Faulkner that he had said something objectionable in connection with Cavalier going to the Union, Faulkner immediately tried to refute Pittman of that notion, telling him flatly, "That's not what I said." Faulkner further clarified to Pittman that Cavalier's decision to seek Union assistance was irrelevant, telling him "I don't care if she goes to the [U]nion, it does not matter to me if she wanted to be in there. I don't care." Tr. 169. What mattered instead, Faulkner told Pittman, was that the matter had been submitted to the NRAC and not at the local level to attempt to resolve.

It is true that at one point in his testimony, Faulkner spoke as if the reasonable accommodation decision had already been decided, telling Pittman that there "may have been a different outcome." Tr. 154. But at other points, Faulkner's testimony accurately reflects the fact that Cavalier's request was actually still pending, and that Faulkner did not know the outcome of NRAC's recommendation. Specifically, Faulkner recalled telling Pittman "once it's at that level [NRAC], it's out of our hands" (Tr. 153), and Faulkner further testified that "once it goes to the central office, we're not going to go against the subject matter expert." Tr. 169. Further, the undersigned finds it makes sense for management to relay that they expect to follow the recommendation of higher Agency authority, i.e. the NRAC, who has subject matter expertise regarding an accommodation request.

The GC argues that Faulkner could not remember everything that took place—for example, he could not say how long the April 8th meeting lasted, or whether it pertained only to Cavalier—but this does not undermine Faulkner's overall testimony. No one would expect a witness to remember every single detail of a past event, and it is especially understandable that Faulkner would be challenged to recall relatively trivial details rather than the substantive labor relations question presented.

As for the April 8th conversation between Faulkner and Mayle, Faulkner testified that he told Mayle that he denied making an anti-union statement. Faulkner's testimony on this

point is consistent with his testimony as a whole and is credible generally. Mayle's claim on the other hand, that Faulkner improbably responded to an accusation of anti-union retaliation by saying, "it is what it is," is not. Tr. 129. It is generic in nature and expresses a callousness that is entirely contrary to Faulkner's character. Rather than acting callously, Faulkner went on to say he'd tell Clifford to have Cavalier stay on her flexible schedule (for the time being).

The conversation between Mayle and Williams on April 12 likewise fails to prove Faulkner made the alleged anti-union statement. Williams told Mayle that "Faulkner is a big boy and he's going to have to live up to what he said. He's going to have to own up to what he said." Tr. 133. While Williams's statement tacitly acknowledges that the Union believed Faulkner had said something objectionable and that Faulkner might have to defend himself against such claims, Williams did not say that the Union's impression was correct. Even if Williams's statement could be construed as such, it would carry little weight, since Williams did not participate in the April 8th meeting and thus had no first-hand knowledge of what was said.

An additional basis for crediting Faulkner's account over Pittman's is the conspicuous absence at the April 20th meeting between Faulkner, Brown, Cavalier, and Pittman of: (a) any anti-union statement; and (b) any claim that Faulkner had made an anti-union statement at the April 8th meeting (or at any other point). *See* Tr. 57, 183-84. Instead, the April 20th meeting saw Faulkner expressing support for Cavalier, telling her that he hoped she won her EEO grievance because he didn't agree with the NRAC's decision. Tr. 37.

Finally, Faulkner testified from home because he has since retired from Federal service. The undersigned finds Faulkner's willingness to return to testify to be consistent with his past union history and his experience fostering productive relationships between labor and management. It likewise underscores Faulkner's dedication to honesty and integrity. Faulkner testified, upon being asked why he returned to testify, "I kind of felt like this was someone . . . questioning my integrity. So I wanted to come back to be involved in this. It was important for me to do this." Tr. 151-52.

The undersigned, having reviewed the record and considered the evidence, finds Faulkner's testimony to outweigh Pittman's testimony. However, Pittman's testimony is not found to be intentionally misleading. It is apparent he enthusiastically takes his Union responsibilities seriously and advocates strenuously on behalf of whom he is representing. In the case at bar, the undersigned simply finds he misunderstood Faulkner's comments in the heat of the moment of the April 8th meeting. It entailed miscommunication, nothing else.

For all these reasons, the undersigned credits Faulkner's account of what was said at the April 8th meeting over Pittman's account. The undersigned thus finds that Faulkner did not make an anti-union statement at the meeting.

The Respondent Did Not Commit an Independent Violation of § 7116(a)(1)

It is an unfair labor practice under § 7116(a)(1) of the Statute for an agency to interfere with, restrain, or coerce any employee in the exercise of rights under the Statute, including the right to seek and accept union assistance and representation concerning conditions of employment. *See, e.g.*, *Dep't of the Navy, Portsmouth Naval Shipyard*, 7 FLRA 766, 777 (1982).

The test for determining whether a statement or conduct violates § 7116(a)(1) is an objective one. Although the circumstances of the pertinent incident are taken into consideration, the standard is not based on the subjective perceptions of the employee or the intent of the employer. Rather, the question is whether, viewed objectively, the agency's action would tend to interfere with, restrain, or coerce employees in the exercise of their rights protected under the Statute, or whether the employee could reasonably have drawn a coercive inference from the agency's action. *Mich. Nat'l Guard*, 69 FLRA 393, 396 (2016).

A violation of § 7116(a)(1) may be found where, for instance, a statement explicitly links an employee's protected activity with treatment adverse to the employee's interests. *See FAA*, 64 FLRA at 370 (supervisor informed steward he was disqualified from flying as a crew member based on protected activity); *USDA, U.S. Forest Serv., Frenchburg Job Corps, Mariba, Ky.*, 49 FLRA 1020, 1034-35 (1994) (statement linking employee's use of official time with negative perceptions of employee's performance); *Dep't of the Treasury, U.S. Customs Serv., Region IV, Miami, Fla.*, 19 FLRA 956, 968-69 (1985) (statements linking employee's position as a union official with the denial to the employee of new, challenging, and interesting job assignments, and with limitations on the employee's career opportunities).

Having credited Faulkner's account of the April 8th meeting, the undersigned finds that Faulkner's statements did not violate § 7116(a)(1) of the Statute. Faulkner did not connect the outcome of Cavalier's request to her Union involvement, and Faulkner did not say anything that could reasonably make anyone "think twice" about requesting or providing Union assistance. The things that Faulkner did say—that once a reasonable accommodation request was submitted to the NRAC, the matter was out of Faulkner's hands; that Cavalier's decision to go to the Union made no difference from his perspective; and that Faulkner would not go against the NRAC's recommendation—are not coercive or otherwise unlawful. *Cf. U.S. DOJ, Fed. BOP, FCI Elkton, Ohio*, 62 FLRA 199, 201 (2007) (comments that are intemperate and express some degree of frustration with the union do not automatically violate the Statute).

For these reasons, it is found that the Respondent did not commit an independent violation of § 7116(a)(1) of the Statute.

The Respondent Did Not Violate § 7116(a)(1) and (2) of the Statute

Under § 7116(a)(2) of the Statute, it is a ULP to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment. 5 U.S.C. § 7116(a)(2). In *Letterkenny Army Depot*, 35 FLRA 113, 117-18 (1990), the Authority established the analytical framework for determining whether an agency action violates this provision. The GC bears the burden of establishing, by a preponderance of the evidence, that a ULP was committed. *Id.* at 118. First, the GC must show: (1) that the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) that such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment. *Id.* If the GC proves these elements, it has established a prima facie case of discrimination. The existence of a prima facie case is determined by considering the evidence in the record as a whole, not just the evidence presented by the GC. *U.S. DOD, U.S. Air Force, 325th Fighter Wing, Tyndall AFB, Fla.*, 66 FLRA 256, 261 (2011).

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

It is undisputed that Cavalier engaged in protected activity by seeking the Union's assistance. *See DHS, U.S. CBP, Laredo, Tex.*, 71 FLRA 1069, 1072 n.42 (2020); *U.S. Dep't of the Navy, Naval Aviation Depot, Naval Air Station Alameda, Alameda, Cal.*, 38 FLRA 567, 569 (1990). Cavalier sought Union assistance when she asked for a Union representative in her meeting with Clifford, and in her attempts to continue to work on a flexible schedule and to receive a reasonable accommodation. Also, the Respondent was clearly aware of Cavalier's protected activity.

The next question is to determine whether Cavalier's protected activity was a motivating factor in the Agency's treatment of her in connection with conditions of employment, specifically, the Agency's decision to deny Cavalier's reasonable accommodation request.[5]

The "motivating factor" analysis may include considerations such as the timing of the action, the words and conduct of supervisors, and the disparate treatment of an employee. *FAA*, 64 FLRA at 368; *Dep't of the Air Force, AFMC, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 55 FLRA 1201, 1205 (2000). In addition, the absence of any legitimate basis for an action may form part of the proof of the GC's prima facie case. *See Davis Monthan AFB*, 58

[5] There is no dispute that the Agency's denial of Cavalier's request, which affected her work schedule and leave balances, was an action made in connection with conditions of employment. *Cf. U.S. Dep't of HHS, SSA, Balt., Md.*, 37 FLRA 161, 162 (1990) (finding respondent violated § 7116(a)(1) and (2) by restricting steward's use of emergency annual leave).

FLRA at 650. Also, a supervisor's anti-union animus can also shed light on the supervisor's motivation concerning his action. *See U.S. Dep't of Transp., FAA, El Paso, Tex.*, 39 FLRA 1542, 1552-53 (1991).

The GC's unlawful motivation argument relies primarily upon Pittman's account of the April 8th meeting. The undersigned respectfully credits Faulkner's account of that meeting over Pittman's, and nothing in Faulkner's account indicates Faulkner was unlawfully motivated. Contrary to the GC's claims, Faulkner did not make an explicit connection between Cavalier's protected activity and an Agency decision to deny Cavalier's reasonable accommodation request. Rather, when Pittman suggested that Faulkner had said something objectionable in connection with Cavalier going to the Union, Faulkner responded, "That's not what I said." Tr. 169. And Faulkner further clarified to Pittman that Cavalier's decision to seek Union assistance was not relevant to how the Agency would resolve Cavalier's reasonable accommodation request. Rather, Faulkner explained, the Agency would resolve Cavalier's request based on the NRAC's recommendation. Tr. 169.

The GC asserts that in light of Cavalier's protected activity it was "certainly plausible" that Cavalier's decision to involve the Union "ruffled someone's feathers and adversely affected the outcome of her accommodation request," suggesting that there was anti-union animus. The GC further argues that there was no legitimate justification for the Respondent's action. GC Br. at 12. But the GC fails to identify exactly whose feathers were ruffled, or how that resulted in Cavalier's request being denied. The record is devoid of the culprit.

The most obvious candidate is Clifford, but nothing in his words or conduct reveals anti-union animus. Clifford told Cavalier on March 19 that her flexible schedule would be discontinued. Clifford told Mayle that this was for departmental needs. Later, Clifford provided reasons for the discontinuation to Cavalier, who felt the reasons were "bogus." While Clifford's explanation may not have been adequate in Cavalier's view, the record indicates that there were legitimate reasons for Clifford's decision. Specifically, Clifford felt Cavalier was abusing the flexibilities in her work schedule, and Brown advised Clifford that the BOP did not allow employees to work flexible schedules, at least not on a permanent basis. Further, Clifford's subsequent explanation for his decision to discontinue Cavalier's flexible schedule, however flawed, is not a reason to suspect that the decision was based on Cavalier's protected activity, since the decision was made on or before March 19, prior to Cavalier's protected activity.

It is also true that Clifford denied Cavalier's request for a Union representative, and Faulkner acknowledged that there were "some issues" between Clifford and the Union. Tr. 152. But there is no claim that Clifford's denial of Cavalier's request for a Union representative was improper, and, as noted above, there is no clear evidence that the "issues" between Clifford and the Union involved anything other than normal workplace disagreement. Brown credibly testified that he did not recall discussing Cavalier's involvement with the Union with Clifford, and did not recall Clifford making a comment to the effect of there being a different outcome because of union involvement. Tr. 186. Additionally, there is no evidence

that Clifford played a role in the Agency's decision to deny Cavalier's reasonable accommodation request.

It is further noted that Clifford's denial of Cavalier's request for a Union representative was based upon Cavalier's erroneous assumption that Clifford was asking her to execute a document denying her reasonable accommodation request. In hindsight, she determined that Clifford was merely asking for more medical records to support her request for an accommodation, which is routine and customary, and a likely explanation for Clifford's response. This circumstance does not support a finding of anti-union animus by Clifford or the Agency. For all of these reasons, the undersigned respectfully finds this line of argument falls short.

Evidence of anti-union animus among the other managers is likewise lacking. Faulkner, the former union member and current LMR chair, had a productive and respectful relationship with the Union. *See* Tr. 106, 111. Further, Brown credibly testified he did not recall Faulkner making any comments regarding the Union's involvement or the effect it might have had. Tr. 183-84. Moreover, there is nothing suspect in Faulkner's actions. The record reveals that the NRAC recommended denying Cavalier's request, and that it was established practice at FCI Elkton, consistent with the BOP's Program Statement, for Faulkner to follow the NRAC's expert advice. *See* Tr. 27, 37, 153, 181, 193; GC Ex. 4 at 5; Jt. Ex. 5 (noting the NRAC would review for reasonable accommodation purposes); *see also* Jt. Ex. 7 at 7 (providing for consultation with the NRAC).

There is no evidence Brown held anti-union animus views either, and any suggestions to the contrary are misplaced. The undersigned notes that Brown did not tell Cavalier he saw no reason her reasonable accommodation request would be denied. Cavalier's request sought the ability to work on a flexible schedule, but Brown had indicated from the beginning that a flexible schedule could not be entertained in an institution setting, at least not as a long-term measure, so it is unlikely he would have told Cavalier such a request would be approved. Tr. 186-87. (In light of this finding, there is no longer a basis for the GC's suspicious-timing claim.) *See* GC Br. at 14. Further, even if Brown had told Cavalier he saw no reason her request would be denied, the undersigned would not find anything about this to be suspicious, since it was clear that FCI Elkton's decision on Cavalier's request would be based on the NRAC's recommendation, not on Brown's speculation about it.

The undersigned likewise finds that Brown did not tell Cavalier he felt "too close to the case" and would be "pulling back," as Cavalier claimed. Brown did not recall saying these things to Cavalier, Brown had not previously withdrawn from working on a reasonable accommodation request, and there is no indication that Brown did anything out of the ordinary when working on Cavalier's reasonable accommodation request. In fact, his testimony supported his primary role, in handling accommodation requests, to be more perfunctory of relaying the request to the NRAC rather than engaging further in the process.

It is noted that Brown convincingly indicated that the Respondent has not engaged in disparate treatment. He testified that he had not noticed any difference in outcomes if the union was involved or not involved in an employee's reasonable accommodation request. Tr. 184.

Likewise, there are no signs that Williams held anti-union animus with respect to Cavalier's attempt to receive a reasonable accommodation, and no evidence supporting that Williams influenced the Agency's decision to deny Cavalier's request. Finally, there is no indication that Nance held anti-union views, or that he was even aware that Cavalier had sought the Union's assistance. *See* Tr. 30, 94, 194-95. He refused her request to discuss the matter and referred her to Brown. Tr. 30.

The GC claims that the Respondent failed to follow the interactive process as required under the BOP's Program Statement, but this argument too is unpersuasive. The BOP's Program Statement indicates that the interactive process begins with the employee's supervisor or the HRO using Form 100A, that the process can involve the submission of medical documentation, and that decisions are made in consultation with the NRAC. The evidence in the record fully supports findings in compliance with the BOP policy. Cavalier filled out Form 100A and submitted it to Brown (who then forwarded it to the NRAC), and Cavalier subsequently submitted medical documentation as required. Tr. 181-82; Jt. Ex. 7 at 6-7. While there are some gaps in the record—for example, it is unclear whether or to what extent there was an analysis of the essential functions of Cavalier's job—these gaps do not suggest that the Respondent failed to engage in the process, or that the process was a facade. Accordingly, the GC's claim is misplaced.

The GC suggests that the alternate effective solution in which Cavalier could take leave under the FMLA is unlawful, based on two private-sector cases under the Americans with Disabilities Act (ADA), *Morin V. Hannaford Bros. Co., LLC*, 2018 WL 2746570, at *12, and *Reilly v. Revlon, Inc.*, 620 F.Supp. 2d at 543. As an initial matter, claims of federal employees are governed by the Rehabilitation Act, not the ADA. *OPM*, 61 FLRA 358, 361 (2005). Congress has adopted the standards of the ADA for determining whether there has been disability discrimination in violation of the Rehabilitation Act, *id.*, and it is possible that a solution involving unpaid leave might be inappropriate in some circumstances absent an undue hardship, *see Elise S. v. Pompeo*, Appeal No. 0120170164, 2019 WL 4945034, at *17 (Sept. 25, 2019). But the GC fails to show that the Respondent's solution under which Cavalier could take leave, including unpaid leave, is inherently suspect, *see, e.g. Breanne H. v. McAleenan*, Appeal No. 2019002006, 2020 WL 4501370, at *7 (June 9, 2020) ("The Commission notes that unpaid leave is a potential reasonable accommodation under the Rehabilitation Act."); *Deangelo C. v. Barr*, EEOC Appeal No. 0120180010, 2019 WL 4945038, at *4 (Sept. 27, 2019) (same), especially in light of Brown's credible testimony indicating that a flexible schedule could not be provided in an institution setting on a permanent basis. Moreover, even if the Respondent's effective solution were contrary to the Rehabilitation Act, that would not be a sign of unlawful motivation, since the NRAC's recommendation, which Faulkner simply followed, was made without any knowledge of Cavalier's protected activity.

The GC suggests that Faulkner denied Cavalier's reasonable accommodation request in retaliation for Cavalier's decision to submit the matter to the NRAC rather than to Faulkner. But that is based on Pittman's account of the April 8th meeting, which has not been credited. Faulkner's account, which has been credited, shows only that Faulkner felt bound to follow the NRAC's recommendation where, as here, a request had already been submitted to the NRAC's subject matter expert.

The GC characterizes the claim that FCI Elkton never grants flexible schedules as a shifting rationale. While Cavalier was permitted to work on a flexible schedule during her first year at FCI Elkton (and for a year prior to that when she was at FCI Fairton), it was clearly communicated on a consistent basis that this was intended to be merely a temporary measure. The Respondent has consistently indicated that employees may not work on flexible schedules on a permanent basis at FCI Elkton, or at the BOP in general. Moreover, Brown informed Clifford of the policy against flexible schedules, and Clifford advised Cavalier that her flexible schedule would be discontinued, prior to Cavalier's protected activity. Further, given FCI Elkton's policy against granting permanent flexible schedules, it is unsurprising that the Respondent was willing to provide an alternative solution, even though that solution might have reduced coverage on days when Cavalier's medical condition prevented her from arriving on time.

It is noted that the GC does not claim that there was anything suspicious about the Respondent not granting Cavalier's alternative reasonable accommodation request that she be allowed to work from 9:00 a.m. to 6:00 p.m. (to 5:00 p.m. every other Thursday, with every other Friday off), instead of on her regular schedule. Jt. Ex. 2. And the undersigned finds nothing suspicious in this regard. First, Cavalier's alternative request went against the Agency's interest in scheduling uniformity. *See* Tr. 196. Additionally, while Cavalier may have felt that the Agency's reasons against allowing her to work (on a flexible schedule) until 6:00 p.m. were "bogus," it is apparent that the Agency believed, on balance, that Cavalier's willingness to work beyond her regular hours did not benefit the Agency. *See* Tr. 46-47, 122. Moreover, we know the Agency's interest in having Cavalier return to her regular schedule was legitimate because this interest arose prior to Cavalier's protected activity. *See* Tr. 21-24. Likewise, there is no indication that the NRAC failed to take Cavalier's alternative request into account or acted inappropriately. Accordingly, the undersigned finds nothing suspicious about the fact that the Respondent did not grant Cavalier's alternative request.

The GC urges that the undersigned draw a negative inference regarding the Respondent's decision not to call Nance or Scion as witnesses and the Respondent's failure to submit documentary evidence indicating FCI Elkton always follows the recommendations of the NRAC. In general, when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *IRS*, 54 FLRA at 682. Likewise, a judge may draw an adverse inference from the failure of a party to voluntarily produce documents or other objects in its possession as evidence. *U.S. DOJ, Fed. BOP, U.S. Penitentiary (Admin. Maximum) Florence, Colo.*, 60 FLRA 752, 757 (2005). An adverse

inference is not appropriate, however, where merely cumulative testimony is involved. *See U.S. Dep't of Commerce, NOAA, Nat'l Ocean Serv., Coast & Geodetic Survey, Aeronautical Charting Div., Wash., D.C.*, 54 FLRA 987, 1018 (1998).

The undersigned finds that Nance and Scion's testimony, and any documentary evidence setting forth a policy with respect to the NRAC's recommendations (assuming such a document even exists), would have merely confirmed testimony and documentary evidence heretofore analyzed, considered and discussed herein. It is nearly certain that Nance and Scion would have testified that the NRAC's recommendation was based solely on lawful factors, such as a consideration of the medical documentation Cavalier provided, and that Faulkner was indeed permitted to follow the NRAC's advice. For these reasons, the GC's argument is misplaced.

Based on the foregoing, the undersigned finds that the GC failed to prove that Cavalier's protected activity was a motivating factor in the Respondent's treatment of her. Accordingly, the GC has failed to establish a prima facie case of discrimination.

Finally, even if the GC had established a prima facie case, the evidence overwhelmingly supports a legitimate justification for the Respondent's action, and that the same action would have been taken in the absence of protected activity. Pursuant to BOP policy, Cavalier's request was submitted to the NRAC, the BOP's subject matter expert. The NRAC then issued a recommendation based on legitimate factors, specifically, the substance of Cavalier's request, the medical documentation Cavalier had submitted, and the needs and policies of the BOP and FCI Elkton. In recognition of Cavalier's needs, the NRAC recommended that Cavalier be allowed to take leave as needed when her medical condition prevented her from starting work at her regularly scheduled start time. In recognition of the needs and policies of the BOP and FCI Elkton (*see* Tr. 196), the NRAC recommended that Cavalier's request to work on a flexible schedule be denied. Further, based on the NRAC's expertise and FCI Elkton's long-established practice of deferring to the recommendations of the NRAC, and consistent with the BOP's Program Statement providing for consideration of the NRAC's views, Faulkner decided to follow NRAC's recommendation and deny Cavalier's request. As the Respondent followed established procedures and based its decision on legitimate factors, there was a legitimate justification for the Respondent's action. And given that it was FCI Elkton's practice to follow the NRAC's recommendations, it is clear the Respondent would have taken the same action even in the absence of protected activity.

Based on the foregoing, the undersigned concludes that the Respondent did not violate § 7116(a)(1) and (2) of the Statute.

Summary

Based on the foregoing, the undersigned finds that the GC failed to prove the Respondent independently violated § 7116(a)(1) of the Statute, and failed to prove that the Respondent committed a violation of § 7116(a)(1) and (2) of the Statute. Accordingly, the undersigned recommends that the Authority adopt the following Order:

ORDER

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

Issued, Washington, D.C.
April 19, 2023

David L. Welch, Chief Judge
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Date: 2023.04.19 14:16:58 -04'00'

DAVID L. WELCH
Chief Administrative Law Judge