UNITED STATES OF AMERICA
**FEDERAL LABOR RELATIONS AUTHORITY**
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: May 20, 2005

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
U.S. PENITENTIARY
LOMPOC, CALIFORNIA

Respondent

and Case No. SF-CA-03-0640

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3048, AFL-CIO

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. §2423.34(b), I am hereby transferring t he above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
**FEDERAL LABOR RELATIONS AUTHORITY**
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

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| DEPARTMENT OF JUSTICE<br>FEDERAL BUREAU OF PRISONS<br>U.S. PENITENTIARY<br>LOMPOC, CALIFORNIA<br><br>Respondent | |
| and<br><br>AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3048, AFL-CIO<br><br>Charging Party | Case No. SF-CA-03-0640 |

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves her 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 Federal Labor Relations Authority pursuant to 5 C.F.R. §2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JUNE 20, 2005**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

SUSAN E. JELEN
Administrative Law Judge

Dated: May 20, 2005
Washington, DC

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

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| and<br><br>AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3048<br><br>Charging Party | Case No. SF-CA-03-0640 |

Jon R. Pannozzo, Jr., Esquire
For the General Counsel

Steven R. Simon, Esquire
Theresa T. Talplacido
For the Respondent

Barry Fredieu
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

## DECISION

### Statement of the Case

This case arises out of an unfair labor practice charge filed by the American Federation of Government Employees, Local 3048, AFL-CIO, (Charging Party or Union) against the Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Lompoc, California (Respondent), as well as a Complaint and Notice of Hearing issued by the Regional Director of the San Francisco Region of the Federal Labor Relations Authority (FLRA). The complaint alleged that the Respondent violated §7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §7101, *et seq.* (Statute). Specifically, the complaint alleged that Respondent violated the Statute by reassigning bargaining unit employee Kevin Isom from his Main Corridor position to

a Tower position from April 1-12, 2003; by removing Isom from his position on the Respondent's Disturbance Control Team in April 2003; and by reassigning Isom from his Main Corridor position to a Tower position from June 12-17, 2003. The alleged conduct was because the employee engaged in protected activity under §7102 of the Statute, including assisting the Union in a grievance, and making complaints concerning health and safety issues in accordance with the parties' collective bargaining agreement. (G.C. Ex. 1(c))

Respondent timely filed an answer to the complaint, admitting certain allegations but denying the substantive allegations of the complaint. (G.C. Ex. 1(d))

A hearing in this matter was held in Lompoc, California. The parties were represented and afforded a full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses and file post-hearing briefs. Both the General Counsel and the Respondent filed timely briefs.

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

**Statement of the Facts**

The Respondent is an agency under 5 U.S.C. §7103(a)(3). The American Federation of Government Employees, Council of Prison Locals, AFL-CIO (AFGE) is a labor organization under 5 U.S.C. §7103(a)(4) and is the certified exclusive representative of a nationwide consolidated unit of employees of the Federal Bureau of Prisons, Washington, D.C. (BOP) The Charging Party is an agent of AFGE for the purpose of representing employees at the Respondent. (G.C. Ex. 1(c) and 1(d)

BOP and AFGE are parties to a Master Agreement (MA) covering employees in the unit described above. The MA has expired, but the parties continue to follow the terms of the agreement. Article 6 of the MA is entitled RIGHTS OF THE EMPLOYEE, and Section b.1. states that:

> The parties agree that there will be no restraint, harassment, intimidation, reprisal, or any coercion against any employee in the exercise of any employee rights provided for in this Agreement and any other applicable laws, rules, and regulations, including the right:

> 1. to bring any matters of personal concern to the attention of any Management official . . . and any other authorities. The parties endorse the concept that matters of personal concern should be addressed at the lowest possible level. . . .

Article 27, entitled HEALTH AND SAFETY, Section a.1. provides:

> Section a. There are essentially two (2) distinct areas of concern regarding the safety and health of employees in the Federal Bureau of Prisons:
>
> 1. the first, which affects the safety and well-being of employees, involves the inherent hazards of a correctional environment . . .

Article 27, Section e. states:

> Unsafe and unhealthful conditions reported to the Employer by the Union or employees will be promptly investigated. . . No employee will be subject to restraint, interference, coercion, discrimination, or reprisal for making a report and/or complaint to any outside health/safety organization and/or the Agency.

(Jt. Ex. 1)

The Respondent's penitentiary is located at Lompoc, California. During the time covered in this matter, the primary management officials at the Lompoc facility were Warden Al Herrera, Associate Warden Karam, Executive Assistant Joe Henderson, Captain Keith Roy, and Deputy Captain Karge. (G.C. Ex. 1(c) and 1(d)) The facility has eight Towers located outside the three fences of the institution. (Tr. 50, 51, 203) The inmates are housed in the Main Corridor. (Tr. 61)

The Respondent's facility is operational 24 hours a day, and employees work three shifts: morning, day and night. The selection of employees for quarterly post assignments is based on the procedures contained in Article 18, section d. of the MA. (Jt. Ex. 1) Typically, about nine weeks prior to the upcoming quarter, the Respondent disseminates shift preference request forms to all officers. (Tr. 24) The employees submit their preference requests and about seven weeks before the quarter, a blank roster is posted so that the officers know what shifts are available. (Tr. 24). No later than five weeks prior to the quarter, the Roster Committee meets to

assign shift and preference assignments by seniority. Under Article 18, Section d. 2.d., "the roster committee will consider preference requests in order of seniority and will make reasonable efforts to grant such requests. Reasonable efforts means that Management will not arbitrarily deny such requests." (Jt. Ex. 1) However, management officials under Warden Herrera could revise the Roster Committee's assignments. Three weeks prior to the quarter, the roster is posted. (Tr. 24) The seniority list used by the Roster Committee covers approximately 200 employees, including all custody line staff at the General Schedule 5, 7 and 8 levels. (Tr. 56-57)

Kevin Isom is a Senior Officer Specialist and has worked at USP Lompoc for 15 years. (Tr. 49-50) His seniority rank was either ninth or tenth in the Spring of 2003. (Tr. 57)

**Backpack Grievance**

On August 16, 2002, Isom was present at the staff lounge with another staff member, Mr. Gardner from the Education Department. (Tr. 53, 100) Captain Roy and Associate Warden Karam entered the staff lounge and Captain Roy noticed an unattended backpack and expressed concerns regarding use of the backpack as escape paraphernalia by inmates. (Tr. 53) Captain Roy then searched the unattended backpack. (Tr. 53) The Union contacted Isom regarding the incident and both Isom and Gardner gave statements to the Union. (Tr. 22, 54, 123; G.C. Ex. 2)

The Charging Party's Vice President Burton Garnsey met with Captain Roy in an attempt to informally resolve the issue before the grievance was filed. During this meeting Garnsey informed Roy that he had statements from both Isom and Gardner. Roy allegedly told Garnsey that the Union should not proceed any farther because "heads will roll".[1] (Tr. 124) Garnsey filed the grievance on August 26, 2002. (G.C. Ex. 4)

A few days after the grievance was filed, Garnsey met with the Warden. During this informal meeting, Garnsey gave the Warden the names of the two officers, Isom and Gardner, who had given statements. Garnsey also stated that the Union wanted a written apology posted throughout the

[1] Captain Roy testified that he was aware of the grievance regarding the backpack issue that was filed by Garnsey, but denied that he was aware that Isom was involved with the grievance. (Tr. 207)

institution. The Warden stated that before that happened, he would search everybody's backpack going in and out of the institution. The Warden also stated that "it would not behoove you or any of the union members here to proceed any farther with this grievance." (Tr. 125)[2] The Respondent issued its grievance denial on September 24, 2002. No further action was taken on the grievance. (Tr. 126, 127; G.C. Ex. 5).

**Reassignments to Towers**

In November 2002, Isom was working the Main Corridor of the USP, as his assignment for the quarter. According to Isom, November 15 was a non-work day for the inmates. Isom was escorting inmates from the theater, when Captain Roy told the inmates to tuck in their shirt tails. Isom thought that since it was a non-work day, the inmates were not required to tuck in their shirt tails, however, he did go into the theater and tell the inmates to tuck in their shirt tails. (Tr. 58-59) According to Captain Roy, Isom was not enforcing the Respondent's rule that inmates have their shirt tails tucked in. This rule is for discipline, and to ensure that the inmates do not have any weapons or contraband. (Tr. 205-207)

The following day, Isom was told by the operations lieutenant that he had been roster adjusted to one of the Towers. Isom attempted to talk with Captain Roy, who would not give him an explanation. (Tr. 59) Isom talked to the Captain the next Tuesday, who explained that he removed Isom from the Main Corridor because he wasn't following the rules and regulations and that he was picking and choosing when to follow the rules about the shirt tails. Isom denied this. (Tr. 59) Captain Roy told Isom that the move to the Tower was not discipline but was for reflection time. (Tr. 59)

A few weeks later, Isom spoke with Captain Roy about returning to the Main Corridor. According to Isom, Roy

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[2] The complaint does not allege that the statements of Captain Roy or Warden Herrera were violative of section 7116(a)(1) of the Statute. These statements would be untimely under section 7114(a)(2)(A) of the Statute, however, the General Counsel argues they should be used in support of its section 7116(a)(2) allegation. While both Captain Roy and Warden Herrera deny making any threatening remarks, (Tr. 212-213; 219-220; 284) I credit the testimony of Garnsey regarding the statements made during the processing of the grievance. His testimony was consistent and forthright, and more convincing than that of Respondent's witnesses.

asked if Isom was going to be a team player.[3] Isom responded that he was always there for the institution. Isom was returned to the corridor in early December. (Tr. 60-61)

Tower 3 was Isom's scheduled post for the first quarter of 2003. On February 3, 2003, he was working the evening watch on Tower 3. Apparently there had been several fights within the Hispanic inmate population during the day shift. The involved inmates were taken to segregation, but there was no general lockdown of the institution. (Tr. 61-62) Isom found out about the fights when he reported to work at midnight. Although none of the staff members were hurt, he felt that the matter should have been taken care of differently. There is an intercom system connecting the eight Towers. That night, there was considerable discussion among the Towers, over the intercom, of the incidents and the manner in which it was handled. Isom felt that only about 4-5 of the Towers were involved in the discussion. None of the inmates could overhear the discussion. (Tr. 63-64)

On February 4, 2003, Isom was called at home for mandatory overtime in the segregation unit. He was then called again and told he would be assigned to one of the Towers. Isom later talked with Captain Roy who said that Isom was discussing security issues with the staff and was projecting a negative image of the administration and they didn't want him inside the institution. Captain Roy told him that he was a cancer that had to be cut out.[4] Captain Roy also told him that the Warden made the decision. (Tr. 69-70)

For the second quarter of 2003, Isom requested to work in the Main Corridor. He was designated to work inside by the Roster Committee. However, when he talked to Captain Roy about his assignment, Isom was told that he would not be assigned to work inside and that he would be roster adjusted to a Tower, because of the negative image. Isom worked in a Tower for about two weeks and then was returned to the Main Corridor. (Tr. 70-71)

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[3] Captain Roy denied that he ever used the words "team player". I credit Isom's testimony regarding this comment; Isom's testimony was more consistent and believable.

[4] Captain Roy denied ever telling Isom that he was a cancer that needed to be cut out. Again I credit Isom's testimony regarding this statement, for the same reasons as noted above.

On June 1, Isom was working the day watch. When he reported in, he found out that there had been a riot on the K unit (a housing unit off the Main Corridor) and 12-14 staff members had been hurt. Isom worked all night cleaning up the mess. (Tr. 71-73) Later, he was working overtime and there was much discussion among the staff members about the riot, the manner in which it was handled and that there had been no briefings and the status of the injured was unknown. (Tr. 75)

On June 10, 2003, Isom was working the Main Corridor on the day watch. While he was in the staff lounge, Executive Assistant Henderson came in and Isom complained to him about the plan to feed spaghetti to the inmates. The last time this had happened when the institution was in lockdown, there was quite a mess to deal with. Henderson passed on the suggestion about serving something else. Isom also told Henderson that the staff was concerned that they weren't getting any answers about what was going on. (Tr. 77-79)

On June 11, Isom was approached by Deputy Captain Karge who told him he was removing him from the Main Corridor until there was a further investigation of his conversation with Henderson. (Tr. 81) Isom was sent to the Towers for several days. He later met with Karge who told him he was returning him to the Main Corridor. Isom returned to the Main Corridor on June 18.

**Disturbance Control Team**

Disturbance Control Teams (DCT) are composed of correctional officers and other staff members within the facility and are responsible for responding to critical emergencies and incidents within the institution. (Tr. 157, 148) Lt. William Lumbattis was the team leader for DCT #1 and Isom had been a volunteer on the team since 1990. The DCT is certified once a year; members of the team are required to train eight hours every quarter. (Tr. 86, 87, 165, 167) Lumbattis prepares the schedule for training at the beginning of the year. DCT #1 was scheduled for training on Wednesday, March 5, 2003. (Tr. 148; R. Ex. 2 page 9)

Isom reported for work at Tower 3 on the morning shift (midnight to 8:00 a.m.) on March 5. He called Daniel Banania, the Correctional Supervisor on that shift, from the Tower. Banania informed Isom that he was not scheduled for the Tower but was on the schedule for

mandatory training for DCT. Banania told Isom that he should go home and then report back for the training. Isom told Banania that he had not been informed of the training and he had made arrangements for his tour. Isom stated that he would not go home. According to Isom, Banania told him that he could stay at the Tower and finish his shift. Isom denied that Banania ordered him to leave the Tower. (Tr. 109) Banania sent the other officer, who was there to replace Isom, home. (Tr. 140) Banania prepared a memorandum to Deputy Captain Jonathan Karge that same morning. Banania did not propose any type of discipline for Isom. (Tr. 143, 145) The memo stated, in part:

> . . . I immediately informed Officer Isom to go home, so he could participate [in] the DCT training on Day Watch. Officer Isom stated he was not going home and would not attend the DCT training as scheduled. I reminded Officer Isom the DCT training was mandatory and as a member he must attend it. Again, Officer Isom told me he was not going to attend. When I asked him why he was not going to attend the training, he stated nobody told him ahead of time and already made a plan to take care of his family.

(R. Ex. 2, page 8)

At the end of the morning shift, Isom went to where the members of the DCT #1 were assembled. Isom appeared in his officer uniform and told Lumbattis that he had just finished working his shift. Lumbattis told him that he was required to be there for the training, but Isom told him that he had no idea that the training was that day. Isom told him that he did not know about the training and that he was not allowed in the facility and couldn't check his messages. (Tr. 156, 157) According to Isom, Lumbattis apologized for not telling him about the training and told him he could make up the training with another team. (Tr. 90-92) Lumbattis testified that he called Isom at home, and believed he left a message on his voice mail. (Tr. 150) Lumbattis sent Isom home. Since Isom had just worked a shift, it would be overtime for him to remain for the training and Lumbattis was not authorized to approve overtime. Further, Isom was not in training clothes. (Tr. 151, 169, 170)

Lumbattis did not remember apologizing to Isom or telling him he could make up the training. Isom did not ever request to make up the training. (Tr. 159, 162, 169)

Lumbattis did write a memorandum to Deputy Captain Karge in October 2003, some seven months after the incident. The memorandum reads, in part:

> . . . I asked Officer Isom if he was going to train. Officer Isom told me he had already worked morning watch and he was not aware that the team was scheduled to train. I told Officer Isom that I had given each team member a training schedule, I had informed each team member of training via LAN at least a week before training, and that I contacted each team member via telephone to notify them of training. Officer Isom then told me that since he was not allowed in the facility he had no way of checking his LAN and therefore was unaware of training.

(R. Ex. 2, page 8)

Isom had been on one of the DCT teams since August 1990. He had never missed a training session prior to this incident. (Tr. 88) Isom was not aware of anyone being removed from DCT for missing training. (Tr. 95)

Karge received the above memorandum from Banania the following day. Banania also told Karge that he told Isom to go home and Isom told him he wasn't going because he didn't get notice of the training. Banania did not "order" Isom to go home, although he did tell him to go home. (Tr. 174, 180-181, 182). Karge removed Isom from DCT the next day and told Lumbattis to tell Isom. (Tr. 176, 203)

Isom was not aware that he had been removed from the DCT until April 2003, when other team members told him they had heard he quit. Isom talked to Lumbattis, who referred him to Captain Karge. Karge told him that he removed him from the team based on the team leader's word. When Isom protested, Karge told him that he was still making the decision to remove him from the DCT because he missed the one day of training. (Tr. 93-94)

**ISSUES**

Whether or not the Respondent violated section 7116(a)(1) and (2) of the Statute by:

1. Reassigning Kevin Isom from his Main Corridor position to a Tower position from April 1-12, 2003;

2. Removing Kevin Isom from his position on the Respondent's Disturbance Control Team in April 2003.

3. Reassigning Kevin Isom from his Main Corridor position to a Tower position from June 12-17, 2003,

**POSITIONS OF THE PARTIES**

**GENERAL COUNSEL**

The General Counsel asserts that it has established that the Respondent violated section 7116(a)(1) and (2) of the Statute by its conduct in reassigning Isom on two different occasions from his position in the Main Corridor to a Tower position and when it removed Isom from his position on the DCT. The General Counsel asserts that Isom clearly engaged in protected activity when he assisted the Charging Party by giving his August 18, 2002 statement in support of the backpack grievance filed on August 26, 2002. Furthermore, on two separate occasions, Isom asserted contractual rights under Articles 6 and 27 of the MA by bringing safety and security concerns to the attention of the Respondent. The first was Isom's February 3, 2003 Tower discussion with co-workers over the Respondent's inaction/ safety issues associated with a series of early February inmate altercations and the second was Isom's June 11, 2003 staff lounge conversation with Executive Assistant Henderson that raised various employee interdepartmental concerns over the Respondent's handling of the June 1 riot. The General Counsel notes that the Authority has long recognized that the assertion of a contractual right constitutes protected activity under the Statute. *See United States Department of Labor, Employment Training Administration, San Francisco, California*, 43 FLRA 1036 (1992) (*ETA*).

The General Counsel asserts that the Respondent reassigned Isom in April 2003 because of his protected activity. Although Isom was designated by the Roster Committee to work in the Main Corridor for the quarterly period beginning April 1, 2003, Captain Roy informed Isom that he was being roster adjusted to a Tower post until further notice because of "the negative image of the administration that Isom presented to others." The General Counsel asserts that the actual reason for the reassignment was based on Isom's protected activities. This is further supported by the Respondent's actions on February 4, of not allowing Isom to work mandatory overtime inside the Main Corridor, but outside in the Tower. On February 4, Administrative Lieutenant Iverson issued an electronic mail message to all Lieutenants that listed the names of four employees, including Isom, who were restricted from working inside the institution. Other individuals listed were the Charging Party's president Frank Campo, Daniel Files, and

Daniel Cheswick. (G.C. Ex. 6) Apparently, at least three of those listed were under investigation by the Respondent. There was no pending disciplinary action against Isom and the General Counsel asserts that the timing of the Respondent's conduct is suspicious and is evidence of discriminatory motivation. *United States Customs Service, Region IV, Miami District, Miami, Florida*, 36 FLRA 489, 496 (1990) (*Customs*).

The General Counsel further asserts that the Respondent removed Isom from the DCT because of his protected activity. Although training was scheduled for the DCT on March 5, 2003, Isom had not been personally informed of the training. Further Lt. Banania did not order Isom to go home and acquiesced in Isom's desire to stay and finish his shift. Isom had never missed a training session before and assumed it could be made up in April. The General Counsel asserts that the Respondent's reasons for removing Isom from the DCT were unfounded, since Isom had not disobeyed a direct order from Lt. Banania to go home and report for the training the next morning. The General Counsel argues that the only conclusion is that Isom's removal was motivated by his prior protected activities, referring again to the August 18 statement in support of the backpack grievance and the February 4 Tower comments.

With regard to the final allegation of the complaint, the General Counsel asserts that the Respondent reassigned Isom in June 2003 because of his protected activities. Following an inmate riot in the prison on June 1, Isom had a conversation with 4-5 employees from various departments who were working in Unit D. The employees were generally concerned about the manner in which the administration had handled the lockdown and complained about the lack of briefings by management staff and why the administration had placed the concerns of the inmates over those of the staff. On June 10 (nine days later), Isom discussed these various concerns with Executive Assistant Henderson. As Henderson had an open door policy and was the liaison to the Warden, Isom felt that he was the best person to present the interdepartmental concerns and issues that were being raised. The following day, June 11, Captain Karge informed Isom that he was being reassigned from the Main Corridor to Tower 3, effective that day. He was being reassigned until Karge investigated the conversation Isom had with Henderson, and that Isom had gotten in trouble for this before.

The General Counsel asserts that Isom was asserting his contractual right to express safety concerns to the Respondent and that his conduct in no way amounted to flagrant misconduct which exceeded the bounds of protected

activity. *American Federation of Government Employees and Social Security Administration, Vairico, Florida*, 59 FLRA 767 (2004); *Air Force Flight Test Center, Edwards Air Force Base, California*, 53 FLRA 1455 (1998). The General Counsel asserts that the evidence shows that the conversation took place in the staff lounge and not in the dining room where inmates were present. Further, after Karge conducted his investigation, he determined that no violation had been committed and returned Isom to the Main Corridor. The General Counsel therefore asserts that Isom's assertion of contractual rights was the sole motivating factor underlying the decision to reassign Isom from the Main Corridor to a Tower from June 12-17, 2003.

Finally, the General Counsel argues that the Respondent's defense that the May 1, 2003 grievance filed on behalf of Theodore Cintora by the Charging Party and/or the January 2004 settlement of the grievance bar any allegations of this unfair labor practice must be rejected. (R. Ex. 1, page 6) The Cintora grievance was filed as a result of Isom being reassigned to Tower 1 and Cintora being moved to the Main Corridor in his place. This grievance was not related factually to either Isom's April removal from the DCT or his June reassignment to the Towers and Isom was not involved in the processing of the grievance. Further different legal theories were advanced by the grievance and the ULP in these separate venues. In the ULP, the Charging Party is claiming that Isom was reassigned to the Towers and removed from the DCT, in retaliation for his protected activities in violation of section 7116(a)(1) and (2) of the Statute. The Cintora grievance alleges specific contractual violations and requests, as a remedy, adherence to the contract. Although the Statute is referenced in block 5 of the grievance, no statutory basis for a violation is set forth. Therefore, the ULP and the Cintora grievance were different factually and advanced different legal theories, and the Respondent's grievance bar defense should be rejected.

Further Respondent's theory that the ULP was settled by the parties' settlement agreement in Case No. FMCS #03-51253-A, must be rejected. The settlement agreement itself and the settlement correspondence between the parties do not mention the ULP or Isom's name. (R. Ex. 1, pages 2-5; G.C. Ex. 7-9) Further the settlement agreement only references a single case, related to the temporary reassignment of correctional officers. There is no evidence that the Charging Party ever agreed to resolve this ULP in the above settlement agreement.

**Respondent**

The Respondent first argues that the General Counsel has failed to prove that Officer Isom was engaged in protected activity and that the protected activity was a motivating factor in the Respondent's actions concerning his post assignments and DCT assignment. Although Isom may have prepared a memorandum in support of the August 2002 grievance, the Respondent asserts that Isom's name did not appear on the grievance and that management was unaware that he gave a statement or was a potential witness. Further there is no evidence of any union animus on the part of Deputy Captain Karge, who was responsible for removing Isom from the DCT and for his June reassignment to the Towers. Further Captain Roy's comments to Isom referred to "reflection time" and "team player", and he was merely trying to enforce prison regulations. Both Captain Roy and Warden Herrera deny making any threatening statements to the Union representative in late August 2002 in reference to the grievance.

The Respondent asserts that Isom's comments to Henderson cannot be considered protected activity because such comments were contrary to the express terms of Article 7 of the MA and Isom admits that any such comments would be inappropriate in the presence of inmates. The Authority has recognized the "special security concerns . . . of paramount importance" inherent in a correctional workplace. *American Federation of Government Employees, Council of Prison Locals, Local 919 and U.S. Department of Justice, Federal Bureau of Prisons, Leavenworth, Kansas,* 42 FLRA 1295 (1991); *American Federation of Government Employees, AFL-CIO, Council of Prison Locals, Local 1661 and U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Danbury*, Connecticut, 29 FLRA 990, 1014 (1987) (reversed as to other matters, sub nom. *U.S. Department of Justice, Federal Bureau of Prisons, FCI Danbury v. FLRA*, No. 87-1762 (D.C. Cir. August 9, 1990). The Respondent further argues that Isom's comments were disruptive and inappropriate and therefore were not protected under the Statute. *Veterans Administration Medical Center and American Federation of Government Employees, Local 2207*, 32 FLRA 777, 778-781 (1988); *Defense Logistics Agency, Defense Depot Tracy, Tracy, California,* 16 FLRA 703, 714-715 (1984).

Further, even assuming that the General Counsel has established a *prima facie* case in this matter, the Respondent asserts that the record evidence shows that the Respondent had a legitimate justification for the three actions in this matter and that it would have "taken the same action even in the absence of previously-occurring protected activity." *United States Air Force Academy*,

52 FLRA 874, 880 (1997); *Letterkenny* Army Depot, 35 FLRA 113, 118 (1990) (*Letterkenny*). In that regard Captain Roy had repeatedly counseled Isom about not enforcing the shirt tail rule, and while declining to issue disciplinary action, instead temporarily reassigned him to the Towers. Deputy Captain Karge likewise avoided disciplinary resolution of Isom's non-attendance at mandatory DCT training and his improper June 2003 comments in the presence of inmates, choosing rather to resolve the matters through reasonable and prudent administrative assignment decisions.

Further, the Respondent argues that the April 2003 allegation in the complaint is barred by the prior-filed grievance. The prior grievance includes all temporary roster adjustments in the 40 day period immediately preceding the May 1, 2003, and would have included Isom's April 2003 reassignment. Therefore, under section 7116(d), the April 2003 reassignment is barred by the previously filed grievance.

Further the April 2003 reassignment is also barred by the grievance settlement agreement in January 2004. The settlement agreement states that the parties "amicably settle and resolve the issues concerning the temporary reassignment of correctional officers", and therefore necessarily includes the April 2003 assignment issue in this case.

## ANALYSIS AND CONCLUSION

### Grievance Bar Issue

The Authority's implementing Statute does not permit parties to litigate the same issue under both grievance/ arbitration procedures and as an unfair labor practice. Thus, under section 7116(d) of the Statute, issues which can be raised under a grievance procedure may be raised under the grievance procedure or as an unfair labor practice, but not under both procedures. Whether a grievance is barred by an earlier-filed ULP, or vice-versa, requires examining whether the grievance involves the same "issues," that is, whether the grievance arose out of the same factual predicate as the ULP and whether the legal theory advanced in support of the grievance and the ULP are substantially similar. When both tests are met, section 7116(d) bars the subsequent action. *See OLAM Southwest Air Def. Sector (TAC), Point Arena Air Force Station, Point Arena, California,* 51 FLRA 797, 801-02 (1996) (*Point Arena AFS*), and cases cited therein.

Recently, in *United States Department of Labor, Washington, D.C. and American Federation of Government Employees, Local 12*, 59 FLRA 112 (2003), the Authority once again drew a clear distinction between legal theories supporting allegations of statutory violation and allegations of contract violations, finding that the theories were not substantially similar for purposes of section 7116(d). In the instant manner, while it can be argued that Isom's April 1-12, 2003, was covered by the grievance, which included all reassignments for the 30 days prior to the grievance (May 1, 2003), the legal theories were not substantially similar. In that regard, the grievance asserted that the reassignments were not proper under Article 18 of the MA. Although there is a reference to U.S.C. 5, no specific theory of violation of the Statute is set forth, and no evidence was presented that any such theory was argued during the grievance process. The ULP, however, advances a legal theory that Isom was reassigned in retaliation for his protected activities, in violation of section 7116(a)(1) and (2) of the Statute. There is no assertion that this conduct was violative of the MA. Therefore it is clear that the grievance presented an alleged violation of the collective bargaining agreement, while the ULP concerned a statutory violation.

Under these circumstances, the prior-filed grievance does not bar the ULP in this matter.

**Grievance Settlement**

Similarly, the Respondent's argument that the grievance settlement agreement bars consideration of the April 1-12, 2003 reassignment is rejected. The grievance settlement does not refer specifically to Isom or the unfair labor practice at issue in this matter. There is no evidence that the ULP and the complaint issued in November 2003 were considered during the January 2004 settlement discussions. Nor does the settlement language encompass the overall theory of the complaint, that the Respondent had violated section 7116(a)(1) and (2) of the Statute. In conclusion, there is no evidence that the Union resolved this ULP through the grievance settlement.

**Controlling Law**

In *United States Department of the Air Force, Aerospace Maintenance & Regeneration Center, Davis-Monthan Air Force Base, Tucson, Arizona*, 58 FLRA 636 (2003) (*Davis-Monthan AFB*) the Authority clarified the application of the framework in *Letterkenny* to cases of alleged discrimination in violation of section 7116(a)(1) and (2) of the Statute.

Under that framework, the General Counsel establishes a *prima facie* case of discrimination by demonstrating that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee. Once the General Counsel makes the required *prima facie* showing, an agency may seek to establish the affirmative defense that: (1) there was a legitimate justification for the action; and (2) the same action would have been taken even in the absence of the protected activity. In determining whether the General Counsel has made a *prima facie* case, consideration is to be given to the record as a whole. *Department of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 55 FLRA 1201, 1205 (2000) (*Warner Robins*).

**April 1-12, 2003 Reassignment**

In order to demonstrate that Isom was engaged in protected activity, the General Counsel relies on Isom's statement in support of a grievance in August 2002 as well as Isom's participation in Tower discussions regarding how the Respondent handled incidents involving certain prisoners on February 3, 2003. Although it is clear that Isom was engaged in protected activity when he gave a statement to the Union in support of the backpack grievance, there is no evidence to tie this August activity with his reassignment more than seven months later.

The General Counsel is correct in asserting that conduct which occurred more than six months prior to the filing of the charge in this matter may be utilized to explain the conduct or events occurring within the 6-month period. *See Long Beach Naval Shipyard, Long Beach, California*, 44 FLRA 1021, 1040 (1992); *United States Department of Interior, Lower Colorado Dams Project, Water and Power Resources Service*, 14 FLRA 539, 543 (1981). However, the record evidence fails to connect the statements of Captain Roy and Warden Herrera made during the processing of the grievance in August 2002, with the subsequent reassignment more than seven months later. The General Counsel attempts to connect Captain Roy's statements in November 2002 to Isom's previous protected activity are speculative at best and not supported by the record. Rather the evidence from both Captain Roy and Isom demonstrate the November transfer was directly related to the shirttail incident, and I do not find the words "team player" to be sufficient to establish a continuing pattern of union animus or to establish discriminatory treatment by the reassignment in February.

Further I do not find that the February Tower discussion among the bargaining unit employees was protected activity. The General Counsel argues that this discussion with co-workers raised contractual safety issues, but clearly there is no evidence that these discussions were directed at management or were even brought to the attention of management by those involved. While the National Labor Relations Board might consider the Tower discussion to be "concerted activity" under the National Labor Relations Act, *see Neff-Perkins Co.*, 315 NLRB 1229, 1232 (1994) (questions relating to quality of equipment and the setting of employees' wage rate found to be of "common concern to all employees," and thereby indicative of concerted activity); *Whitaker Corp.*, 289 NLRB 933 (1988) (voicing of concern regarding wage policy, phrased in the context of "we" considered to be concerted activity"; *Rockwell International Corp.*, 814 F.2d 1530, 1535 (11th Cir. 1987) (objection to lowering volume of radios found to be concerted activity and not a "purely personal griping."), the Authority has indicated that not all concerted activity is protected under the Statute. In *ETA*, the Authority found ". . . that when an individual employee asserts a right that emanates from a collective bargaining agreement, that employee is engaging in the protected activity under section 7102 of the Statute of assisting the union that negotiated the agreement." In *ETA*, the employee asserted a right contained in Article 43, Section 3 of the parties' collective bargaining agreement, entitled Procedures for Developing Elements and Performance Standards, by submitting highly critical comments to her supervisor concerning newly announced performance standards.

In this instance, while the parties' MA references health and safety issues, there is no evidence that these complaints about the manner in which the Respondent did or did not respond to an inmate situation were the type of activity the Authority has ever considered as protected under the Statute. Article 27, Section e. of the parties' MA refers to "unsafe and unhealthful conditions reported to the Employer", but the Tower discussions were clearly internal and did not seek to make such a report to the Employer.

Even if I were to find that Isom was engaged in protected activity, I still would not find that the General Counsel has established a *prima facie* case in this matter, since the evidence fails to show that the protected activity was the motivating factor in the action taken against Isom. *Internal Revenue Service, North Atlantic Region, Brookhaven Service Center, Holtsville, New York*, 53 FLRA 732 (1997). In that regard, the General Counsel's own evidence indicates

that the Respondent is not adverse to moving its employees from inside the prison to the Towers under various circumstances. In that regard, the evidence does not establish that Isom's reassignment in November 2002 was related to his protected activity. Further the grievance filed in May 2003, complained that "Correctional Services Management continually removes officers from their assigned designated quarterly posts . . ." (R. Ex. 1 page 6) The General Counsel has made no attempt to argue that Isom's reassignments were a deviation from any practice by the Respondent, or that Isom was singled out for such treatment. The Lieutenant's note that was issued on February 4, 2003, listed four employees, including Isom and the Union President. The General Counsel did not present any evidence regarding the protected activity of either Daniel Files or Daniel Cheswick.

Therefore, since the General Counsel has failed to establish a *prima facie* case in this matter, I have concluded that the Respondent did not violate the Statute as alleged with regard to Isom's April 1-12, 2003 reassignment.

**Disturbance Control Team**

For the same reasons stated above, I do not find that the General Counsel has established a *prima facie* case with regard to Isom's removal from the Disturbance Control Team. Again, the evidence fails to support that Isom was engaged in protected activity, either by the August 2002 statement in support of a Union grievance or the February 2003 Tower discussions.

Further, even assuming that Isom was engaged in protected activity as asserted, the General Counsel has failed to demonstrate that Isom's protected activity was the motivating factor in the action taken to remove him from the Disturbance Control Team. In that regard, the evidence shows that the removal was directly related to Isom's failure to go home after he reported for the midnight shift in order to be able to report for the mandatory training. Deputy Captain Karge took action following receipt of the memo from Lt. Banania. There is no evidence to show any union animus on the part of Karge, who was directly responsible for the action of removing Isom.

Therefore, since the General Counsel has failed to establish a *prima facie* case in this matter, I have concluded that the Respondent did not violate the Statute as alleged with regard to Isom's removal from the Disturbance Control Team.

**June 12-17, 2003 Reassignment**

I do find, in agreement with the General Counsel, that Isom was engaged in protected activity on June 11, 2003, when he expressed safety concerns to Executive Assistant Henderson regarding handling of the prison riot. In that regard, Isom was relaying to Henderson that several of the staff members had expressed concerns regarding what information was given to them in the aftermath of the riot and how they felt they were treated. As the Warden's Executive Assistant, Henderson would have been an appropriate management official to bring these concerns to. Although there was no explanation of the delay in Isom's bringing these issues to management's attention, I do find that his efforts are clearly the type of activity that the Authority would find protected.

Further it appears clear that Isom would not have been transferred from the Main Corridor to the Tower but for his conversation with Henderson. Therefore, the General Counsel has established a *prima facie* case in this matter.

The question then becomes whether or not the Respondent has established that there was a legitimate justification for the action and whether the same action would have been taken even in the absence of the protected activity. *See Letterkenny.*

The Respondent first argues that Isom's comments were inappropriate since they were contrary to the express terms of Article 7 of the MA, which states "The parties agree that they and their representatives will not make statements or post notices in inmate access areas which would endanger staff or the security of the institution." (Jt. Ex. 1) The Respondent further argues that Isom's comments were disruptive and inappropriate and therefore were not protected under the Statute. The General Counsel asserts that Isom was asserting his contractual right to express safety concerns to the Respondent and that his conduct in no way amounted to flagrant misconduct which exceeded the bounds of protected activity.

Isom asserts that his conversation with Henderson took place in the staff lounge and not in the dining room where inmates were present. Isom denies that he made his comments to Henderson in front of inmates or that he made any inappropriate comments to Henderson. As stated previously, I found Isom's testimony to be clear and consistent, and credit his version of his conversation with Henderson. I further noted that Deputy Captain Karge conducted an

investigation and found no violation had been committed by Isom and returned him to the Main Corridor.

If conduct that exceeds the boundaries of protected activities is established, the conduct loses its protection under the Statute and can be the basis for discipline. If the conduct retains its protection, it cannot be the basis for discipline. "In effect, in such a case, it is not legitimate for an agency to discipline for conduct occurring during the course of protected activity that [does not exceed the boundaries of protected activities]." *Federal Bureau of Prisons, Office of Internal Affairs, Washington, D.C.*, 53 FLRA 1500, 1516 (1998). While the Respondent does have legitimate security concerns considering its overall workplace environment, the evidence in this matter does not in any way indicate that Isom's conduct in his discussion with Henderson amounted to flagrant misconduct which exceeded the bounds of protected activity. There is no evidence of intemperate language on the part of Isom, that his conversation took place in front of inmates or was otherwise disruptive of the workplace. Under these circumstances it can be reasonably concluded that Isom's conduct on June 11, 2003 did not constitute flagrant misconduct.

Under these circumstances, the Respondent has failed to prove by a preponderance of the evidence that it had a legitimate reason for transferring Isom out of the Main Corridor to a Tower. Therefore, I find that Respondent's action with regard to the June 2003 reassignment for conduct that was within the ambit of protected activity and constitutes a violation of section 7116(a)(1) and (2) of the Statute.

Accordingly, I find that the Respondent violated section 7116(a)(1) and (2) when it reassigned Isom from the Main Corridor to a Tower in June 2003 based on conduct that occurred when he was engaged in protected activity. I find that the Respondent did not violate section 7116(a)(1) and (2) by transferring Isom from the Main Corridor to a Tower in February 2003 or by removing him from the Disturbance Control Team in February 2003.

The General Counsel requested that, in addition to the traditional cease and desist order, that it would be appropriate to order the Respondent to assign Kevin Isom to the Main Corridor for the next quarterly rotation. I do not find this an appropriate remedy as there was no allegation relating to the actual quarterly assignments of Isom, but rather to the adjustment of assignments during the quarter. Any changes to Isom's assignment must, of course, be

consistent with the MA and the Respondent's obligations under the Statute.

It is therefore recommended that the Authority adopt the following order:

**ORDER**

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the U.S. Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Lompoc, California shall:

1. Cease and desist from:

(a) Discriminating, retaliating, or taking reprisal against any bargaining unit employee by reassigning that employee to a different post because he/she engaged in activity protected under the Federal Service Labor-Management Relations Statute, such as asserting a contractual right by bringing safety concerns to the attention of management.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Post at its Lompoc, California facilities, where bargaining-unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Warden, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that the allegations in the complaint that the Respondent violated section 7116(a)(1)

and (2) of the Statute by reassigning Kevin Isom from the Main Corridor to a Tower in February 2003 and by removing him from the Disturbance Control Team be, and they are, hereby dismissed.

Issued, Washington, DC, May 20, 2005.

SUSAN E. JELEN

_____

Administrative Law Judge

**NOTICE TO ALL EMPLOYEES**
**POSTED BY ORDER OF THE**
**FEDERAL LABOR RELATIONS AUTHORITY**

The Federal Labor Relations Authority has found that the U.S. Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Lompoc, California, violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

**WE HEREBY NOTIFY OUR EMPLOYEES THAT:**

WE WILL NOT discriminate, retaliate, or take reprisal against any bargaining unit employee by reassigning that employee to a different post because he/she engaged in activity protected under the Federal Service Labor-Management Relations Statute, such as asserting a contractual right by bringing safety concerns to the attention of management.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

_____
(Respondent/Activity)

Date: _____By:_____
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, San Francisco Regional Office, Federal Labor Relations Authority, whose address is: 901 Market Street, Suite 220, San Francisco, CA 94103, and whose telephone number is: 415-356-5000.

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. SF-CA-03-0640, were sent to the following parties:

_____

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**CERTIFIED MAIL & RETURN RECEIPT** **CERTIFIED NOS:**

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**REGULAR MAIL:**

President
AFGE
80 F Street, NW
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DATED: May 20, 2005

Washington, DC