



FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424

OALJ 18-03

FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
COLEMAN, FLORIDA

RESPONDENT

AND

Case No. AT-CA-16-0394

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 506, AFL-CIO

CHARGING PARTY

Katie A. Smith
For the General Counsel

Angie Wiesman
Candice E. Geller
For the Respondent

Jose Rojas
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

As frequently happens in a large, busy workplace such as a federal prison, two problems were unfolding at Penitentiary 2 of FCC Coleman in late 2015. Were they connected or coincidental? That is the question underlying this case.

Union steward Fernando Lopez learned that managers were occasionally leaving some housing units with one correctional officer, rather than the required two, for short periods of time. In response, Lopez filed an informal grievance with Captain David Leu, protesting this practice. At roughly the same time, Leu was receiving complaints from Special Housing Unit (SHU) inmates that in weeks with a federal holiday, they were being afforded only four, rather than the required five hours a week of recreation. Staffing levels throughout the prison are low on weekends and holidays, so inmates are not given recreation on those days. On reviewing the inmate complaints, Leu saw that national agency policy

indeed required him to provide recreation five days a week, and that this would require certain SHU officers, who previously had holidays off, to start working holidays. The Union objected to this decision as well.

Leu held two meetings with Union officials about these separate problems within a few days in early December. What I need to resolve now is whether Captain Leu indeed kept these problems separate, or whether he required the SHU officers to work holidays as a way of retaliating against Lopez (a SHU officer himself). Additionally, I must determine whether Leu made comments at the second meeting that would intimidate employees from filing grievances.

After reviewing all the evidence and weighing the credibility of the varying witness accounts, I conclude that Leu did not speak in a coercive manner during the meeting. And because I find that Leu was not motivated by Lopez's protected activity, I conclude that the decision to require certain officers to work on holidays did not unlawfully discriminate against them.

STATEMENT OF THE CASE

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

On March 8, 2016, the American Federation of Government Employees, Local 506, AFL-CIO (the Union) filed an unfair labor practice (ULP) charge against the Federal Bureau of Prisons, Federal Correctional Complex, Coleman, Florida (the Agency, Respondent, or FCC Coleman). GC Ex. 1(a). After investigating the charge, the Regional Director of the FLRA's Denver Region issued a Complaint and Notice of Hearing on November 29, 2016, on behalf of the General Counsel (GC), alleging that the Agency violated § 7116(a)(1) of the Statute by making statements to employee Fernando Lopez that interfered with, restrained, and coerced employees in the exercise of their rights under the Statute; that the Agency violated § 7116(a)(1) and (2) of the Statute by changing conditions of employment because of Lopez's protected activity; and that the Agency violated § 7116(a)(1) and (5) of the Statute by changing conditions of employment without giving the Union an opportunity to bargain over the change. GC Ex. 1(c). The Respondent filed its Answer to the Complaint on December 20, 2016, denying that it violated the Statute. GC Ex. 1(d).

A hearing was held in this matter on January 24, 2017, in Inverness, Florida, and on March 28 and 29, 2017, in Apopka, Florida. At the hearing, the GC withdrew paragraphs 12 and 14 of the Complaint (i.e., the allegation that the Agency changed conditions of employment in violation of § 7116(a)(1) and (5)). Tr. 8. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The GC and the Respondent filed post-hearing briefs, which I have fully considered. Based on the entire record, including my observations of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent, an activity within the Federal Bureau of Prisons (BOP), is an agency within the meaning of § 7103(a)(3) of the Statute. The American Federation of Government Employees, AFL-CIO (AFGE), a labor organization within the meaning of § 7103(a)(4) of the Statute, is the certified exclusive representative of nationwide consolidated units of Prison Locals, which include employees of the Respondent. The Union, a labor organization within the meaning of § 7103(a)(4), is an agent of AFGE for the purpose of representing unit employees at FCC Coleman. GC Exs. 1(c) & 1(d). The AFGE and the BOP are parties to a nationwide collective bargaining agreement, known as the Master Agreement.

FCC Coleman consists of four institutions, classified by their level of security: the Low, the Medium, and two penitentiaries (USP 1 and USP 2). Tr. 60-61. This case concerns correctional officers who work at the Special Housing Unit at USP 2. Each penitentiary has its own SHU, which is a prison with a prison, capable of holding more than 200 inmates. Tr. 221-22, 275-76. Inmates are generally sent there because they have violated prison rules and cannot be managed in the prison's regular housing units, though some inmates are placed in the SHU for protective custody. Tr. 80, 87. Many SHU inmates are more dangerous than inmates in the general population, and they spend most of their day confined to their cells. *See* Tr. 80-81, 268-69. BOP policy requires the institution to offer SHU inmates one hour of recreation a day, five days a week, for a total of five hours of recreation a week.¹ Tr. 80, 228, 402.

The Special Housing Unit at USP 2 is led by the SHU Lieutenant. Tr. 237, 342. On most weekdays, there are eight correctional officers assigned to the SHU: the SHU 1-5 officers, the SHU 6 officer, the recreation officer, and the property officer. Tr. 87. The latter three of these positions (the SHU 6 officer, recreation officer, and property officer) are the focus of the dispute in this case. The recreation officer is responsible for offering inmates recreation (Tr. 276), escorting them to outdoor recreation cages (Tr. 227-28), and making sure that incompatible inmates are kept separated from each other during recreation (Tr. 228). The SHU 6 officer assists the recreation officer in moving inmates to and from recreation. Tr. 403, 458. The property officer is responsible for managing SHU inmates' property, which cannot be brought into their cells. Tr. 88, 229-30. While the property officer may occasionally assist other correctional officers, he or she does not normally assist the recreation officer or the SHU 6 officer in providing recreation to inmates. Tr. 231, 411. Officers bid to be assigned to these and most other posts throughout FCC Coleman via a quarterly, seniority-based bidding process. *See* Tr. 75, 339.

At FCC Coleman, most correctional officer positions are considered "seven-day" or "24-hour" posts, because they need to be staffed every day. Tr. 95-96, 101-03. Although an individual officer assigned to that post only works five days a week, relief officers fill the post at other times. Other posts, however, are considered "five-day" posts, because they are

¹ There are some exceptions to this rule. For example, there are no make-up sessions if recreation is cancelled due to a power outage, a prison lockdown, or a thunderstorm. Tr. 228-29, 287. And as this case demonstrated, for a period of time, the recreation lost on federal holidays was not made up.

not filled on weekends or holidays. Tr. 64-65, 96. Prior to late 2014, the recreation officer, property officer, and SHU 6 officer were seven-day posts, although the officers assigned to those posts had holidays off. Tr. 101, 385, 403, 420-21. Because the officers assigned to these posts did not have to work weekends or holidays, these posts were considered desirable by many people, even though the SHU is a more stressful and dangerous area. Tr. 101, 275.

In 2013, BOP changed its staffing guidelines agencywide, causing a loss of authorized positions at many prisons, including FCC Coleman. Tr. 403, 447, 457. As BOP's so-called 2013 staffing guidelines were implemented at FCC Coleman in the latter part of 2014, the SHU 6, property officer, and recreation officer positions became five-day, rather than seven-day posts, meaning that on weekends and holidays the posts were vacant. Tr. 406, 447, 457-58.

Changing these positions from seven-day to five-day posts had a ripple effect on the prison's ability to provide recreation for inmates. At FCC Coleman, the longstanding practice was that SHU inmates did not receive recreation on holidays, and generally not on weekends either. Tr. 190, 224, 403-04, 457. This meant that on most weeks, inmates would have recreation Monday through Friday. On weeks with a federal holiday, inmates were not given recreation on the holiday, but they would make up the lost day on Saturday, at which time recreation was overseen by the relief recreation officer and SHU 6 officer. Tr. 402-06, 457-58. However, once those relief officer posts were eliminated on weekends, the SHU did not have adequate staff to provide recreation. As a consequence, inmates received only four hours a week of recreation on weeks with federal holidays from sometime in 2014 to early 2016. Tr. 403, 406-07, 457-58. The post order for the SHU recreation officer, issued on December 1, 2014, reflects the policy of not providing inmates with recreation on weekends and holidays, while it ignores the BOP requirement of providing recreation five days a week. Tr. 386-87; GC Ex. 2 at 3.

At some point, probably in mid to late November of 2015,² Captain Leu, the Chief Correctional Services Supervisor for USP 2, received complaints from SHU inmates that they were not receiving their full five hours of recreation on weeks with holidays, in violation of BOP policy. Tr. 402, 428-29. At the hearing, Leu acknowledged that the Agency had been in violation of the policy. Tr. 401-02, 406-07. To correct the violation and enable SHU inmates to resume having recreation on holidays, he decided to require the recreation and SHU 6 officers to start working on holidays. Tr. 377-78, 385-86, 458. Leu testified that he made the decision himself, without consulting the warden. Tr. 429. Leu added that it was unnecessary for the property officer to work on federal holidays, because the property officer does not assist in providing recreation for inmates.³ Tr. 377-78, 411, 421-22, 424, 429-30.

² Unless otherwise noted, all events in this case occurred between November of 2015 and January of 2016. Accordingly, events in November and December refer to 2015, and events in January refer to 2016.

³ While I believe that Leu did not intend to require the property officer to work holidays, I note that at one point in his testimony, Leu included the property officer among the positions that would be required to work holidays. Tr. 386. The inclusion of the property officer in this list appears to have

Also in late November, a correctional officer told Lopez (the Union steward for USP 2) that management had “vacated” the #2 officer post in a regular housing unit for two hours on November 20, meaning that only one correctional officer was working in that housing unit. *See* Tr. 68, 73-74, 169; GC Ex. 10. When Lopez checked the roster, he saw that other #2 officer posts in the housing units had also been left unassigned for two-hour periods on various dates. Tr. 169; GC Ex. 10.⁴ The Union considered it extremely dangerous to leave a housing unit with less than two correctional officers, especially since an inmate in USP 1 had recently stabbed an officer in a housing unit; accordingly, Union President Jose Rojas authorized Lopez to file an informal grievance protesting the vacated #2 officer posts.⁵ Tr. 66, 68, 167-68. That grievance was filed with Captain Leu within a few days after November 20,⁶ alleging that the Agency violated the Master Agreement and the staffing guidelines when it vacated the #2 officer posts. As a remedy, Lopez requested that the Agency stop vacating the posts. Tr. 170, 172; GC Ex. 10.

Leu responded to the informal grievance by setting up a meeting with the Union for December 4. Tr. 172-74. Lopez was unable to attend the meeting on that date, so the Union was represented instead by Vice President Trudy Soto and Chief Steward Ronald Rodriguez. Tr. 172, 207. During the meeting, Soto and Rodriguez mainly objected to the Agency augmenting the correctional counselor’s duties by requiring him to function as a #2 officer, though they also objected to the Agency improperly vacating the #2 officer post. Tr. 382-83, 396. The parties did not reach any agreement at this meeting. At some point after December 2015, AFGE removed Soto and Rodriguez from their Union positions, for reasons apparently unrelated to our case. Tr. 173, 211, 464.

been inadvertent, as Leu described more specifically elsewhere that he never intended to require the property officer to work holidays. Tr. 377-78, 411, 421-22, 424.

⁴ While there was conflicting testimony as to what exactly it means to “vacate” a position, the general facts were not disputed: the situation commonly arose when a #2 officer in a housing unit would call in sick. Since the warden required that every housing unit have two officers assigned during that shift, management would have to find a relief officer. Most housing unit correctional officers work from 8:00 a.m. to 4:00 p.m. or 4:00 p.m. to midnight, but the #2 officers work a 2:00 to 10:00 p.m. shift. As a result, it was often difficult to find someone willing to come in at 2:00 p.m., but it was considerably easier to find someone from the morning shift to work overtime, starting at 4:00 p.m. Therefore, managers would frequently leave the #2 housing post unassigned (or “vacated”) between 2:00 and 4:00 p.m. and ask a counselor in the same housing unit to “cover” the vacant post. The Union objected not only to the lack of a second correctional officer, but also to management “augmenting” the duties of a counselor in this manner. Tr. 302-03, 381-83, 449-450.

⁵ Union and management officials often refer to these grievances, optimistically, as “informal resolutions,” but since this dispute was not actually resolved, I will refer to it as an “informal grievance.” Tr. 68, 168, 179, 397.

⁶ Although Lopez’s letter to Leu was dated September 22, 2015, Lopez testified that this was a clerical error. The letter refers to events occurring on November 20, so it clearly was written after that date, most likely within a few days. Tr. 169; GC Ex. 10.

Even though Lopez did not attend the December 4 meeting, he learned later that day that Leu was going to require some SHU officers to work the upcoming Christmas and New Year's Day holidays. Lopez testified that on the afternoon of December 4, SHU officers called him and said, "[H]ey, thanks, we lost our holidays because you filed on this paperwork," i.e., the informal grievance. Tr. 172. Lopez reported this to Rojas, who observed, "it appeared to me . . . that it was retaliation." Tr. 69; *see also* Tr. 173. Rojas contacted Leu to set up a meeting to resolve the issue.⁷ Tr. 69.

The December 7 Meeting

On December 7, Rojas and Lopez, whose assigned post at the time was as SHU property officer (Tr. 377), met with Leu and Administrative Lieutenant Kenny Rogers in Rogers's office.⁸ Tr. 70, 173-74, 463-64. Due to significant differences in each witness's recollection of the meeting, I will describe each person's account separately.

The Meeting According to Lopez

Lopez described the beginning of the meeting as follows:

I walked in and we greeted each other and I said, hey, Cap, what's going on? Why are you taking the holidays away from the SHU crew? Captain Leu stated, well, if I can't vacate one post, I can't vacate any post. You can't have your cake and eat it too. At that point we started to raise our voices. It got a little robust. And I told him, I said, this was not to do all that; all I wanted you to do was fix the 2-hour vacated post. It wasn't to do all this extra stuff. And he said to me, he said – let me figure these words – as a matter of fact, you know what I'll do is, I will give you the holiday off and I'll take the holidays away from SHU 6 and SHU rec and they will all hate you for that and you're going to have to eat that.

Tr. 174-75.

Lopez testified that Leu's statements about vacating posts and having your cake and eating it too "baffled" him, "because the informal [grievance] had nothing to do with Special Housing. It had to do with . . . the housing unit out on the compound. So I don't know why he related one with the other." Tr. 210. In addition, Lopez testified that the only justification Leu gave for his actions was "he can't vacate any posts." Tr. 177.

⁷ I note here that Lopez and Leu appear to have had a good relationship at work, though they had not spent significant time with each other in a labor relations setting. Tr. 211. Lopez testified that he and Leu had "worked hand in hand on almost everything," and that "I was Captain Leu's employee and on that level we had a different level of respect for each other." Tr. 209, 211.

⁸ Leu testified that the meeting took place on December 19 (Tr. 397), but Lopez was more precise in testifying that the two meetings occurred on a Friday and Monday, December 4 and 7. Tr. 172-73. While the precise dates of the meetings are not crucial, I believe it is more likely that they occurred on December 4 and 7.

Asked how he responded, Lopez testified: "I said, well, if I'm going to have to eat that – I said, first, if the staff members in Special Housing can't see that this is retaliation, then – excuse my language, Your Honor – fuck them, they are not my friends." Tr. 175. Lopez continued: "Second, if I'm going to eat that, I'll eat it but you're going to have to eat retaliation, hostile work environment and anything else I can file in reference to this thing right here." *Id.*

Rojas then intervened, asking Leu if they could "keep status quo until after January 1st; then we will come back and sit down and talk about it. Captain Leu responded, oh, so you don't want me to be the Grinch who stole Christmas? And Rojas said, yeah, basically, that's it." *Id.* Leu did not mention safety concerns or inmate recreation policy as a basis for his actions. Tr. 177.

Lopez emphasized that the Union did not agree at the meeting that the Agency could require SHU officers to work on holidays after January 1, 2016. Tr. 176. Rather, Lopez left the meeting believing that SHU officers would have holidays off until the Union and management met again and negotiated over the matter. Tr. 175-76.

The Meeting According to Rojas

Rojas described the meeting as follows:

The discussion was robust. Lopez was explaining that the vacating of the post and the taking away of the holidays were two different issues, that it was retaliation. And Captain Leu kept saying you can't have your cake and eat it. He kept saying that over and over again. And they were going back and forth.

Tr. 70-71. Rojas did not speak much during the meeting. Instead, he testified, "I let – just guiding Lopez and let him handle it. My role really was just almost like a mediator." Tr. 70. Rojas indicated that Rogers also did not say much at the meeting. Tr. 466.

However, after seeing that the discussion between Lopez and Leu was "going nowhere," Rojas said, "I intervened and I said, stop. I said, let's put a band aid on this issue. Let's give these guys the holidays, and at the beginning of the year we will sit down and we will discuss the issue further to try to come up with an agreement." Tr. 71; *see also* Tr. 76-77. Rojas told Leu that officers had already made travel plans and asked that management continue to allow them to have Christmas and New Year's Day off this year. Tr. 71. Leu agreed to let officers take Christmas and New Year's Day off, saying, "let's not be like the Grinch that stole Christmas . . . then the first of the year we'll come back and discuss the issue." *Id.*

Asked whether Leu said anything specifically about staffing the SHU posts because of Lopez's informal grievance, Rojas testified, "I don't recall." Tr. 79. In addition, Rojas acknowledged that by giving SHU officers Christmas and New Year's Day off, Leu was willing to work with the Union. *Id.* Rojas also testified that Leu did not mention any BOP policy as a justification for requiring officers to work on holidays. Tr. 79-80.

Asked at the hearing to describe why there was discussion of the informal grievance at the December 7 meeting, Rojas stated:

[W]hat happened was Lopez wrote an informal grievance saying you cannot vacate the housing unit officers, the number two officers. So what Leu said, okay, I'm not going to vacate, but also, I'm not going to vacate SHU – the positions in SHU that had holidays off. So in our opinion he retaliated. He took the holidays off and made Lopez look bad. So now those officers, he was hoping, would be angry at Lopez for trying to fix a separate issue because there was no issue in SHU. We always had holidays off. There was never an issue. All of a sudden now because he filed the informal grievance now he changed it from having holidays off to you got to have holidays on. Now you got to work the holidays, right after he turned in his informal about vacating the posts in the housing units.

Tr. 71-72.

The Meeting According to Leu

Although Leu testified extensively about the events of this case, and about the need for SHU officers to work (or not work) on holidays, he was not asked many questions specifically about the December 7 meeting. He testified that he had previously met with Soto and Rodriguez regarding the grievance over leaving housing officer positions vacant, but that subject did not come up at the subsequent meeting with Lopez and Rojas. Tr. 380-81, 383-84. While he clearly defended his decision to require the recreation and SHU 6 officers (as well as the SHU lieutenant, a nonbargaining unit position – see Tr. 424) to work holidays, it is not clear what explanation he gave to Lopez and Rojas for that decision. He says he told them that the property officer was not needed on holidays, because that officer has nothing to do with inmate recreation. Tr. 377-78, 430. Lopez accused him of retaliating against him for filing the earlier grievance, and Leu told Lopez that the two issues had nothing to do with each other. According to Leu, “He [Lopez] made statements to the fact that being his position in there and the other staff in the Special Housing Unit are going to have to work the holidays, but he wouldn't, it definitely would look bad on him.” Tr. 378; see also Tr. 429-30. Leu testified, however, that he did not tell Lopez at the meeting (1) that if he couldn't vacate one post, he wouldn't vacate any post (Tr. 384); (2) that if he couldn't vacate the housing posts, he wouldn't allow SHU officers to have holidays off (Tr. 381); or that he would make officers hate Lopez for having holidays off and Lopez would have to “eat that” (Tr. 378).

At some point during the meeting, the Union noted that employees had already made holiday plans based on the posted schedule, and it requested that the SHU officers not be required to work on the upcoming Christmas or New Year's Day. Leu agreed to this, because it would benefit staff morale. Tr. 393-94. He believed that when the meeting ended, the Union understood that the recreation and SHU 6 officers would work subsequent holidays, beginning on Martin Luther King, Jr. Day in January. Tr. 393. Asked to describe how the meeting ended, Leu stated: “It ended well. No issues, shook hands, everything was good.

And . . . we . . . decided . . . when this would take effect.” Tr. 393; *see also* Tr. 419. Leu denied there was any understanding that the parties would engage in further negotiations after the new year before requiring the recreation and SHU 6 officers to work future holidays. Tr. 418-19. In this regard, Leu testified that he would not have agreed to any additional discussions on the subject, since he was preparing to leave FCC Coleman in January. *Id.*

The Meeting According to Rogers

Rogers testified that the December 7 meeting was called to discuss the Union’s objection to the new requirement that the SHU 6 and recreation officers work on federal holidays. Tr. 328. As they discussed this issue, Rogers admitted that he had already posted the change sheet for the week of the Christmas holiday, and it listed the SHU 6 and recreation officers as having the holiday off. Tr. 300. Lopez asked Leu to let the recreation and SHU 6 officers have the holidays off and to assign Lopez (the property officer) to work on the holidays. Rogers recalled Lopez saying that he “wasn’t concerned about himself; basically he’ll come to work but just give those guys the days off.” Tr. 301. Captain Leu would not agree to the recreation and SHU 6 officers having holidays off, but he did agree to give them the upcoming Christmas and New Year off, since they had already made holiday plans on that basis. Tr. 300, 326. When the meeting ended, Rogers believed that all parties understood that the officers in question would be off for the coming Christmas and New Year, but that they would have to work on future holidays. Tr. 299-300, 328-29. The Union did not agree to this solution, and Lopez said he planned to grieve the decision, but the Union officials understood Leu’s decision. *Id.* Rogers advised Leu to allow Lopez to exercise his right to file a grievance. Tr. 299.

According to Rogers, Lopez accused Leu at the meeting of requiring the SHU officers to work on holidays in retaliation for Lopez’s informal grievance over the vacant housing posts; Leu told Lopez, however, that the two issues had nothing to do with each other. Tr. 303. Rogers testified that Leu did not tell the Union officials that if he wasn’t allowed to vacate certain posts, then he wouldn’t vacate other posts. Tr. 331. Similarly, Leu did not say that he would continue to give Lopez holidays off so that the other SHU officers would hate him and Lopez would “have to eat that”, and he did not say anything about “the Grinch who stole Christmas.” Tr. 301.

After the December 7 Meeting

A week or two after the December 7 meeting, Leu and Rojas resolved the informal grievance on their own, with Leu agreeing not to vacate the #2 housing officer posts after the start of 2016.⁹ Tr. 397; GC Ex. 11 at 2. About the settlement, Leu added: “[I]t wasn’t in an official. We kept a very open line of communication and just – he would stop in my office, this and that. We spoke and that’s what we agreed to with the number 2 housing unit officers” Tr. 397.

On approximately January 14, Lopez learned that management had assigned the recreation officer, the property officer, and the SHU 6 officer to work on January 18, Martin Luther King, Jr. Day. See GC Ex. 11 at 2. Lopez and Rojas were surprised by this, because they believed that management had agreed at the December 7 meeting not to assign these officers to work holidays without first meeting with the Union. Tr. 71, 77-78, 178. Rojas then asked Lopez to schedule a follow-up meeting, because “he had the rapport with Captain Leu.” Tr. 78. At the hearing, Lopez acknowledged that he did not end up scheduling a follow-up meeting with Leu. Tr. 201. Instead, he wrote an email to Lt. Rogers on January 14 regarding the holiday assignments:

[I]t has come [to] the attention of Local 506 that a change to specific posts has occurred, specifically the Special Housing Recreation Officer and the Special Housing Property and the Special housing #6 Officer were not granted Holiday Off as has been past practice. Even the Special housing Lt. has the day off. These are considered five (5) day posts and seems to be a case of fraud, waste and abuse of man hours and government funds. We strongly suggest that you revert to past practices and correct this mistake.

GC Ex. 11 at 2. Rogers apparently forwarded the email to Leu, who replied to Lopez later that day, stating:

Per a meeting conducted with Mr. Rojas . . . and myself, which you and Lieutenant Rogers were both present this will not occur and all holidays will be worked to include the Special Housing Unit Lieutenant. If you recall the informal resolution you filed concerning posts being vacated, Mr. Rojas and myself agreed not to vacate these posts during holidays after the first of the year. I appreciate your effort to save the agency money, and prevent waste, however staff safety always comes first. I have included Mr. Rojas in this email in the event you do not recall the meeting that day.

⁹ Leu’s testimony regarding the resolution of the informal grievance was detailed (Tr. 397-99), and I credit it, even to the extent it conflicts with Rojas’s claim that he and Leu never met outside of the December 7 meeting, and even though Rojas testified that he generally works with wardens and lets vice presidents and stewards work with captains. Tr. 462-63. I note in this regard that Rojas received Leu’s January 14 email claiming that Leu and Rojas had resolved the informal grievance, and Rojas did not say or do anything to indicate that Leu’s statement was inaccurate. See Tr. 78. It also appears that the grievance was indeed resolved, and no other explanation for the resolution was offered.

Id. On Martin Luther King, Jr. Day, the recreation and SHU 6 officers worked as assigned. Lopez was assigned to work the property officer position, but he called in sick. Tr. 157-59, 199. Officer Richard Spade, the recreation officer at that time, offered recreation to inmates, but only seven or eight inmates participated in recreation that day. Tr. 234. And on January 20, Lopez responded to Leu's email:

During our meeting on the vacating of number 2 Housing unit Officers what we discussed was that we would return to status quo or as you put it "not be the grinch who stole Christmas" and revisit the Holiday off issue after the first of the New Year. To my knowledge that has yet to occur. Yet you and your administrative Lt. Kenny Rogers took it upon yourselves to "change from status quo" the prior practice of holiday off for the Special Housing posts. Operating within "Fair and Equitable Treatment" as well as addressing the financial situation that administration is constantly complaining about, all other institutions granted the Special Housing Recreation and Special Housing Property Officers holiday off. Instead you stated and I quote "I appreciate your effort to save the agency money, and prevent waste, however staff safety always comes first" does this mean that there is a safety issue at Pen 2 that we should be concerned about or are you stating that the other institutions don't care about staff safety. As a matter of fact we just reviewed the roster assignments for 1/18/16 the Special Housing Property Officer post was Unassigned or to use your terminology "vacated", so safety does not seem to be the factor in canceling the holiday off for that post. It has also come to our attention that recreation was conducted on 1/18/16 which goes against the newer version of the post orders that were implemented by you. We have attached a copy of the post orders for your convenience. The two posts that are mentioned in this email are part of the custody roster and considered five day posts according to the staffing guidelines just as is the Captains Secretary, T&A clerk, Administration Lt., etc. so in essence if one has to come to work for safety reasons all have to come to work. I have included Mr. Rojas in this email in the event you do not recall this meeting as I do. In conclusion I suggest that in all future meetings we take minutes as to avoid these types of misunderstandings.

Id. at 1-2. Leu spent his last day at FCC Coleman on January 24, 2016; he left to become the Assistant Warden at FCI Fairton, in New Jersey. Tr. 374, 408.

On President's Day, February 15, 2016, Spade was assigned and worked as the recreation officer, Officer Borders as the SHU 6 officer, and Lopez as the property officer. Jt. Ex. 1. Spade offered the inmates recreation, but only twelve to fifteen of them accepted the opportunity. Spade speculated that few inmates wanted to do recreation on Martin Luther King, Jr. Day and President's Day because recreation had not been offered on previous holidays and inmates were "caught off guard" by the change. Tr. 235.

On Memorial Day, May 30, and on subsequent holidays in 2016, management required the recreation officer, the SHU 6 officer, the property officer, and the SHU lieutenant to work, but inmates were not offered recreation. *Jt. Ex. 1*. Spade testified that this was because the regular SHU lieutenant, Lieutenant Allen, followed the post order, which states that recreation is not offered on holidays. *Tr. 236-40*.

Additional Issues Discussed at Hearing

At the hearing, Leu clarified some of the statements he made in his January 14 email. He testified that when he wrote “this will not occur,” he was saying that the recreation officer and the SHU 6 officer would not have holidays off. *Tr. 423-24*. In addition, he stated that he never intended for the property officer to work holidays, and that his failure to correct Lopez’s belief that the property officer would be required to work holidays was inadvertent. *Tr. 424, 430*. (Nevertheless, someone in management did require the property officer to work holidays, starting on January 18, 2016. *See Tr. 157-59, 199; GC Ex. 8*.) I asked Leu whether, by raising the subject in his email of vacating posts – which was the focus of Lopez’s informal grievance – that was a sign that the subject of vacating posts was discussed at the December 7 meeting. Leu responded: “No. I really don’t believe we did during that meeting. I know prior to this email we did resolve the issue with the [housing unit #2 officer]. So that is probably why I put them both in there.” *Tr. 426*.

When asked to explain how requiring the recreation and SHU 6 officers to work holidays was a matter of staff safety, Leu stated:

I can’t knowingly violate policy. So regardless, we had to provide those inmates with recreation. If I was to allow those staff to continue to have the holiday off, I’m going to have to provide the recreation with limited staff. So where there’s now six of us plus the rec officer, which would be seven, now we are going to be down two staff members. And depending on, you know, any number of circumstances, that could be pretty detrimental to staff safety. So that was my concern, you know.

Tr. 426-27. Leu acknowledged that offering inmates recreation on holidays contravened the post order, which states that inmates will not receive recreation on weekends or holidays. He stated that post orders are generally updated once a year, and that he would have updated the post order to reflect the new practice, but he didn’t do so here, because he left FCC Coleman shortly thereafter. *See Tr. 387-88*.

Officer David Luke, who has worked as recreation officer, property officer, and SHU 6 officer in the Special Housing Unit, testified that recreation was generally not offered on holidays because there was “minimum manning[.]” on holidays. Many posts, including counseling, the tool room the captain’s secretary, tower 6, and the rear gate, as well as the recreation officer, property officer, SHU 6 officer, were not staffed. With only a bare-bones staff, Luke testified, providing recreation would be difficult logistically and could be

dangerous if, for example, a fight broke out in one of the recreation cages. Tr. 280-81. When asked at the hearing whether he knew the reason management was requiring SHU officers to work holidays, Luke answered, "I guess just because they didn't want to vacate posts. I guess that's why. Other than that, there's no reason to – I mean, the government could save money by not putting us down there" Tr. 281.

Rojas explained that he did not get involved in the email discussion because he is not a "micro-manager[]" and because Lopez, as the subject matter expert, was in charge of the case. Tr. 78.

With respect to the BOP policy on recreation for SHU inmates, Leu testified that the policy is set forth in Program Statement 5270.10, Special Housing Units, which provides that inmates are to be "afforded 5 hours of recreation per week", "in 1-hour nonconsecutive increments. Specifically, 1 hour per day outside of their cell for 5 days." Tr. 402. Rojas testified that SHU inmates "are allowed 1 hour a day of recreation per policy." Tr. 80. And Spade testified that inmates are "required to have the opportunity for 1 hour [of recreation] on a 5-day basis." Tr. 228.

Lopez and Leu clarified the difference between unassigned and vacated posts. According to Lopez, an unassigned post is one at which nobody is scheduled to work, and a vacated post is one at which an officer is assigned but goes unstaffed for one to three hours, or one that is supposed to be staffed but goes unfilled. Tr. 115, 160. Leu similarly testified that an unassigned post is one that has not yet been staffed, and a vacated post is one where the person staffing the post is removed and the position is not filled. Tr. 380; *see also* Rojas's description at Tr. 73.

Rojas and Lopez testified that labor relations at FCC Coleman were poor generally. In this regard, Rojas asserted that the Union had filed twenty-five to thirty ULP charges and forty to fifty grievances in the last year. Tr. 61. Lopez testified nonetheless that he had had a good work relationship with Leu, but that "with the labor-management, that's another end of the spectrum where I guess ties got cut and I didn't realize it was going to go that route." Tr. 210-11.

Finally, Rojas testified that SHU officers at other institutions at FCC Coleman were not required to work holidays. Tr. 74. However, Lopez indicated that management "intermittent[ly]" assigned special housing officers at the other institutions to work holidays. He added that it was up to the captain of each institution as to whether to require officers to work holidays. Tr. 185, 202. Leu testified that he did not know whether other institutions at FCC Coleman had problems providing five hours of recreation to special housing unit inmates on weeks with a holiday. Tr. 429.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel contends that the Agency violated § 7116(a)(1) of the Statute when Leu made coercive statements during the December 7 meeting, and that it violated § 7116(a)(1) and (2) by discriminatorily requiring SHU officers to work on federal holidays. With regard to the coercive comments, the GC states that the standard for determining whether a statement violates § 7116(a)(1) is an objective one. *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Elkton, Ohio*, 62 FLRA 199, 200 (2007). In addition to looking at the words themselves, the surrounding circumstances are also taken into account when determining whether a statement is coercive. GC Br. at 23 (citing *Dep't of the Army Headquarters, Wash., D.C.*, 29 FLRA 1110, 1124 (1987)).

The GC argues that Leu spoke coercively when he told Lopez that the other officers would hate Lopez for having holidays off and that Lopez would have to “eat that.” The GC further argues that when Leu told Lopez that if he couldn't vacate one post he couldn't vacate any post, and when he said Lopez could not have his cake and eat it too, he directly connected Lopez's earlier grievance over the #2 housing officer posts to his decision requiring SHU officers to work holidays, thereby demonstrating his intent to retaliate. GC Br. at 23. It is clear that these statements were coercive when considered in context: a “heated meeting” in which Leu made it clear that he was requiring the SHU officers to work holidays because Lopez had previously filed a grievance. *Id.*

With regard to the alleged violation of § 7116(a)(1) and (2), the GC asserts that Leu required the recreation, SHU 6, and property officers to work holidays because of Lopez's protected activity. *Id.* at 23-24, 30. Applying the analytical framework of *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*), the GC starts from the premise that Lopez engaged in protected activity by serving as a Union representative and by filing the informal housing officer grievance. GC Br. at 25. Next, it contends that Lopez's protected activity was a motivating factor in Leu's decision to require SHU officers to work holidays. In this regard, the GC argues that Lopez filed the informal grievance on approximately November 20 and that Leu announced on December 4 that SHU officers would have to work holidays. *Id.* at 25-26. That Leu took the unprecedented step of altering officers' schedules in the middle of the assignment-bidding quarter is a further sign that those actions were unlawfully motivated. *Id.* at 26. The GC adds that relations between the Agency and the Union were already poor, and while Leu and Lopez may have had a good relationship in the past, the relationship soured after Lopez filed the informal grievance, and hit a new low at the December 7 meeting. Further, the GC contends that Leu's statements at the December 7 meeting show an anti-Union animus and a hostility to protected activity. *Id.* at 26-27.

The General Counsel also attacks the credibility of Leu's testimony regarding the December 7 meeting. In this regard, the GC asserts that Leu gave different reasons for requiring SHU officers to work holidays. At the meeting, he said only that he couldn't vacate any post. Later, in his January 14 email to Lopez, he indicated that he acted in order to promote staff safety. Finally, at the hearing, Leu insisted that he acted in order to comply

with BOP policy on inmate recreation. The GC also argues that Leu was the only person to deny there were discussions at the December 7 meeting about vacating posts; no witness corroborated Leu's claim that the December 7 meeting ended on a positive note; and even Rogers testified that the meeting ended with Lopez threatening to file a grievance. *Id.* at 21-22.

The GC argues it is not believable that the BOP policy was the reason Leu assigned SHU officers to work holidays. Leu knew in 2014 that SHU inmates were not receiving five hours of recreation on weeks with holidays, yet he expressed no concern about this until November 2015, when Lopez filed the informal grievance. *Id.* at 27. The General Counsel further contends that BOP policy does not constitute a legitimate justification for Leu's actions. The GC notes that the Respondent did not even offer the text of the policy as an exhibit; accordingly, Respondent has not proved that the policy required Leu's response, and the GC requests that I draw an adverse inference against the Respondent – specifically, that I infer the policy document would contradict Leu's description of it. *Id.* at 20.

To rebut the Agency's justification for Leu's action, the GC reiterates that Leu was not concerned about the amount of recreation SHU inmates received until after Lopez filed his informal grievance. *Id.* at 28. The GC also argues that the BOP policy does not explain why the Agency required the property officer, who is not responsible for facilitating inmate recreation, to work holidays. *Id.* at 29. Further, the GC contends that the policy cited by Leu could not be a legitimate justification, because the Agency stopped providing recreation to SHU inmates on holidays, beginning Memorial Day 2016. *Id.*

Respondent

The Respondent asserts that it did not violate the Statute in any respect. As for the coercion charge, Respondent argues that Leu made no direct, or even indirect, threat to employees regarding any protected activity. Resp. Br. at 5. It was Lopez, not Leu or Rogers, who raised the issue of the housing officer grievance at the December 7 meeting and sought to connect it to the decision to require SHU officers to work holidays; Leu simply, and properly, responded that the two matters had nothing to do with each other. *Id.* Leu explained at the December 7 meeting, and in his email to Lopez, why he was requiring SHU officers to work holidays. Further, Respondent contends that if Leu had been acting in a retaliatory manner, he would not have agreed to let SHU officers take Christmas and New Year's Day off. *Id.* Moreover, Rogers actually stated during the meeting that Lopez should be allowed to exercise his right to file a grievance. *Id.* at 5-6.

With respect to the charge of discrimination, Respondent argues that the GC has failed to establish a prima facie case under *Letterkenny*. While it acknowledges that Lopez was engaged in protected activity, Respondent argues that the evidence fails to explain how the informal grievance had any influence on Leu's decision to require SHU officers to work holidays. On the contrary, Leu told Lopez that the grievance had nothing to do with SHU officers working on holidays, and the GC failed to rebut that assertion. *Id.* at 7-8.

Even if the GC had established a prima facie case, the Respondent argues that Leu required SHU officers to work holidays for legitimate, non-discriminatory reasons. Specifically, Leu acted in order to comply with the BOP policy that required the Agency to offer SHU inmates five hours of recreation a week, and in order to ensure staff safety. *Id.* at 8. In this regard, Respondent submits that the Authority's decision in *Office of Program Operations, Field Operations, SSA, S.F. Region*, 9 FLRA 73, 74-75 (1982), is applicable.

ANALYSIS AND CONCLUSIONS

The GC's Motion to Strike

On the first day of the hearing, Respondent's counsel raised a concern that certain documents the General Counsel planned to submit had apparently been obtained in violation of BOP policy, adding that the matter would be referred to the BOP's Office of Internal Affairs. Tr. 36-37. The GC's counsel asked that Respondent not be allowed to pursue its investigation while questioning witnesses. Tr. 39.

I informed the parties that I would allow a very limited amount of questioning about how the documents were obtained, so that I could determine whether the documents in question were actually admissible. I noted that the source of the documents could be relevant to whether the documents are admissible, but I added that the Agency would not be allowed to use the hearing to further its own internal investigation. Tr. 39, 196-97. Respondent's counsel complied with my ruling and asked a limited number of questions about how certain documents were obtained. Tr. 195-99, 242, 254, 338.

The General Counsel now moves to strike this testimony from the transcript. It contends that the questions asked by Respondent's counsel were an improper extension of the BOP's internal investigation, and that these questions could have a chilling effect, deterring other employees from testifying in hearings, and thus impairing the GCs ability to enforce the Statute. The GC further asserts that the questions asked by Respondent's counsel were not directed toward the admissibility of the particular documents, because in all but one instance (Tr. 242) the exhibits had already been admitted into evidence. Finally, the GC cites a decision issued by Administrative Law Judge Susan Jelen, *U.S. Dep't of Homeland Sec., U.S. Immigration & Customs Enforcement*, Case No. DA-CA-14-0436 (Apr. 23, 2016) (ALJD No. 16-23) (*DHS*). In that case, Judge Jelen found that it was unlawful for the agency to initiate and conduct an investigation regarding testimony a witness had given in a prior ULP hearing.

The Respondent opposes the motion to strike, arguing that its counsel complied with my ruling and asked only a limited number of questions about the origins of the documents; that there is no basis for rearguing the ruling I made at the hearing; and that there is no protection under the Statute for the unauthorized collection of Agency documents.

After considering the matter further, I reaffirm my ruling. It was necessary to allow Respondent's counsel to ascertain the source of the documents in order to determine their admissibility, and the questions asked of the witnesses were properly limited. Counsel did not use the hearing as a prelude to or proxy for an internal investigation; rather, the questions in dispute concerned the source and relevance of certain exhibits, a standard type of question that is asked at virtually every hearing. Further, because Respondent's counsel's questions were not investigatory in nature, and because there is no evidence that the BOP's internal investigation would encompass testimony given at our hearing, our situation is unlike the situation in *DHS*.

Finally, the GC argues that because most of the Respondent's counsel's questions were asked after the documents were admitted, the questions did not concern admissibility and thus went beyond the scope of my ruling. Contrary to the GC's claim, admissibility is a broad term that encompasses the relevance of material at and after the time it is entered into evidence. See *Black's Law Dictionary* 55, 674 (10th ed. 2014). As Respondent's counsel's questions pertained to the source and relevance of the documents, they pertained to admissibility, even though they were asked after the documents had been admitted into evidence. The GC's Motion to Strike is therefore denied.

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

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 present and process grievances under a negotiated grievance procedure. The analytical framework for evaluating a supervisor's statements, articulated not long ago in *Michigan Army Nat'l Guard*, 69 FLRA 393, 396 (2016), is virtually unchanged from the earliest days of the Authority:

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.

(footnotes omitted); see also *U.S. Dep't of Transp., FAA*, 64 FLRA 365, 370 (2009) (*FAA*); *U.S. Dep't of Agric., U.S. Forest Serv., Frenchburg Job Corps, Mariba, Ky.*, 49 FLRA 1020, 1034 (1994); *Fed. Mediation & Conciliation Serv.*, 9 FLRA 199, 208 (1982) (*FMCS*). 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, e.g., *FAA*, 64 FLRA at 370, where a supervisor told a union steward he would have continued to accept his doctor's note if he had not forwarded an email to other union officials. Similarly, the Authority found a manager's statement coercive when she said that an employee had "become nothing but a troublemaker" since becoming a union steward. *U.S. Air Force*,

Lowry AFB, Denver, Colo., 16 FLRA 952, 960 (1984); *see also EEOC, San Diego Area, San Diego, Cal.*, 48 FLRA 1098, 1107 (1993). On the other hand, in *FMCS*, 9 FLRA at 210-11, a manager's warning to a union official that the leaking of confidential information could be detrimental to the agency and to employees was found not to be threatening or coercive.

I begin my analysis by determining what happened at the December 7 meeting. This requires an evaluation of the credibility of the four witnesses who testified about the event. While I believe that each witness tried to testify accurately, each of their accounts had its own flaws, and none of their recollections is entirely accurate. Thus, I believe Lopez testified accurately about what was said and what took place, but as I will explain below, I do not credit a key part of Lopez's testimony regarding the meeting. In addition, Lopez had difficulty supporting the conclusions he reached about Leu's words and actions, and other evidence leads me not to credit Lopez's claim that his ties with Leu were cut after the December 7 meeting. I found Rojas to be credible, and I consider his failure to corroborate key aspects of Lopez's testimony to be especially telling. However, Rojas, like Lopez, had trouble supporting his conclusions about the Agency's actions.

Lopez and Rojas both recalled several memorable statements made by Leu at the December 7 meeting (about the Grinch who stole Christmas, vacating and not vacating posts, and having your cake and eating it too), and I credit their independent recollections of those statements over Leu's claim that he did not say anything about vacating posts, and over Rogers's claim that Leu did not say anything about vacating posts or the Grinch who stole Christmas. However, as I will explain below, I am unconvinced that Leu's statements were expressed in a coercive manner.

Leu's testimony on many points was detailed and I found his testimony to be credible overall, even though I do not credit his testimony that there was no mention of vacating posts at the December 7 meeting. Further, while Leu failed to offer the Union a clear and consistent rationale for his decisions, I am convinced that Leu genuinely believed that BOP policy required him to assign SHU officers to work holidays, and that staff safety was a consideration when making these assignments. I note that while Leu indicated during the December 7 meeting that he would not assign the property officer (who, at that time, was Lopez) to work on holidays, it is apparent that on January 14 someone (most likely a lieutenant, since scheduling is normally handled by lieutenants, and Leu was preoccupied in January with his transfer to New Jersey) assigned Lopez to work the property officer post on Martin Luther King, Jr. Day, January 18, 2016. *See* Tr. 157-59, 300; GC Ex. 11.

I similarly found Rogers's testimony to be generally credible, but there are some points in his testimony that I do not rely on, such as those mentioned above. Additionally, I credit Lopez's and Leu's testimony that Leu told Lopez at the December 7 meeting that he would not be required to work holidays over Rogers's testimony to the contrary. Tr. 174-75, 430. In addition, Rogers may have attributed certain statements to Lopez that in fact were made by Rojas. *See* Tr. 326.

With these observations in mind, I will synthesize all credible testimony to give a coherent picture of what took place at the December 7 meeting.

The meeting began with Lopez asking Leu why he was requiring SHU officers to work on the holidays, probably a reference specifically to Christmas and New Year's Day. Tr. 174. Leu stated that SHU officers, specifically the SHU 6 and recreation officers, would be required to work all holidays. Leu added that the property officer, the post to which Lopez was assigned, would not be required to work holidays, since that officer was not involved in providing recreation for inmates.¹⁰ Upon hearing this, Lopez stated that this would make him look bad as a Union steward if he had the holidays off while the other two officers were required to work. Lopez suggested instead that Leu require him to work holidays and let the recreation and SHU 6 officers have the holidays off. Lopez accused Leu of retaliating against him for filing the informal grievance regarding the housing officer posts. Leu responded that the housing grievance had nothing to do with SHU officers working holidays. Somewhere during this exchange, Leu may have said something to the effect of, "if I can't vacate one post, I can't vacate any post," and "you can't have your cake and eat it too." And at some point Lopez indicated he would respond with a grievance or ULP charge alleging "retaliation, hostile work environment and anything else I can file."

Seeing that the conversation between Lopez and Leu was "going nowhere," Rojas proposed a "band aid" solution. Tr. 71. Specifically, he proposed that Leu give the SHU officers the coming Christmas and New Year's Day off, and that the parties meet in the new year to work out an agreement on future holidays. Rojas noted that officers had already made their holiday plans based on the prior schedule, and Leu agreed to give them Christmas and New Year's Day off, out of a desire to promote staff morale. (It was probably at this point that Leu said something about not being the Grinch who stole Christmas.) Despite Lopez's earlier comment about filing a formal grievance or a ULP charge, the meeting ended on a neutral or even positive note, because the two parties left with different understandings of the compromise they had reached. From the perspective of Leu and Rogers, the Agency had just enabled SHU officers to enjoy their upcoming Christmas and New Year holidays, but they also believed the Union officials understood that the recreation and SHU 6 officers would be required to work on future holidays. From the perspective of Lopez and Rojas, the Union had won Christmas and New Year's Day off for SHU officers and had also gotten management to agree to negotiate with them before requiring the officers to work on future holidays.

¹⁰ Given the extent to which Lopez was concerned that Leu had made his holiday work decision as a retaliatory measure, it seems to me that Leu must have attempted to explain at the meeting why he was requiring the recreation and SHU 6 officers to work, especially since he explained to Lopez why the property officer was not required to work. He did explain his rationale at the hearing, but nobody asked him at the hearing what explanation he gave to Lopez and Rojas on December 7. I cannot speculate as to what Leu might have said at the December 7 meeting, beyond the descriptions given by the participants at the hearing. But since Leu told Lopez why the property officer was not needed on holidays, it is reasonable to infer that he also told Lopez why the other two officers were needed.

I do not credit Lopez's testimony that Leu stated he would deliberately give Lopez holidays off and take them away from the recreation and SHU 6 officers so that Lopez's coworkers would "hate" him and Lopez would have to "eat that." Leu and Rogers both deny that Leu said this, and Rojas did not quote Leu as having used those specific words. *See* Tr. 70-72. Further, if Leu had said something even arguably coercive, I would expect Rojas, the Union's president, to have reacted; yet Rojas kept quiet for most of the meeting. Tr. 70. And while Rojas did finally intervene, he did so only when it appeared Lopez and Leu had reached an impasse. I doubt Rojas would have acted in such a diplomatic manner if Leu had said that he would make Lopez's coworkers "hate" him and that Lopez would have to "eat that."

Moreover, although Rojas testified that Leu acted in order to make Lopez look bad, Rojas failed to cite specific details to support that claim. At other points in his testimony, Rojas indicated that Leu acted appropriately. For example, Rojas acknowledged that Leu was willing to work with the Union to give SHU officers the coming Christmas and New Year's Day off. And when Rojas was asked at the hearing whether Leu had said anything about specifically staffing the SHU posts because of Lopez's informal grievance, Rojas answered only, "I don't recall." Tr. 79.

To be clear, I do not believe Lopez's testimony regarding Leu's statements was fabricated. Rather, I think that Lopez was projecting his own fears on Leu for the loss of holidays, and thereby jumping to a conclusion regarding Leu's motives. After Soto and Rodriguez met with Leu about the vacated #2 housing officer posts on December 4, Lopez was contacted by SHU officers that same day, blaming him for the loss of their holidays. Tr. 172-73. Thus it is apparent that even before the December 7 meeting, both Lopez and other SHU officers attributed the loss of their holidays to the filing of the housing officer grievance, even though there was (and is) no evidence directly connecting those two actions. Thus, before the December 7 meeting even began, Lopez was convinced Leu was retaliating against him personally, and he let Leu know his feelings at the start of the meeting. When Leu explained why the SHU 6 officer and the recreation officer needed to work on holidays, and why the property officer was not needed, Lopez viewed this as an attempt to make his fellow officers angry at him, prompting him to accuse Leu of intending just such a result. In that context, Leu may well have acknowledged Lopez's concern about being blamed by his fellow officers; but Leu also insisted that the two issues were entirely separate, and Lopez would have to deal with the sentiments of his fellow officers. Merely acknowledging Lopez's concerns is not coercive, and I do not believe Leu did anything more than that.

I am also unconvinced by the GC's claim that by his words, Leu was implying that his decision to require SHU officers to work holidays was connected to Lopez filing the housing officer grievance. Lopez was the one who first asserted that the two issues were connected, not Leu; Leu responded by insisting that the two issues had nothing to do with each other. And the evidence suggests that the two issues were in fact unrelated. The informal grievance concerned posts in the regular housing unit that were vacated for two hours (decisions that were generally made by a lieutenant, not a captain), generally due to a temporary shortage of manpower, while the assignment of SHU officers on holidays was a longer-term decision that

Leu made. All of these factors make me reluctant to view Leu's statements at the December 7 meeting as connecting the two matters. Indeed, with respect to Leu's alleged statement, "If I can't vacate one post, I can't vacate any post," it is unclear how the Union's objection to management vacating a post – that is, removing an officer from an assigned post or failing to assign an officer to an unfilled post, usually for a short amount of time – would justify (in Leu's eyes) his decision to assign SHU officers to work holidays. *See* Tr. 115, 380. Even if Leu's statement about vacating posts was intended to equate the housing officer posts with SHU officers working holidays, I do not view his short and somewhat vague comment as threatening or retaliatory, even in the context of a heated discussion in which Lopez had accused Leu of retaliation. If he was asking Lopez why the Union insisted on officers working in one situation and on officers not working in another situation, he is making a logical (or perhaps illogical) argument, not a threat. Absent a more detailed explanation from Lopez or Rojas, there is not enough evidence to convince me that the comment was expressed in a manner meant to discourage employees from pursuing grievances. Leu's other allegedly coercive statement, "You can't have your cake and eat it too," is even more ambiguous, and Lopez and Rojas failed to explain how such a seemingly neutral statement was coercive.

Additional factors weigh against the General Counsel's claim that Leu spoke in a coercive manner. First, the December 7 meeting ended on a neutral or positive note, with Lopez and Rojas fully expecting to have an additional conversation with management about SHU officers working holidays. It is unlikely the two would have anticipated a follow-up meeting if Leu had spoken in a coercive manner. Second, in his January 14 and 20 emails to Rogers and Leu concerning SHU holiday assignments, Lopez makes no reference to any coercive comments allegedly made by Leu at the December 7 meeting. *See* GC Ex. 11. Lopez protests what he views as a repudiation of the parties' December 7 agreement not to require SHU officers to work holidays without bargaining, and Leu disputes that he ever agreed to bargain before requiring them to work on holidays. *Id.* While these emails reflect a legitimate difference of opinion over a management decision, they don't suggest any lingering animosity that might have been present if Leu had recently made coercive statements to Lopez to discourage him from pursuing grievances.

Based on the foregoing, I find that the General Counsel has failed to demonstrate that Leu spoke in a coercive manner at the December 7 meeting. Accordingly, the Respondent did not commit an independent violation of § 7116(a)(1).

The Respondent did not violate § 7116(a)(1) and (2) of the Statute

Under § 7116(a)(2) of the Statute, it is an unfair labor practice for an agency "to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment." In *Letterkenny*, 35 FLRA at 117-18, the Authority established the framework for determining whether an agency action violates § 7116(a)(2). The GC always bears the burden of establishing, by a preponderance of the evidence, that an unfair labor practice was committed. *Id.* at 118. Initially, 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 is successful, it has established a prima facie case of discrimination. The burden then 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.

Looking at the first part of the *Letterkenny* test, it is clear that Lopez engaged in protected activity. It is well established that an employee's right to file and process grievances under a collective bargaining agreement is protected activity within the meaning of § 7102 of the Statute. See *U.S. Dep't of Health & Human Servs., SSA, Balt., Md.*, 42 FLRA 22, 25, 56-57 (1991); *EEOC*, 24 FLRA 851, 855 (1986), *aff'd sub nom. Martinez v. FLRA*, 833 F.2d 1051 (D.C. Cir. 1987). There is no dispute that Lopez filed the informal grievance. Accordingly, I find that Lopez engaged in protected activity.

With respect to motivating factors, the General Counsel argues that the close proximity in time between Lopez filing the informal grievance and Leu deciding to require the SHU 6 officer and the recreation officer to work holidays is a strong indication that the first event motivated the second. GC Br. at 25-26. The Authority has long considered the timing of a management action significant in determining whether a prima facie case of discrimination has been established under § 7116(a)(2). See *U.S. Customs Serv., Region IV, Miami Dist., Miami, Fla.*, 36 FLRA 489, 495 (1990). However, while the proximity in time between an agency's action and an employee's protected union activity may support an inference of illegal anti-union motivation, it is not conclusive proof of such motivation, or of a violation; rather, it must be evaluated within the totality of the evidence. *Dep't of the Air Force, Air Force Material Command, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 55 FLRA 1201, 1205-06 (2000); *U.S. Dep't of Labor, Wash., D.C.*, 37 FLRA 25, 37 (1990). In our case, the totality of the evidence convinces me that the two events were separate and unrelated, and that their close proximity in time was coincidental.¹¹

In the chain of events from the filing of the informal housing grievance to the assignment of SHU officers to work holidays, there is a missing link: the December 4 meeting, in which Lopez's grievance was discussed, but not resolved, by Leu, Soto, and Rodriguez. Even though Soto and Rodriguez were Union officials and could shed light on what was said at the meeting, they were not called as witnesses by the GC, nor were they called by the Respondent; as a result, the record reveals little, if anything, about the substance of the parties' discussions during the December 4 meeting. If Leu harbored a grudge against the absent Lopez for having filed the housing grievance, he might have expressed that sentiment to Soto and Rodriguez, but we have no way of evaluating whether that occurred,

¹¹ In this regard, my earlier discussion of the December 7 meeting, and my finding that Leu did not coerce or intimidate Lopez at that meeting, are relevant to my evaluation of the evidence on the 7116(a)(2) allegation as well.

other than Leu's testimony (Tr. 384) that his decision had nothing to do with the grievance.¹² I do not draw any adverse inferences from the failure to call Soto and Rodriguez, because I recognize that they were dismissed from their Union positions by Rojas in relation to a separate incident. Therefore, neither side could be entirely confident as to how they would testify. Nonetheless, the absence of their testimony leaves a void in the record that hurts the GC more than the Respondent, since it is the GC who must prove that Leu was unlawfully motivated in requiring SHU officers to work on holidays.

The record is also unclear as to exactly how the decision to require SHU officers to work on holidays was communicated to employees. Lopez, who was not at the December 4 grievance meeting, heard from SHU officers later that day that they were being required to work on Christmas and New Year's Day, and those employees seem to have connected this decision to the grievance. Tr. 172. But neither the employees nor Lopez had attended the grievance meeting, so it is nothing more than speculation to make that connection, unless they heard it directly from Leu, Soto, or Rodriguez. Again, we have a void. Leu's rather ambiguous testimony comes closest to filling the void. At the hearing, he was asked:

Q. At some point during your December meeting, do you recall telling the Union that they may be required – union members that they may be required to work federal holidays?

A. Yes.

Q. And what do you recall about that?

A. We were going to notify them shortly after the meeting. More than likely my admin lieutenant would put a change sheet out.

Tr. 384-85. Leu does not specify whether "the meeting" in question was the December 4 or December 7 meeting, but the context suggests that he meant the December 4 meeting, since the Union had already protested the holiday work assignment prior to the December 7 meeting. Thus it would appear that SHU employees saw the change sheet posted on December 4, advising them that the recreation officer and SHU 6 officer were assigned to work on Christmas and New Year's Day, and they immediately protested to Lopez. This would also mean that Leu's decision to require these officers to work those holidays was not announced at the grievance meeting with Soto and Rodriguez. Using the grievance meeting over vacant housing posts to announce the SHU holiday decision would suggest they were connected, and would support the discriminatory motivation that Lopez inferred. But using a change sheet to announce the decision would be the normal, neutral method, and it would not suggest any discriminatory intent.

¹² While Lopez testified that SHU officers contacted him on December 4 and attributed their being required to work on holidays to the housing grievance, Lopez did not attribute any such sentiments to Soto or Rodriguez, who had just met with Leu about that housing grievance.

In order to appreciate the absence of unlawful motivation, it is helpful first to review the valid reasons Leu had for requiring the SHU 6 and recreation officers to work holidays. Leu testified that he acted in order to comply with the BOP policy requiring the Agency to offer SHU inmates one hour of recreation a day, five days a week. The evidence supporting this is strong. Rojas, Luke, and Leu all testified that BOP policy required that SHU inmates be offered this amount of recreation, and it is essentially undisputed that the Agency had in fact been violating this policy since 2014. In addition, I credit Leu's testimony that the Agency lacked the resources to provide recreation on weekends after the staffing guidelines were implemented in 2014 (*see* Tr. 385), that inmate complaints forced him to reckon with the fact that the BOP policy was being violated, and that the inmate complaints ultimately led him to require the SHU officers to work and to offer recreation to inmates on holidays starting in January 2016. While it is unclear exactly when inmates raised these complaints and exactly when Leu decided to require the SHU officers to work holidays, Leu handled the complaints himself, and he responded quickly enough to prevent the complaints from requiring the intervention of senior management. *See* Tr. 428-29. In this context, I find that the complaints probably arose in mid to late November, perhaps right after Thanksgiving, a week or two before Leu decided, on December 4, 2015, to require the SHU officers to work holidays. *See* Tr. 172. While Lopez's informal complaint was filed on or a few days after November 20, 2015, it is nevertheless clear to me that the inmate complaints are what led Leu to require the SHU officers to work holidays. And because a failure to act would have resulted in a continued violation of BOP policy (and continued inmate complaints, which ultimately would have had to be resolved by the warden), it is understandable that Leu implemented the change when he did, even though such changes were usually not made in the middle of the assignment-bidding quarter.

I reach this conclusion even though Leu's explanation was imperfect. In addition to not stating when the inmate complaints were raised, Leu said almost nothing about the substance of the complaints. Moreover, based on the somewhat sketchy descriptions by all witnesses of Leu's explanation on December 7 for the new holiday work requirement, it is unclear whether Leu told the Union that he was basing his decision on the inmate complaints or the BOP recreation policy.¹³ Nevertheless, I am convinced that complying with the BOP policy was what motivated Leu to act, as his testimony is consistent with the fact that the Agency started offering five hours of recreation on weeks with holidays as soon as it was feasible, after the Christmas and New Year's Day holidays. Any remaining doubt about Leu's explanation is extinguished by the fact that Leu admitted at the hearing that under his watch the Agency violated BOP policy by failing to offer SHU inmates a sufficient amount of recreation on weeks with holidays. *See* Tr. 401-02, 406-07. I doubt that Leu would have made such an admission if he did not believe that the policy had in fact been violated.

Although Leu may not have told the Union that he was basing his decision on BOP policy, he did state in his January 14 email to Lopez that his decision was based on staff safety. Taken in context, Leu's explanation is entirely understandable. Having decided that the Agency needed to comply with BOP policy, and realizing that the way to do that was to offer recreation on holidays, Leu needed to determine how to provide the recreation in a safe

¹³ See my comment in note 10 above.

manner. The answer, given the fact that the Special Housing Unit usually had a skeletal staff on holidays, was to require the two officers who are normally in charge of inmate recreation (the recreation and SHU 6 officers) to work on holidays. *See* Tr. 280-81, 426-27. Thus, while staff safety was not the primary reason for Leu's action, it was a valid reason for requiring SHU officers to work holidays, and it was entirely consistent with the primary goal of complying with BOP policy.

While the record shows that Leu had valid reasons for requiring the recreation and SHU 6 officers to work holidays, the record is essentially devoid of signs that Lopez's informal grievance was a motivating factor in Leu's decision. (*See* note 11 above).

Prior to the December 7 meeting, Leu had a good relationship with Lopez, and Leu's December 4 meeting with Soto and Rodriguez concerning Lopez's housing grievance did not set off any alarms of anti-union or otherwise hostile comments or behavior. During the December 7 meeting, Leu did not speak in a coercive manner, and Leu did not say anything negative about Lopez, the Union, or the housing grievance. More specifically, Leu said nothing to indicate that he was requiring SHU officers to work holidays because of Lopez's informal grievance. Again, I note that Rojas was unable to cite a single instance in which Leu specifically connected his decision to require SHU officers to work holidays to the filing of the informal housing grievance. Tr. 79. And when Lopez asserted that Leu was retaliating against him for filing the informal grievance, Leu responded that the two issues had nothing to do with each other, a fact that Lopez himself seemed to recognize. Tr. 210, 303.

The subsequent email dialogue between Lopez and Leu also fails to reveal an unlawful motivation on Leu's part. While it is true that Leu mentioned the informal grievance in his January 14 email to Lopez, Leu did this merely to note that he and Rojas had resolved the matter, which he did on terms favorable to the Union. *See* Tr. 397. And while Lopez's January 20 email raised some points challenging Leu's explanation for requiring officers at USP 2's SHU to work holidays (including the claim that officers at other special housing units at FCC Coleman had the Martin Luther King, Jr. holiday off),¹⁴ Lopez still did not expressly claim that Leu was retaliating against him for his grievance. GC Ex. 11.

Two more factors weigh against the GC's argument. First, the Agency's budget and manpower resources have been limited, and it is unlikely that the housing officer grievance would have led Leu to commit the Agency to pay additional officers to work holidays, if he didn't feel they were needed. *See* Tr. 281; GC Ex. 11. Essentially, this logic suggests that a manager, angry at being prodded to spend scarce monetary resources for officers in the housing units, will respond by spending even more money for officers in the SHU. Second, there is no evidence indicating Leu harbored any animus against Lopez or the Union. This is bolstered by the fact that Leu showed no animus towards Soto and Rodriguez, even though

¹⁴ There is hardly any evidence supporting this claim. While Rojas testified that officers at other special housing units at FCC Coleman did not have to work holidays, Lopez indicated that management occasionally assigned special housing unit officers at the other institutions to work holidays, and he testified that it was up to the captain of each institution to decide whether to require officers to work holidays. Tr. 74, 185, 202.

they were the Union representatives who actually met with him on December 4 concerning the housing grievance, and by the fact that Leu showed no animus towards Rojas, even though Rojas helped Lopez at the December 7 meeting and was involved in many more grievances than Lopez. Indeed, Leu worked with Rojas to resolve the informal grievance. Based on the foregoing, it is clear to me that Lopez's protected activity was not a motivating factor in Leu's decision.

In so finding, I acknowledge that on January 14, 2016, someone in management decided to assign Lopez to work on January 18, Martin Luther King, Jr. Day, notwithstanding Leu's insistence at the hearing that the property officer was not needed on holidays. While this could have been based on a need for extra security at the SHU, on a desire for the property officer to assist in facilitating inmate recreation, or simply on poor communications between the soon-departing Leu and his administrative lieutenants,¹⁵ the Agency has failed to explain exactly why Lopez was assigned to work on Martin Luther King, Jr. Day. However, because I am convinced that compliance with the BOP policy is what motivated Leu to act; because the evidence shows that Leu was not troubled by the informal grievance or by Lopez's role in pursuing it; and because there was not an especially close proximity in time between the filing of the informal grievance and the January 14 decision to assign Lopez to work on Martin Luther King, Jr. Day, I conclude that Lopez's protected activity was not a motivating factor in the decision to assign him to work the Martin Luther King, Jr. Day holiday, or subsequent holidays.

I also acknowledge that the Agency stopped offering recreation on holidays, beginning Memorial Day 2016. In other circumstances, that could be a sign that the justification cited by Leu was pretextual. However, as discussed at the end of the hearing, our dispute (as framed by the GC's Complaint) focuses on Leu's actions in December 2015 and January 2016; it does not encompass decisions made by other Agency officials after Leu left FCC Coleman, on January 24, 2016. Tr. 474-77. Accordingly, the General Counsel's reliance on the Agency's actions on and after Memorial Day 2016 is misplaced, and I do not consider them.

Finally, the GC argues that because Respondent failed to introduce a copy of the BOP policy cited by Leu (Program Statement 5270.10, Special Housing Units), I should draw an adverse inference against the Respondent with respect to the policy. The Authority has held that 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. Dep't of Justice, Fed. Bureau of Prisons, U.S. Penitentiary (Admin. Maximum), Florence, Colo.*, 60 FLRA 752, 757 (2005). However, such an inference is not appropriate where merely cumulative evidence is involved, or where the inference is not reasonable. *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); *Internal Revenue Serv., Philadelphia Serv. Ctr.*, 54 FLRA 674, 682-83 (1998). Given the credible testimony from three separate witnesses – Leu, Rojas, and Spade – indicating that BOP policy required the Agency to offer SHU inmates one hour of recreation

¹⁵ Lt. Rogers seemed to believe that the SHU property officer was supposed to start working on holidays in January, in addition to the recreation officer and SHU 6 officer. Tr. 299-300.

a day, five days a week, the weight of the evidence supports Leu's understanding of the policy. Accordingly, the policy document itself was not necessary to prove this point. Further, Leu genuinely believed that the BOP policy required him to offer SHU inmates five hours of recreation each week, and because Leu was motivated by this valid concern, it is almost irrelevant what the precise terms of the policy actually were. Accordingly, I do not draw an adverse inference against the Respondent with respect to the BOP policy.

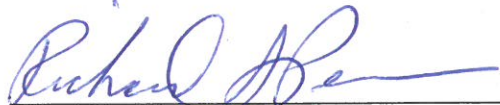
Looking at all of the evidence offered by both sides, I conclude that the General Counsel has not shown that Lopez's protected activity was a motivating factor in Leu's decision to require SHU officers to work holidays. Accordingly, the GC has not made a prima facie case, and as the Authority stated in *Letterkenny*, in such situations, the case ends without further inquiry. 35 FLRA at 118. I thus find that the Agency did not violate § 7116(a)(1) and (2) of the Statute.

Based on the foregoing, I recommend that the Authority issue the following order:

ORDER

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

Issued, Washington, D.C., October 26, 2017



RICHARD A. PEARSON
Administrative Law Judge