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

OALJ 16-23

U.S. DEPARTMENT OF HOMELAND SECURITY
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL IMMIGRATION AND CUSTOMS ENFORCEMENT, COUNCIL 118, AFL-CIO

CHARGING PARTY

Case No. DA-CA-14-0436

Charlotte A. Dye
Elizabeth Wiseman
For the General Counsel

Ricardo Spraglin
For the Respondent

Monica G. Romo
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

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

On September 19, 2014, the American Federation of Government Employees, National Immigration and Customs Enforcement, Council 118, AFL-CIO (Union) filed an unfair labor practice (ULP) charge against the U.S. Department of Homeland Security,

U.S. Immigration and Customs Enforcement (Respondent). (G.C. Ex. 1(a)). After an investigation of the charge, the Dallas Regional Director of the FLRA issued a Complaint and Notice of Hearing on May 1, 2015, alleging that the Respondent violated § 7116(a)(1)(2) and (4) of the Statute by requesting, launching and interrogating Daniel Ramirez, Union President for AFGE, Local 1944, in an Office of Professional Responsibility investigation relating to his testimony in a hearing before the undersigned Administrative Law Judge. (G.C. Ex. 1(c)). The Respondent filed an Answer to the Complaint on May 15, 2015. (G.C. Ex. 1(d)). In its Answer, the Respondent admitted some of the factual allegations, but denied that it violated the Statute as alleged in the Complaint. (G.C. Ex. 1(d)).

A hearing in this matter was held on June 15, 2015, in Harlingen, Texas. The parties were afforded an opportunity to be represented and heard, to examine witnesses, introduce relevant evidence, and make oral arguments. The General Counsel and Respondent filed timely post-hearing briefs which have been 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 is an agency under § 7103(a)(3) of the Statute. (G.C. Exs. 1(c) & (d)). At all times material to this matter, Julien Calderas was the Deputy Field Office Director of Respondent's San Antonio Field Office, and Mark West was a Special Investigator with the Office of Professional Responsibility (OPR). These individuals were supervisors, management officials and/or agents of the Respondent under § 7103(a) (10) and (11) of the Statute. (G.C. Exs. 1(c) & (d)).

The American Federation of Government Employees (AFGE), National Immigration and Customs Enforcement, Council 118, AFL-CIO is a labor organization under § 7103(a)(4) of the Statute and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent. (G.C. Exs. 1(c) & (d)). AFGE, Local 1944 (Local 1944) is an agent of AFGE for purposes of representing employees at the Respondent. (G.C. Exs. 1(c) & (d)). Daniel Ramirez is employed by the Respondent as an Immigration Enforcement Agent in the San Antonio Field Office, and he has been the President of Local 1944 since 2009 and held this position at all times material to this matter. (Tr. 29-30).

On April 9, 2014, a hearing was conducted in San Antonio, Texas, relating to a charge filed by Local 1944 against Immigration and Customs Enforcement, San Antonio Field Office, concerning the suspension of alternate works schedules (AWS) for certain employees at the Harlingen and Port Isabel offices. Daniel Ramirez filed the charge on behalf of Local 1944 and represented Local 1944 at the hearing where he was called as a witness by the General Counsel in that matter. (Tr. 30).[1]

[1] On September 28, 2015, I issued the decision in *DHS, ICE, San Antonio, Tex.*, Case No. DA-CA-13-0410 (OALJ 15-55) and found that the Respondent violated the Statute as alleged in the

As stated above, Ramirez was called as a witness by the General Counsel in Case No. DA-CA-13-0410 and testified, under oath, regarding the allegations of the Complaint. Specifically he was questioned regarding his dealings with the Respondent's representatives regarding the alternate work schedules, the temporary suspension of the AWS for certain employees, when he received notice, and subsequent attempts to negotiate post-implementation. (Tr. 30, 31).

Pursuant to Respondent's Employee Code of Conduct, 1033.1, dated August 7, 2012, ICE employees are responsible for reporting employee misconduct, including arrests and violations of law, rule, or regulation, in accordance with established policies and procedures. The instruction further states, at 5.16, Reporting violations of Laws and Employee Misconduct: Employees have a responsibility to report allegations of employee misconduct, including any violations of law, rule or regulation, of which they are aware. (R. Ex. 1 at 6).

On July 2, 2004, the Respondent issued its Guidance on Reporting Employee Misconduct. This established the creation of a Joint Intake Center, and noted that employees are subject to disciplinary action for failing to report allegations of misconduct. The memorandum also included an attachment with examples of misconduct, specifically, "Criminal activity: conduct that would violate state or federal criminal laws. Examples of criminal activity include, but are not limited to: bribery, theft or misuse of funds, smuggling, drug possession, perjury, civil rights violations such as mistreatment of aliens, etc." (R. Ex. 2 at 2).

On November 10, 2010, a memorandum was issued to all employees, regarding what types of complaints should appropriately be directed to the Joint Intake Center (JIC).[2] This memorandum reiterates the types of misconduct allegations that employees must report to the JIC, OPR, or the OIG (Office of Inspector General) and those types of allegations that should be referred to local management. Employees should report allegations of substantive misconduct or serious mismanagement to the JIC, OPR, or OIG. Less serious misconduct, however, should be reported to local management. (R. Ex. 3).

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footnote 1 continued
complaint. At the request of the parties in the instant matter, I have taken official notice of the transcript, exhibits and briefs in that case. (Any reference to that transcript is identified as 13-0410). No exceptions to my decision were filed and the Authority issued an Order on November 19, 2015, upholding the decision.

[2] The JIC is an agency investigating arm set up to receive complaints involving U.S. Immigration and Customs Enforcement or U.S. Customs and Border Patrol employees. (R. Ex. 2). Allegations of misconduct received by the JIC are screened by the Office of Inspector General and, when warranted, are returned to the JIC for appropriate action by the ICE Office of Professional Responsibility or the CBP Office of Internal Affairs. (R. Ex. 2).

On May 13, 2014, Calderas sent an email to the JIC regarding a possible violation of 18 U.S.C. § 1621 (perjury) and/or 18 U.S.C. § 1001 (false statements):

> This email is being sent to report a possible violation of 18 U.S.C. § 1621 and 18 U.S.C. § 1001 by Immigration Enforcement Agent (IEA) Daniel Ramirez who is assigned to the San Antonio Field Office (SNA). IEA Ramirez also serves as the Local 1944 Union President.
>
> On April 9, 2014 at 9:00 AM there was a hearing in Federal Court before the Federal Labor Relations Authority involving an Unfair Labor Practice charge the Union filed against ICE ERO, San Antonio. The case # is DA-CA-13-0410 in the matter of: *Department of Homeland Security, Immigration & Customs Enforcement, San Antonio, Texas and American Federation of Government Employees, Local 1944, AFL-CIO* before Administrative Law Judge Susan E. Jelen at U.S. Federal Building and Courthouse, Room 371, 615 East Houston Street, San Antonio, Texas.
>
> It was during this hearing IEA Ramirez was called as a witness for the Union. Upon reviewing the court transcript (attached), it appears IEA Ramirez made several statements while under oath, that may be perjurious. Attached is the hearing transcript along with an outline and exhibits that appear to demonstrate a violation of 18 U.S.C. § 1621 and 18 U.S.C. § 1001.
>
> IEA Ramirez's misrepresentation/misstatement of the facts in his sworn testimony could potentially inure to his (and Union's) benefit, the FLRA judge's ruling, thus providing a motive to alter the facts. IEA Ramirez's credibility as a witness and as a law enforcement officer are now in question.

(G.C. Ex. 3a). Attached to the email was an outline of Ramirez' testimony, including excerpts from the transcript in Case No. DA-CA-13-0410, and multiple exhibits from the hearing. (G.C. Ex. 3a-k).

On June 2, Mark West, a Special Investigator with Respondent's OPR in San Antonio, Texas, forwarded Calderas' May 13, 2014, email to Joey Contreras, Assistant United States Attorney for the Western District of Texas: "Below is the email from DFOD Calderas making an allegation against IEA Ramirez, the local AFGE Union President. Attached is the outline and exhibits submitted by DFOD Calderas as well as the entire transcript of the hearing. Please advise as to whether or not your office has any interest in prosecuting this case." (G.C. Ex. 3a at 2; Tr. 88-89). Contreras responded the next day, asking "As I understand this, Ramirez was asked in an administrative hearing how he learned of a certain policy change. He said he didn't remember, or wasn't clear – and he was testifying a year after the fact. Who is Julian Calderas and is he the person who feels perjury occurred?" (*Id.*). West immediately responded, stating "Correct. Calderas is the Deputy Field Office Director (DFOD) for ICE ERO in San Antonio, and he is the one saying Ramirez perjured himself. I don't see it. Like you said, Ramirez was testifying a year after

the fact and said he didn't remember the conversation." (*Id.*). Contreras immediately responded, asking "Why does Calderas believe Ramirez intentionally lied? Is Calderas a neutral investigator? What is his role in this matter?" (*Id.* at 1). West responded, stating "Calderas is not neutral. He is in charge of relations with the Union, he is ERO management. He believes that Ramirez lied about remembering in order to sway the judge to rule favorably for the Union. Ramirez is the local Union President, Calderas is his "nemesis," representing ERO management."[3] (*Id.*). Contreras then responded "We will decline prosecution." (*Id.*).

West continued with his OPR investigation, on an administrative level. He interviewed and took a signed affidavit from Calderas on June 17. (G.C. Ex. 5i). He also took affidavits from three bargaining unit employees from the Harlingen office on June 18, June 23 and July 22. (G.C. Ex. 5m, n, and o; Tr. 83).

On August 5, 2014, Ramirez received a notice informing him that he was the subject of an OPR investigation and that his appearance and sworn testimony were required. (G.C. Ex. 5h). On August 7, 2014, Ramirez, with his Union representative, met with OPR investigator West. He signed several forms (G.C. Ex. 4a, b, c, d and f, 5d, e, f, g, h; Tr. 51) and he was sworn in and asked a series of prepared questions. (G.C. Ex. 4h). The interview was recorded and transcribed. (G.C. Ex. 5*l*).

During the interview, West asked Ramirez questions about when he learned of the termination of AWS. He gave Ramirez a copy of the email dated April 2, 2013, at 3:43 p.m., which is an email from Ramirez to Assistant Field Office Director Diana Perez in which he was asking questions about the termination of the AWS. (G.C. Ex. 3f; Tr. 13-0410). In the email, Ramirez stated, "Earlier today I was notified by LMR [Sealey] of SNA's intent to terminate AWS." During the hearing, Ramirez testified that he did not recall having a conversation with Sealey about the termination of the AWS. (Tr. 32). However, this email shows that he had, in fact, had a conversation with Sealey about the termination earlier in the day on April 2, 2013. West asked if the email was shown to him at the hearing. (G.C. Ex. 5*l*). Ramirez did not remember if the email was shown to him at the hearing (for the record, it was shown to Ramirez by Counsel for the General Counsel, but was not referred to by Respondent's Counsel). West asked if Ramirez may have recalled the conversation with Sealey if the agency attorney had shown him the email at the hearing. (*Id.*). Ramirez told West that he may have remembered, but, of course, the hearing was in April 2014, which is over a year after the email was sent to Perez, so he still might not have recalled the specific conversation, although, based on the email, he would not have disputed that he had some conversation with Sealey. (*Id.*). Ramirez told West that he emails or speaks to LRS Sealey probably 3-5 times a day, on average. Ramirez represented a bargaining unit of 600 people, so he frequently speaks to LRS Sealey about the employees' conditions of employment. (*Id.*). West asked if Ramirez had deliberately lied under oath regarding when he was notified

[3] It is clear from the testimony that West is the one who used the term "nemesis" and that he has limited knowledge of the relationship between Calderas and Ramirez and limited understanding of labor relations. I find the use of this term of no probative value in this decision.

of the intended change to AWS. Ramirez told West that he had not. West asked Ramirez if it was his intention to mislead the court by claiming that he did not remember discussing the suspension of AWS with LRS Sealey. Ramirez told him that it was not his intention. (Tr. 32-33).

West then went on to ask Ramirez questions relating to whether the Union had agreed to post-implementation bargaining. (G.C. Ex. 5*l*). West stated that it had been alleged that he testified untruthfully with regards to post-implementation bargaining on the AWS change. West asked if Ramirez was making deliberate misstatements in his testimony. Ramirez told West that he was not making deliberate misstatements. West asked if, at the hearing, Ramirez was testifying to the best of his recollection. Ramirez told West that he had testified to the best of his recollection. West asked Ramirez how much time had passed between the events in question and the hearing. Ramirez told him that it was about a year. (G.C. 5*l*; Tr. 33-34).

West then moved on to ask Ramirez questions relating to his communications with bargaining unit employees about their perceived workload and AWS. (G.C. Ex. 5*l*). This allegation was not included in the initial charges submitted to the JIC, but was added when West took Calderas' affidavit. (G.C. Ex. 3a, 3b, 5i). West said that it was alleged that Ramirez testified untruthfully regarding the workload of the Enforcement Removal Assistants in the Harlingen AOR. (G.C. Ex. 5*l*). West asked if Ramirez recalled speaking with any ERAs in the Harlingen AOR regarding their workload. (*Id.*). Ramirez told him that he had. (*Id.*). He asked Ramirez if he recalled how many meetings that he had with the ERAs about their workload. (*Id.*). Ramirez told him that he had two meetings with the ERAs – one in Harlingen and one in Port Isabel. West asked Ramirez if management was present at either of these meetings. Ramirez told him they were not. West then asked Ramirez, with regard to the influx of aliens into the United States, what was the consensus of those at the meetings about whether their workload had increased. Ramirez told him that they had said that their workload had not increased. West asked Ramirez if he had lied under oath regarding his meetings with the ERAs. Ramirez told him that he had not lied. (G.C. Ex. 5*l*; Tr. 48-49).

On October 16, 2014, Ramirez received an email forwarding a memorandum titled Letter Of Closure, from Timothy M. Moynihan, Assistant Director, Office of Professional Responsibility. The memorandum stated, in part: "The investigation into this matter has been completed. The investigative results do not support the reported allegation(s); therefore, this report will not be referred to management for action and is now considered closed." (G.C. Ex. 5b, 6; Tr. 58).

No action was taken against Ramirez as a result of the OPR investigation. (Tr. 84).

PRELIMARY MATTERS

The Respondent named Calderas as a witness and technical advisor. (Tr. 11, 12). At the hearing, Calderas was present as a technical advisor, but was not called by the Respondent as a witness, with Respondent's counsel stating since "his testimony is contained in the affidavit," referring to the affidavit given by Calderas during the OPR investigation and submitted into evidence as G.C. Exhibit 5i. (Tr. 73, 74).

The General Counsel requests that I draw an adverse inference regarding Respondent's failure to call Calderas as a witness at the hearing. The GC asserts that Calderas was the person who made the charges of perjury and false statements and who initiated the OPR investigation and was therefore the sole witness for Respondent who could explain the bases for the charges. *See Internal Revenue Serv., Phila. Serv. Ctr.*, 54 FLRA 674, 682 (1998) (Respondent's failure to call missing management witness who was the selecting official to explain the basis for nonselection warrants concluding that there was no legitimate justification for failure to select).

The Respondent's decision to rely on the investigative statement of Calderas, rather than calling him as a witness, resulted in no direct evidence regarding the motivation of Calderas in initiating the investigation. While I question the prudence of this course of action, I do not find it necessary to draw an adverse inference as requested by the General Counsel.

POSITIONS OF THE PARTIES

General Counsel

The GC asserts that the Respondent violated § 7116(a)(1), (2) and (4) of the Statute by investigating Ramirez on charges of alleged perjury and false statements in reprisal for his role in testifying on behalf of the Union in the ULP hearing in Case No. DA-CA-13-0410. Using the framework set forth in *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*), the GC first asserts that Ramirez was engaged in activity protected by the Statute through his involvement in testifying on behalf of the Union at the April 9, 2014, unfair labor practice hearing. Further, the GC asserts that the Respondent was motivated by Ramirez' protected activity in pursuing a charge of alleged perjury and false statements and conducting an investigation over a six-month period (May 13 to October 16, 2014).

In this regard, the GC questions the manner in which the investigation against Ramirez was initiated and conducted and the severity of the discipline sought (criminal charges) in relation to Ramirez' actual conduct at issue. In particular, the GC first asserts that the items about which Ramirez was supposed to have lied were not particularly germane to the issue of the AWS elimination by Respondent. While it is true that an email showed that Ramirez had received "notice" of Respondent's immediate elimination/suspension of the AWS for the Harlingen and Port Isabel employees, that "notice" was mere hours before, and on the same day as the email to bargaining unit employees notifying them of the termination.

Moreover, the email which refers to Ramirez' earlier discussion with Sealey was part of the exhibits for the General Counsel in Case No. DA-CA-13-0410. Similarly, whether Respondent offered to bargain "post-implementation" with the Union or whether the Union did or did not agree to bargain post-implementation is immaterial to the allegation at issue in the case, which was Respondent's refusal to bargain prior to the elimination/suspension of AWS, especially since Respondent's position was that it had no obligation to bargain under the contract. And, again, documents existed at the time of the hearing about Ramirez' meetings with Respondent about this matter, but none were offered by the Respondent. (G.C. Ex. 3j, 3k; Tr. 13-0410 45). Lastly, Calderas' addition, in his affidavit to West, of the allegation related to what the affected employees told Ramirez about their workload is completely reaching and borderline bad faith by Calderas. Calderas' "evidence" that Ramirez lied is nothing more than the bare numbers of aliens coming over the border. But Ramirez wasn't testifying as to the actual workload. Rather, he testified to what he was told by unit employees. (Tr. 13-0410 51, 52). Even if the unit employees had been incorrect about their workload, Ramirez, who was not one of the affected employees, testified about what he was told by the employees. Not only is this not perjury, it is in fact intrinsically truthful – Ramirez only testified as to what he was told, and nothing more.

Second, the severity of the discipline sought was far outside the range of reasonableness, given that Calderas' May 13, 2014, email to the JIC first calls his statements "perjurious," but later *in the same email* downgrades them to "misrepresentation /misstatements of the facts." Moreover, his affidavit to West indicates that Ramirez' statements "may be perjury or misrepresentation, or at a minimum constitute a lack of candor and/or conduct unbecoming a law enforcement officer." Ramirez' "perjury" is demoted even farther, to a "lack of candor and/or conduct unbecoming a law enforcement officer." Moreover, while his email initiating the investigation only lists two instances of "perjury" against Ramirez (meeting with Sealey and post-implementation bargaining), by the time that he gives his affidavit to West, Calderas had added a third allegation against Ramirez (workload discussion with unit employees). Further, while Respondent seems to indicate that its defense to this charge is that all employees must raise possible misconduct to the JIC, the fact is that *only* Calderas raised those allegations. If Ramirez' testimony had been perjurious, and not just a thinly veiled opportunity for Calderas to punish Ramirez for his protected activity, surely one other person would have raised the allegation to the OPR or JIC.

The GC also asserts that the Respondent violated § 7116(a)(1) by investigating Ramirez on charges of alleged perjury and false statements due to his role in testifying on behalf of the Union in the unfair labor practice hearing in Case No. DA-CA-13-0410. At issue is Calderas' initiation of the JIC investigation and the subsequent investigation of Ramirez for his testimony at the ULP hearing in DA-CA-13-0410. The Authority has found that an agency violates § 7116(a)(1) by accusing a union representative of lying about the contents of ULP charges because doing so would have a reasonable tendency to coerce or intimidate the representative in the exercise of his right to assist a union. *Veterans Admin. Med. Ctr., Memphis, Tenn.*, 39 FLRA 388 (1991) (*VAMC*). The same conclusion is warranted in the instant Complaint. Initiating and conducting an investigation into a witness's testimony at an unfair labor practice hearing will tend to coerce or intimidate a

reasonable employee and inherently interfere with their right to pursue current unfair labor practice charges and/or file future unfair labor practice charges. The message to Ramirez, and all other employees, was that providing testimony on behalf of the Union in support of a ULP charge may lead to an investigation against the employee on charges of perjury.

The General Counsel asserts that the appropriate scope for the posting of the Notice in this case is nationwide. In determining the scope of a posting requirement, the Authority considers the two purposes served by the posting of a notice. *VAMC*, 39 FLRA at 388. First, the notice provides evidence to unit employees that the rights guaranteed under the Statute will be vigorously enforced. Second, in many cases, the posting is the only visible indication to those employees that a respondent recognizes and intends to fulfill its obligations under the Statute. (*Id.*). There are circumstances where it is appropriate to require that notices be posted in areas other than the particular locations where the violation occurred to further these purposes. The question here, then, is whether a posting beyond the particular locations where the unlawful conduct occurred is appropriate to effectuate the purposes and polices of the Statute. A broad posting has been ordered where the violation involved "an issue of import" to members of the unit who do not work at the site where the violations occurred.

There can be no question that an employee's § 7102 right to support a labor organization through testimony at an unfair labor practice hearing is such an "issue of import." Respondent's conduct in this case strikes at the very heart of the Authority's ability to investigate and resolve ULP cases without witness intimidation or reprisal. Given the importance of the right to testify, freely and without fear of discipline or interference, a unit-wide posting is appropriate in this case. The signatory for the Notice should be Daniel Ragsdale, Deputy Director of Immigration and Customs Enforcement, the management representative responsible for ICE.

Respondent

The Respondent denies that it violated the Statute as alleged in the Complaint. The Respondent takes the position that the investigation by OPR was necessary under the parties' collective bargaining agreement, citing to Article 31, that no disciplinary action may be taken except "for appropriate cause as provided in applicable law." (R. Ex. 5b). Although the Respondent concedes that Ramirez was engaged in protected activity be testifying as the Union President at the ULP hearing involving Case No. DA-CA-13-0410, it further asserts that the content of his testimony was reasonably believed to be perjury. The commission of perjury by a federal law enforcement officer constitutes flagrant misconduct, which is not protected by the Statute. *U.S. DOJ, Fed. BOP, FCI, Florence, Colo.*, 59 FLRA 165 (2003) (*FCI*). Further, if perjury allegations are found, the officer may be precluded from testifying in any future criminal cases under the *Giglio* policy.[4] The Respondent asserts that, without a

[4] *Giglio v. United States*, 405 U.S. 150 (1972) (*Giglio*), requires federal prosecutors to disclose to defense counsel information that bears on the credibility of a government witness. *DHS, U.S. Customs & Border Prot., Swanton, Vt.*, 65 FLRA 1023, n.3 (2011).

thorough investigation by an independent and neutral party such as OPR, it would not be able to obtain the necessary and sufficient evidence to support any criminal or administrative proceeding.

There is an affirmative requirement that federal law enforcement agents, such as Ramirez, testify truthfully, whether performing union duties or not, and the questions regarding the truthfulness of Ramirez' testimony mandated referral of any perjury allegations to OPR for investigation. Such an OPR investigation, absent animus, was necessary to determine if Ramirez had committed the flagrant act of perjury.

The Respondent further notes, however, that no action, adverse or otherwise, was taken against Ramirez for his testimony. The Respondent was merely concerned about the veracity of his testimony. The Respondent therefore argues that it should not be found to have violated the Statute since it demonstrated that there was a legitimate justification for its action and that the same action would have been taken even in the absence of protected activity. *Letterkenny*; *Mt. Healthy City School Dist. Bd. of Edu. v. Doyle*, 429 U.S. 274 (1977).

ANALYSIS AND CONCLUSION

Section 7102 of the Statute guarantees employees the right to form, join, or assist any labor organization or refrain from such activity without fear of penalty or reprisal. Section 7102 further provides that protected employee rights include the right to act for a labor organization in the capacity of a representative. Section 7116(a)(1) makes it an unfair labor practice for an agency to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under the Statute. Section 7116(a)(2) of the Statute makes it 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." Section 7116(a)(4) of the Statute makes it an unfair labor practice "to discipline or otherwise discriminate against an employee because the employee has . . . given any information or testimony under this chapter."

The Complaint in this matter alleges that the Respondent violated § 7116(a)(1), (2) and (4) of the Statute by initiating the OPR investigation regarding the Union President's testimony at a prior unfair labor practice hearing involving the same parties. Under the framework established by the Authority in *Letterkenny*, 35 FLRA at 113, the GC 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 GC 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. When the alleged discrimination concerns discipline for conduct occurring during protected activity, "a necessary part of the respondent's defense is that the conduct constituted flagrant misconduct." *Fed. BOP, OIA, Wash., D.C.*, 53 FLRA 1500, 1514 (1998). If flagrant misconduct is established, the conduct loses its protection under the Statute and can be the

basis for discipline. (*Id.* at 1515). While the agency has the burden of establishing its affirmative defense by a preponderance of the evidence, the GC has the overall burden of establishing the violation by a preponderance of the evidence on the record as a whole. The same framework applies for resolving complaints of discrimination under § 7116(a)(4) of the Statute. *See Fed. Emergency Mgmt. Agency*, 52 FLRA 486, 490 n.2 (1996); *Dep't of VA Med. Ctr., Brockton & W. Roxbury, Mass.*, 43 FLRA 780, 781 (1991).

This matter begins with the filing of the ULP in Case No. DA-CA-13-0410 and the subsequent hearing held in April 2014. Rodriguez, as the local union president, filed the ULP with the Dallas Region and was called as a witness by the General Counsel at the hearing. Immediately following the hearing, the Respondent through Calderas, Deputy Field Office Director, initiated an OPR investigation into Rodriguez' testimony at the hearing.[5]

The Respondent agrees that the GC met the first prong of the *Letterkenny* test, that Ramirez was engaged in protected activity; *i.e.*, giving testimony at the unfair labor practice hearing. Further, the evidence clearly shows that Ramirez' protected activity was the motivating factor in the Respondent's conduct in initiating the OPR investigation. Although there was some question regarding the effectiveness of Ramirez' testimony due to his inability to remember certain specifics, I do not find that his testimony in any way amounted to "flagrant misconduct" or negated his protection under the Statute. There was no evidence that his testimony was maliciously and knowingly false. In conclusion, I find that the GC has established a prima facie case under the *Letterkenny* analysis.

I further reject the Respondent's assertion that: (1) there was a legitimate justification for its actions; and (2) that the same action would have been taken in the absence of the protected activity. The Respondent only presented vague assertions regarding the necessity of initiating the OPR investigation. Even the OPR's immediate response to Calderas' letter of complaint showed a concern over the difficulty in establishing perjury in this particular matter, noting the testimony occurred almost a year after the events in question and that the witness indicated on the stand that he was unable to remember the details of many of the questions asked. This may in fact go to his usefulness as a witness, (and was dealt with by the ALJ decision, see note 5 above) rather than any deliberate attempt to withhold the

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[5] I note that the issue regarding Ramirez' testimony was fully considered by the ALJ decision in Case No. DA-CA-13-0410. As stated in note 1, the "Respondent devotes three pages of its post-hearing brief to attacking the credibility of the General Counsel's sole witness, Local Union President Daniel Ramirez, and in particular Mr. Ramirez's testimony regarding the implementation of CWS/AWS in 2009 and his communications with the Respondent's managers relating to the subsequent elimination or suspension of CWS/AWS in 2013 that is the subject of the Complaint in this matter. (R. Br. at 15-18). Mr. Ramirez did display some difficulty recalling pertinent details. (*see e.g.*, Tr. 49-50). Consequently, to the extent that his testimony conflicts with the documentary evidence and the testimony of the Respondent's witness, Enrique Lucero, I have relied on the latter in making my findings of fact."

truth. The U.S. Attorney was unwilling to consider any sort of prosecution and took less than one day to make that decision. Further, it is clear that after his initial reading of the allegations and before an investigation, West "didn't think there was any way that was ever going to be proven; that there was no way you could prove, based on the transcript, that he was being untruthful when he said he didn't remember." (Tr. 81).

While the Respondent argues the OPR had no choice but to continue the investigation, I fail to see where that has been established by the evidence in this matter. The investigation itself was quite thorough and Mr. West took statements from several witnesses, including the complaining party, bargaining unit employees involved in the initial ULP and finally with Ramirez. The investigation, once completed, was closed and no action was taken against Ramirez. None of this is particularly helpful to the Respondent in its defense of this matter and fails to show that there was a legitimate justification for its initiation of the investigation. Despite the clear indication from both the DOJ and OPR that an investigation into Ramirez' testimony would find nothing of value, and certainly not maliciously and knowingly false testimony, an investigation by the OPR was carried out over a six-month period (May to October 2014) before coming to the final, inexorable conclusion that no perjury existed. Thus, it is clear that Calderas' allegations of perjury made against Ramirez, and OPR's investigation of Ramirez, were adverse actions that flowed directly from Ramirez' testimony and represent a violation of § 7116(a)(4).

In *FCI*, 59 FLRA at 165, the Authority found that the Respondent did not have legitimate, nondiscriminatory reasons for referring a union representative's conduct to the Office of Internal Affairs for investigation, for conducting an investigation, and for subsequently proposing discipline. The General Counsel's evidence demonstrates that, in this case, Respondent did not have a legitimate, nondiscriminatory reason for initiating and conducting an investigation into Ramirez' testimony in the unfair labor practice hearing in DA-CA-13-0410. In conclusion, I find no evidence that the same action would have been taken in the absence of Ramirez' protected activity. It was the protected activity itself, the testimony at the ULP hearing, that was the issue of the investigation. The Respondent has presented no evidence to the contrary.

Therefore, I find that the Respondent violated § 7116(a)(1), (2) and (4) by initiating the investigation, as alleged in the Complaint.

I further find that the Respondent violated § 7116(a)(1), as an independent violation, by this conduct. The standard for determining whether an agency violates § 7116 (a)(1) is an objective one. *Ogden Air Logistics Ctr., Hill AFB, Utah*, 34 FLRA 834, 837 (1990); *Marine Corps Logistics Base, Barstow, Cal.*, 33 FLRA 626, 637 (1989). The test is whether, under all the circumstances, the statement or conduct could reasonably tend to interfere with, restrain, or coerce bargaining unit employees in exercising their rights under the Statute. *EEOC, Jackson Area Office, Jackson, Miss.*, 34 FLRA 928, 933 (1990). Remarks to employees who were to testify in an FLRA hearing that they were being watched closely by supervisors were violative of the Statute. *162nd Tactical Fighter Grp., Arizona Air Nat'l Guard, Tucson*, 20 FLRA 818, 825 (1985) (ALJ Decision).

The Authority has found that an agency violates § 7116(a)(1) by accusing a union representative of lying about the contents of unfair labor practice charges because doing so would have a reasonable tendency to coerce or intimidate the representative in the exercise of his right to assist a union. *VAMC*, 39 FLRA at 388. The same conclusion is warranted in the instant Complaint. Initiating and conducting an investigation into a witness's testimony at an unfair labor practice hearing would tend to coerce or intimidate a reasonable employee and inherently interfere with their right to pursue current unfair labor practice charges and/or file future unfair labor practice charges and to testify regarding such charges in an unfair labor practice hearing. The message to Ramirez, and all other employees, was that providing testimony on behalf of the Union in support of an unfair labor practice charge might lead to an investigation of the employee on charges of perjury.

REMEDY

Although the General Counsel requested a nationwide posting, signed by the Deputy Director of ICE, I find that this matter was limited to the San Antonio Field Office. As such, I will order an appropriate cease and desist order to be signed by the Deputy Assistant Director, Field Operations Division in all locations within the Respondent's San Antonio Field Office, and disseminate a copy of the notice electronically to all San Antonio Field Office employees. *See U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221, 226 (2014).

In conclusion, I find that the Respondent violated § 7116(a)(1), (2) and (4) of the Statute, by initiating an OPR investigation regarding the testimony of Union President Ramirez at an unfair labor practice hearing before the undersigned Administrative Law Judge. Accordingly, I recommend that the Authority adopt the following order:

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the Department of Homeland Security, Immigration and Customs Enforcement, shall:

1. Cease and desist from:

(a) Interfering with bargaining unit employees' protected rights under the Statute by investigating employees because of their testimony at a ULP hearing.

(b) Disciplining or otherwise discriminating against bargaining unit employees in the exercise of their rights assured by the Statute.

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

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

(a) Within 14 days, remove from its files any reference to the investigation of Daniel Ramirez for alleged perjury or false statements in connection with his testimony in Case No. DA-CA-13-0410, and within three days thereafter, notify him in writing that this has been done, and that his testimony and participation in Case No. DA-CA-13-0410 will not be used against him in any way.

(b) Post at its facilities where bargaining unit employees represented by the American Federation of Government Employees, National Immigration and Customs Enforcement, Council 118, AFL-CIO (Union), are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Deputy Assistant Director, Field Operations Division, San Antonio Field Office, and shall be posted and maintained for sixty (60) consecutive days thereafter, in conspicuous 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.

(c) Distribute a copy of the Notice, as stated above, signed by the Deputy Director, through the Respondent's email system to bargaining unit employees represented by the Union.

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

Issued, Washington, D.C., April 29, 2016

Susan E. Jelen

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 Homeland Security, U.S. Immigration and Customs Enforcement, San Antonio, Texas, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY BARGAINING UNIT EMPLOYEES THAT:

WE WILL NOT interfere with bargaining unit employees' protected rights under the Statute by investigating employees because of their testimony at an FLRA hearing.

WE WILL NOT discipline or otherwise discriminate against bargaining unit employees by subjecting them to investigations in reprisal for their testimony at an FLRA hearing.

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

WE WILL remove from its files any reference to the investigation of Daniel Ramirez for alleged perjury or false statements in connection with his testimony in Case No. DA-CA-13-0410, notify him in writing that this has been done, and that his testimony and participation in Case No. DA-CA-13-0410 will not be used against him in any way.

_____
(Agency/Respondent)

Dated: _____ By: _____
(Signature) (Title)

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

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