ORAL ARGUMENT NOT SCHEDULED

No. 05-1168

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1302,

Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent

ON PETITION FOR REVIEW OF A DECISION AND ORDER OF

THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Appearing below in the administrative proceeding before the Federal Labor Relations Authority (Authority) were the United States Department of Justice, Federal Bureau of Prisons, United States Penitentiary (Administrative Maximum), Florence, Colorado (BOP) and American Federation of Government Employees, Local 1302 (AFGE). AFGE is the petitioner in this court proceeding; the Authority is the respondent.

B. Ruling Under Review `

The ruling under review in this case is the Authority's Decision and Order in *United States Department of Justice, Federal Bureau of Prisons, United States Penitentiary (Administrative Maximum), Florence, Colorado and American Federation of Government, Local 1302*, Case No. DE-CA-01-0700, decision issued on March 22, 2005, reported at 60 F.L.R.A. (No. 144) 752.

C. Related Cases

This case has not previously been before this Court or any other court. Counsel for the Authority is unaware of any cases pending before this Court which are related to this case within the meaning of Local Rule 28(a)(1)(C).

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GLOSSARY

ADX	Administrative Maximum facility
Authority	Federal Labor Relations Authority
BOP or agency	United States Department of Justice, Federal Bureau of Prisons, United States Penitentiary (Administrative Maximum), Florence, Colorado
JA	Joint Appendix
Judge or ALJ	Administrative Law Judge
Letterkenny	*Letterkenny Army Depot*, 35 F.L.R.A. 113 (1990)
Ogden Air	*Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah*, 35 F.L.R.A. 891 (1990)
SJA	Supplemental Joint Appendix
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000)
Thomas	*Thomas v. NLRB*, 213 F.3d 651 (D.C. Cir. 2000)
ULP	unfair labor practice
union or petitioner	American Federation of Government Employees, Local 1302
Warner Robins	Dep't of the Air Force, Air Force Material Command, Warner *Robins Air Logistics Ctr., Robins AFB, Ga.*, 55 F.L.R.A. 1201 (2000)

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STATEMENT OF JURISDICTION

The decision and order under review in this case was issued by the Federal Labor Relations Authority (Authority) on March 22, 2005. The Authority's decision is published at 60 F.L.R.A. (No. 144) 752. The Authority exercised jurisdiction over the case pursuant to § 7105(a)(2)(G) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000) (Statute).[1]

[1] Pertinent statutory provisions are set forth in Addendum A to this brief.

This Court has jurisdiction to review final orders of the Authority pursuant to § 7123(a) of the Statute.

STATEMENT OF THE ISSUES

Whether substantial evidence supports the Authority's decision that the agency did not commit unfair labor practices in violation of § 7116(a)(1), (2), and (4) of the Statute where a prison warden, selecting candidates for promotion from a best-qualified list, declined to promote a union employee based on that employee's non-exemplary performance reviews, unsupportive feedback from supervising Lieutenants, pattern of borderline sick leave abuse, and history of unchallenging post assignments.

Whether substantial evidence supports the Authority's decision that the agency did not commit an unfair labor practice in violation of § 7116(a)(1) of the Statute where a prison warden told a union employee that the warden would never do anything to advance the careers of a very small group of corrupt and criminal employees, but emphasized that the employee in question was not a member of the group.

STATEMENT OF THE CASE

This case arises out of an unfair labor practice (ULP) proceeding brought under § 7118 of the Statute. The case involves an Authority adjudication of a ULP complaint based on a charge filed by the American Federation of Government Employees, Local 1302 ("AFGE," "union," or "petitioner"). The complaint

alleged that the United States Department of Justice, Federal Bureau of Prisons, United States Penitentiary (Administrative Maximum), Florence, Colorado ("BOP" or "agency") violated § 7116(a)(1), (2), and (4) of the Statute by failing to promote an employee, allegedly in retaliation for the employee's protected activity. The complaint further claimed that BOP violated § 7116(a)(1) of the Statute when its warden purportedly told an employee that, because of the employee's protected activity, the warden would do nothing to further the employee's career. Adopting the recommended decision and order of its Administrative Law Judge ("Judge," or "ALJ"), the Authority held that no unfair labor practices had occurred. AFGE now seeks review in this Court under § 7123(a) of the Statute.

STATEMENT OF THE FACTS

A. Background

The Bureau of Prisons administers four correctional institutions in Florence, Colorado. One of these facilities, the Administrative Maximum facility (ADX), "houses anywhere from 350 to about 500 of the [B]ureau's most dangerous and most violent inmates. Virtually all of these inmates have fairly serious histories of violence and/or escape. Many, about half, [have] been involved in either murders or serious assaults on other inmates or staff." Supplemental Joint Appendix (SJA) 3.

The ADX has its own warden, and employs approximately 200 correctional officers, who are responsible for the security and control of the inmates housed at

the institution. Joint Appendix (JA) 16, JA 87-88. Officers are "hired either at the GS-5 or GS-6 pay grade … and they can be promoted non-competitively through GS-7, Senior Officer. Promotion to GS-8, Senior Officer Specialist, the highest non-supervisory correctional position, involves a competitive selection process." JA 16, 105. ADX correctional officers are represented by AFGE, Local 1302, as part of a nationwide bargaining unit under a collective bargaining agreement between BOP and the AFGE Council of Prison Locals. JA 16, 86-87.

One officer in particular, Eric Nicholls, is central to the facts of this case. Mr. Nicholls began to work at ADX in February 1996 as a GS-6 Correctional Officer. JA 104. Consistent with the process described above, he was non-competitively promoted to GS-7 Senior Officer in February 1997, after one year at ADX. JA 16, 86.

Beginning in November 1998, and at all times relevant to this case, Michael Pugh served as ADX's warden. JA 126, 142-43. The warden, assisted by a subordinate Captain and staff of 17 Lieutenants, JA 126, 240, is "responsible for the overall running of the institution[.]" JA 201.

B. Interactions between Warden Pugh and Eric Nicholls

1. August 1999 "get acquainted" meeting and ensuing unfair labor practice complaint

After Warden Pugh arrived at ADX, he held a series of "get-acquainted" meetings with correctional officers. JA 7. Pugh and Nicholls met in August 1999, at the same time that Pugh's approval was pending for a Quality Step Increase

(QSI) for Nicholls. *Id*. In the course of their meeting, Pugh indicated that he opposed Nicholls' QSI for two reasons. First, upon arriving at ADX, Pugh had repeatedly been slandered and undermined by union members on a union website. Pugh was aware that Nicholls posted on the website, and was concerned that these comments reflected a lack of loyalty on the part of their authors.[2] JA 50. Second, Pugh was alarmed by corruption among the ADX correctional staff, JA 16, which he associated with a core group of union employees (at least one of whom is currently imprisoned, JA 242).

> When I arrived at the ADX … there were bad things happening there. … There were staff members who were not giving inmates all of the things that they are entitled to, and there were staff members who were giving other inmates things that they should not have. And the inmates that were getting things they should not have were your gang-type inmates, your most dangerous inmates, and the weaker inmates were the ones who were not always getting those things that they are entitled to.

JA 243-44. As Nicholls recalled, "he began to tell me that there were … [union] members … that were bringing in contraband to the Aryan Brotherhood inmates in the institution[.]" JA 92.

By the end of their meeting, however, Pugh was convinced that Nicholls was a loyal employee, not responsible for the more seditious website postings, and not

[2] *See* SJA 5. A representative posting, dated April 28, 1999, reads: "I have to comment on the latest actions of our deranged, power-crazed piece of [expletive] warden. This lunatic does not have the authority to transfer bargaining unit staff to another institution against their will. This employee has done nothing wrong and is being moved because this mentally ill CEO feels that he is disruptive. Who is next? I am disruptive. I dare him to try it with me. He does not have the onions. The real disruptive force in OUR ADX is Punk Pugh. He needs to be forced out."

closely affiliated with the corrupt group of correctional officers: "I did not consider him to be a significant player." JA 245. The Warden informed Nicholls that his QSI would be approved. JA 7.

This meeting, and a similar meeting with another bargaining unit member, led to a 1999 ULP complaint and, ultimately, an ALJ decision finding that Pugh had violated § 7116(a)(1) of the Statute "by telling Nicholls and [the other employee] that they initially did not receive QSIs because of their comments on the [u]nion's website … and by telling them that key [u]nion leaders and the [u]nion itself were corrupt." JA 7-8. No exceptions were filed to the ALJ's decision, which, under the Authority's regulations, 5 C.F.R. § 2423.41(a), became the final, non-precedential, decision of the Authority. Nicholls took part in the investigation of the charge, provided an affidavit in the case, and testified at the hearing. JA 93-94.

2. Nicholls' non-selection for promotion

More than a year and a half after Pugh and Nicholls' "get-acquainted meeting," ADX posted a vacany announcement for GS-8 Senior Officer Specialist positions. JA 102. GS-8s are assigned "some of the more high-profile" duties at ADX, and are the only correctional officers permitted to "work a position where they are processing inmates into and out of the institution[.]" JA 106. Nicholls was one of thirty-five officers who applied for competitive promotion. JA 8, 63-64.

In February 2001, after the application period closed, but before Warden Pugh had received the Best Qualified List (from which he would make his selections), JA 125-26, Nicholls scheduled a meeting with Warden Pugh. Nicholls understood that the Warden placed emphasis on candidates' post assignments, rewarding assignments that required inmate-to-officer contract and penalizing officers who chose assignments that did not involve inmate contact.[3] Accordingly, Nicholls was concerned about his current post assignment: "[A]t that time I was assigned to a [guard] tower … I decided that I should go talk to the Warden; remind him that … I just happened to be working in a tower this quarter, which was not typical for me." JA 123. Warden Pugh recollects that "he gave a very glowing account of himself as an officer[.]" JA 235.

The selection process had three phases. First, a Rating Panel composed of a supervisor and a human resources specialist scored candidates' applications and supporting materials. SJA 18. The Rating Panel graded each candidate based on how well his or her qualifications matched the position's advertised criteria (Knowledge, Skills, and Abilities, or "KSAs"). SJA 19, JA 63-64. Evaluating each application package in light of the KSAs, the Rating Panel awarded Nicholls

[3] Correctional officers at ADX receive quarterly post assignments. JA 116-17. Post assignments range from having very little contact with inmates, such as guard tower assignments, to having close, regular contact with the prison population. JA 117-19. Such assignments were commonly referred to as "trench" assignments. Nicholls acknowledges that he had specifically requested a tower assignment during the quarter that the vacancy announcement was posted. JA 164.

sixty points, making him one of the nine highest-scoring candidates.[4] JA 63-64. After the Rating Panel scored each application, a Promotion Board determined which candidates would be placed on the Best Qualified List for final consideration by the Warden. The "Board's function is simply to take the names and determine some cutoff point above which people will be considered best qualified, and below which they won't be on that list[.]" SJA 47. The three-person Promotion Board, consisting of Captain John Bell, a human resources specialist, and a union representative, JA 65, decided to draw the cutoff roughly halfway down the list, and placed the twenty candidates who rated at or above 53 points on the Best-Qualified List. SJA 31. By virtue of his 60-point score, Nicholls was placed on the list. Finally, Warden Pugh reviewed the Best Qualified List, from which he "was authorized to select for promotion as many, or as few, of the best qualified as he desired." JA 17, citing SJA 7-8. Thirteen candidates – but not Eric Nicholls – were selected for promotion.

In determining whether to select a best-qualified officer for promotion, Warden Pugh considered four factors: (1) the candidate's two most recent performance evaluations, (2) input from supervisory Lieutenants, (3) his or her

[4] The Rating Panel's worksheet lists Nicholls as tied for seventh based on his score of 60; however, two candidates were tied for sixth with 61 points. Because of these ties among candidates, Nicholls was actually either the eighth or ninth highest-scorer. By way of comparison, the highest scoring candidate received 75 points. *See* Tr. 147, JA 63-64.

post assignment history, and (4) whether the candidate used sick leave responsibly. JA 202. Of these, the greatest weight was given to the Lieutenants' input. JA 202.

The Warden's selection criteria were well-known among ADX employees: "I make it very public in the institution at staff [meetings] and annual training [that] those are the things that I look at." JA 238, 262. *See also* JA 165 (Nicholls' testimony that "each week [the Warden] would … make mention of the upcoming vacancy … [a]nd he listed four elements that he was going to be taking into consideration"); JA 186 (union local president McCulloch's testimony that Warden Pugh "had four factors," which he described during the February 2001 meeting with Nicholls). "I'm looking for those areas that show me that they stood out in areas that I think were important in the running of that institution. And the officers who go down into the trenches and deal with those inmates in a responsible way, and the ones we can rely upon to be at work, and the ones that are supporting those Lieutenants every day on the job, the ones that they can rely upon, those are the guys that I have … to promote. If I don't, I'm going to lose them in the long run." JA 253.

Warden Pugh's selection worksheet indicates that Nicholls did not distinguish himself under any of the four metrics. Nicholls' performance evaluations were good, but not excellent. He had received two consecutive

evaluations of "exceeds," the second-highest rating available, but had not received a single "outstanding" rating.[5] JA 79.

Nor did Nicholls receive positive feedback from his supervisory Lieutenants. Warden Pugh testified that he considered this factor the most important of the four. JA 208. For this reason, the Warden consulted ADX Lieutenants before making any promotion or award.

> Every time that I had a [promotion board], and every time that I selected for awards … I would … go into a Lieutenants' meeting and … share with them all of the nominees … to get their input as a group regarding the officer's work performance[.] … And I would simply throw the name out on the table and let them talk, and I would listen. … And I weighed their input very heavily, because I thought it was actually important that … we support these Lieutenants who are really given the responsibility for the mission of that institution 24 hours a day[.]

JA 206-07. In late February, Warden Pugh attended a Lieutenants' meeting for the purpose of receiving feedback about the candidates for promotion to GS-8. The candidates themselves were not in attendance. As the Warden read names off of a list, the Lieutenants discussed each candidate, and Warden Pugh was able to "get a feel for whether [they] strongly support an officer or not support an officer, or whether they're kind of ambivalent about it." JA 207. He would then "make

[5] *See* JA 79. At the time of the selection, the second year's annual evaluations were not complete, and JA 79 reflects cross-outs or split ratings; for instance, William Cox's worksheet entry reads "OEO." This indicates that Cox received an "outstanding" on his first annual evaluation, and was considered to be borderline between "outstanding" and "exceeds" for the second annual evaluation, based on his first three quarterly evaluations and his supervisors' forecasts of his final quarterly evaluation. JA 202, 205-06.

notations [beside] each name" on his list, corresponding to the Lieutenants' consensus. JA 207. Pugh's worksheet shows that the Lieutenants' feedback did not support Nicholls' selection, JA 80, which struck Pugh as inconsistent with Nicholls' self-promotion at their earlier meeting. "[The earlier meeting] was very much in the forefront of my mind when I had the meeting with the Lieutenants and learned that they did not support him. And I asked them some questions about that, because, quite frankly, I was surprised." JA 236. "It's just that, based on the comments, it was clear to me that there was not support for Nicholls. And … I was surprised, largely because of the meeting that I had with him." JA 257.

Nicholls' candidacy was further hampered by his sick-leave usage. "There are a lot of staff who hook up sick leave to their days off and their annual leave … [a]nd they show patterns over a period of time." JA 253. Pugh's Administrative Lieutenant considered Nicholls' sick-leave usage to be consistent with this abusive practice.[6] JA 203. "I asked [the Administrative Lieutenant] to go back and research the [sick leave] records over a two-year period of time … it was his assessment based on his review of the records, that [Nicholls] abused sick leave." JA 251-52.

Finally, Nicholls' post assignment history, although containing some "trench" assignments, was "pretty neutral. [He] had experience in both" trench

[6] *See* JA 79. Pugh summarized the Administrative Lieutenants' feedback in each case by noting either an "A" (abuse or borderline abuse), an "OK" (a "strong leave record") or a "—" (unremarkable leave record). JA 203. Nicholls received an "A." JA 79.

and non-trench assignments.[7] JA 203, 79. The Warden testified as to the importance of a strong record of trench assignments: "Those are the guys who really made an impact on the running of the institution, so I always looked for officers who worked in those posts and who demonstrated a responsibility in that area." JA 203. In order to determine which candidates should be rewarded for their history of trench assignments, "[w]e went back over the records and [examined] who had those assignmnets, where the greater amount of assignments was. And again, on Eric Nicholls, he had a pretty balanced record there … in terms of being in the trenches. … But when you look at the record, he spent as much probably out of the [trenches] as he did in the [trenches], or in those areas that involved a lot of inmate contact." JA 254.

As the record shows, the Warden did not consider anything other than the four criteria above: "Once I get the Best-Qualified List … those four areas are the areas that I have found valuable … to include in my determining who should be selected, and those are the only four areas that I look at." JA 210. Warden Pugh did not penalize Nicholls, or any other employee, for their union participation. JA 210-11.

In summary, Nicholls "did not have a strong record of being in … what I call trench assignments, being … physically with inmates. … His leave record was

[7] *See* JA 79. "If I have a T circled, that means they were strong in the trenches. The 'NT' I assume means 'no trenches,' and a line means that, you know, they worked some trenches. A lot was average." JA 203. Nicholls received a "line." JA 79.

clearly not good; arguably abuse. But what I looked at was the fact that it was not a strong leave record. His evaluations were '[e]xceeds' both the year before and the same year, and for it to be a strength, the way I looked at things, it would have [had to be] an '[o]utstanding' evaluation. And the Lieutenants did not support [him] at the meeting that I held with the Lieutenants." JA 238-39. As a result of his uniformly unremarkable record, Nicholls was not selected for promotion.

The Warden's selections were announced on or about March 30, 2001. JA 127. Following the selection announcement, Nicholls began tracking down his supervisory Lieutenants, JA 130, "and basically asked them what happened," JA 145, that had led to his non-selection. Although some of the Lieutenants were sympathetic towards Nicholls (*see, e.g.,* Nicholls' hearsay testimony that "[d]uring the conversation on the phone, Lieutenant Retzlaff, he expressed his disappointment with the selections, and he said, 'The Warden has the power to promote anybody he wants, and it's probably nothing we can do about it,'" JA 131), there is no evidence in the record that any Lieutenant admitted to strongly endorsing Nicholls. Most of Nicholls' interviewees were decidedly non-committal. For instance, Nicholls approached one Lieutenant who had recently met with the Warden, and "all he would tell me is, 'It's personal.'" JA 147. Later, Nicholls "inquired with Lieutenant Walters about the selections. … He said, 'The Warden promoted some people that we didn't want promoted, and he didn't

promote some people that we wanted promoted,'" but Walters refused to specifically address Nicholls' candidacy. JA 148.

3. Pugh's and Nicholls' May 3, 2001 meeting

Taking advantage of Warden Pugh's open-door policy, JA 151, Nicholls scheduled a meeting with Pugh "to inquire about being passed over for the promotion." JA 150. Warden Pugh had been unaware that the meeting would deal with Nicholls' non-selection, and, as a result, was reluctant to engage Nicholls in conversation. According to Nicholls' recollection of the meeting,

> I said, "I don't understand what's going on." I pointed out on the copies of the post assignment history, the pattern of working positions of high responsibility, high profile. He – at that point he stopped me and said, "Is, is there a question? What is this about?" I said, "Yes. I wanted to know why you passed me over for a promotion here." He said, "I have to be careful what I say to you."

JA 152.

As Nicholls recalls, Warden Pugh expressed concern that "in his experience, … he could say something and then later on that … could be interpreted in a different way." JA 153. Despite his caution, in an effort to respond to Nicholls' interrogation, Warden Pugh "gave him all of the reasons. I went over with him those areas that I looked at, areas that he should have already known … [a]nd I went over all of that with him, being very confident that when he saw the results of that, that he probably would agree [with the non-selection decision]." JA 238. The Warden's confidence was based, at least in part, on earlier meetings with the local

union president and vice-president, who expressed no concerns or dissatisfaction upon being briefed on the selection process and its results. JA 238.

Both Nicholls and Warden Pugh agree that the meeting became more heated when Pugh informed Nicholls that "the Lieutenants weren't all backing [him]." JA 153, 240. "I told him I didn't believe that … [a]nd I told him that I had talked to them all … he said, 'So you don't trust me, then?' And I said, 'I guess not.'" JA 153-54. In an effort to reassure Nicholls, Warden Pugh produced his notes from the Lieutenants' meeting (JA 79). The Warden showed Nicholls that, according to his notes from the meeting, Nicholls had not received general support from his supervisors. JA 154.

As Warden Pugh testified, "[h]e became very argumentative about that. I indicated to him that I thought we should end the meeting; that I thought we probably shouldn't have had the meeting; if I had known that, that he was coming to talk to me about that, that I wouldn't have had it. He proceeded to tell me that I was lying to him[.] [A]t that point I escorted him to the door and asked him to leave." JA 212.

Nicholls recalls the end of their meeting differently. "I asked him if he … was including me in with a group of people that he was angry with." JA 154. According to Nicholls,

> [H]e cupped his hands together to form a circle, and he said, "There's a circle of people that have had it out for me since I got here, and there's an outer ring of people who jumped on the bandwagon for a while. But you – then they later came to their senses, and I don't have

> anything against them. But the inner ring of people, I will never do anything to help them in their career. They're on their own."

JA 154-55. "I asked him, 'Is – can you give me any reason to help me believe that you're not retaliating against me?' And he just … said, 'Get out.'" JA 155.

Although Warden Pugh testified that this last exchange never occurred, he did clarify his feelings towards the core group of corrupt employees: "When you say 'core group,' again, I can count them on one hand. And I see Eric Nicholls as having nothing to do with [those] three or four staff members." JA 247. "I never viewed Eric Nicholls as any prime mover in that activity." JA 242. As for those three or four officers who were "prime movers", Pugh explained that he "would have removed [himself] from any decision regarding their career if that would have come before me[.]" JA 229, 247.

4. The General Counsel's Complaint

On July 31, 2002, the General Counsel issued a complaint, alleging that BOP and Warden Pugh had violated § 7116(a)(1), (2), and (4) of the Statute by not selecting Nicholls for promotion as a result of his protected activities and, furthermore, had violated § 7116(a)(1) of the Statute by telling Nicholls, in the May 3, 2001, meeting, that he would not be assisted in his career. JA 27-31.

C. The ALJ's Decision

Following a hearing, the Administrative Law Judge found that no ULP had been committed. "Eric Nicholls' protected activity was not a motivating factor in the Warden's decision not to promote him," JA 25, and statements made in the

May 3, 2001, meeting "[did] not constitute interference, restraint or coercion of protected activity." JA 22.

1. Nicholls' non-selection

In concluding that BOP's non-selection of Eric Nicholls for promotion was not discriminatory in violation of § 7116(a)(1), (2) and (4), the Judge applied the test of *Letterkenny Army Depot*, 35 F.L.R.A. 113, 118-19 (1990) (*Letterkenny*). Under *Letterkenny*, the General Counsel must make out a *prima facie* case of discrimination in order to go forward with its case; if the *prima facie* case is made, the burden of rebuttal shifts to the respondent. JA 21, citing *Letterkenny* at 118-19.

Here, the Judge found that the General Counsel had not established a *prima facie* case of discrimination. "[A]fter weighing the entirety of the evidence on [the] issue" of whether Nicholls' protected activity was a motivating factor in his non-selection, the Judge concluded that Warden Pugh made his promotion selections without considering Nicholls' protected activity. JA 22. In reaching this conclusion, the Judge specifically rejected a number of the General Counsel's allegations. For instance, the General Counsel had alleged that Nicholls' non-selection was retaliation for Nicholls' participation in the 1999 ULP case against BOP; the Judge, however, determined that

> the General Counsel's emphasis on Nicholls' protected activity is exaggerated; … it appears to me that Nicholls had very little public involvement with the [u]nion, and his prosecution of the ULP charge was a relatively discrete event that does not weigh strongly in favor of an inference of bias on the Warden's part. … I don't accept the

> premise that Pugh nurtured an intent to retaliate against Nicholls a year after the FLRA decision.

JA 23. In support of this finding, the Judge pointed to evidence that two officers who had utilized union processes to challenge disciplinary actions were selected for promotion at the next opportunity. "This suggests, as does other circumstantial evidence, that Warden Pugh was able to make promotion selections without considering employees' protected activity." JA 23.

Moreover, as to the criteria Warden Pugh employed in making his selections, "[w]hile the General Counsel argues that other factors … should have carried more weight … the [a]gency's merit promotion plan allows the selecting official to select any employee on the Best Qualified list, and … the Warden has broad discretion to apply those criteria most important to him[.]" JA 23. The Judge rejected the General Counsel's argument that Pugh's criteria were pretextual, noting that the four factors were consistently applied and well-known to employees. *Id*.

Ultimately, the Judge noted, the General Counsel's argument that Nicholls' non-selection was discriminatory "essentially requires me to find that Warden Pugh (perhaps with the assistance of his Administrative Lieutenant) consciously falsified the exhibits in order to cover up his discriminatory non-selection of Nicholls. … In other words, unless the Warden falsified these exhibits, they corroborate his testimony that Nicholls did not have a strong record in any of the four areas." JA 24.

The Judge determined, based largely on his assessment of the witnesses' credibility, that "the record as a whole does not support a conclusion that Pugh or his assistant falsified Nicholls' scores on these criteria." *Id*. To the contrary, the Judge found uncontroverted evidence that Nicholls' two most recent evaluations were, in fact, "exceeds," JA 24; that "Nicholls did not dispute the factual assertions … about his leave balance, except to say that he had never been formally accused of any abuse … [which] is rather faint praise," *id.*; that Nicholls' "balanced record of assignments in all areas of the prison may not [have been] the type of strong record of 'trench' assignments that the Warden was looking for," JA 25; and, regarding the Lieutenants' feedback, that there was "no basis for believing that [Pugh] intentionally recorded a 'negative' consensus for Nicholls when in fact the Lieutenants had recommended Nicholls' promotion." JA 25.

On this last, most contentious, point, the Judge expressly discounted Nicholls' relation of his conversation with several of the Lieutenants.

> In contrast to Pugh, Nicholls did not make a contemporaneous business record of his conversations with the Lieutenants; moreover … I do not believe that the Lieutenants would have given him an accurate and reliable account of what transpired at the Lieutenants' meeting with the Warden. That meeting was intended to be confidential, and the Lieutenants would understandably not want their internal discussions about officers to become public knowledge. If they had expressed negative opinions about Nicholls at the meeting, it is unlikely they would admit this to Nicholls when he confronted them later.

JA 25. For the reasons set forth in the Judge's opinion – that no connection could be established between Nicholls' involvement in the 1999 ULP and his non-

selection, that the selection criteria were non-discriminatory, and that the selection criteria were fairly applied to Nicholls – the Judge determined that BOP had not violated § 7116(a)(1), (2), or (4) when it did not select Eric Nicholls for promotion.

2. Pugh's and Nicholls' May 3, 2001 meeting

In holding that Pugh's comments in the May 3 meeting did not violate § 7116(a)(1), the ALJ applied the objective standard of *Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah*, 35 F.L.R.A. 891, 895-96 (1990) (*Ogden Air*). Under *Ogden Air*, "[t]he question is whether, under the circumstances, the statement or conduct tends to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement[.]" JA 21, citing *Ogden Air* at 895.

As an initial matter, the ALJ credited a portion of Nicholls' recollection of the meeting, and generally accepted Nicholls' testimony that Pugh "said something about being unwilling to help a small group of officers in their careers." JA 21. In this connection, the Judge noted the similarities between the language Pugh used in his testimony (particularly his references to an inner ring of corrupt, subversive employees) and Nicholls' description of the May 3 discussion. *Id.* However, the ALJ found that Warden Pugh had not acted coercively. First, "the full context of the conversation … makes it clear to me that Pugh emphasized to Nicholls on May 3 that he did not consider Nicholls to be within the 'group' of officers he would never help. Nicholls' own testimony makes this apparent[.]" JA 21-22. Second,

"the Warden never referred to Nicholls' protected activity in any way. … The only reasonable objective interpretation of the May 3 conversation is that when Nicholls accused him of retaliation, the Warden told Nicholls he did not consider him to have done anything objectionable or worthy of retaliation. Such a statement does not constitute interference, restraint or coercion of protected activity." JA 22.

The Judge recommended dismissal of the complaint, and the General Counsel excepted to the Judge's decision.

D. The Authority's Decision

On review, the Authority denied the General Counsel's exceptions to the Judge's factual findings, inferences from those facts, and ultimate conclusions, and affirmed the Judge's recommended dismissal. JA 13.

1. Nicholls' non-selection

With respect to Nicholls' non-selection, the Authority specifically addressed three General Counsel arguments: that the Judge misapplied *Letterkenny*, that the Judge should have drawn adverse inferences from the absence of corroborating evidence, and that the Judge's determination was unsupported by the evidence. After consideration and discussion, the Authority rejected each General Counsel contention.

First, the Authority held that *Letterkenny* had been properly applied. The General Counsel argued, in its exceptions, that the Judge erred by considering the entirety of the record, as opposed to only the General Counsel's evidence, in

determining whether a *prima facie* case of discrimination had been established. JA 10. The Authority disagreed, citing precedent: "The Judge did not err by considering the record as a whole in determining whether the General Counsel had established a *prima facie* case … [t]he Authority has specifically approved the approach to *Letterkenny* used by the Judge." JA 12, citing *Dep't of the Air Force, Air Force Material Command, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 55 F.L.R.A. 1201, 1205 (2000) (*Warner Robins*).

Second, the Authority rejected the General Counsel's claim that the Judge should have drawn an adverse inference from BOP's failure to produce Nicholls' 2000-2001 quarterly evaluations. As noted above, n. 5, Warden Pugh considered the two most recent years' evaluations in making his selections; however, because the second year's annual evaluations were not yet complete, Pugh had asked the Lieutenants to forecast each candidate's final rating for the second year. The Authority noted that, at the hearing, Nicholls did not dispute that he actually had received an "exceeds" for his second annual rating, as the Lieutenants projected that he would. JA 13. Moreover, the Authority found that "even assuming that the Judge erred by failing to draw an adverse inference against the Respondent for failing to produce Nicholls' quarterly performance evaluations for 2000-2001,

given the weight of the evidence as a whole, that fact is not fatal to the Judge's decision." *Id.*[8]

Finally, the Authority held that the Judge's findings and conclusions were supported by the record. "The Judge carefully considered all the evidence in this case. He weighed the conflicting testimony and resolved issues as to the sufficiency of the evidence. He made factual findings and drew reasonable inferences[.] … The General Counsel emphasizes certain evidence and overlooks or minimizes evidence that the Judge found persuasive, but fails to demonstrate that the Judge's inferences from all of the evidence, and the conclusions based on those inferences, are not reasonable based on the record as a whole." JA 13. Based on its rejection of the General Counsel's arguments, the Authority affirmed the Judge's determination that BOP did not violate § 7116(a)(1), (2), or (4) by not selecting Eric Nicholls for promotion.

2. Pugh's and Nicholls' May 3, 2001 meeting

Regarding the May 3, 2001, conversation, the Authority held that the Judge correctly determined that the meeting did not constitute a violation of § 7116(a)(1). The Authority cited the Judge's findings that "(1) Nicholls 'steered the conversation' … toward the group of people with whom Pugh was angry; (2) Nicholls tied Pugh's motives in not selecting him to Pugh's attitude towards that

[8] Though not explicitly raised in the General Counsel's exceptions, the Authority also rejected any claim that an adverse inference should be drawn from BOP's decision not to introduce cumulative evidence from the Lieutenants regarding their assessment of Nicholls' candidacy. JA 13, n. 3.

group; and (3) as a consequence, it would have been impossible for Pugh to have avoided the subject." JA 12, citing JA 21-22. The Authority affirmed the Judge's holding that, having been drawn into the conversation, Pugh had not spoken coercively or improperly. To the contrary, the Authority determined that the evidence supported the Judge's findings that "Pugh never mentioned Nicholls' protected activity … [and] that Pugh made clear to Nicholls … that he did not include Nicholls in the group that opposed him and that, in effect, Pugh told Nicholls that he 'harbored no animosity to him.'" JA 12, citing JA 22.

The union now appeals the Authority's decision to this Court.

STANDARD OF REVIEW

Authority decisions are reviewed "in accordance with the Administrative Procedure Act," and may be set aside only if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 97 n.7 (1983); *see also Pension Benefit Guaranty Corp. v. FLRA*, 967 F.2d 658, 665 (D.C. Cir. 1992).

This Court has noted that "[w]e accord considerable deference to the Authority when reviewing an unfair labor practice determination, recognizing that such determinations are best left to the expert judgment of the FLRA." *Fed. Deposit Ins. Co. v. FLRA*, 977 F.2d 1493, 1496 (D.C. Cir. 1992) (internal quotations omitted). As a result, "[o]ur scope of review is limited." *Pension Benefit Guaranty Corp.*, 967 F.2d at 665. So long as the Authority "provide[s] a

rational explanation for its decision," it will be sustained on appeal. *Fed. Deposit Ins. Co.*, 977 F.2d at 1496.

Where, as here, the Authority interprets its own enabling statute, "we are mindful that we owe great deference to the expertise of the Authority as it exercises its special function of applying the general provisions of the Act to the complexities of federal labor relations." *Ass'n of Civilian Technicians v. FLRA*, 269 F.3d 1112, 1115 (D.C. Cir. 2001) (internal quotations omitted). Similarly, "we defer to the Authority's interpretation of its own precedent." *Nat'l Treas. Employees Union v. FLRA*, 399 F.3d 334, 339 (D.C. Cir. 2005).

Review of the Authority's factual determinations is narrow. "We are to affirm the FLRA's findings of fact 'if supported by substantial evidence on the record considered as a whole.'" *Pension Benefit Guaranty Corp.*, 967 F.2d at 665 (internal citations omitted); *see also* 5 U.S.C. § 7123(c) ("[t]he findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive"). A petitioner's burden is particularly high when challenging an ALJ's credibility determinations: "In making this inquiry, we will not disturb the Board's adoption of an ALJ's credibility determinations unless those determinations are 'hopelessly incredible,' 'self-contradictory,' or 'patently unsupportable.'" *Palace Sports and Entertainment, Inc. v. NLRB*, 411 F.3d 212, 220 (D.C. Cir. 2005) (internal citations and quotations omitted).

SUMMARY OF ARGUMENT

The Authority correctly held that the Bureau of Prisons did not commit unfair labor practices in violation of § 7116(a)(1), (2), and (4) of the Statute by not selecting Eric Nicholls for promotion; furthermore, the Authority correctly held that the agency did not violate § 7116(a)(1) when Nicholls and Warden Pugh discussed Nicholls' non-selection in their May 3, 2001, meeting.

As regards Nicholls' non-selection, substantial evidence supports the Authority's conclusion that the non-selection was not motivated by Nicholls' protected activity. The overwhelming weight of record evidence indicates that Warden Pugh, acting on behalf of the agency, evaluated candidates for promotion based on four metrics: their most recent performance appraisals, feedback from supervisory Lieutenants, sick leave usage, and post assignment history. The record also shows that Nicholls was not a strong performer under any of these metrics. His appraisals were good, but not exceptional; he received negative feedback from his supervisory Lieutenants; a review of his sick leave usage suggested possible abuse; and his post assignment history reflected a nearly even balance between challenging "trench" assignments and non-challenging positions that did not require inmate contact. By comparison, the record is devoid of evidence showing a link between Nicholls' protected activity and Pugh's non-selection decision. As a result, the Authority correctly held that the General Counsel had not proven its *prima facie* discrimination case, and the complaint was properly dismissed.

The union's argument to the contrary is unavailing. The union asks to set aside the Authority's sound decision, based upon the union's claim that certain evidence supports a contrary conclusion that Nicholls' protected activity was at least a motivating factor in his non-selection. However, the union misunderstands this Court's review based on substantial evidence: contradictory evidence, even if persuasive in its own right, does not permit the Court to set aside the Authority's determinations. Instead, the union's burden – not satisfied here – is to show that the evidence that the Authority relied upon in reaching its conclusions is insubstantial. No such showing can be made here. Furthermore, the union's argument that an adverse inference should have been drawn from the absence of certain evidence is incorrect.

Finally, concerning Nicholls' May 3, 2001, discussion with Pugh, substantial evidence supports the Authority's conclusion that a reasonable person, in Nicholls' position, would not have interpreted Warden Pugh's comments to constitute interference, restraint, or coercion regarding protected activity. Record evidence shows that even after Nicholls suggested that Pugh was lying to him about the reasons for his non-selection, Warden Pugh took pains to explain why Nicholls' qualifications did not support promotion at that time. Moreover, in their meeting, the Warden specifically rebutted Nicholls' allegation of retaliation by reinforcing that Nicholls had done nothing to offend him. Here, too, the union's unconvincing arguments misapply the Court's substantial evidence review. The

union argues that because the agency was found to have committed a ULP in 1999, the Authority should infer unlawful animus in the May 3, 2001, meeting. Not only is this inference unsupported by record evidence, but – even if taken as true – the fact remains that the Authority's conclusion on this point is supported by substantial evidence.

Accordingly, the union's petition for review should be denied.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE AUTHORITY'S DETERMINATIONS THAT THE AGENCY DID NOT VIOLATE § 7116(a)(1), (2), OR (4) WHEN THE WARDEN DID NOT SELECT NICHOLLS FOR PROMOTION AND THAT THE AGENCY DID NOT VIOLATE § 7116(a)(1) WHEN THE WARDEN TOLD NICHOLLS THAT THERE WERE CERTAIN CORRUPT, CRIMINAL, EMPLOYEES WHOSE CAREERS HE WOULD NOT ADVANCE.

A. The Authority Correctly Held that No ULP was Committed When Warden Pugh did not Select Eric Nicholls for Promotion

The Authority correctly held that BOP did not commit ULPs under § 7116(a)(1), (2), or (4) by not selecting Eric Nicholls for promotion. In so holding, the Authority applied the correct legal analysis, and its determinations were supported by substantial evidence. Furthermore, the union's remaining argument – that an adverse inference should have been drawn from BOP's failure to produce certain evidence – is without merit.

1. The appropriate legal analysis

In finding that BOP did not violate § 7116(a)(1), (2), or (4) by not selecting Eric Nicholls for promotion, the Authority correctly applied the *Letterkenny* analysis. Under *Letterkenny*, "[t]he General Counsel bears the initial burden of establishing a *prima facie* case by demonstrating that: (1) the employee against whom the alleged discriminatory action was taken was engaged in an activity protected by the Statute; and (2) such protected activity was a motivating factor in the agency's treatment of the employee[.]" JA 9, *Letterkenny* at 118. If – and only if – the General Counsel establishes a *prima facie* case, the burden shifts to the Respondent to rebut that *prima facie* case by establishing the affirmative defense that: (1) there was a legitimate justification for its actions; and (2) the same action

would have been taken in the absence of the protected activity. JA 9, *Letterkenny* at 123.[9]

In the instant case, based on the record as a whole – including BOP's explanation of why Nicholls was not selected for promotion – the Authority affirmed the Judge's holding that the General Counsel had failed to establish a *prima facie* case. JA 12. *See also Warner Robins* (cited by the Authority at JA 12); *Dep't of Veterans Affairs Med. Ctr., Leavenworth, Kan.*, 60 F.L.R.A. 315, 319 (2004) ("Whether the GC has established a *prima facie* case is determined by considering the evidence in the record as a whole, not just the evidence presented by the GC."); *Portsmouth Naval Shipyard, Portsmouth, N.H.*, 49 F.L.R.A. 1522, 1532 (1994) ("On the basis of the entire record, we conclude, in agreement with the Judge, that the General Counsel failed to establish a *prima facie* case that the Respondent violated section 7116(a)(1), (2), and (4) of the Statute.").[10]

Applying this well-settled analysis to the instant case, the Authority properly considered the record as a whole in concluding that the General Counsel had failed

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[9] Although *Letterkenny* speaks only in terms of § 7116(a)(2) disrimination violations, the doctrine extends to § 7116(a)(4) retaliation cases, as well. *See Dep't of Veterans Affairs Med. Ctr., Brockton and West Roxbury, Mass.*, 43 F.L.R.A. 780, 781 (1991).

[10] This approach is consistent with the National Labor Relations Board's analysis for deciding cases under 29 U.S.C. § 158(a)(3). *See, e.g., Greco & Haines, Inc.*, 306 N.L.R.B. 634 (1992) ("a prima facie case … is not limited to evidence presented by the General Counsel"); *NLRB v. CWI of Maryland, Inc.*, 127 F.3d 319, 332 (4th Cir. 1997) ("the presence of a legitimate explanation may work to negate the [*prima facie*] case"); *Holo-Krome Co. v. NLRB*, 954 F.2d 108 (2d Cir. 1992).

to make a *prima facie* case that Nicholls' non-selection was motivated by protected activity. The complaint was properly dismissed.

2. The Authority's decision is supported by substantial evidence

The Authority's conclusion, that Nicholls' non-selection was not motivated by protected activity, is supported by substantial evidence. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Thomas v. NLRB*, 213 F.3d 651, 657 (D.C. Cir 2000) (*Thomas*). It is "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Maritime Comm.*, 383 U.S. 607, 620 (1966).

A review of the record as a whole supports the Authority's conclusions. As set forth above, pp. 7-14, the agency offered persuasive evidence that Nicholls' non-selection was based entirely on his failure to distinguish himself under Pugh's four selection criteria, and that Nicholls' protected activity was a non-factor.

- Warden Pugh was free to select any, all, or none, of the individuals on the Best-Qualified List, SJA 7-8;
- The Warden was not bound by the rankings of the Rating Panel and, thus, the fact that Nicholls received one of the nine highest scores from the

Panel does not suggest that he should have been promoted over lower-rated candidates, *id.*, JA 238;

- In selecting candidates for promotion, Warden Pugh applied the same set of four criteria to each applicant, JA 202, 210-11;
- These criteria were well-known throughout ADX and were applied to every promotion process, JA 165, 186, 238, 257, 262;
- These were the only criteria that Pugh used in his decision making, JA 210-11;
- The Warden's worksheets were accurate reflections of the information provided to the Warden by his Lieutenants, JA 205-05, 207-08, 254-55;
- Pugh limited his selections to those candidates who had shown strength under the four criteria, JA 252-53, 255, and particularly those who received positive feedback from the Lieutenants, JA 208; and
- As reflected in Warden Pugh's worksheets, Nicholls did not excel under any of the four criteria and, thus, was not selected. JA 79, 80, 203, 210, 239, 243, 252-54, 257.
- As the Judge credited, JA 24-25, the Warden did not give any consideration to Nicholls' participation in the 1999 ULP proceeding, his posts to the union website, or any other protected activity in making his selection. JA 210-11.

The clear conclusion from this evidence is that Nicholls' non-selection was not connected with his protected activity.

In contrast, the union's proposed finding – that anti-union animus motivated Warden Pugh's non-selection of Nicholls – finds minimal support in the record. The union, Pet. Br. 19-20, points to the chronological proximity between the 1999 ULP case and Nicholls' non-selection. To the union, this commands that Warden Pugh had an "obvious … resentment against the union," which, despite the Warden's credited testimony to the contrary, compelled him to "react negatively to an employee such as Nicholls[.]" Pet. Br. 20.

The union's claims are not compelling; nor do they provide a basis for finding that the Judge's determinations were not supported by substantial evidence. As the Judge and Authority noted, JA 13, more than a year passed between the ULP hearing and Nicholls' non-selection. The Authority and the Judge refused to accept the union's *post hoc, ergo propter hoc* argument, and for good reason: absent specific proof to the contrary, there is no reason to simply assume that Warden Pugh acted in a retaliatory manner, especially in light of the passage of time between the two events.

As the Authority noted, the Judge was called upon to carefully consider all the evidence in this case and weigh conflicting testimony. JA 13. This process necessarily required the Judge to observe "the witnesses and their demeanor," JA 16, and make the very type of credibility determination which this Court has

expressed an unwillingness to second-guess. The court "must accept the ALJ's credibility determinations . . . as adopted by the Board, unless they are patently unsupportable." *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001).

In light of the balance of evidence on this point, the Authority was correct in adopting the Judge's factual findings. It is not enough to show, as the union attempts in its brief, that conflicting evidence exists or that contrary conclusions could be drawn from the evidence; instead, the union's burden before this Court is to show that the Authority's conclusions are *unsupportable*. Because it is unable to make this showing, petitioner simply points to contradictory evidence, not credited by the Judge, and promotes logical conclusions that the Judge and Authority specifically discounted. This Court has specifically rejected such attempts to undermine Authority decisions, ruling that the Authority's findings, "supported by substantial evidence, may not be displaced on review even if the court might have reached a different result had the matter been before it de novo." *Power v. FLRA*, 146 F.3d 995, 1001 (D.C. Cir. 1998) (internal quotations and citations omitted). In any event, the evidence in the record, consistent with *Thomas*, is such that a reasonable mind could conclude, as the Authority did, that Nicholls' non-selection was in no way motivated by his protected activity, in violation of § 7116(a)(1), (2), or (4).

3. The union's remaining argument on this point is incorrect

In its final argument regarding Nicholls' non-selection, the union asserts, Pet. Br. 22, that the Judge and Authority erred by failing to draw an adverse inference from BOP's inability to produce Nicholls' quarterly evaluations for 2000-2001. This argument is unpersuasive.

As an initial matter, the drawing of adverse inferences is left to the ALJ's discretion. *See, e.g., Overnight Transp. Corp. v. NLRB*, 140 F.3d 259, 266 n.1 (D.C. Cir. 1998) ("the decision of whether to draw an adverse inference has generally been held to be within the discretion of the fact finder"); *see also Underwriters Lab., Inc. v. NLRB*, 147 F.3d 1048, 1054 (9th Cir. 1998) ("The decision to draw an adverse inference lies within the sound discretion of the trier of fact."). In this case, the Judge exercised his sound discretion and found that no adverse inference was appropriate as a result of BOP's failure to introduce Nicholls' 2001 quarterly evaluations.

Furthermore, the Authority properly held that the ALJ did not abuse his discretion in not drawing an adverse inference. The ALJ's hearing took place in November, 2002, well after Nicholls received his actual final rating for the 2001 year; if the "exceeds" projection had been proven inaccurate, one would have expected Nicholls to testify to that effect. As the Authority observed, JA 13, "Nicholls did not question the information on [the Warden's worksheet] that projected his rating for the 2000-2001 period as 'exceeds.'" Furthermore, as shown above, the "weight of the evidence as a whole" demonstrates that Nicholls had

been denied promotion based on his qualifications alone. The Authority correctly determined that an adverse inference as to the contents of Nicholls' quarterly evaluations would not have substantially changed the weight of the evidence. JA 13.

B. The Authority Correctly Held, and Substantial Evidence Supports, that no ULP was Committed during the May 3, 2001, Meeting between Warden Pugh and Eric Nicholls

In evaluating whether BOP violated § 7116(a)(1), the Judge properly applied *Ogden Air*'s objective "reasonable person" test, and the Authority correctly held that the Judge's conclusions under that test were supported by the evidence. As noted above, under *Thomas*, substantial evidence need not be uncontroverted, but simply enough to allow a reasonable person to reach the conclusion in question. Here, the record provides abundant evidence to support the conclusion that a reasonable person, in Eric Nicholls' position, would not have felt threatened or coerced by the May 3, 2001, post-selection conversation with Warden Pugh.

In this connection, the record shows that

- Nicholls, not Pugh, steered the conversation to protected activity, JA 154-55;
- Nicholls understood that he was not included in the small group of employees who Pugh said he would not help, JA 154-55;

- The small group of employees referenced by Pugh was engaged not in protected activity; unlike Nicholls, this group was engaged in criminal misconduct, JA 242;
- Even with respect to those few employees engaged in criminal misconduct for whom Pugh "would never do anything to help them in their career[s]," Pugh never suggested that he would impair their careers were they ever to engage in protected activity, but only that he would "have removed [himself] from any decision," JA 154-55, 229, 247;
- Pugh made clear to Nicholls that, in Pugh's view, Nicholls had not done anything "objectionable or worthy of retaliation," JA 241-42, 245-47; and
- Any hostility Pugh showed Nicholls was a result of Nicholls accusing Pugh of being untruthful about the reasons for his non-selection. JA 163, 212.

As shown, substantial evidence plainly supports the Authority's conclusion that the conversation between Warden Pugh and Eric Nicholls would not have coerced or restrained a reasonable person in his exercise of protected activity.

In its effort to undermine the weight of this evidence, the union again retreats, Pet. Br. 16, to the 1999 "get-acquainted" meeting and subsequent ULP proceedings to show coercion and interference in the May 3, 2001, conversation. These are distinct events; if anything, the fact that the BOP was found to have

committed a ULP in 1999 would arguably make the Warden more conscientious in his dealings with Nicholls, not more vindictive.

In sum, the Authority correctly held that the evidence supports the Judge's conclusion that a reasonable person in Nicholls' position – having steered the conversation to union involvement, and accused the Warden of illegally retaliating against him – would not have interpreted Warden Pugh's moderate, carefully worded comments to constitute interference, restraint, or coercion regarding protected activity.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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December 2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1302,	)	
Petitioner	)	
v.	)	No. 05-1168
FEDERAL LABOR RELATIONS AUTHORITY,	)	
Respondent	)	

CERTIFICATE OF SERVICE

I certify that copies of the Brief For The Federal Labor Relations Authority, have been served this day, by mail, upon the following:

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December 14, 2005