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

DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER ALEXANDRIA, LOUISIANA Respondent and	Case No. DA-CA-00190
ROGER HOYT Charging Party	

NOTICE OF TRANSMITTAL OF DECISION

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

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

Any such exceptions must be filed on or before **OCTOBER 28, 2002**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, Suite 415
Washington, DC 20424-0001

ELI NASH
Chief Administrative Law Judge

Dated: September 25, 2002
Washington, DC

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

MEMORANDUM DATE: September 25, 2002

TO: The Federal Labor Relations Authority

FROM: ELI NASH
CHIEF ADMINISTRATIVE LAW JUDGE

SUBJECT: DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
ALEXANDRIA, LOUISIANA

Respondent

and Case No. DA-CA-00190

ROGER HOYT

Charging Party

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

Enclosures

OALJ 02-62

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

DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER ALEXANDRIA, LOUISIANA Respondent and	Case No. DA-CA-00190
ROGER HOYT Charging Party	

John M. Bates, Esquire
Tiffany A. Foreman, Esquire
For the General Counsel

Alan Ott, Esquire
For the Respondent

Before: ELI NASH
Chief Administrative Law Judge

DECISION

Statement of the Case

The General Counsel of the Federal Labor Relations Authority (General Counsel), by the Regional Director of the Dallas Regional Office, issued an unfair labor practice (ULP) complaint on May 31, 2000, alleging that Respondent violated § 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (the Statute), by terminating the employment of a probationary employee, Mr. Roger Hoyt, because Hoyt engaged in activity protected by the Statute.[1] Respondent's answer denies that it violated the Statute.

A hearing was held in Houston, Texas, on January 9, 2001. The parties were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine

[1] The General Counsel has moved to amend the ULP complaint to correct typographical errors involving the elimination of duplicate paragraphs eleven and twelve contained in the complaint. (General Counsel Exhibit (G.C. Exh.) Nos. 1(d) and 1(l)). The Respondent has not objected to the motion. (G.C. Exh. No. 1(o)). The motion to amend the complaint is granted.

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

Findings of Fact

Hoyt was hired as a GS-11 Computer Specialist by the Respondent Department of Veterans Affairs Medical Center, Alexandria, Louisiana (Medical Center) in September 1998. (Transcript (Tr.) 13-14.) The American Federation of Government Employees, Local 25 (Local 25), is the agent for the exclusive representative of a unit of employees at the Medical Center that includes Computer Specialists. (General Counsel (G.C.) Exh. 1(d), ¶¶ 9, 10.) The unit was covered by a collective bargaining agreement.

Hoyt's primary job responsibilities consisted of ensuring that the connections linking up the several hundred computer work stations at the Medical Center were functioning properly. (Tr. 13, 14.) There were approximately 15 to 20 other Computer Specialists and Computer Assistants working in the same office as Hoyt. (Tr. 61.) The first line supervisor in the office was Mr. Juan Corona, and Corona's immediate superior was Mr. Robert Gabour. (Tr. 64, 98.)

As a newly hired employee at the Medical Center, Hoyt was required to complete a 1 year probationary period, during which his fitness for continued employment would be assessed. 5 C.F.R. §§ 315.801(a), 315.803 (2002). On September 10, 1999, the Medical Center provided Hoyt with a notice of termination from his position, to become effective on September 24, 1999, at the end of his probationary period. (G.C. Exh. Nos. 1 (d) and (l).) The notice was based on several incidents of alleged poor job performance and misconduct by Hoyt that occurred from March to August 1999. In particular, Corona and Gabour made clear that a series of events occurring on the evening of July 20 and early morning of July 21,[2] involving Hoyt's dealings with some contract computer engineers who were doing work at the Medical Center, were the primary basis for Hoyt's termination. (Tr. 79, 98-99.)

The ULP complaint in this case alleges that Hoyt's termination was based on his filing two grievances under the collective bargaining agreement, on July 30 and August 31. (G.C. Exh. No. 1(l), ¶¶ 13-15.) Accordingly, this statement of facts will primarily focus on the record evidence concerning the allegations of poor performance and misconduct on which the termination was based. Much of this evidence was disputed in the record. Credibility determinations concerning the disputes

[2] All dates referenced hereinafter are during 1999, unless otherwise noted.

will be made only to the extent necessary in the part of this decision setting out my conclusions of law.

1. Incidents prior to July 20

On March 16, Corona instructed Hoyt to submit a work order to a telecommunications specialist, and also perform some work himself, to make sure that some cable lines were "pulled" for the pharmacy at the Medical Center. This was "in an effort to move an end device from the hospital's infrastructure that had the potential for failure."[3] (G.C. Exh. No. 14, p. 2.) On July 13, a problem was identified by the pharmacy, namely, that the work on the cable lines had not been performed. Corona subsequently determined that the problem was due to Hoyt's failure to follow instructions. (*Id.*) Hoyt denied this charge, asserting that he had in fact performed the work he was directed to do, and had requested a telecommunications specialist to perform other aspects of the work as requested. (Tr. 45.)

On April 13, Corona instructed Hoyt to "expedite the recovery of the information on a computer" that was used by an employee who was leaving the employ of the Medical Center that week. Corona later alleged that Hoyt failed to complete that task, and that he (Corona) had to complete it. (G.C. Exh. No. 14, p. 1.) Hoyt again denies this allegation. He claims that when he and another employee visited the office of the departing employee, they determined that the departing employee's computer was "completely crashed." (Tr. 34.) On the way back to his office, Hoyt said that Corona asked him to bring the crashed computer back to his office and fix it. Hoyt then asked a lower graded computer technician to pick up the machine and bring it to Hoyt's office, so he could repair it as requested. (Tr. 35.) However, Corona intercepted the technician before he reached Hoyt's office, and Corona took the machine in his own office for repair.

At some point prior to May 4, Corona directed Hoyt to resolve a problem that the computer staff had for some time with a certain type of instructional software that was needed by some Medical Center employees. Corona claimed that, at the time of Hoyt's removal, Hoyt failed to follow instructions and complete this task. (G.C. Exh. No. 14, p. 2.) However, Hoyt stated that while he, like other employees who had tried to solve the problem, was unable to resolve why the software would

---

[3] There is no explanation provided in the record for what "pulling" a cable line means, or what relationship it bears to "mov[ing] an end device." However, it is not essential to the resolution of this case to understand the meaning of these terms.

not work on some computer terminals, he did develop a solution that solved the problem of providing the training. This was to provide the employees who needed the training with the computer terminals that could run the software. (Tr. 53-54.)

On May 4, Corona provided Hoyt with a performance appraisal that covered the time period from the start of his employment at the Medical Center, in September 1998, to March 31. Hoyt received "Successful" ratings on all critical elements of his job. (G.C. Exh. No. 2.) None of the above incidents was pointed out to Hoyt in this appraisal as having been a perceived performance or conduct problem for him.

Also during May, Hoyt was directed to "configur[e] a Cisco PIX fire wall," a piece of computer equipment designed to interface with a private hospital. (Tr. 46.) Corona subsequently claimed that Hoyt had not completed the task in a timely manner. (Tr. 69.) Hoyt claimed that, despite his best efforts to complete the task, he was unable to do so because he was not equipped by management with the tools (training, manuals, etc.) necessary to accomplish the task. (Tr. 47.)

On July 6, Hoyt, as part of a group of seven employees, received a letter of commendation from the Director, Clinical Support Healthcare Line, and subsequently a cash award, for work done on helping to improve customer assistance. (G.C. Exh. Nos. 3 and 4.) On July 9, Hoyt received a review of his probationary period performance to that time from Corona, as approved by Gabour. (G.C. Exh. No. 6.) Hoyt was rated "[S] atisfactory," and his supervisors recommended at that time that Hoyt be retained beyond his probationary period. (*Id.*) Again, no incident that had occurred prior to this review was mentioned to Hoyt at the time of the incident as causing a performance or conduct problem.

2. <u>The events of July 20 and 21</u>

On July 20, contractor employees were present at the Medical Center to upgrade certain computer network equipment. (Tr. 23.) Corona directed Hoyt to remain with these contractors at all times throughout the day on July 20, until the contractor employees had completed their work for the day. (Tr. 37.) The primary purpose of this policy was to ensure that these outside employees would not gain access to confidential patient records and other sensitive information contained in Medical Center data bases. (Tr. 70, 79-81.)

Hoyt was scheduled to work his regular tour of duty that day, which was from 8:00 a.m. to 4:30 p.m. (Tr. 37, 91.) During that time, there were other employees in the office who could briefly relieve Hoyt from his task of physically

remaining with the contract employees while Hoyt, for example, took a rest room or meal break. (Tr. 90.) However, after 4:30 p.m. on July 20, there were no other Medical Center employees to cover for Hoyt. (Tr. 90-91, 106.) Corona testified at the hearing that agency policy required Hoyt to nonetheless remain with the contract employees at all times after 4:30 p.m., even if that meant having those employees accompany Hoyt to the rest room or on break. (Tr. 91.) However, Corona conceded that this requirement was never communicated to Hoyt, and that it was rare for one of his employees to be ordered to remain with contract employees alone after regular work hours. (Tr. 92.)

For his part, Hoyt testified that it was his understanding, based on his observation of other employees' conduct, that taking a 5 or 10 minute break after 4:30 p.m., when no relief was available, was permissible under agency policy. (Tr. 37-38, 106.) Accordingly, he did take somewhere between five and ten brief breaks from 4:30 p.m until he left work some time after 12:00 midnight on July 21, during which times the contract employees were by themselves. (Tr. 38-39.)

At some time during the evening of July 20, Hoyt approached Ms. Donna Pursche, who was substituting for the absent Corona as supervisor that day. (Tr. 24.) Hoyt told Pursche that, due to his late night of work on July 20, he would be in late the next day, July 21. (Tr. 25.) Pursche asked whether Hoyt had previously obtained approval for such a late arrival from Corona. Hoyt replied that he could not ask Corona, who was not present that day. Pursche replied that Hoyt should "do whatever [he] deem[ed] to be necessary." (Tr. 25.) Corona was later informed that Hoyt had also said to Pursche during this conversation that he "had to get his sleep," and that "there was nothing she could do" about his coming in late the next day. (Tr. 66-67.) Hoyt denied that he said anything like this to Pursche during this conversation. (Tr. 36.)

There was disagreement as to when Hoyt left work on the evening of July 20. The contract employees left the Medical Center work site at approximately 12:15 a.m. on July 21. (Tr. 42.) Corona was at work on July 21, and was informed by the contract employees later that day that Hoyt left work at 11:30 p.m. on July 20. (Tr. 83.) Hoyt, however, testified that he left about 10 to 15 minutes after the contract employees. (Tr. 41.)

On the morning of July 21, another Medical Center employee, Mr. David Jewell, informed Corona that when he (Jewell) arrived at work that morning, he found that the doors to a training room near the computer office were not secured and that an intrusion alarm in the computer room had not been activated. (Tr. 67-68.) A note was also found from the

contract employees to Hoyt, advising him that they had completed their work and had left for the night. (Tr. 68.)

Hoyt testified that the doors to the training room lock themselves automatically, and that in any event, he was not responsible for securing the training room door, as that was the province of other employees. (Tr. 40.) He stated further that he did not recall whether or not he set the intrusion alarm in the computer room when he left at 12:30 a.m. on July 21. (Tr. 43.) However, Hoyt testified that it was a common occurrence for the alarm not to be set by the last person leaving at night, because Corona frequently had to remind computer staff employees to make sure that task was accomplished, based on complaints from security personnel. (Tr. 44.)

Corona questioned Hoyt after the latter arrived at work at about 2:00 p.m. on the afternoon of July 21, about what had occurred the previous night. (Tr. 72.) Hoyt denied any wrong-doing, and in fact told Corona at that time that he had left the office the previous night in the company of the contract employees. (Tr. 68.)

Corona testified that he also met that same day with his superior, Gabour, and informed him (Gabour) that he believed that Hoyt's conduct the previous night warranted termination. (Tr. 71.) Gabour corroborated this conversation. (Tr. 98-99.) Gabour testified that he told Corona that he should go to the personnel office, to find out about how to effect the termination. (Tr. 99-100.) Upon going to the personnel office, Corona said he was told to follow the agency instruction on terminations of probationary employees, which called for, among other things, preparing a written statement detailing the reasons for the termination. (Tr. 72.) Corona did not prepare this written statement until September 10, however, the same date as the notice of termination was issued to Hoyt. (*Id.*)

3. Events after July 21

On July 23, Corona sent an e-mail message to Hoyt, received by him on July 27, which reflected Corona's determination that Hoyt was absent without leave (AWOL) from 11:30 p.m. on July 20 to 12:30 a.m. on July 21, and from 8:00 a.m. to 2:00 p.m. on July 21. (G.C. Exh. No. 7, p. 3.) Hoyt contacted his union representative, Mr. Roger Bennett, concerning the AWOL charge. (Tr. 25.) Bennett contacted Corona by e-mail on July 27, to see if a meeting could be arranged to resolve the matter quickly and informally. (G.C. Exh. No. 7, p. 4.)

A meeting did take place, on July 30. It was attended by Corona, Mr. Willy Childs, a personnel specialist, Hoyt, and Ms. Janice Riggs, a union representative. (Tr. 26.) According to Hoyt, nothing was accomplished at this meeting. He characterized Corona and Childs as having been "nontalkative," and said that they simply presented documents to Hoyt and Riggs. (Tr. 27.) Corona, on the other hand, testified that the events of July 20 and 21 were discussed, and that he told Hoyt at the meeting that "there were some issues that needed to be addressed and that we . . . would be coming back with an action." (Tr. 73.)

Later in the day on July 30, Hoyt filed a grievance concerning the AWOL charge under the negotiated grievance procedure. (G.C. Exh. No. 7, p. 1; Tr. 27.) On August 19, Corona provided Hoyt with the first step response to the grievance. In this response, Corona changed the AWOL from 8:00 a.m. to 2:00 p.m. on July 21 to paid leave. (G.C. Exh. No. 9.) The grievance was taken to the second step of the grievance procedure. Gabour provided the second step response on August 30. In that response, Gabour stated that he accepted Hoyt's evidence that he (Hoyt) had been at work until at least 12:00 midnight on July 21, not just until 11:30 p.m. on July 20 as Corona had previously alleged. (Tr. 28-29.) Accordingly, he credited Hoyt with an additional 30 minutes of compensatory time. (G.C. Exh. No. 11.)

During the week of August 2, Corona directed Hoyt to update some software on all work stations at the Medical Center, after having tested the procedures to be used to perform the update. (Tr. 48.) Hoyt did so, but some work stations did not update the software properly. (Tr. 49.) Hoyt detected the problem the next day, and offered two ways to solve the problem to Corona and Gabour, one way allowing for a quick fix, the other more time-consuming. (Tr. 49-50.) Corona and Gabour chose the more time-consuming method, which took about three weeks to complete. (Tr. 50-51.) Corona testified that Hoyt failed to follow directions to test the update before updating the software on the work stations, thereby leaving the work stations unable to run the software for three weeks. (Tr. 70.)

On August 31, Hoyt filed a second grievance under the negotiated grievance procedure. (G.C. Exh. No. 13.) This grievance concerned management's failure to promote Hoyt to a GS-12 pay grade. (*Id.*) The grievance was not finally resolved, however, because on September 10, Hoyt received a notice of termination from the Acting Director of the Medical Center. (G.C. Exh. No. 14.) The termination was to take effect on September 24, the last day of Hoyt's probationary period.

Also on September 10, Corona submitted to Gabour the written statement of reasons supporting the termination, mentioned at p. 7, above, as the personnel office had recommended in late July. (Respondent's (Resp.) Exh. No. 5.) The stated reasons for the delay in Corona's preparing this supporting written statement were that he was waiting for "guidance" from personnel, and that there was during that time period an inspection of the hospital for accrediting purposes by an outside agency, preparation for which took priority over all other matters. (Tr. 72-73.)

The notice of termination to Hoyt was based on the incidents set out above. Specifically, Corona's allegations were as follows:

1) failure to recover information from the computer of a departing employee on April 13 (see p. 4, above);

2) insubordinate behavior to Pursche on July 20 (see p. 6, above);

3) leaving the contract employees alone in the computer room on several occasions on July 20 (see pp. 5-6, above);

4) failing to secure the training room doors on his departure on the night of July 20 (see p. 7, above);
5) leaving the office on the night of July 20 before the contract employees did (see p. 6, above);

6) failing to activate the computer room intrusion alarm on his departure on the night of July 20 (see p. 7, above);

7) failure to follow Corona's instructions of March 16, to obtain new computer lines for the pharmacy (see p. 3, above);

8) failure to complete the Cisco PIX fire wall project in a timely manner (see pp. 4-5, above);

9) failure to follow instructions in updating software on August 2 (see p. 8, above); and

10) failure to follow instructions in installing instructional software on certain work stations (see pp. 4, above).

At some point after receiving the notice of termination on September 10, Hoyt filed a prohibited personnel practice complaint with the Office of Special Counsel (OSC) pursuant to 5 U.S.C. § 2302(b)(9).[4] Hoyt alleged that his termination was due to having engaged in protected activities under the Statute, i.e., having filed his two grievances under the negotiated grievance procedure. (Resp. Exh. No. 3, p. 10.) The OSC concluded that there were "reasonable grounds" to believe that the termination was taken in reprisal for Hoyt's filing his two grievances. (Resp. Exh. No. 3, p. 11.) Accordingly, the OSC sought from a Member of the Merit Systems Protection Board (MSPB), and that Member granted, a 30-day stay of the termination. (Resp. Exh. No. 3, pp. 11, 12.) However, by letter dated April 20, 2000, the OSC advised counsel for the Medical Center that it had concluded its investigation into the matter and "will not pursue [the matter] further." (Resp. Exh. No. 1.)

Discussion and Conclusions

A. Positions of the Parties

1. The General Counsel

The General Counsel alleges that the Medical Center discriminated against Hoyt by terminating his employment because he engaged in protected activity by filing grievances on July 30, 1999 and August 31, 1999. (General Counsel's Brief (G.C. Br.) 11). In this regard, the General Counsel argues that it has established a prima facie case of discrimination under the elements set forth in the Authority's decision in *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*). (*Id.*) The General Counsel argues under *Letterkenny* that there is no dispute that Hoyt was engaged in protected activity of which his supervisors were aware by his filing grievances on July 30 and August 31. (G.C. Br. 11-12). The General Counsel maintains further that the Medical Center's retaliatory motivation for Hoyt's termination is evident from the timing of the action. (G.C. Br. 12-15).

The General Counsel also argues that the Medical Center cannot rebut the General Counsel's prima facie case since the evidence clearly establishes that the reasons offered by the Medical Center for Hoyt's termination do not establish there was a legitimate justification for its action, and that the

---

4 5 U.S.C. § 2302(b)(9) in relevant part forbids agency management from taking a personnel action against an employee based on the employee's having exercised "any appeal, complaint, or grievance right granted by any law, rule, or regulation."

same action would have been taken even absent Hoyt's protected activity. (G.C. Br. 15-23). As a remedy, the General Counsel requests that the Medical Center be ordered to make Hoyt whole for the losses he incurred as a result of his discharge by providing him with back pay with interest from September 10, 1999, and by providing him with all benefits and privileges retroactive to September 10, 1999. (G.C. Br. 24). The General Counsel also requests that the Medical Center be ordered to cease and desist from its unlawful conduct and to post an appropriate notice to all employees. (*Id.*)

2. The Medical Center

The Medical Center argues that there is no subject matter jurisdiction over this complaint under 5 U.S.C. § 7116(d), since Hoyt has previously raised the same issues presented here to the OSC. (Respondent's Brief (R. Br.) 4-5). The Medical Center also argues that Hoyt's selection of the OSC as a forum to seek review of his termination bars consideration of the complaint in this case under section 7121(g) of the Statute. As to the merits, the Medical Center argues the General Counsel failed to establish a prima facie case under *Letterkenny* since the record shows that the decision and formal steps to discharge Hoyt occurred before the filing of any grievances. (R. Br. 6-7). The Medical Center argues further that the termination would have occurred despite the filing of Hoyt's grievances, since there was a drop in Hoyt's performance and conduct following his interim evaluations. (R. Br. 11-15).

B. Analysis

1. Neither the First Sentence of § 7116(d) Nor § 7121(g) of the Statute Deprives the Authority of Jurisdiction Over the ULP Complaint In This Case

a. Respondent argues that the OSC's prohibited personnel practice complaint investigation procedures under 5 U.S.C. § 1214 are, within the meaning of the first sentence of § 7116 (d) of the Statute, an "appeals procedure" under which the issues raised in the ULP complaint could be (and in fact were) properly raised.5 Accordingly, Respondent argues, the Authority is barred from considering the merits of the ULP complaint pursuant to the first sentence of § 7116(d). (R. Br. 4-5.) I reject this argument for the following reasons, and conclude that the first sentence of § 7116(d) does not bar the Authority from consideration of the merits of the ULP complaint in this case.

5 The first sentence of § 7116(d) provides that "[i]ssues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section."

In *Soc. Sec. Admin., Inland Empire Area*, 46 FLRA 161 (1992) (*SSA*), the Authority held that the appeals procedures referenced in the first sentence of § 7116(d) do not include the prohibited personnel practice investigation procedures of the OSC, unless the personnel action at issue in the prohibited personnel practice complaint is appealable to the Merit Systems Protection Board (MSPB). *SSA*, 46 FLRA at 171. In that case, the personnel action at issue was a manager's awarding only a partial share of a gainsharing fund to two employee union representatives, based on the representatives' spending a substantial portion of their tours of duty on official time. *Id.* The employees filed complaints with OSC concerning this action. The Authority observed that a management determination as to gainsharing awards is not the kind of personnel action over which the MSPB has jurisdiction. *Id.* Accordingly, the Authority held that notwithstanding the earlier complaints, it was not barred under the first sentence of § 7116(d) from considering the merits of a ULP complaint alleging a violation of § 7116(a)(1) and (2), based on management's gainsharing award determination. *SSA*, 46 FLRA at 171-72.

Similarly, in the circumstances of this case, the personnel action at issue, i.e., the termination of a probationary employee, is not within the MSPB's jurisdiction. *E.g., Lizewski* v. *Dep't of the Army*, 15 MSPR 417, 419 (1983) (MSPB was without jurisdiction to consider merits of removal of probationary employee except on certain grounds not there present). An employee terminated during his or her probationary period can appeal that termination to the MSPB only for discrimination based on marital status or partisan political reasons, or improper procedures.[6] 5 C.F.R. § 315.806 (b), (c) (2002). There is no indication in the record that Hoyt's termination was alleged to be for those reasons. For the purposes of analysis under *SSA*, I find no basis on which to distinguish the removal in this case from the gainsharing determination at issue in that case. Neither personnel action is appealable by an employee to the MSPB. Thus, based on *SSA*,

---

[6] A probationary employee can bring his or her removal before the MSPB as a prohibited personnel practice if it involves a "whistleblower" claim under 5 U.S.C. § 2302(b)(8). In that case, the employee can bring the action directly to the MSPB, if the OSC declines to do so, by way of an individual right of action under 5 U.S.C. § 1221(a). *See, e.g., Marren* v. *Dep't of Justice*, 51 MSPR 632, 637 (1991), *aff'd* 980 F.2d 745 (Fed. Cir. 1992) (table). This fact does not alter the result under § 7116(d) of the Statute, however. An allegation of a "whistleblower" prohibited personnel practice involves a different issue than does a ULP complaint alleging discrimination under § 7116(a)(2). *SSA*, 46 FLRA at 170-71. Therefore, the first sentence of § 7116(d) is inapplicable to that situation.

I conclude that the first sentence of § 7116(d) does not bar the Authority from considering the merits of the ULP complaint in this case.

b. Respondent makes an additional argument (R. Br. 4, 5), that pursuant to § 7121(g), Hoyt elected to pursue his prohibited personnel practice claim before the OSC, and therefore cannot pursue the claim through the Statute's ULP procedures as well. This argument misapprehends the purpose of § 7121(g).[7] That section was enacted to deal with claims that expressly allege a prohibited personnel practice under 5 U.S.C. § 2302(b)(2) through (12). More particularly, it compels employees with prohibited personnel practice claims to choose one of three potentially available appeal routes for adjudication of the claim. *See Giove* v. *Dep't of Transp.*, 89 MSPR 560, 564-65 (2001). Section 7121(g) on its face makes no reference to ULPs adjudicated under §§ 7116 and 7118 of the Statute.

A ULP complaint that deals with facts and legal theories that could have been alleged as a prohibited personnel practice claim does not convert the ULP into a prohibited personnel practice claim covered by § 7121(g). *Cf. Wildberger* v. *FLRA*, 132 F.3d 784, 787-88 (D.C. Cir. 1998) (noting the exclusive jurisdiction of the Authority to adjudicate ULP complaints, and

---

[7] Section 7121(g) provides in relevant part as follows:

> (g)(1) This subsection applies with respect to a prohibited personnel practice other than a prohibited personnel practice to which subsection (d) applies.
>
> (2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (1) may elect not more than one of the remedies described in paragraph (3) with respect thereto. For purposes of the preceding sentence, a determination as to whether a particular remedy has been elected shall be made as set forth under paragraph (4).
>
> (3) The remedies described in this paragraph are as follows:
>
> (A) An appeal to the Merit Systems Protection Board under section 7701.
>
> (B) A negotiated grievance procedure under this section.
>
> (C) Procedures for seeking corrective action under subchapters II and III of chapter 12.

the MSPB to adjudicate prohibited personnel practice complaints). In short, the election required of employees under § 7121(g) is irrelevant to a determination of the Authority's jurisdiction over a ULP complaint, a matter that is resolved, as here pertinent, by § 7116(d) of the Statute. Accordingly, I reject Respondent's argument under § 7121(g) as well. I therefore now proceed to consider the merits of the case.

2. Framework for resolving a ULP complaint alleging a violation of § 7116(a)(2) of the Statute

The analytical framework for resolving cases like this one is well established, pursuant to the Authority's decision in *Letterkenny*. Under this framework, the General Counsel has, at all times, the overall burden to establish by a preponderance of the evidence 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 in connection with hiring, tenure, promotion, or other conditions of employment. *Indian Health Serv., Crow Hosp., Crow Agency, Montana*, 57 FLRA 109, 113 (2001) (*Crow Hosp.*); *Letterkenny Army Depot*, 35 FLRA 113, 118 (1990). As a threshold matter, the General Counsel must offer sufficient evidence on these two elements to withstand a motion to dismiss. *Crow Hosp.*, 57 FLRA at 113. Whether the General Counsel 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 General Counsel. *Dep't of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 55 FLRA 1201, 1205 (2000) (*Warner Robins*).

However, satisfying this threshold burden establishes a violation of the Statute only if the Respondent offers no evidence that it took the disputed action for legitimate reasons. Where the Respondent offers evidence that it took the disputed action for legitimate reasons, it has the burden to establish, by a preponderance of the evidence, as an affirmative defense that: (1) there was a legitimate justification for its action; and (2) the same action would have been taken even in the absence of protected activity. *Id.*

3. Application of the analytical framework to the facts of this case establishes that the General Counsel has failed to establish a prima facie case of discrimination under § 7116(a)(2) of the Statute

There is no dispute in this case that Hoyt engaged in protected activity under the first prong of the *Letterkenny* framework when he filed the two grievances on July 30 and

August 31. Accordingly, this aspect of the case need not be discussed further. Rather, my discussion herein will focus on the second prong of the General Counsel's prima facie case under *Letterkenny*, i.e., whether, on the record as a whole, the General Counsel has established a prima facie case that this protected activity was "a motivating factor" in Hoyt's termination on September 10.

The General Counsel's argument under the second prong of *Letterkenny* is based on two factors: first, the timing of the termination action; and second, disparate treatment of Hoyt over other employees. (G.C. Br. 11-15.) For the reasons that follow, I find that the General Counsel has not established a prima facie case under the second *Letterkenny* prong.

a. The timing of events. As to the timing issue in this case, the Authority has held that the timing of an agency personnel action can support an inference that the action was motivated by anti-union discrimination, but it is not conclusive proof of a violation of the Statute. *E.g., U.S. Dep't of Veterans Affairs, Med. Ctr., Northampton, Mass.*, 51 FLRA 1520, 1528 (1996).

The General Counsel argues that the September 10 notice of termination came after Hoyt filed his grievances, and after several satisfactory evaluations of Hoyt's job performance. Moreover, the General Counsel claims, as Hoyt's supervisors, Corona and Gabour were aware of his having engaged in this protected activity when they caused the termination notice to issue. (G.C. Br. 11-12.) This evidence, standing on its own, could establish a prima facie case of unlawful discrimination under § 7116(a)(2) of the Statute. *See, e.g., U.S. Dep't of Agric., U.S. Forest Serv., Frenchburg Job Corps, Mariba, Ky.*, 49 FLRA 1020, 1033 (1994) (timing of supervisor's statement linking protected activity with lower appraisal was significant in establishing prima facie case).

However, taking the record as a whole, I do not find that the preponderance of the evidence establishes the timing of management's action as a factor supporting the General Counsel's prima facie case. The Medical Center points to two events which it claims establish that the decision to terminate Hoyt was made before he engaged in the protected activity at issue here. The first of these was the July 21 conversation between Corona and Gabour, during which Corona claims to have told Gabour that in his (Corona's) view, Hoyt should be terminated for the events of July 20 and 21. (R. Br. 8.) The second is Corona's statement to Hoyt during the informal meeting on July 30 (see p. 8, above), prior to Hoyt's filing his first grievance, that Medical Center management would be

"coming back with an action" against Hoyt based on the events of July 20 and 21. (R. Br. 6.)

The General Counsel attacks the Medical Center's evidence concerning the Corona/Gabour discussion of July 21, primarily on the ground that there is no written documentation that supports a holding that this discussion ever took place. (G.C. Br. 12.) While certain factors support the General Counsel's argument, other factors support credibility of the testimony. In support of the General Counsel's position, it seems unlikely that two managers could discuss a matter as important as the termination of an employee, and yet neither themselves create, nor have the personnel office Corona claims to have consulted create, some record of the determination that was reached during the discussion. The Medical Center did not even provide testimony from the personnel office employee(s) to whom Corona supposedly talked concerning this matter, as independent corroboration of this fact.

On the other hand, Corona's testimony concerning his July 21 meeting with Gabour is corroborated by Gabour himself. Thus, whatever may be the likelihood that one witness would provide erroneous testimony on this point, I find that it is less likely that two witnesses would provide the same erroneous testimony. Further, as will be discussed below, Corona subsequently told Hoyt directly that management had decided to take an adverse personnel action against Hoyt. It is unlikely that Corona would make this kind of statement to Hoyt without having obtained authorization for the action from a higher level management official. Therefore, although a close question, I conclude that Corona's and Gabour's testimony concerning their July 21 meeting was credible.

Concerning the July 30 informal meeting with Corona, Childs, Hoyt and Riggs, the Medical Center's unrebutted evidence clearly shows that Corona announced to Hoyt at that meeting, before he filed his first grievance, that management intended to take an adverse personnel action against him. Despite the General Counsel's pointed rebuttal of a number of other aspects of Corona's testimony, at no point did Hoyt or any other witness in the case deny that Corona told Hoyt at the July 30 meeting that management intended to take a personnel action against Hoyt based on the events of July 20 and 21. This failure to even attempt to rebut in any way Corona's statement leads me to conclude that on this matter, his testimony is accurate.

I do not consider Hoyt's vague, general statement that Corona and Childs were "untalkative" at the meeting, and that they simply presented documents to Hoyt and Riggs, as a rebuttal of Corona's specific statement at the July 30 meeting,

that management would be taking an adverse personnel action against Hoyt. Given the importance of Corona's statement to the resolution of this case, a more pointed rejoinder, either from Hoyt or Riggs (who was not called by the General Counsel to testify) was required to call Corona's credibility on this point into question.

It can, of course, be argued that Corona only told Hoyt that management "would be coming back with an action," and made no express mention to Hoyt of a termination. (Tr. 73.) I do not believe, however, that this statement could be considered as vague or ambiguous, given the context of the events in this case. The "action" referred to here could only reasonably have been construed by Hoyt as an adverse personnel action of some kind. This is supported by, for example, Corona's July 23 e-mail to Hoyt concerning placing Hoyt on AWOL for certain of his actions on July 20 and 21. This certainly created an environment wherein Hoyt would reasonably have been aware that management was displeased with his conduct on those days. Indeed, Hoyt promptly filed a grievance on the AWOL determination. Thus, any "action" Corona mentioned at the July 30 meeting would reasonably be understood to be an adverse one of some kind.

The fact that Hoyt did not know for certain at this point that management intended to take a termination action, as opposed to some other form of adverse personnel action, is in my view immaterial. The key point here is that before Hoyt engaged in the protected activity at issue in this case, he knew that management intended to take some form of adverse personnel action against him. It seems to me, therefore, that if there was any cause-and-effect relationship between Hoyt's protected activity and his termination, it was management's stated intent to take an adverse personnel action that triggered the protected activity, and not the other way around.[8]

Based on the foregoing, I find this case to be similar on its facts to *Warner Robins*, 55 FLRA 1201. In that case, the Authority found that the General Counsel had not established a prima facie case of discrimination concerning two employees'

---

[8] Given my holding that the Medical Center's decision to terminate Hoyt preceded his engaging in protected activity, the General Counsel's evidence concerning Hoyt's May and early July satisfactory appraisals loses its relevance. This evidence certainly shows that the Medical Center, and Corona in particular, changed their views concerning the adequacy of Hoyt's performance at some point during July. But it does not establish that Hoyt's protected activity was the reason for this change of views.

performance appraisals, based on the employees filing grievances, when a supervisor had expressed problems with the employees' job performance before the employees filed their grievances. 55 FLRA at 1206. I reach the same result here, for the same reason.

In summary on this point, I find, based on the record taken as a whole, that the General Counsel has failed to establish that the timing of events is a factor in establishing a prima facie case of unlawful discrimination under § 7116(a)(2) of the Statute.

b. Disparate treatment. The General Counsel did succeed in establishing that Medical Center management, Corona in particular, assessed Hoyt's performance and conduct in a manner different than it did for other employees.[9] For example, much of Hoyt's conduct on July 20 and 21, which the Medical Center relied on in Hoyt's termination notice, was established by Hoyt's unrebutted testimony as being consistent with other unit employees' conduct. Thus, it was common for employees to leave contract employees alone for brief periods of time in the computer room, fail to set the intrusion alarm, and fail to secure the training room doors. Yet no other employee was disciplined for these reasons. Corona's testimony identified work rules on these matters, but did nothing to account for why

---

[9] In an earlier case, I have noted that disparate treatment cases involving probationary employees must be based on a showing of management's treatment of other probationary employees, and not employees in general. *Fed. Corr. Inst., Safford, Ariz.*, Case No. SF-CA-30498 (April 5, 1995), slip op. at p. 13. However, that holding is most appropriately applied to situations in which the severity of the personnel action taken is at issue, e.g., suspension versus termination. That is not the case here. Rather, the issue here is whether Hoyt violated any work rules or policies at all. I therefore conclude that it is appropriate to compare management's treatment of Hoyt against other employees in the bargaining unit, regardless of whether they are probationary employees.

these work rules were strictly enforced only against Hoyt.[10] Indeed, as to the work rule concerning not leaving contract employees alone in the computer room after regular work hours, Corona could not even establish that Hoyt had ever been made aware of the rule.

However, the General Counsel's ability to establish disparate treatment of Hoyt, on its own, does not establish a violation of § 7116(a)(2). The missing element in the General Counsel's prima facie case is the connection between the disparate treatment and Hoyt's engaging in protected activity under the Statute. Having failed to establish this connection, I find that the General Counsel has failed to establish a prima facie case of a § 7116(a)(2) violation, and I therefore recommend that the complaint be dismissed. Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

The complaint is dismissed.

Issued, Washington, DC, September 25, 2002.

_____

ELI NASH
Chief Administrative Law Judge

---

10 The General Counsel succeeded in bringing into question the merits of other reasons given for Hoyt's termination. For example, Hoyt's supposedly insubordinate behavior to Pursche on the evening of July 20 was established only through hearsay testimony of Corona, was denied by Hoyt, and was not corroborated by calling Pursche to testify, although she presumably was available to do so. Further, it is difficult to understand how a termination could be based on incidents occurring prior to Hoyt's satisfactory appraisals in May and early July, when those incidents were not raised in those appraisals. However, the termination's merits in and of themselves are not at issue here. *Dep't of the Navy, Naval Weapons Station Concord, Concord, Cal.*, 33 FLRA 770 (1988) (probationary employees may be terminated summarily, as long as such terminations are not based on unlawful discrimination).

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by ELI NASH, Chief Administrative Law Judge, in Case No. DA-CA-00190, were sent to the following parties:

_____

_

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

John M. Bates, Esquire
Tiffany A. Foreman, Esquire
Federal Labor Relations Authority
525 S. Griffin St., Suite 926, LB 107
Dallas, TX 75202-1906
7000 1670 0000 1175 1747

Alan Ott, Esquire
Department of Veterans Affairs
Office of Regional Counsel
510 East Stoner Avenue
Shreveport, LA 71101
7000 1670 0000 1175 1754

Roger Hoyt
22 Carl Giles Road
Glenmora, LA 71433
7000 1670 0000 1175 1761

DATED: September 25, 2002
Washington, DC