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

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION FLORENCE, COLORADO Respondent and COUNCIL OF PRISON LOCALS AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1300, AFL-CIO Charging Party	Case No. DE-CA-00043

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 **JULY 22, 2002**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
607 14th Street, N.W., Suite 415
Washington, D.C. 20424

ELI NASH, Chief
Administrative Law Judge

Dated: June 18, 2002
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: June 18, 2002

TO: The Federal Labor Relations Authority

FROM: ELI NASH, Chief
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
FLORENCE, COLORADO

Respondent

and Case No. DE-CA-00043

COUNCIL OF PRISON LOCALS, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, LOCAL 1300, AFL-CIO

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. § 2423.34(b), I am hereby transferring 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

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ 02-45
WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION FLORENCE, COLORADO Respondent and COUNCIL OF PRISON LOCALS AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1300, AFL-CIO Charging Party	Case No. DE-CA-00043

Jennifer A. Schmitt, Esquire
For the Respondent

Nadia N. Khan, Esquire
For the General Counsel

Before: ELI NASH, Chief
Administrative Law Judge

DECISION

Statement of the Case

On January 31, 2000, the Regional Director for the Denver Region of the Federal Labor Relations Authority (herein called the Authority), issued a Complaint and Notice of Hearing in the above-captioned matter. The proceeding was initiated by an unfair labor practice charge filed on October 26, 1999, and amended on January 1, 2001 by the Council of Prison Locals, American Federation of Government Employees, Local 1300, AFL-CIO (Charging Party/Union). The Complaint alleged that the Respondent violated section 7116 (a)(1) of the Federal Service Labor-Management Relations Statute (herein called the Statute), by telling a union representative to stop distributing a flyer advising employees to obtain union representation when talking with Psychologist and Employee Assistance Program Counselor, Kay

Barron. The Amended Complaint alleges that Respondent violated section 7116(a)(1) and (2) of the Statute by initiating an investigation into the protected activity of the union representative, first by the Office of Internal Affairs (herein called OIA), and then by the Special Investigative Service (herein called SIS); issuing the union representative a proposed one day suspension for engaging in protected activity; and by communicating to OIA that the allegation underlying a proposed one day suspension against the union representative was sustained. The Amended Complaint also alleges that the Respondent, through Warden Alvero G. Herrera, independently violated section 7116(a)(1) by the three actions listed above. Finally, the Complaint, as amended at hearing alleges that the Respondent violated section 7116(a)(1) and (4), when the Warden initiated an investigation into the protected activity described above by the SIS; issued the union representative a proposed one day suspension for engaging in protected activity; communicated to the OIA that the allegation underlying the proposed one day suspension against the union representative was sustained.

A hearing was held in the matter in Denver, Colorado. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The Respondent and the General Counsel submitted timely post-hearing briefs which have been fully considered.[1]

Findings of Fact

A. Employees at the Florence Facility Communicate by Using General Bulletin Boards and Hand Delivering Material

Since at least 1992, there have been general bulletin boards that are available to employees to post material of their choosing at the Florence Facility. A general bulletin board is located in each of the staff lounges. There is a staff lounge outside of the secure perimeter of the Facility

[1] Respondent raised several issues in its brief (pp.13-15) concerning whether the undersigned conducted the instant hearing in a "fair, impartial and judicial manner. . . ." In my view, these issues are more appropriately raised with the Authority. Accordingly, I deem it unnecessary for the undersigned to resolve these issues of bias in making a decision in this case. In reviewing the question of whether the instant complaint could be amended at the hearing to include allegations of violations of section 7114(a)(1), (2) and (4) of the Statute, I adhere to the ruling made at the hearing to allow such an amendment.

and another within the Facility located off the main compound. These general bulletin boards are not locked or otherwise secured. They have been used by employees to post advertisements of items for sale, such as boats, dog houses, cars, and houses, and services to be rendered, such as babysitting and moving services. In addition to the advertisements, employees have placed newspaper articles and notices regarding carpools. The Union has also used these boards to solicit membership. In some cases, the notices posted contain personal information about employees, including their names and telephone numbers.

The record reveals that inmates have extremely limited access to the general bulletin boards in the staff lounges. Inmate access is limited to the one to two inmates who are assigned to clean the lounges approximately two to three times a week. These inmates, however, are under constant supervision and are not permitted to linger in the lounges.

In addition to the general bulletin boards located in the staff lounges, there is also a general bulletin board in each of the inmate housing units, including the Norwood Unit. The inmate housing units contain the living quarters for inmates. Within each housing unit is a center office area for staff. The general bulletin board is located in the center office adjacent to the Unit Manager, Secretary, and Case Manager's offices. These general bulletin boards are also not secured or locked. Employees simply post material by using thumbtacks. Common types of material posted include: menu for officer's mess, congratulatory notes to employees who have been promoted or selected for a new position, and notices of births.

Like the staff lounges, inmates also have limited access to the general bulletin boards in the housing units as inmates are only present in the center office area when summoned by a Case Manager, Secretary, or Unit Manager. Again, like the staff lounges, inmates are not permitted to linger in these areas.

There are no Facility Supplements, policies, or guidelines regulating the use of the above-described general bulletin boards. The practice has therefore developed of employees simply posting material of their choosing on these boards for as long as they wish. It is undisputed that Respondent was aware of the employees' usage of the general bulletin boards in the staff lounges. Thus the record demonstrates that Respondent including the Warden, Associate Wardens, Lieutenants, and Captains, use the lounges for conducting roll calls with staff prior to the start of a shift as well as for leisure. Respondent has also placed

materials on the general bulletin boards and observed employees doing so. There is no evidence showing that Respondent questioned any employees regarding their use of the general bulletin boards, prior to the incident which gave rise to the instant matter.

A practice of hand delivering material to other employees during duty hours has also developed at the Facility. There are no guidelines or policies regulating the hand distribution of material. It has, therefore, become a common practice for employees to hand deliver material, including notices of parties or information regarding various issues such as privatization of prisons. This practice was known to Respondent since it also was the recipient of such materials and it distributed materials in the same manner.

There is no evidence that any employee has ever been investigated or disciplined for posting flyers on general bulletin boards or hand distributing flyers.

B. Dennis R. Turner Distributes a Flyer as Part of His Representational Duties

Dennis R. Turner is employed as a Correctional Counselor at the Facility. He has worked for the Facility since November 1992 and is currently assigned to the Norwood Unit. Turner has been a member of the Union since 1992. From October 1998 until sometime in 1999, Turner served as a Trustee for the Union. Sometime in 1999, Turner was elected to the position of Vice President of the Union which is the position he continues to hold today at the time of the hearing in this matter.

Turner's primary duty as Trustee, was to represent bargaining unit employees; however, he also provided assistance to the President and the Vice President regarding union related matters. As Trustee, Turner was given full discretion to operate on behalf of the Union. As the Union's President, Flake Owen offered uncontroverted testimony that members of the Executive Board are seasoned union representatives who act fairly independently. In his role, Turner was responsible for making decisions regarding the manner and scope of representation to provide to employees. Turner, however, was not authorized to act on behalf of the Union in signing agreements that would bind the Union and invoking arbitration. The latter duties were exclusively those of President Owen.

On or about October 19, 1999, Turner was contacted by unit employee Paltier and asked to serve as Paltier's union

representative during a scheduled meeting with Warden Herrera. Turner agreed to act as Paltier's union representative. Turner met Paltier prior to their meeting with the Warden. At that time, Paltier suggested that he believed he was having difficulties because of a conversation he had with Dr. Kay Barron, a Clinical Psychologist at the Facility. Barron also served as an Employee Assistance Counselor. It is unclear from the record as to when Barron actually had the conversation with Paltier that he related to Turner. Turner testified that he thought Paltier spoke to Barron in her capacity as a Psychologist. Associate Warden Mundt and Benita Spaulding, Assistant Human Resource Manager, had no direct knowledge of the nature of Paltier's communication with Barron. Spaulding testified that she was under the impression that Barron was present at the meeting with the Warden to ensure that Turner understood the fitness for duty letter Respondent prepared for Turner. During their meeting that lasted approximately 10 to 15 minutes, Turner and Paltier met with Associate Warden Robert Mundt, Associate Warden Paula Jarnecke, Warden Alvero Herrera, Gilbert Lyde, Paltier's supervisor, and Barron. Warden Herrera specified that there were some concerns about Paltier's psychological stability and, as a result, Paltier was being placed on administrative leave until he had a fitness for duty evaluation.

After leaving the meeting, Turner and Paltier went to the parking lot where he told Paltier that he would visit him later that day at his home. When they did meet later, Paltier told Turner that it was because of a casual conversation he had with Barron that he was in his current situation. Based on his conversation with Paltier, Turner decided that as a union representative he needed to take some action to notify employees that they could also be placed on home duty, be required to take a fitness for duty physical, and possibly a determination of whether they would be able to return to work, if they spoke to Barron.

Around October 20, 1999, Turner arrived at work prior to his shift, between 10:30 a.m., and 11:30 a.m. Turner went to the Union office and created a flyer which read "IF YOU TALK WITH KAY BARRON YOU BETTER HAVE A UNION REPRESENTATIVE." Turner testified that he created the flyer as an advertisement to other bargaining unit employees to be on guard when speaking to Barron. He considered the flyer to be an extension of employees' *Weingarten* rights as it relates to formal and informal discussions and that it was his responsibility as a union representative to protect employees by putting them on notice of their right to have a union representative. Turner also said that the flyer was

not intended to be all inclusive; rather, he expected that employees would call the Union and the Union could then decide after having a discussion with the employee whether an employee needed to have a union representative during an interview. Turner testified that he in no way intended to harm Barron or to hinder any employees from seeking the assistance of Barron or the EAP program.

Turner testified that because he had only a short period of time to create the flyer, he used the paper that was available in the Union office. Turner further stated that since he was well known as a union representative by employees and he planned to hand distribute the flyer, he thought it was unnecessary to sign the flyer.

Turner posted a flyer on the general bulletin board in the staff lounge off the main compound of the Facility and on the general bulletin board in the Norwood Unit where he worked. Turner had previously used these bulletin boards to post material on two or three other occasions. Turner also hand delivered the flyer to a couple of employees, including Thomas Burke, in the Inmate Systems Management (ISM) area which is adjacent to the compound. The ISM area is a highly restricted area which is used to process inmates upon their arrival and departure from the Facility. Inmates are not routinely left unattended in this area. Turner also hand delivered the flyer to several employees who were working on the compound. All this was done before Turner reported for his shift which began at 12:30 p.m.

C. Respondent Learns of the Distribution of the Flyer

Burke, one of the employees in the ISM, reported the flyer to Associate Wardens Mundt and Jarnecke. Burke was asked by Associate Warden Jarnecke to prepare a memorandum in which he opined that he found the flyer to be "offensive and unprofessional." Supervisor Leann LaRiva, Unit Manager for the Norwood Unit and Turner's supervisor, also saw the flyer posted on the general bulletin board in the Norwood Unit. LaRiva removed the flyer and instructed staff in the immediate area not to post such flyers. LaRiva prepared and submitted a memorandum to Associate Warden Jarnecke stating that the flyer was inappropriate and was in plain view of inmates entering and exiting the staff offices. Barron also contacted the Associate Wardens and the Warden about the flyer. Burke and Barron were the only two employees who reported the flyer to Respondent.

Upon learning about the flyer, Associate Warden Jarnecke immediately reported it to the Warden. Jarnecke, Associate Warden Mundt and the Warden agreed that the flyer

appeared to be inappropriate, that they wanted the distribution stopped, and any such flyers removed from the Facility.

D. Turner and Other Union Representatives are Questioned About the Flyer

Turner testified that LaRiva told him to report immediately to the food service area which was located approximately 60 to 70 yards from his office to meet with the Associate Wardens. Jarnecke said that they decided to call Turner and ask him to come to the dining hall. Associate Warden Mundt, says that they happened to see Turner at the dining hall and then asked him to come to their office. Once Turner met with Associate Wardens Mundt and Jarnecke, he was told that they did not want to speak to him in the food service area and that he needed to go with them to their office located approximately 60 to 70 yards away in another building. Mundt says that Turner was instructed to come to his office because they intended to counsel him. Since it was between 12:30 p.m., and 1:00 p.m., the compound was full of staff and inmates. Turner testified that the Associate Wardens positioned themselves on either side of him and escorted him slowly down the center of the compound to their office as staff and inmates alike watched. Neither Associate Warden said anything to Turner during the walk. Turner testified that he felt he had been apprehended since the manner in which he was escorted is routinely used to escort employees out of the Facility when they are accused of misconduct. This feeling apparently was shared by other staff and inmates who later questioned him as to whether he had done something wrong.

When he arrived at the Associate Warden's office, Turner was questioned for about 15 minutes by the two Associate Wardens regarding the distribution of the flyer. Turner admitted to the distribution of the flyer and told the Associate Wardens that the distribution of the flyer was an extension of his representation of Paltier. Jarnecke then ordered Turner to stop distributing the flyer under the authority of the Bureau of Prisons. Turner agreed to stop distributing the flyer and thought the matter was resolved. Mundt testified that he questioned Leah Ann Tucker a union representative, regarding the flyer and both denied any knowledge of the flyer. The order of their questioning, while not material, is not clear from the record.

Union President Owen was also summoned to Mundt's office where Jarnecke was also present for part of the meeting. Mundt questioned Owen about the flyer, which at

that time, Owen had no knowledge of the flyer and had never seen a copy of the flyer. Owen, therefore, asked Mundt to explain what he was referring to; however, Mundt refused, stating that he could not discuss the matter because there was an investigation.

When Owen encountered Turner later on, he relayed the meeting with the Associate Wardens. According to Owen, he learned that Turner had distributed the flyer because Turner believed that Barron had disseminated information to Respondent which lead to an employee (Paltier) being placed on home duty. Turner also told Owen that he was also questioned about the flyer and told to stop distributing it which he agreed to do.

Owen testified that upon learning about the circumstances surrounding Turner's distribution of the flyer -- Turner's representation of an employee who was placed on home duty -- he determined that all Turner was doing was "telling folks about their *Weingarten* rights. Hey, you know, if you want to talk to some folks, take a union rep with you." Owen confirmed that Turned had acted in his capacity as a union representative.

On October 20, 1999, Jarnecke prepared a memorandum to the Warden regarding the posting of the flyer by Turner. The memorandum recounted the meeting with Turner, noting that Turner was instructed to cease the distribution of the flyer and that Turner replied that as an official representative of the local union, he had the right to notify bargaining unit employees of their *Weingarten* rights. The memorandum failed to state that Turner agreed to stop distributing the flyer. The memorandum did note, however that both President Owen and Chief Steward Tucker denied any involvement in the distribution of the flyer.

On October 21, 1999, Owen sent a memorandum to Mundt apparently too follow-up on their conversation the previous day. Owen expressed support for Turner's actions as a union representative and stated, among other things, that ". . . we support information that advises all bargaining unit staff of their rights. . . . We support that all staff be aware of the representation that is afforded to them with 5 U.S.C. and the Master Agreement."

E. Warden Herrera Refers the Matter to OIA

Warden Herrera said that when there is an allegation of unprofessional conduct or misconduct, he instructs the SIS to conduct a preliminary investigation before referring the matter to OIA. There is no evidence that such a preliminary

investigation was conducted in this case, however. Warden Herrera maintained that it was common for employees to be referred to OIA for alleged conduct violations. After the matter is referred to OIA, it can be referred back to the Facility for local investigation depending on the severity of the allegation and the pending workload of the OIA. A Warden, however can insist that the OIA conduct an investigation. Warden Herrera also stated that he has no discretion to decline to go forward with an investigation once it is referred back to the Facility by OIA.

According to Warden Herrera, on October 21, 1999 he referred Turner's distribution of the flyer to OIA. The Warden testified that he thought the flyer was a personal attack on Barron, a psychologist who was also part of the EAP program. Furthermore, the Warden claimed that Barron was aware of the flyer and was distraught over the matter, and felt that an outside entity should look into the situation. He thus prepared an incident report to the OIA alleging unprofessional conduct/retaliation or discrimination against an employee reporting a violation of standards of conduct. Sources of the allegations were listed as: LaRiva and Burke. The summary of the incident noted, among other things, that the flyer was in plain view of staff and inmates and that the flyer was found to be inappropriate, highly offensive, and unprofessional.

According to Warden Herrera, after some time had passed and the case remained pending, he spoke to Doug Hill, Chief, OIA, who informed him that the OIA had quite a workload so he offered to conduct a local investigation of the Turner case so that OIA would be able to investigate another case of higher severity. There is no documentary evidence to support any exchange of this sort between Warden Herrera and the OIA. According to the Warden, OIA did indicate that the case was without prosecutorial merit. Additionally, an investigative report dated February 28, 2000, prepared by Lieutenant Antonio Salas, SIS Supervisor, concluded in regard to the Turner incident that "OIA determined that the matter was without prosecutorial merit" and it was subsequently referred to FCI for administrative resolution on November 19, 1999. In spite of OIA's conclusion that the case was without prosecutorial merit, the Warden states that he did not have discretion to not proceed with the investigation.

On October 26, 1999, the Union filed the unfair labor practice charge.

F. **Warden Herrera Refers the Matter to SIS**

Turner and Owen first became aware that an investigation was underway regarding Turner's distribution of the flyer sometime in early February 2000. At that time, Turner was contacted by Salas. Because of scheduling conflicts, no time was set for Turner to be interviewed. On February 3, 2000, however, Salas approached Turner while he was in a training session and told him that he needed to meet with him. Turner requested to meet with Salas after the training was over, but was told by Salas that he needed to speak to him now. Turner was escorted from the area and taken to Salas' office for the investigative interview. Turner requested Owen to serve as his union representative during the interview. When Owen arrived, he informed Salas that he was there as Turner's union representative. Salas informed Turner and Owen that the investigation was "getting to be a pain to him," that he did not want to do the investigation, and that he was ordered to do it. Salas further stated that he didn't see any merit to the investigation, but he was going to proceed since he was ordered to do so. Salas informed Turner that he was being charged with unprofessional conduct relating to the distribution of the flyer. Salas then proceeded to question Turner regarding the flyer. Salas asked about the circumstances that lead to the creation of the flyer, whether it was an impulsive thing, or whether it was something that was thought out or planned. In response to the questions, Turner admitted creating and distributing the flyer and explained that it was an extension of his representational duties to do so. The interview lasted approximately 30 to 45 minutes, after which Turner signed and received a copy of an affidavit that Salas prepared during the interview.

On February 16, 2000, Turner provided an affidavit to the Authority in connection with the unfair labor practice charge.

On February 28, 2000, Salas submitted his investigative report regarding Turner's alleged unprofessional conduct in connection with the distribution of the flyer to the Warden.

The investigative report stated, in part:

> While it is agreed the Union and it's representatives have the right to keep constituents advised of these [Weingarten] rights, it is required to do so in a professional and responsible manner. The flyers which were distributed, well intended as they allegedly were, did not do so. They identified a single employee, did not acknowledge her official capacity or

> duties, and did not explain what manner of conversations with this individual might require Union representation. . . . This sort of propaganda projects a message of mistrust and paranoia to employees, and rather than being a positive means of informing employees of their rights, becomes an attempt to single out and ostracize an individual. Based on all available information, the allegations of Unprofessional Conduct against Counselor Dennis R. Turner are sustained.

G. Turner is Issued a Proposed One Day Suspension

On April 10, 2000, Gilbert Lyde, who replaced LaRiva in January 2000 as Turner's supervisor, issued Turner a Notice of Proposed Suspension for one day for Unprofessional Conduct. The notice was dated April 7, 2000. Turner had no prior warning that he was going to receive the proposed disciplinary action. The proposal stated that Turner's distribution of the flyer violated Program Statement 3420.08, Standards of Employee Conduct which states that it is essential to the orderly running of any Bureau that employees conduct themselves professionally.

Also on April 10, 2000, Turner prepared a written response to the proposed suspension and submitted it to Lyde. The response stated, among other things, that the proposal did not address how his conduct in connection with the flyer is or was unprofessional, nor does it mention how the conduct interfered with the mission of the facility or agency. Turner further stated that his actions were protected union activity.

On May 18, 2000, Turner received a response to his April 10, 2000 letter from Benita Spaulding, Assistant Human Resource Manager signed by the Warden. The letter stated, in part, that:

> Ms. Barron is a Clinical Psychologist, as well as an Employee Assistance Program (EAP) Counselor. The EAP is available to staff with alcohol and drug abuse, personal/emotional, financial, martial, and other personal or family problems. As an EAP Counselor, Ms. Barron interviews employees and assesses the nature of their problem (s). As a result of you distributing this flyer, Ms. Barron's credibility *could have been diminished* as an EAP Counselor. (Emphasis added)

The letter stated that no action would be taken on the notice of proposed disciplinary action.

On May 25, 2000, Warden Herrera submitted a memorandum to Paul Copenhaver, Special Agent, OIA, requesting that OIA close the investigation. Warden Herrera attached a copy of the SIS investigative report. In his cover memorandum, Warden Herrera stated the following:

> I agree with the findings, *the allegation of Unprofessional Conduct has been sustained against Counselor Turner*. I have decided to take no disciplinary action. No further action is required and I am considering this matter closed. (Emphasis added)

Warden Herrera's memorandum is now maintained by the OIA as part of its records.

H.___Respondent's Asserted Reasons for its Actions

Mundt and Spaulding testified that the flyer violated the master agreement between the Federal Bureau of Prisons and the Council, dated March 1998. Specifically, Article 7 (Rights of the Union), Section (n) of the agreement which provides:

> The parties agree that they and their representatives will not make statements or post notices in inmate access areas which would endanger staff or the security of the institution.

Mundt testified that Turner violated the above-referenced provision of the contract by putting Barron's name in the flyer. According to Mundt, Barron, who was not called by the Respondent to testify, told him that by putting her name in the flyer it attacked her character and implied that every time an employee saw her, there would be disciplinary or adverse action since union representation is usually needed with those types of actions.

Mundt, Spaulding, and LaRiva all acknowledged that they had no knowledge of any inmates who actually saw the flyer.

Spaulding also testified that the flyer violated Article 12 (Use of Official Property), Section (c) of the contract which provides the following:

> The use of Employer bulletin boards, office space, and office equipment is negotiable at the local level. It is understood that such use of these

items is expected to promote efficient labor management relations. . . .

Jarnecke stated that she was most concerned that the flyer was not only a personal attack on Barron, but also an attack on the confidentiality of the EAP program because Barron administered the program. Also Jarnecke says that she thought employees would wonder if they had to take a union representative with them to talk to a psychologist about marital or financial difficulties.

The EAP provides a confidential forum for employees to seek assistance with personal problems. The psychology staff, rather than counseling employees, serves as a referral source to services in the community that can provide care to the employees. Confidentiality is maintained of information communicated by employees to the EAP staff unless: (1) the employee expresses an intent to hurt someone in the workplace or, (2) exhibits behavior that causes concern about the employee's ability to safely respond to an emergency at the Facility or otherwise threatens the security of the Facility. If either of the two exceptions to confidentiality applies, the EAP staff is required to report the information to the Warden.

I. Respondent's Customary Methods of Communicating with Bargaining Unit Employees

The evidence established that Respondent normally communicates with bargaining unit employees through the use of official bulletin boards which are strictly controlled by Respondent and are secured behind lock and key. One such bulletin board is located next to the Warden's office. Another is maintained by Human Resources, which includes such information as vacancy announcements, thrift savings plan information, and insurance information.

Respondent also uses the LAN computer system to communicate with bargaining unit employees. The same type information posted on the bulletin boards is sent over the LAN system. Such information includes: notification of births and deaths, meetings for official purposes, meeting sponsored by employee organizations, sale of tickets, notices from Respondent regarding the duty officer and assignments, and vacancy announcements.

Television monitors are also used by Respondent to communicate with bargaining unit employees. There are three such monitors: one is located at the front of the Facility by the control center; a second is situated in the staff lounge; and a third monitor is located at the Federal Prison

camp (the Federal Prison camp is operated by the Facility). These monitors contain the same type of information that is sent by email or posted on the bulletin boards. The information includes: announcements of the duty officer for the week and congratulations to employees on promotions.

Analysis and Conclusions

A. Did Respondent Violate Section 7116(a)(1) of the Statute by Telling Union Representative Turner to Stop Distributing a Flyer in Which He Advised Employees to Obtain Union Representation When Talking with Kay Barron, a Psychologist and Employee Assistance Program Counselor at the Facility

It is well settled that Federal employees have the right to publicize matters affecting unit employees' terms and conditions of employment. *See, Scott Air Force Base, Illinois*, 34 FLRA 1129, 1135 (1990)(*Scott AFB*).

The right to publicize matters affecting employees' terms and conditions of employment includes instances where employees distribute handbills or literature on behalf of an exclusive representative in non-work areas during non-work times. *See, General Services Administration*, 27 FLRA 643, 645-46 (1987)(*GSA*); and *Internal Revenue Service, North Atlantic Service Center, Andover Massachusetts*, 7 FLRA 596, 597 (1982)(*IRS*). This right may also be expanded by past practice to include distribution during work times. *See, Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 43 FLRA 318, 328 (1991) (*DHHS*).

A union may also establish through past practice, the right to use an employer's property (i.e., bulletin boards) as the means of communication. Where the right of access to agency property has been established by past practice, an employer would reasonably tend to discourage union activity in violation of section 7116(a)(1) of the Statute if it discriminatorily denied a union the use of an agency bulletin board or other public area (*Department of Defense Dependents Schools, Mediterranean Region, Naples American High School (Naples), Italy*, 21 FLRA 849, 850, 863-64 (1986) (*DODDS*); or where the agency removes union material from the employer's property where the union had been permitted to post notices and the posted material meets the employer's established standards. *Department of Labor, Office of Workers' Compensation Programs, Branch of Special Claims*, 11 FLRA 77, 83 (1981)(citing *Container Corporation of America*, 244 NLRB 318 (1979), enforced in relevant part, 649 F.2d 1213 (6th Cir. 1981)). *See, Scott AFB*, 34 FLRA at 1136.

Turner credentials as a union representative were not challenged. Neither was it questioned that Turner was representing Paltier at the time he prepared the flyer herein. The record reveals that Turner was responsible for making decisions as to the manner and scope of representation to provide to employees. The record also shows that the Union's President Owen supported Turner's action of distributing the flyer. Thus, in the Union's view, Turner was acting as a union representative when he distributed the flyer. Usually, action undertaken in the capacity as a union representative is protected conduct. *See, Federal Bureau of Prisons, Office of Internal Affairs, Washington, D.C.*, 53 FLRA 1500, 1516 (1998). In my opinion, the instant record clearly shows Turner was acting in his capacity as a union representative at the time he distributed the flyer in this case, and that the flyer was union literature.

Turner's flyer was placed on two general bulletin boards -- one in a staff lounge and the other in the Norwood Unit. It is unchallenged that there are no Facility policies, supplements, or guidelines regulating the use of these boards. Further, since at least 1992, a practice developed of employees using these boards to post material of their choosing, including advertisements of items for sale and services provided. The evidence is also clear that Respondent was aware that this practice existed and prior to the incident in this case took no action to restrict the use of the bulletin boards used by Turner to post his flyers. These circumstances point to a conclusion that the Union had a right to post its flyer on these general bulletin boards. *DODDS*, 21 FLRA at 849.

The record also clearly discloses that employees were permitted to distribute material in the workplace during duty hours. Thus, no Facility guidelines or policies regulated the hand distribution of material. To the contrary, it was shown that a common practice existed of employees hand delivering material, including notices of parties or information regarding various issues such as privatization of prisons. Respondent was the recipient of these materials and itself distributed materials in this same manner, so it can hardly deny the existence of this practice. Accordingly, it can only be concluded that the Union was permitted to hand-distribute its flyer to employees consistent with established past practice. *DHHS*, 43 FLRA at 318.

The right to distribute union literature is not absolute, however. The content of such literature may

justify its restriction. *See, for example, Veterans Affairs Administration Medical Center, Cincinnati, Ohio*, 26 FLRA 114 (1987)(*Veterans Affairs*), *aff'd* sub nom. *American Federation of Government Employees, Local 2031 v. FLRA*, 878 F.2d 460 (D.C. Cir. 1989). Union literature containing offensive remarks does not automatically lose the protection of the Statute, since such protection is not limited to comments that can be condoned. *See*, *Department of the Navy, Naval Facilities Engineering Command, Western Division, San Bruno, California*, 45 FLRA 138, 155 (1992)(*NFEC*). In the words of the Supreme Court, " . . . federal law gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point." *See, Old Dominion Branch No. 46, National Association of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 283 (1984). In order to lose its protected status the content of the distributed literature must constitute "flagrant misconduct." *See, NFEC*, 45 FLRA at 155-56.

Respondents' argument that Turner's flyer did not constitute protected activity because it did not inform employee[s] of the *Weingarten*[2] rights misses the mark. This attempt to recast the matter by arguing that this is a *Weingarten* case does not give the matter its due. This case has nothing to do with Paltier's rights during an interview. It involves the right of a union representative to engage in protected activity by keeping bargaining unit members informed by posting messages on appropriate bulletin boards. There is also no contention by Respondent that the flyer was indeed "flagrant misconduct" which would remove the flyer from the ambit of protected activity. Respondent, however, joined in that issue by contending that Turner was not engaged in protected activity when he distributed the flyers referencing Barron.

Based on the foregoing, it is concluded that the record supports a conclusion that the content of the flyer was protected activity and that Respondent did not have a legitimate justification for initiating the OIA investigation based on the posting of the flyers.

As already mentioned, Respondent based a portion of its defense on the parties' collective bargaining agreement. Where a Respondent claims as a defense to an alleged unfair

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[2] *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975), the model for section 7114(a)(2)(B) of the Statute, which mandates the right of exclusive representative to be given the opportunity to be represented at investigatory examinations of unit employees under certain circumstances.

labor practice that a specific provision of the parties' collective bargaining agreement permitted its actions alleged to constitute an unfair labor practice, the Authority, including its ALJs, will determine the meaning of the parties' collective bargaining agreement and will resolve the unfair labor practice complaint accordingly. The Authority also held that in resolving these cases it will apply the same standards and principles in interpreting collective bargaining agreements as applied by arbitrators in both the Federal and private sectors and the Federal courts under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. "The focus will be on the interpretation of the express terms of the collective bargaining agreement. . . . The parties' intent must be given controlling weight, 'whether that intent is established by the language of the clause itself, by inferences drawn from the contract as a whole, or by extrinsic evidence'. . . . Furthermore, in determining the meaning of the collective bargaining agreement, the administrative law judge should consider, as necessary, any alleged past practices relevant to the interpretation of the agreement." *Id.* at 1110 (citations omitted); *See also, Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1167 (1993); and *U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C.,* 52 FLRA 256 (1996).

Respondent points to two separate provisions of the collective bargaining agreement. The first, Article 7 (Rights of the Union), Section (n) of the agreement provides as follows:

> The parties agree that they and their representatives will not make statements or post notices in inmate access areas which would endanger staff or the security of the institution.

Although Respondent cited neither of the above contract articles in disciplining Turner, it now contends that the flyer violated the above-referenced provision because it did not "promote efficient labor-management relations" and, as explained by Spaulding, could have been a threat to the bargaining unit employees. First, the plain language of the provision refers to the use of agency property that is negotiated at the local level. The instant matter does not involve the use of equipment that was negotiated between the parties; rather, it involved the hand-distribution of the flyer and the use of general bulletin boards -- rights of all employees which were created in this matter through past practice. Accordingly, section (c) is inapplicable in this

case. Even if section (c) was applicable, Respondent admittedly has never sought to enforce this provision of the agreement through the grievance machinery.

Assuming Respondent's argument has any validity it still fell short of showing that Article 7 was applicable to the situation in this case. The plain language of section (n) prohibits notices which would endanger staff or the security of the Facility. There is no mention in the agreement of prohibiting names in a notice. Nor is there any evidence revealing that the flyer endangered staff or the security of the Facility. Instead, the record indicates that the general bulletin boards used to post the notices were located in highly restricted areas where inmates have only limited access. Furthermore, there is no evidence showing how staff would be endangered. Thus, only two employees complained about the flyer and neither asserted that the flyers were a threat to them or to the Facility. Accordingly, it is reasonable to conclude that there is no evidence demonstrating that Article 7, Section (n) plays any part in this case.

Respondent next relies on Article 12 (Use of Official Property), Section (c) of the contract which provides as follows:

> The use of Employer bulletin boards, office space, and office equipment is negotiable at the local level. It is understood that such use of these items is expected to promote efficient labor management relations. . . .

Respondents' witness Spaulding suggested that the flyer violated the above-referenced provision because it could have been a threat to the bargaining unit employees by stating that they better speak to a union representative. Spaulding acknowledged that Respondent had never filed a grievance alleging a violation of Article 12, Section (c) of the master agreement, however. Furthermore, Spaulding admitted those contract violations are not referred to the OIA for investigation.

Having acknowledged that violations of the agreement are not referred to OIA it nonetheless pursued action against Turner for doing something that seemingly had never before been found improper. Accordingly, Respondent's reliance on the provisions of the collective bargaining agreement only supports a conclusion that its asserted reasons for its actions herein are pretextual. *See, Pennsylvania State Office*, 53 FLRA at 1635. Accordingly, it is found that Respondent's assertion that somehow Turner's

action in circulating the flyers was a violation of the collective bargaining agreement was not genuine.

Based on the foregoing, it can only be concluded that the posting and hand-distribution of the flyer by Turner are protected activity within the meaning of the Statute. Accordingly, Respondent violated section 7116(a)(1) of the Statute when LaRiva removed the flyer from the Norwood Unit bulletin board[3] and when Associate Wardens Mundt and Jarnecke ordered Turner to stop distributing the flyer.

B. Did Respondent Violate Section 7116(a)(1) and (2) by Initiating an Investigation Into the Protected Activity of Union Representative Turner by the Office of Internal Affairs (OIA) and Then by the Special Investigative Service (SIS); and by Issuing Turner a Proposed One Day Suspension for Engaging in Protected Activity; and by Communicating to the OIA that the Allegation Underlying the Proposed One Day Suspension Against Turner Was Sustained

The General Counsel argues that the evidence established a violation of section 7116(a)(1) and (2) of the Statute when Respondent engaged in a course of conduct based solely on consideration of Turner's protected activity by initiating an investigation by OIA and by SIS into Turner's protected activity; by proposing a one day suspension because Turner engaged in the protected activity; and, then informing OIA that the allegations underlying the proposed one day suspension were sustained.

Respondent contends that the General Counsel failed to establish a *prima facie* case by a preponderance of the evidence since the flyer Turner distributed was not protected activity because it did not inform bargaining unit employees of their *Weingarten* rights and because Turner violated the limitation placed on him by the Master Agreement. Finally, Respondent claimed Turner suffered no adverse action as a result of distributing the flyer.

Respondent also asserts that the posting of the flyers constituted unprofessional conduct under the Standards of Employee Conduct. This claim must be evaluated under case law regarding whether an employee was engaged in flagrant misconduct and thus, provide a legitimate reason for the disciplinary action it took against him. Respondent

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[3] Although not specifically alleged in the Complaint, the General Counsel asserts in its brief that the removal of the flyers also violated section 7116(a)(1) of the Statute and that such a violation is incorporated in the allegation that Respondent violated the Statute by telling Turner to stop distributing the flyer. I disagree.

however, failed to address whether Turner was engaged in protected activity, but simply relies on agency policy. It is clear that Respondent suspended Turner for violating the Standards of Employee Conduct and disregarded his claim that he was acting in a representational capacity at the time he posted the flyers. The proposed notice of suspension, makes it abundantly clear that Respondent judged Turner's conduct only as an employee and never considered that he was a union official engaged in protected representational activities. In so doing, Respondent acted at its peril.

The pivotal issue here is whether Turner's conduct was within the ambit of protected activity. *See for example*, *Veterans Administration Medical Center, Bath, New York and Veterans Administration, Washington, D.C.*, 12 FLRA 552 (1983); *Internal Revenue Service*, *Washington, D.C.*, 6 FLRA 96 (1981). Certainly outrageous and insubordinate conduct may remove conduct from the protection of the Statute. *U.S. Air Force Logistics Command, Tinker Air Force Base, Oklahoma City, Oklahoma and American Federation of Government Employees, Local 916*, 34 FLRA 385, 389-90 (1990).

Heretofore, the Authority has balanced the employee's right to form, join, or assist any labor organization, or to refrain from such activity, without fear of penalty or reprisal, with the right of an agency to discipline an employee who is engaged in otherwise protected activity for remarks or actions that exceed the boundaries of protected activity such as flagrant misconduct. *American Federation of Government Employees, National Border Patrol Council and U.S. Department of Justice, Immigration and Naturalization Service, El Paso Border Patrol Sector*, 44 FLRA 1395 (1992). Clearly a union representative may use intemperate, abusive, or insulting language without fear of restraint or penalty, if he or she believes such rhetoric to be an effective means to the Union's point. *Department of the Navy, Naval Facilities Engineering Command*, *Western Division, San Bruno, California*, 45 FLRA 138, 155 (1992)(quoting *Old Dominion Branch No. 46, National Association of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 283 (1984)).

In deciding whether an employee has engaged in flagrant misconduct, the balance clearly permits leeway for impulsive behavior against the employer's right to maintain order and respect for its supervisory staff in the workplace. In striking this balance, the Authority considers the following: (1) the place and subject matter of the discussion; (2) whether the employee's outburst was impulsive or designed; (3) whether the outburst was in any way provoked by the employer's conduct; and (4) the nature of the intemperate language and conduct. *Department of the*

Air Force, Grissom Air Force Base, Indiana, 51 FLRA 7, 11-12 (1995)(referring to *Department of Defense, Defense Mapping Agency, Aerospace Center, St. Louis, Missouri*, 17 FLRA 71, 80 (1985) and *Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington*, 2 FLRA 54, 55 (1979)).

Turner's flyer stated: "If you talk with Kay Barron you better have a union representative." Turner's testimony that he created the flyer after what he had heard from Paltier about a casual conversation with Barron, while he was representing Paltier is uncontroverted. It is also clear that Turner offered this reason to Respondent. Consequently, at the time Turner created the flyer, it was his belief that Barron had violated the confidentiality of a communication with them. In the first place, the evidence certainly does not reveal either the EAP program or Barron's ability to perform her duties were affected by the posting of these flyers on the general bulletin boards.

Second, Turner's actions did not give any indication that it was preplanned or otherwise designed. Instead one can reasonably conclude from the evidence that Turner created and post/distributed the flyer immediately upon his return to work after talking to Paltier. Turner's testimony indicates that he felt a sense of urgency to notify employees of their right to have a union representative when talking to Barron. As a result, Turner acting hastily used the paper that was available to him to create the flyer, posted it on two bulletin boards, and hand-delivered it to a few employees before reporting for duty.

Third, Turner's conduct was provoked by Respondent. Turner testified that Barron was Acting Chief Psychologist at the time she allegedly disclosed the information to Respondent that was conveyed to her by Paltier. It was this disclosure that prompted Turner to warn employees to take a union representative with them when they spoke to Barron.

Fourth, Turner's conduct did not exceed the broad scope of intemperate behavior that remains within the ambit of protected activity. Here, it is useful to look at the language of the flyer: "If you talk with Kay Barron you better have a union representative." As previously explained, this language did not affect the Respondent's right to maintain order and respect for its supervisory staff. Rather, Respondent viewed the language as "inappropriate, offensive, and unprofessional." As stated in *Air Force Flight Test Center, Edwards Air Force Base, California*, 53 FLRA 1455, 1464 (1998) labels do little to help place behavior in its appropriate position on the spectrum of protected-to-excessive conduct. The employee in

desisted as soon as he became aware of the presence of others, weighed heavily in favor of protecting his conduct. *Id.* at 1464-65. While the content of the flyer here may have hurt Barron and offended others, there is no evidence to support a finding that the agency's right to maintain order and respect for its supervisory staff was affected, especially since Turner desisted from posting/distributing the flyer once ordered to do so by the Associate Wardens. *See also, Bureau of Indian Affairs, Isleta Elementary School, Pueblo of Isleta, New Mexico*, 54 FLRA 1428 (1998).

Although the record is unclear as to whether Barron was acting as a Psychologist or as an EAP Counselor at the time of the alleged communication to Paltier, it is certain from their testimony that both Paltier and Turner understood that the conversation with Barron was confidential and would not be reported to Respondent. According to the record, as a Psychologist and EAP Counselor, Barron is required to reveal to Respondent information communicated to her by staff if: (1) the employee expresses an intent to hurt someone in the workplace or, (2) exhibits behavior that causes concern about the employee's ability to safely respond to an emergency at the Facility or otherwise threatens the security of the Facility. These exceptions to the confidentiality of communication with Barron which employees might not be aware of, raised in Turner's view, a need to inform employees that it might be useful to have a union representative present when talking with Barron.

While the flyer certainly mentioned Barron's name, it contained no derogatory or defamatory statements about Barron or the position/s she held. As in *Federal Aviation Administration Honolulu, Hawaii*, 53 FLRA 1762, 1773-74 (1998)(*FAA*), there is no basis for the undersigned to conclude that the union falsely stated or recklessly disregarded the actual facts and circumstances that occurred. Nor is there any suggestion of a disruption to agency operations as a result of the flyer. Indeed there is no hint in the record that Turner's actions were motivated to harm either Barron or the EAP program by posting the flyers. Again it is worthy of note that there is no evidence showing that the flyer was seen by any inmates and it was posted in areas where inmates have limited access. Furthermore, it appears from the record that the flyer was posted on general bulletin boards where employees had a practice of posting material of their choosing, including personal information. This use of the general bulletin board created, in my opinion, a past practice with respect to the use of those bulletin boards. Accordingly, there is no support for a showing that Barron's ability to perform her duties as a Psychologist to inmates was harmed.

Actually the flyer made no mention of the EAP program. Finally, Respondent failed to present any evidence of harm caused to the program as a result of the flyer. Respondent speculated that the flyer contained Barron's name, attacked her character and, implied that every time an employee saw Barron there would be disciplinary or adverse action since union representation is usually needed with those types of actions. This argument is unfounded, particularly since Respondent offered no evidence to support its contention that the flyer was such an attack on Barron. *See*, *IRS*, 7 FLRA at 596-97; *NFEC*, 45 FLRA at 138. Moreover, Barron did not testify, so we have no indication of the impact that the flyer had on her personally, or on the EAP program other than the unsupported speculation offered by Respondent.

The measure used in resolving complaints of alleged discrimination in violation of section 7116(a)(2) of the Statute places on the General Counsel the overall burden of establishing 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, promotion, or other conditions of employment. *See, Letterkenny Army Depot*, 35 FLRA 113 (1990)(*Letterkenny*); *Department of the Air Force, Warner Robins Air Logistics Center, Warner Robins Air Force Base, Georgia*, 52 FLRA 602, 605 (1996). Where a *prima facie* case is established, the burden shifts to the agency. The agency then 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.; see also, Indian Health Service, Crow Hospital Crow Agency, Montana*, 57 FLRA No. 32 (2001)(*Indian Health Service)*.

The first element of *Letterkenny* is satisfied since Turner was the designated union representative of a bargaining unit employee, Paltier. Turner thus served as Paltier's representative at a meeting with Respondent concerning Paltier being placed on administrative leave and ordered to take a fitness for duty evaluation. It was in this capacity -- as Paltier's union representative -- that Turner created a flyer using the Union's equipment and, subsequently, posting and hand-distributing the flyer. The flyer was supported by the President of the Union and was created because, as Turner testified, he wanted to protect other bargaining unit employees from receiving the same fate as Paltier by informing them of their right to have a union representative. Under these circumstances, it is again concluded that Turner was engaged in protected activity when

he created the flyer and that flyer constituted union literature which the Authority has found to be protected activity. *See for example, FAA,* 53 FLRA at 1773-74.

The second element of *Letterkenny* that the protected activity must have been a motivating factor in the agency's treatment of the employee is also satisfied. The evidence is abundantly clear that no policies or guidelines regulating either the use of bulletin boards or the hand-distribution of material existed at the Facility. There is also an undisputed past practice of employees positing and hand distributing a variety of material, including advertisements, articles, and congratulatory notes on these same bulletin boards. Unquestionably employees have posted and hand-distributed these materials with Respondent's knowledge and acquiesce. It is also undisputed that no employee has ever been questioned about their material, investigated, or disciplined for using these bulletin boards for the posting of what appears to be all sorts of material. Nonetheless, as soon as a union representative posted and distributed a flyer that Respondent found "inappropriate, offensive, and unprofessional," Respondent launched into a course of action. *See, Indian Health Service.* Accordingly, the evidence points to a single reason for Respondent's course of conduct -- Turner's posting and distribution of the flyer. It is therefore, reasonable to conclude that "but for" Turner's posting and distribution of the flyer, he would not have been subjected to OIA and SIS investigations, received a proposed one day suspension, and had an allegation underlying the proposed suspension sustained.

Based on the explanation set forth above, it is clear that a *prima facie* violation of the Statute was established since the only reason Respondent engaged in the course of conduct that violated the Statute was Turner's distribution and posting of a flyer that could plausibly be deemed as protected activity. *See, United States Army Intelligence Center Fort Huachuca and Fort Huachuca, Arizona*, 54 FLRA 794, 803 (1998).

I find no merit in Respondent's claim of a legitimate justification for its actions against Turner. Clearly Respondent took several actions against Turner for conduct that was "inappropriate, offensive, and unprofessional," under the Standards of Conduct and did not consider that Turner was engaged in protected activity. Each of Respondent's actions will be considered separately below.

1. Office of Internal Affairs Investigation

Respondent asserts that the matter was referred to OIA because there was an allegation of unprofessional conduct. In support of this allegation, the Warden completed a "Referral of Incident to OIA" which described the flyer and stated that it was posted in the Norwood Unit in plain view of staff and inmate traffic and was distributed to employees in the ISM office. The referral also stated that the flyer was found to be inappropriate, highly offensive, and unprofessional, and noted that Barron was the EAP psychologist. Respondents' witnesses testified that they viewed the flyer as a personal attack on Barron and on the EAP program she administered. Again it is clear that Respondent's asserted reasons for its action against Turner failed to consider that Turner was engaged in protected activity.

The evidence further demonstrates that Respondent did not follow its own procedures in connection with referrals to OIA in this case. Warden Herrera testified that when there is an allegation of unprofessional conduct, he instructs SIS to conduct a preliminary investigation before referring the matter to OIA. No evidence, however, was introduced to show that any preliminary investigation by SIS was ever conducted in connection with Turner's case. Had Respondent followed its own procedures, it might have determined that no inmates saw the flyer and that the areas where the flyers were posted were restricted to inmates and therefore, it was very unlikely that inmates would have seen the flyers. Furthermore, Respondent could have determined, as the record reflects, that the flyer did not adversely affect the EAP program or Barron's ability to perform her duties. Instead, the Warden chose to refer the matter directly to OIA. The timing of that referral to OIA is critical to Respondent's defense. The record shows that the referral occurred *after* Turner was questioned, admitted that he posted/distributed the flyer in his capacity as a union representative, and agreed to stop the distribution. Furthermore, the referral was made even after supervisor LaRiva, removed the flyer from the Norwood bulletin board where it was allegedly in plain view of inmates and staff. The timing of the referral suggests that the matter had already been remedied and that Respondent's asserted reasons for going forward with the matter appear pretextual. *See, Department of Housing and Urban Development, Pennsylvania State Office, Philadelphia, Pennsylvania*, 53 FLRA 1635, 1653 (1998)(*Pennsylvania State Office*).

Having failed to show that there were legitimate concerns regarding inmates viewing the flyer, adverse effects on the EAP program as a result of the flyer, or contract violations, the only remaining justification of

Respondent for launching the OIA investigation is that it found the flyer to be "inappropriate, offensive, and unprofessional." Respondent appears to be arguing that the flyer constitutes "flagrant misconduct" and that it, therefore, had a legitimate justification for initiating the investigation. As previously noted, however, Turner's conduct remained within the ambit of protected activity.

2. Special Investigative Service (SIS) Investigation

In addition to the reasons offered as legitimate justifications for the OIA investigation, Respondent contends that it had no discretion regarding the SIS investigation. The record fails to support Respondent's assertion.

The evidence reveals, as indicated by the Investigative Report by SIS Agent Salas, that on November 19, 1999, OIA informed the Facility that it was deferring the Turner case to the Facility for administrative resolution. The report further stated that OIA determined the matter to be without prosecutorial merit. Respondent explained that despite the findings of the report, which the Warden concurred with, the Facility was still obligated to pursue the investigation locally. Respondent offered only the uncorroborated testimony of the Warden that it had no discretion over the matter. The Authority has found that mere assertions by an agency, in the absence of corroborating or documentary evidence, are inadequate to overcome a *prima facie* showing of a violation. *Ogden Air Logistics Center, Hill Air Force Base, Utah*, 35 FLRA 891, 900 (1990)(*Hill AFB*). Further, the Warden's claim is less credible when considered together with the statement of Salas. It is uncontroverted that Salas, the SIS Supervisor, told Owen and Turner that the investigation was getting to be a pain to him, that he did not want to do it, and that he was ordered to do so. The Warden would have us believe that he was required to conduct an investigation even after OIA had determined it was without prosecutorial merit and his own experienced agent felt that the case lacked merit. Moreover, the Warden's testimony is inconsistent with other evidence introduced at the hearing. In this regard, the Warden testified that after some time had passed, he contacted OIA and learned that OIA had a heavy workload. The Warden then offered to have SIS conduct the investigation so that other cases of higher severity could be investigated by OIA. The report of investigation, which documents OIA's findings, fails to make any reference to workload demands as the reason the Turner case was sent back to the Facility from OIA. Furthermore, it is noted that Respondent failed to produce any corroborating evidence to substantiate the testimony of the

Warden that OIA had a heavy workload or there was any other reason why the investigation should continue internally. *Hill AFB*, 35 FLRA at 891.

The evidence, taken as a whole, demonstrates that Respondent ordered the SIS investigation and, as outlined above, had no legitimate reason to do so. *Pennsylvania State Office*. It is logical for an administrative law judge to conclude that a party has an unlawful reason for its conduct where it offers pretexts to justify its action.

3. Turner Receives a Proposed One Day Suspension

On April 7, 2000, Respondent issued Turner a proposed suspension for one day. The basis of the proposed suspension was "unprofessional conduct." The proposal stated that Turner violated Program Statement 3420.08, Standards of Employee Conduct, which states that it is essential to the orderly running of any Bureau facility that employees conduct themselves professionally. The specific conduct alleged to have constituted "unprofessional conduct" was listed as the distribution of the flyer to ISM staff and the posting of the flyer on the bulletin board in the Norwood Unit. Turner submitted a written response on April 10, 2000 to his supervisor, Lyde, asking for clarification regarding the rationale for the proposed suspension. On May 18, 2000, the Warden issued Turner a letter stating that "[a]s a result of you distributing this flyer, Ms. Barron's credibility could have been diminished as an EAP Counselor." It makes no mention of Turner acting in a representational capacity. It is my opinion that an agency acts at its peril in disciplining an employee for violation of Standards of Employee Conduct without considering that the employee was engaged in protected activity. In this case Turner raised the issue of his protected status with Respondent, but was ignored.

Accordingly, the evidence discloses that the only justification presented for issuing the proposed suspension to Turner was that the flyer *could have* diminished Barron's credibility as an EAP Counselor. As previously noted, Respondent failed to present any evidence that the EAP program was impaired or that Barron's ability to perform her duties were or could have been harmed by the distribution of the flyers. Since Respondent failed to offer any other reason why it found the flyer objectionable, in my view, it is reasonable to conclude that, based on the evidence in that case, Respondent's offered justification is pretextual.

4. Warden Herrera Informs OIA that He Sustains the Unprofessional Conduct Violation

On May 18, 2000, the Warden informed Turner that he was not taking any action on the notice of proposed suspension. Nonetheless, on May 25, 2000, the Warden submitted a memorandum to OIA stating that the allegation of unprofessional conduct was sustained against Turner. Although the Warden requested that the investigation be closed, the evidence establishes that the memorandum prepared by the Warden is maintained by the OIA.

The General Counsel insists that the Respondent violated section 7116(a)(2) of the Statute by sustaining the violation against Turner since, as outlined above, when it had no legitimate justification for doing so. It is urged that since a record is being maintained of the violation, Respondent is in effect discriminating against Turner based on his protected activity.

Based on the foregoing, it is concluded that maintaining this record of suspension in Turner's file does constitute discriminatory action. Accordingly, it is found that this action by Respondent constitutes a violation of section 7116(a)(2) of the Statute.

C. Respondent Violated Section 7116(a)(1) and (4) of the Statute by Initiating an Investigation Into the Protected Activity of a Union Representative by the SIS; by Issuing a Union Representative a Proposed One Day Suspension for Engaging in Protected Activity; and by Communicating to the OIA that the Allegation Underlying the Proposed One Day Suspension Against Union Representative Turner Was Sustained[4]

The General Counsel maintains that Respondent also violated section 7116(a)(1) and (4) of the Statute when it initiated an investigation by SIS into the protected activity of union representative Turner; by issuing a proposed one day suspension to Turner for engaging in protected activity; and by communicating to the OIA that the allegation underlying the proposed one day suspension against Turner was sustained.

Section 7116(a)(4) of the Statute provides that it is an unfair labor practice for an agency to "discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter [.]" In *Department of the Air Force, Air Force Materiel*

[4] As previously noted, the Complaint was amended at the hearing to include this allegation.

Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 55 FLRA 1201 (2000)(*Robins AFB*), the Authority reaffirmed its *Federal Emergency Management Agency*, 52 FLRA 486 (1996)(*FEMA*) decision extending the *Letterkenny* framework to cases involving alleged violations of section 7116(a)(4) of the Statute.

As previously outlined, the General Counsel has 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, promotion, or other conditions of employment. If the General Counsel establishes a *prima facie* case, the burden shifts to the agency. The agency 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. *Letterkenny*, 35 FLRA at 113.

The record in this case establishes a *prima facie* violation of the Statute. The evidence shows that the Union filed an unfair labor practice charge on behalf of Turner with the Authority on October 26, 1999. It also reveals that Respondent was aware of the filing of the unfair labor practice charge since a copy was served on the Warden. *See, FEMA,* 52 FLRA at 486; and *Department of Veterans Affairs Medical Center, Brockton and West Roxbury, Massachusetts*, 43 FLRA 780, 787 (1991)(*Brockton*). Turner also provided an affidavit to the Authority in connection with the ULP on February 16, 2000.

The evidence shows that subsequent to the filing of the unfair labor practice charge, around November 19, 1999 or almost three weeks after the unfair labor practice charge was filed on Turner's behalf, Respondent initiated an SIS investigation into Turner's conduct. As explained above, the Respondent had full discretion and authority to order the SIS investigation and did so even after the OIA had determined that the allegations against Turner lacked prosecutorial merit. The timing of the initiation of the investigation and the filing of the unfair labor practice charge warrants an inference that the filing of the charge was a motivating factor in the decision to initiate the SIS investigation. *See, Brockton*, 43 FLRA at 787; and *Robins AFB*, 55 FLRA at 1206 n. 5 (affirming its previous holding that timing alone can warrant an inference of discrimination). Accordingly, a *prima facie* case of discrimination has been established. As explained

hereinafter, Respondent has failed to rebut the *prima facie* showing of discrimination by showing that it had a legitimate justification for its action or that it would have taken the same action in the absence of protected activity; therefore, a violation of the Statute has been established.

With respect to the proposed suspension, the evidence shows that Respondent issued the proposed suspension to Turner on April 7, 2000, more than five (5) months after he posted and distributed the flyer. The proposed suspension was also issued after the unfair labor practice charge was filed and approximately one-and-a-half months after Turner provided an affidavit to the Authority in connection with the charge. Like the initiation of the investigation, the timing of the proposed suspension and Turner's protected activity warrants an inference that the protected activity motivated Respondent to issue the proposed suspension to Turner. Accordingly, a *prima facie* case of discrimination has been established which, as explained above, Respondent has failed to rebut.

Lastly, the record reveals that on May 25, 2000, Warden Herrera informed OIA that he had sustained the violation of unprofessional conduct against Turner. This action was also taken after the filing of the unfair labor practice charge and after Turner provided an affidavit to the Authority. The timing of the Warden's decision to sustain the allegation of unprofessional conduct and the protected activity also warrants an inference that the protected activity motivated Respondent to sustain the violation. This inference is buttressed by the Warden's decision to not finalize the proposed suspension. As explained above, the Warden had no legitimate justification for issuing the proposed suspension.

Accordingly, it is concluded that the sole reason the Warden communicated to OIA that he sustained the violation was to retaliate against Turner for engaging in protected activity.

D. Respondent Independently Violated Section 7116(a)(1) of the Statute by Initiating an Investigation Into the Protected Activity of a Union Representative First by the Office of Internal Affairs (OIA) and Then by the Special Investigative Service (SIS); by Issuing a Union Representative a Proposed One Day Suspension for Engaging in Protected Activity; and by Communicating to the OIA that the Allegation Underlying the Proposed One Day Suspension Against the Union Representative Was Sustained

The Authority has held that the standard for determining whether a statement or conduct violates section 7116(a)(1) of the Statute is an objective one. The question is whether, under the circumstances, the statement or conduct would tend to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement. Although the circumstances surrounding the making of the statement are taken into consideration, the standard is not based on the subjective perceptions of the employee or the intent of the employer. *See, U.S. Department of Agriculture, U.S. Forest Service, Frenchburg, Job Corps, Mariba, Kentucky,* 49 FLRA 1020, 1034 (1994).

The General Counsel urges that the one day suspension, and the communicating to OIA that the allegation underlying the proposed suspension was sustained -- viewed together -- establish that the Respondent committed an independent violation of section 7116(a)(1) of the Statute because these acts interfere with, restrain, or coerce employees in the exercise of rights protected under the Statute.

With respect to the OIA and SIS investigations, the Authority's decision in *Federal Bureau of Prisons, Office of Internal Affairs, Washington, D.C.*, 53 FLRA 1500, 1508-11 (1998)(*BOP*) is germane. There the Authority explained that the standard for determining a violation is whether, viewed objectively, the agency's action would tend to interfere with, restrain, or coerce employees in the exercise of their rights protected under the Statute. In *BOP*, the Authority found that the investigation did not violate the Statute because there were security concerns that arose from the possibility of physical violence at the prison. *See also, Defense Property Disposal Region, Ogden, Utah and Defense Property Disposal Office (DPDO), Camp Pendleton, Oceanside, California*, 24 FLRA 653, 657 (1986)(*DPDO*). *BOP* and *DPDO*, teach that an agency must have legitimate reasons to justify its inquiries into or exposure to union business because of the chilling effect such inquiries or exposures have on the exercise of employees' protected rights. Unlike *BOP* and *DPDO*, Respondent here did not show any legitimate reasons, such as security concerns, which necessitated an investigation into the protected activity of Turner. This is particularly evidenced by the fact that Turner admitted to creating and distributing the flyer, and also agreed to stop distributing the flyer. Under such circumstances, where the evidence fails to establish a legitimate basis for the investigations, the only conclusion that one could reasonably reach is that Respondent intended to interfere with, restrain, or coerce employees in the exercise of their rights protected under the Statute.

Respondent issued Turner a proposed suspension and then informed OIA that the allegations underlying the proposed suspension were sustained further supports a conclusion that Respondent engaged in a course of conduct designed to chill protected activity. The Authority specifically recognized that agencies are required to take such necessary steps and precautions and to refrain from engaging in a course of conduct which would produce a chilling effect on the exercise of employees' rights to serve as union representatives. *See, U.S. Department of the Treasury Customs Service, Washington, D.C.*, 38 FLRA 1300, 1310 (1991); *U.S. Department of the Air Force, Randolph Air Force Base, San Antonio, Texas,* 46 FLRA 978 (1992); *Department of the Army, Fort Bragg Schools*, 3 FLRA 363 (1980); *Social Security Administration*, 7 FLRA 823, 830 (1982); and *U.S. Naval Supply Center, San Diego, California*, 21 FLRA 792, 806 (1986).

Section 7116(a)(1) violations do not depend on harm or adverse consequences to employees as a result of an agency's conduct, but hinge on whether a particular statement or conduct of an agency tends to interfere with, restrain, or coerce employees in the exercise of their rights under the Statute. The evidence in this case reveals that, Respondent launched a course of conduct aimed at chilling protected activity. The evidence shows that the Associate Wardens called Turner to the food service area only to tell him they needed to speak with him in private, then publicly escorted Turner across the compound in plain view of inmates and staff. Respondent also questioned Turner as well as two other representatives about the flyers although Turner admitted that it was he who posted the flyers. Respondent initiated two separate investigations into the matter. Interrupted Turner's training with other staff members to approach him and require him to participate in an investigatory interview. Issued Turner a proposed suspension more than six months after the incident although he never denied posting the flyers. Then Respondent waited over a month to inform Turner that it would not take any actions. Nevertheless, some seven months after the incident, Respondent informed OIA that the violation against Turner was sustained. It is clear from the foregoing that Respondent was sending a message through its conduct that would make any reasonable person think twice before following in Turner's footsteps.

Accordingly, it is concluded that Respondent independently violated section 7116(a)(1) of the Statute by initiating an investigation into the protected activity of a union representative first by the Office of Internal

Affairs (OIA) and then by the Special Investigative Service (SIS); by issuing a union representative a proposed one day suspension for engaging in the protected activity; and by communicating to the OIA that the allegation underlying the proposed one day suspension against the union representative was sustained.

Remedy

The General Counsel proposes that in addition to the posting of notices that Respondent also post the notices where notices to employees are customarily posted, including Respondent's official bulletin boards, television monitors, and over the electronic mail system. In these circumstances it is urged that the television monitors and email system have been used by Respondent to customarily communicate with bargaining unit employees, that such postings would not constitute a non-traditional remedy. The General Counsel views such a remedy as reasonably necessary and one which would effectively recreate the conditions and relationships with which the unfair labor practice interfered, as well as to effectuate the policies of the Statute, including the deterrence of future violations conduct. I agree that such a posting is necessary in this matter.

Additionally, I agree with the General Counsel that Respondent should rescind the May 25, 2000, memorandum to OIA which sustained the allegation of unprofessional conduct against Turner and expunge its files, including any OIA records, of any reference that the violation against Turner was sustained. *See, Indian Health Service*.

Based on the foregoing, it is recommended that the Authority adopt the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Florence, Colorado, shall:

1. Cease and desist from:

(a) Interfering with bargaining unit employees' rights protected by the Federal Service Labor-Management Relations Statute to distribute union literature by requiring the Council of Prison Locals, American Federation of Government Employees, Local 1300, AFL-CIO, to stop distributing copies of its flyer and by removing such flyers.

(b) Proposing to suspend for one day Dennis Turner, or any other bargaining unit employees, in order to discriminate against the employee because the employee engaged in activity protected by the Federal Service Labor-Management Relations Statute.

(c) Communicating to the Office of Internal Affairs that the allegations underlying the proposed suspension issued to Dennis Turner on April 7, 2000, or any other unit employees, have been sustained because the employee engaged in activity protected by the Federal Service Labor-Management Relations Statute.

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

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

(a) Permit the Union to distribute copies of its flyer in accordance with existing practices for distributing such union literature at the Facility.

(b) Expunge from all Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, including the Office of Internal Affairs, any and all records of the alleged unprofessional conduct against Dennis Turner being sustained.

(c) Post at its Florence, Colorado facilities where bargaining unit employees represented by the Council of Prison Locals, American Federation of Government Employees, Local 1300, AFL-CIO are located, including the television monitors and electronic mail system normally used to disseminate information to employees, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Warden, and shall be posted and

maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

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

Issued, Washington, DC, June 18, 2002.

_____

ELI NASH, Chief
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

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

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with bargaining unit employees' rights protected by the Federal Service Labor-Management Relations Statute to distribute union literature by requiring the Council of Prison Locals, American Federation of Government Employees, Local 1300, AFL-CIO, to stop distributing copies of its flyer and by removing such flyers.

WE WILL NOT propose to suspend for one day Dennis Turner, or any other bargaining unit employees, in order to discriminate against the employee because the employee engaged in activity protected by the Federal Service Labor-Management Relations Statute.

WE WILL NOT communicate to the Office of Internal Affairs that the allegations underlying the proposed suspension issued to Dennis Turner on April 7, 2000, or other bargaining unit employees, have been sustained because the employee engaged in activity protected by the Federal Service Labor-Management Relations Statute.

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

WE WILL, permit the Council of Prison Locals, American Federation of Government Employees, Local 1300, AFL-CIO, to distribute copies of its flyer in accordance with existing practices for distributing union literature at the facility.

WE WILL expunge from all Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, including the Office of Internal Affairs, any and all records of the alleged unprofessional conduct against Dennis Turner being sustained.

_____
(Respondent/Agency)

Dated:_____By:_____
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Denver Regional Office, Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 100, Denver, CO 80204, and whose telephone number is: (303)844-5224.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by ELI NASH, Chief Administrative Law Judge, in Case No. DE-CA-00043, were sent to the following parties:

CERTIFIED MAIL ___ **CERTIFIED NUMBERS**:

Nadia Khan, Esquire 7000-1670-0000-1175-3000
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Jennifer Schmitt, Esquire
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Bobby Harnage, National President
AFGE, AFL-CIO
80 "F" Street, N.W.
Washington, D.C. 20001

_____
CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: JUNE 18, 2002
WASHINGTON, DC