



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

MEMORANDUM

DATE: May 25, 2010

TO: The Federal Labor Relations Authority

FROM: CHARLES R. CENTER
Chief Administrative Law Judge

SUBJECT: DEPARTMENT OF JUSTICE
BUREAU OF PRISONS, U.S. PENITENTIARY
MARION, ILLINOIS

RESPONDENT

AND

Case No. CH-CA-08-0486

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
LOCAL 2343, 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



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Case No. CH-CA-08-0486

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard by the undersigned Chief Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his 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 **JUNE 28, 2010**, and addressed to:

Office of Case Intake & Publication
Federal Labor Relations Authority
1400 K Street, NW., 2nd Floor
Washington, DC 20424-0001

CHARLES R. CENTER
Chief Administrative Law Judge

Dated: May 25, 2010
Washington, D.C.

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

DEPARTMENT OF JUSTICE
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RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2343, AFL-CIO

CHARGING PARTY

Case No. CH-CA-08-0486

John F. Gallagher, Esq.
For the General Counsel

Jennifer A. Spangler, Esq.
For the Respondent

Greg Shadowens
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (Authority), Part 2423.

A Complaint and Notice of Hearing was issued on December 18, 2009, based on an unfair labor practice charge filed on June 17, 2008, against the Department of Justice, Bureau of Prisons, U.S. Penitentiary, Marion, Illinois (Respondent) by the American Federation of Government Employees, Local 2343, AFL-CIO (Charging Party/Union). The Complaint

alleges that the Respondent changed the shift to which employee Jeffrey Dwyer was assigned on May 26, 2008, in retaliation for his protected activity and, thereby, violated §7116(a)(1) and (2) of the Statute.

A hearing was held in Benton, Illinois on February 4 and 5, 2010, where all parties were represented and afforded a full opportunity to be heard, produce relevant evidence, and examine and cross-examine witnesses. Both the General Counsel and Respondent filed timely 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

Background and Events Involved in the Complaint

The Respondent is an agency under §7103(a)(3) of the Statute. (GC Ex. 1c and 1e) The American Federation of Government Employees, Local 2343, AFL-CIO (AFGE), is a labor organization under §7103(a)(4) of the Statute and is the exclusive representative of a nationwide unit of employees at the Bureau of Prisons. (GC Ex. 1c and 1e) The Charging Party is an agent of AFGE for the purposes of representing the unit employees employed at the Respondent. (GC Ex. 1c and 1e).

During all times material, Jeffrey Dwyer was employed by the Respondent as a Senior Officer Specialist. (Tr. 32) During the period 2006 to 2010, Dwyer served as a Vice President of the Union. (Tr. 33) During May of 2008, Dwyer was assigned to an evening shift that worked from 4:00p.m. to 12 midnight. (Tr. 33).

For a period of slightly less than five years that ended in August 2008, Alan Cohen served as a Lieutenant at the Respondent. (Tr. 77-78) During 2007-2008, Cohen was assigned as the Special Investigative Supervisor (SIS) Lieutenant at the Respondent. (Tr. 78) The SIS is responsible for, among other things, investigating allegations of staff misconduct. (Tr. 78) During May of 2008, Cohen investigated an allegation of physical abuse made by an inmate. Specifically, the inmate claimed that an unknown employee of the Respondent gouged his eye during an incident in which he was being restrained by several staff members. (Tr. 78) As Dwyer was one of the several staff members present during the incident, he was one of the employees that Cohen needed to interview in conjunction with the investigation. (Tr. 78-79) Cohen conducted interviews of some of the staff members present during the incident the week before May 14, 2008. (Tr. 38-39, 97) Cohen conducted those interviews at the Special Housing Unit (SHU), which was the worksite where the interviewees were assigned at the time and on the evening shift. (Tr. 97) Brad Thomas, also a Vice President of the Union, served as the union representative at those interviews. (Tr. 97) Cohen testified that in conjunction with those interviews and in response to a query from Thomas as to when

the interviewees would receive copies of their affidavits, he advised Thomas that he would provide copies to either Thomas or the interviewees themselves once he finished interviewing everyone. (Tr. 79-80, 97) According to Cohen, Thomas told him that was fine.¹ (Tr. 80).

Cohen returned to the SHU on May 14, 2008, to interview the remaining witnesses including Dwyer. (Tr. 79) It is undisputed that on Cohen's arrival, Dwyer took issue with Cohen's proposed arrangements as to who would provide union representation and told Cohen that he should contact Larry Blades, who was the Chief Steward for the Union, and have him designate the Union's representative. (Tr. 41; GC Ex. 5) Although Dwyer did not address it in his testimony at the hearing, an e-mail that Dwyer sent to Warden Lisa Hollingsworth later on May 14 stated that Cohen initially said that Union President, Greg Shadowens, had told him to call either Dwyer or Thomas to see who wanted to "do repping."² (Ex. 5) Cohen did, however, acquiesce to Dwyer's objection and made an attempt to reach Blades by radio but when that proved unsuccessful, he contacted Thomas and arranged for him to come to SHU to provide representation during the interviews. (Tr. 41-42; Ex. 5) From his testimony and the e-mail he sent to Hollingsworth, it is clear that Dwyer felt Cohen should have made further efforts to reach Blades; however, there is no evidence that Thomas, who had served as the Union's representative in previous interviews relating to the particular inmate abuse allegation being investigated raised any objection to continuing to function as the Union's representative at the May 14 interviews.

At some point after Cohen's arrival, Dwyer also took issue with the fact that the interviews were being conducted in SHU rather than in the SIS office based on Dwyer's view that it was an inappropriate location. (Tr. 42-43; Ex. 5) According to Dwyer's May 14 email to Hollingsworth, Cohen response was that he thought it was easier to conduct the interviews in that location. (Ex. 5).

After Thomas arrived, Cohen commenced the interview with Dwyer by giving him a form that identified the allegation being investigated and set forth information regarding the purpose of the interview, the obligation to reply to interview questions fully and truthfully,

¹ Thomas did not testify at the hearing in this case and Cohen's testimony regarding his dealings with Thomas is undisputed.

² Dwyer's account in his May 14 e-mail to Hollingsworth that Cohen asserted he was relying on guidance from Shadowens in approaching Dwyer and/or Thomas to serve as representative is consistent with testimony by Cohen that in speaking with Shadowens after the events of May 14 about the matter of arranging representation for "after hours" interviews, Shadowens informed him that he should just go to any Union Executive Board (E-board) members who were available. (Tr. 87) According to Dwyer's testimony, the E-board consists of the Union president; executive vice-president; first, second and third vice presidents and treasurer. (Tr. 40) Both Dwyer and Thomas were identified as being vice presidents whereas Blades was identified as being the chief steward at the time of the events on May 14. It does not appear that stewards are members of the E-board. (Tr. 19).

and rights to representation.³ (Tr. 42, 79; GC Ex. 3) This form also contained an acknowledgement section, which stated: “I have read and understand my rights and obligations set forth above” and it contained a block for the signatures of the employee being questioned and the individual conducting the investigation. (GC Ex. 3) Dwyer insisted that he would not sign the Form B unless he was given a copy of the signed document immediately upon his signature. (Tr. 42, 79; GC Ex. 5) Dwyer’s testimony at the hearing at times suggests Cohen refused to provide him a copy of the signed Form B altogether or was evasive about whether he would. (Tr. 42) This is inconsistent with the description Dwyer provided in an unfair labor practice (ULP) charge that Dwyer signed on May 16, 2008, in Case No. CH-CA-08-0430, wherein Dwyer indicated that Cohen told him he would give Dwyer a copy of the Form B “when [I] get ready, probably when the investigation is complete [sic].” (GC Ex. 6) Cohen testified that he told Dwyer he would give Dwyer a copy of the Form B at the “completion” and that he had previously told Thomas that once he finished all the interviews he would give all the affidavits out at once and Thomas said that was fine. (Tr. 79-80, 97) Taken in context, I interpret Cohen’s reference to “completion” as meaning the completion of all the interviews and his statement about distribution of the affidavits as meaning copies of the Form B’s would be distributed with copies of the affidavits. I find that Dwyer’s statement in the May 16 ULP charge demonstrates that Cohen was planning on giving him a copy of the signed Form B at the completion of his investigation. The approach adopted by Cohen in this particular investigation was consistent with what he identified as his typical practice, which was to distribute the Form B at the conclusion of the interview to which it applied or, where there was an investigatory reason for doing so, wait until the completion of the investigation.⁴ (Tr. 81).

Dwyer, however, was of the view that he was entitled to a copy of the signed Form B immediately upon his demand and refused to sign it unless Cohen complied with his wishes. Statements made by Dwyer during his testimony indicated that his demand was based on his interpretation of a discussion that occurred during a March 2008 Labor Management Relations meeting between management and the union and what he characterized to be an agreement reached on the matter of providing copies of the Form B to employees. (Tr. 42) It appears an issue for Cohen was that complying with Dwyer’s demand would require leaving the room after the interview had begun. (Resp. Ex. 1).

³ The witnesses generally referred to this form as “Form B.”

⁴ Cohen’s approach was similar to the practice described by another witness, Lt. Jesse Mash, who held the position of SIS Lieutenant multiple times. (Tr. 107) In this regard, Mash stated he typically gives a copy of the Form B to any interviewee who requests one after their interview is completed. (Tr. 110) Additionally, Shadowens’ testimony also corroborates this practice. Specifically, Shadowens testified the general practice was to give the affiant a copy of the signed Form B along with their affidavit at the end of the interview. (Tr. 28)

When the discussion regarding the Form B became heated and Dwyer continued to insist that he would not sign the Form B unless he was given a copy of the signed document immediately, Cohen terminated the interview. (Tr. 79 and 98) Cohen prepared a memorandum for the file, dated May 14, in which he recounted Dwyer's refusal to sign the form, which he characterized as a refusal to cooperate with an investigation. (Resp. Ex. 1) For his part, Dwyer sent an e-mail to Hollingsworth informing her of the "incident with Lt. Cohen[.]" (GC Ex. 5) In the email, Dwyer contended that Cohen had acted inappropriately in: his efforts to obtain a Union representative to be present at the interview; conducting the interview in the SHU rather than in the SIS office; and not agreeing to provide Dwyer with a copy of the signed Form B immediately upon signature. (GC Ex. 5) Hollingsworth forwarded Dwyer's email to Cohen and asked what was involved. (Tr. 98).

On an unidentified date subsequent to May 14, Cohen met with Hollingsworth and told her about Dwyer's "refus[al] to cooperate with the investigation." (Tr. 82) According to Cohen, he suggested to Hollingsworth that it might be best in the future to conduct interviews on the day shift when the Union President and Chief Steward would be available should such things come up again and she agreed. (Tr. 82) At some point, Hollingsworth instructed Cohen to re-interview Dwyer. (Tr. 99) Cohen decided to re-interview Dwyer on May 26, 2008, and had Dwyer changed from the evening shift to the day shift for that day. (Tr. 82-83) As it turned out, May 26, 2008, was Memorial Day. Cohen testified that at the time he decided on this date and arranged for the schedule change, he did not realize that May 26 was the Memorial Day Holiday. (Tr. 82) The schedule change was made on Thursday, May 22, 2008, and Dwyer was notified of it that evening. (GC Ex. 2; Tr. 59) Dwyer testified that the lieutenant who informed him of the shift change did not tell him the reason for it but told him Cohen was the one making the change. (Tr. 59) In the ULP charge, Dwyer indicated that initially he thought Cohen might be attempting to interview him again but then saw on the daily roster for May 26 that Cohen was scheduled to be off. (GC Ex. 1a).

The next day, Dwyer attempted to contact Cohen. (Tr. 59) When he initially was unsuccessful in reaching Cohen, Dwyer called Hollingsworth and inquired whether his shift had been changed in order for him to meet with her "on Monday." (Tr. 59) Hollingsworth responded that she did not work on holidays. (Tr. 59) A further attempt to reach Cohen was successful and at the hearing in this case, the two offered slightly different accounts of the conversation that ensued. According to Dwyer, he asked why his schedule had been changed on Memorial Day and Cohen responded that it was because of the need to complete the investigation on the inmate abuse allegation. (Tr. 60) Cohen testified that Dwyer asked him if they were "still doing it" on Monday and Cohen responded that they were. (Tr. 83) Cohen's description of the conversation is consistent with the scenario presented by Dwyer that he originally thought the change was because Cohen planned to interview him, but became uncertain of this when he discovered that Cohen was scheduled to be off that day. I credit Cohen's version of the general direction of the conversation over Dwyer's. I find that Dwyer actually referred to the date as Monday during his conversation with Cohen, who

testified credibly that it was not until the next day that he realized the upcoming Monday was the Memorial Day holiday. (Tr. 83, 88) Cohen testified that once he realized this, he decided to follow through with the then-established schedule rather than change it again despite the fact it would mean the Union president would not be working and Cohen himself would have to go in to work on the holiday when he would otherwise be off. (Tr. 89-90) Thus, Cohen was the one most impacted by his oversight regarding the holiday. While Dwyer was already scheduled to work a later shift that day, Cohen would not have had to report at all on that Monday holiday had the re-interview not been set for that date.

At the re-interview that occurred on Monday, May 26, 2008, Cohen and Dwyer were present, along with union representative Hackleman and Lt. Mash.⁵ (Tr. 83) Although it appears from the testimony of both Cohen and Dwyer that getting Dwyer to sign the Form B did not go smoothly and took some effort on Cohen's part, Dwyer eventually signed it. (Tr. 61, 84) Cohen proceeded to question Dwyer and then typed up an affidavit in narrative form. (Tr. 84) Dwyer refused to sign the affidavit asserting that it should show only "yes/no" answers rather than being in narrative form. (Tr. 84) Cohen explained that the affidavits were required to be in narrative form but Dwyer was unrelenting. (Tr. 84, 108) Cohen asked if there was anything that was inaccurate or untrue in the affidavit he had prepared and Dwyer responded there was not. (Tr. 84, 108) The record shows that Dwyer did not object to the substance of the affidavit but only that it was in narrative form rather than stated simply in terms of yes/no answers. Cohen terminated the interview and had Mash provide an affidavit about what transpired. (Tr. 84, 108; Resp. Ex. 5) The following day, Cohen reported the incident to Hollingsworth and at her direction he prepared a "Referral of Incident" for staff misconduct for submission to Internal Affairs alleging that Dwyer refused to cooperate in an investigation on May 14 and May 26, 2008. (Tr. 85-86; Resp. Ex. 3) The referral prepared by Cohen cites only Dwyer's refusal to sign the Form B on May 14 and refusal to sign the affidavit on May 26 as the bases of the allegation. (Resp. Ex. 3).

Cohen testified that his plan to conduct all interviews on the day shift was short-lived and ceased within a matter of a few days because he was instructed by Associate Warden Chris Zych to stop the practice of changing the shifts of those being interviewed to the day watch. (Tr. 104-05) Although Zych testified that he did not direct Cohen to cease the practice, I credit Cohen's testimony that someone told him to do so. I find it more likely that Zych's account of the matter is what is faulty rather than Cohen's recollection of who gave him the instruction. In this regard, the record shows that the decision to conduct all interviews on the day shift was prompted by Dwyer's refusal to sign the Form B and in the hope that conducting the interviews at a time when the Union President was available would

⁵ Cohen requested Mash to be present as a witness. (Tr. 83) Cohen testified that although he had not originally intended to have Mash there, he saw in Mash, who had SIS experience and, consequently, was familiar with the process, an opportunity to have a witness present who could be beneficial. (Tr. 92).

facilitate the prompt resolution of such problems. As it turned out, that plan quickly went awry when the day that Cohen scheduled the interview turned out to be a day that the Union President was off and Cohen experienced further problems with Dwyer when he refused to sign the affidavit. Additionally, the plan generated complaints from the Union and Dwyer. In these circumstances, I find it likely that someone in management would have intervened in the matter of Cohen's plan to conduct all interviews on the day shift and adjust the shift assignments of interviewees accordingly. Moreover, such an intervention is consistent with a statement on Zych's part, which will be discussed later herein, to the effect that his perception was that at times Cohen had trouble letting things go.

Dwyer's Prior Union Activity

In addition to Dwyer's actions relating to the May 14 interview, the General Counsel contends that the motivation for changing Dwyer to the day shift on May 26 flowed from Dwyer's previous union activity relating to matters that involved Cohen. One of the prior activities cited involved a claim by Dwyer that after Cohen took over the SIS position, the Union began having a problem with employees who were subject to investigation not receiving a copy of their Form B.⁶ (Tr. 37) This matter was raised by Dwyer on behalf of the Union at a Labor Management Relations (LMR) meeting held in March 2008. (Tr. 36-38; GC Ex. 4) Cohen was not present at that meeting. (GC Ex. 4) Insofar as the subject of the Form B, the minutes of the meeting state only as follows:

32. Will staff continue to get copies of their Form B when charged?

Management: If requested. (G.C. Ex. 4 at 8)

Cohen testified he did not know that Dwyer had complained at the LMR meeting about the way he was handling Form B's. (Tr. 93) Cohen stated the only thing he knew about the Form B being discussed at an LMR meeting was that he was asked if he gave Form B's out to which he responded that he did and verified with the Office of Internal Affairs that he was supposed to. (Tr. 93) .

I find Cohen's testimony that he didn't know that Dwyer complained about him at the LMR meeting is credible and there is no evidence to show that Cohen indeed knew about Dwyer's activity in that regard. The minutes of the LMR meeting in question show that forty-four (44) items were addressed during the meeting. Moreover, the minutes give the impression that the question raised about the Form B was an innocuous one presented in the course of a wide range of issues under discussion and the minutes do not identify which of the six union representatives shown as being present raised the issue. Associate Warden

⁶ Although Shadowens echoed Dwyer's claim, he also testified that he didn't recall having personally experienced a problem with Cohen in regard to providing a copy of the Form B when requested and in the investigations in which he served as Union representative, Cohen provided the Form B. (Tr. 29-30).

Keller, who was one of the four management representatives present, testified at the hearing in this case that his recollection of the discussion about the Form B was not that it concerned a “problem” but was more in the nature of a discussion concerning whether or, maybe, when an interviewee would get a copy during the investigative process. (Tr. 74) There is no evidence that any of the attendees at the meeting revealed Dwyer’s identity to Cohen or reported the nature of the discussion about Form B as something with negative implications for Cohen. I find the record fails to establish that Cohen knew about Dwyer’s activity with respect to raising Form B at the LMR meeting.

Dwyer also filed two grievances on a matter that he viewed as involving Cohen. (Tr. 47) The two grievances alleged inmates were being given advance information that they were “leaving on the bus.” (Tr. 47) Dwyer asserted these grievances pertained to Cohen because Cohen was the lieutenant in charge of bus operations, but acknowledged that he did not think Cohen was the one releasing the information. (Tr. 49-50) There is no evidence Cohen was involved in the processing of the grievances. Dwyer testified that, in responding to the grievances he filed, Associate Wardens Zych and Keller as well as Warden Bledsoe all disagreed with his views on the particular matter raised in the grievance and defended the procedure relating to bus operations that Dwyer challenged. (Tr. 49, 52-53) Cohen stated that although he knew there were complaints about the “transportation thing,” he didn’t know about the grievances and he typically was not privy to that information. (Tr. 94) I find that although Cohen was aware that a question was being raised about bus operations, there is no basis in the record for finding that Cohen saw or would reasonably have seen it as threatening to him or posing a problem for him.

Another of Dwyer’s union activities cited by the General Counsel as motivation for Cohen’s action involved an Office of Inspector General (OIG) complaint brought by Dwyer. According to Dwyer, he learned a particular inmate told an employee that Cohen solicited the inmate to inform on the employee. (Tr. 45-46; GC Ex. 7) Initially, Dwyer spoke with Keller and Zych and objected to the use of an inmate to gather information about employees but got no satisfaction from them. (Tr. 45-46; GC Ex. 7) Although Dwyer’s testimony about the chronology involved is confusing, it appears he raised this matter with Keller and Zych initially on April 14 and had a further discussion relating to it with Keller on April 17, 2008.⁷ (Tr. 44-46, 67-68, 68-69; GC Ex. 7) Subsequent to his communications with Keller and Zych, Dwyer contacted Kimberly Thomas (K. Thomas), an OIG agent, by telephone on April 18, 2008, and alleged the Respondent was using an inmate to gather information for a disciplinary action against an employee. (Tr. 46; GC Ex. 7) Dwyer followed this up with a written complaint to the OIG dated May 18, 2008, which was on Union letterhead and from

⁷ In the OIG complaint Dwyer filed, he stated that he first learned of the alleged solicitation of the inmate on the afternoon of April 14, 2008, and that he discussed the matter with Keller and Zych in a meeting the same day. (GC Ex. 7) In the OIG complaint, Dwyer describes a further discussion on the matter that he had in a meeting with Keller that occurred on April 17, 2008. (GC Ex. 7)

him as Union Vice President. (GC Ex. 7) Cohen acknowledged that he learned of Dwyer's allegation to the OIG that he was using the inmate as an informant. (Tr. 81) Cohen testified credibly he was not using the inmate to inform on employees and provided an explanation, which I credit, that the dealings he had with the particular inmate pertained to a different matter. (Tr. 81-82) Cohen further testified he viewed Dwyer's OIG complaint as baseless and was confident the OIG would not even look into it because using inmate informants did not constitute a violation of the standards of conduct. (Tr. 94-95) Dwyer testified he was informed by OIG that his complaint was being referred to the Office of Internal Affairs, and never heard anything further about an investigation. (Tr. 55-56) The record shows Cohen did not find Dwyer's OIG complaint threatening.

Alleged Comments by Zych and Keller

Dwyer testified that both Zych and Keller told him Cohen was mad about his activity in filing the grievances and the OIG complaint. In this regard, Dwyer testified that during his meetings with Zych and Keller, Keller told him Cohen was "pissed off because [Dwyer] had filed some grievances that was questioning his ability to run the bus operations, and that I had made [a] comment to Mr. Keller that I was considering filing this OIG investigation, and that Lt. Cohen was pissed off that I would believe inmates over him." (Tr. 51) During redirect examination, Dwyer appeared to pinpoint the meeting during which this statement was allegedly made by Keller as the one that occurred on April 17. (Tr. 69) This date is consistent with what Dwyer stated in the ULP charge that he filed in this case. (GC Ex. 1a) In the charge, however, Dwyer described Keller as telling him at that meeting Cohen "was mad because I requested [an] OIG investigation concerning [an] inmates accusations." (GC Ex. 1a) There is no evidence that Zych was present at the April 17 meeting. Keller testified that he did not recall making such comments to Dwyer. (Tr. 73) The only other individual whom Dwyer identified as being present at the meeting on April 17, Jerry Goolsby, did not testify. (GC Ex. 1(a) and 7) .

At some point in June 2008, Shadowens and Dwyer encountered Zych and had a conversation with him regarding the situation between Dwyer and Cohen.⁸ (Tr. 25-27, 61-62) According to both Shadowens and Dwyer, Zych initiated the meeting. (Tr. 25-27 and 61-62) Shadowens stated that Zych wanted to talk to them about the problems between Dwyer and Cohen and Dwyer responded by telling Zych about the issues he had with Cohen relating to the Form B and the location where the interviews would be held. (Tr. 26)

⁸ Although Zych recalled having a number of meetings and discussions with Dwyer and Shadowens on many different matters, he did not recall this particular discussion. (Tr. Vol. 2 at 6-8) He did, however, vaguely recall that he had a discussion in which an attempt was made to resolve the matter of the location at which SIS interviews would be conducted. (Tr. Vol. 2 at 8) I credit the Shadowens and Dwyer that the discussion occurred.

Shadowens stated that Zych agreed the interviews should take place in the SIS office again and the staff should be provided a copy of their Form B. (Tr. 27) Shadowens testified Zych commented to them that Cohen had a hard time letting things go and was behaving childishly. (Tr. 27).

Dwyer's account of the conversation differed from that given by Shadowens. Dwyer testified Zych told him "Cohen was pissed off at me about filing these grievances, questioning his – Cohen looks at it as the Union questioning his authority. He was pissed off at me over the OIG referral." (Tr. 62) Dwyer testified he responded to Zych, "that's why I filed this unfair labor practice because [Cohen] was retaliating against me for my Union activities." (Tr. 62) According to Dwyer at the end of the meeting he asked Zych, "are you telling [me] again that Cohen's pissed off at me because of my Union activities?" and Zych responded, "yeah, that's why he's pissed off at you, because you keep filing these grievances." (Tr. 62).

In his testimony, Zych denied telling Shadowens and Dwyer that Cohen was angry with Dwyer because he engaged in Union activity. (Tr. Vol. 2 at 6) Zych also testified he did not recall making a statement at any meeting that Cohen was being childish about the issues involving the Union or to the effect that Cohen having a difficult time letting something go. (*Id.* at 7-8).

I do not find Dwyer's testimony that Keller and Zych told him Cohen was mad at him because he filed grievances and the OIG complaint credible. I find it unlikely that two separate managers in two separate meetings would relay such information about a fellow manager to Union representatives. I find it especially unlikely Zych would tell Dwyer that Cohen was mad at him because of his union activities after Dwyer told Zych in the same conversation that he filed an unfair labor practice charge because Cohen was retaliating against him for his union activity. I find it particularly telling that Shadowens who was present during this conversation made no mention in his testimony of Zych saying Cohen was mad at Dwyer because of the grievances and OIG complaint. Such a statement, if made, would surely have caught the attention of Shadowens, who was Union president at the time, and he surely would have been asked about it and reported it in his testimony had it occurred.

The lack of credibility with respect to the comments alleged to have been made by Zych to the effect that Cohen was mad about Dwyer's Union activity reflects negatively on the reliability of Dwyer's testimony with respect to the substantively identical comments he alleges Keller made. Moreover, with respect to the comments Dwyer attributes to Keller, I find the variations in Dwyer's accounts of what Keller allegedly said together with the chronology involved also casts doubt on the reliability of Dwyer's testimony. As to the variations, Dwyer's accounts differ with respect to whether Keller told him Cohen was mad because Cohen was considering filing with the OIG or had filed with the OIG a complaint. As to chronology, Dwyer first raised the "inmate informant" issue with Keller and Zych on

April 14 in Keller's office. During cross-examination, Dwyer contended that during the course of this conversation he told Keller and Zych he was contemplating taking the matter to the OIG. (Tr. 67) According to Dwyer, Keller indicated he would look into the matter and talk to Cohen and the inmate. (Tr. 46; GC Ex. 7) Dwyer also testified that at the end of this particular discussion, Cohen walked in and although Dwyer waited to see if he (Dwyer) was going to be given the opportunity to discuss the matter, that did not happen. (Tr. 46) In his OIG complaint, Dwyer claimed it was reported to him by another Union official that Keller was observed meeting with the inmate involved on April 15. (GC Ex. 7) Dwyer makes no reference in either his testimony or the OIG complaint to any conversation between himself and Keller until their April 17 meeting. In his testimony at hearing, Dwyer asserted that at the April 17 meeting Keller's comments about Cohen being mad because of Dwyer's OIG complaint included a statement to the effect that Cohen was mad because Dwyer would believe an inmate over Cohen. (Tr. 51) This suggests that somewhere between April 14 and April 17, Cohen's side of the story was relayed to Dwyer who rejected it in favor of whatever the inmate was saying. The absence of anything in the chronology set forth by Dwyer to indicate this occurred during the period between April 14 and April 17 casts further doubt on Dwyer's account of Keller's comments.

I find Dwyer's testimony that Keller and/or Zych made comments to him that Cohen was mad about his activity in filing grievances and an OIG complaint unreliable, and I do not credit it. I do, however credit Shadowens' testimony that Zych made a comment to the effect that Keller had trouble with letting things go and was behaving childishly. I do not find any evidence that this comment was directed at, or suggestive of, Cohen's reaction to Dwyer's Union activity. Rather, the comment appears to have been Zych's response to the issues relating to Form B and the location in which SIS interviews would take place.

Discussion and Analysis

Position of the Parties

A. General Counsel

The General Counsel alleges the Respondent's action in changing Dwyer's shift on May 26, 2008, from the evening to the day watch was in retaliation for Dwyer's protected activity and in violation of §7116(a)(1) and (2) of the Statute. The General Counsel contends that under the applicable analytical framework, which is that set forth in *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*), it has established a prima facie case that the change constituted discrimination against Dwyer, which was motivated by his Union activity. In this regard, the General Counsel maintains Dwyer engaged in several actions during the period March 2008 to May 2008 in his capacity as a Union representative that challenged matters relating to areas within Cohen's responsibility. The General Counsel asserts the timing of the change in Dwyer's shift assignment on May 26, 2008, which was the Memorial

Day holiday, relative to his activity in aggressively challenging the way that matters within the scope of Cohen's responsibility were being carried out lend to an inference that the change was motivated by Dwyer's Union activity. The General Counsel further contends there is credible evidence provided by Dwyer and Shadowens that establishes Cohen was disturbed and angry about Dwyer's activity and confirms Cohen's motivation for the change was Dwyer's protected activity.

Citing the *Letterkenny* framework, the General Counsel argues that once a prima facie case of discrimination against Dwyer has been established, the burden shifts to the Respondent to show it had a non-discriminatory justification for its action and the Respondent has failed to meet its burden. In particular, the General Counsel contends Cohen's explanation of his actions in scheduling and conducting an interview with Dwyer during the day shift on a holiday lack credibility. Additionally, the General Counsel asserts Respondent cannot validly argue Dwyer's conduct during the May 14 interview necessitated that the subsequent interview be held during the day shift on Memorial Day. In support of this assertion, the General Counsel maintains Dwyer's conduct on May 14 constituted protected activity and even assuming it didn't, Respondent failed to provide an explanation as to why Dwyer's conduct "compelled Cohen to conduct that second investigation on the day shift on Memorial Day and no other." (GC Brief at 6, footnote omitted).

As remedy, the General Counsel seeks an order requiring the Respondent to cease and desist and post a notice to employees.

B. Respondent

The Respondent contends the General Counsel has not demonstrated by a preponderance of the evidence that Dwyer's protected activity was a motivating factor in the change of his shift on May 26, 2008, from the evening watch to the day watch. (Resp. Brief. at 6) In this regard, the Respondent asserts the General Counsel failed to show Cohen knew about the grievances Dwyer filed and failed to provide credible evidence that Cohen was angry about Dwyer's OIG activity. The Respondent also argues the General Counsel failed to demonstrate that Dwyer suffered an "adverse employment action" as it maintains is necessary to establish a prima facie case under *Letterkenny*. In conjunction with this argument, the Respondent points out that Dwyer was already scheduled to work on Memorial Day and although he had the opportunity to do so failed to inform Cohen about the impact of the shift change on his personal plans. Additionally, the Respondent emphasizes the change was a one-time event.

The Respondent argues that even assuming arguendo the General Counsel established a prima facie case for a violation of §7116(a)(1) and (2), it has shown a legitimate, non-discriminatory reason for the change in Dwyer's shift on May 26, 2008. The Respondent maintains that the reason for the shift change on May 26 was Dwyer's failure to cooperate with the investigatory interview conducted on May 14 when he refused to sign his "Warning

and Assurance” form and that the change was made in the hope the availability of other Union representatives would facilitate success in the second attempt to interview him. The Respondent contends that Union representatives who are involved in alleged acts of misconduct are obligated to cooperate in the investigation of the misconduct and the shift change was an appropriate response to Dwyer’s failure to cooperate. Additionally, the Respondent asserts that Dwyer’s failure to cooperate distinguished him from the other employees who were interviewed in the same investigation and, as a consequence, Dwyer cannot claim disparate treatment.

Discussion

In *Letterkenny*, the Authority articulated its analytical framework for addressing allegations of discrimination claimed to violate §7116(a)(2) of the Statute. Under that framework, the General Counsel has the burden to establish by 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 connection with hiring, tenure, promotion or other conditions of employment. *E.g.*, *U.S. Dep’t of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Elkton, Ohio*, 61 FLRA 515, 519 (2006) (*FCI, Elkton*); *Letterkenny*, 35 FLRA at 118. Once the General Counsel makes the required prima facie showing, the respondent may seek to establish the affirmative defense that: (1) there was a legitimate justification for the action; and (2) the same action would have been taken in the absence of the protected activity. *E.g.*, *FCI, Elkton*, 61 FLRA at 519; *Letterkenny*, 35 FLRA at 118. The General Counsel may seek to establish the respondent’s reasons for taking the action were pretextual. *E.g.*, *FCI, Elkton*, 61 FLRA at 519.

Although Dwyer was a union officer at the time of the investigation involved in this case, he was not being investigated for or interviewed about his union activity. His role at the investigatory interview that Cohen sought to conduct was that of an employee who was present when an incident occurred in which an inmate was allegedly abused. Employees have the responsibility to co-operate in management investigations of possible misconduct. *See Pension Benefit Guar. Corp.*, 52 FLRA 1390, 1406 (1997), *aff’d* 146 F.3d 995 (D.C. Cir. 1998). The record shows that having employees acknowledge that they have been advised of their rights and obligations by signing the Form B was an integral part of the investigatory interview process and it is undisputed that signing the Form B was a necessary prelude to obtaining an affidavit from an employee witness. Although the record shows that Dwyer engaged in protected activity during the period preceding the rescheduling of his shift assignment for May 26, 2008, I find a preponderance of the evidence establishes that Cohen’s action in changing Dwyer’s shift assignment for that particular day was a response to Dwyer’s refusal to sign the Form B. Cohen changed Dwyer’s shift in an effort to increase the likelihood that Dwyer’s cooperation in the investigation could be elicited during the second attempt to interview, and take an affidavit from, him. More specifically, Cohen hoped that the Union president’s availability on the day shift would afford a means for obtaining

assistance in the event Dwyer continued to resist cooperating in the investigative process. That Cohen's plan turned out to be fatally flawed by his inadvertent selection of a holiday as the date for the second attempted interview and did not accomplish the purpose he hoped for does not change the fact that his motivation was to increase the potential that he could overcome Dwyer's resistance to signing the Form B and obtain an affidavit from him.

A preponderance of the evidence does not support a finding that Dwyer's activity in filing grievances, ULP's, OIG complaints, raising issues before an LMR meeting or challenging the manner in which Cohen arranged for Union representation at the investigatory interviews conducted on May 14 and the location in which Cohen was conducting those interviews were motivating factors in the change in his shift assignment. As discussed in the finding of facts section above, insofar as Dwyer's activities in filing grievances and complaints and bringing matters before the LMR meeting, the record does not establish that Cohen was aware of Dwyer's role, viewed the activities as having any real potential for negative consequences, or bore any malice toward Dwyer for his activities. With respect to Dwyer's actions in raising various objections about how Cohen was conducting the investigation on May 14, it was Dwyer's refusal to sign the Form B rather than those actions, that brought Cohen's efforts to obtain an affidavit from Dwyer to a halt. Also, it was only Dwyer's refusal to sign the Form B that Cohen cited in the memo for the record he prepared shortly after in documenting what he perceived as Dwyer's lack of cooperation.

Dwyer's demand that he be given a copy of the Form B may have been protected activity. In this regard, the Authority has found that where an individual employee asserts a right that emanates from a collective bargaining agreement, that employee is engaging in protected activity. *See, e.g., U.S. Dep't of Labor, Employment & Training Admin., San Francisco, Cal.*, 43 FLRA 1036 (1992). In this case, although Dwyer referenced a "labor agreement" as being the basis of his claim that he was entitled to a copy of the Form B immediately on signature, there is no evidence in the record to show that a collective bargaining agreement between the parties required such. Rather, Dwyer's testimony indicates that he was relying on his interpretation of what he perceived to be an agreement reached during the LMR meeting at which the Form B was discussed. In any event, I find that whatever statutory protection Dwyer might have had with respect to asserting a right to receive a copy of the Form B did not extend to his refusal to sign the Form B unless provided the copy on his terms. Moreover, even assuming Dwyer's view as to when he should be provided a copy of the Form B was consistent with an "agreement" reached between management and the Union, his resort to "self-help" by refusing to sign the form rather than signing and then challenging Cohen's action by filing a grievance or some other means was not protected activity. *Cf., e.g., Veterans Admin. Med. Ctr. & Am. Fed. of Gov't Employees, Local 2386, AFL-CIO*, 34 FLRA 666 (1990) (an agency's failure to meet its statutory obligations does not justify self-help by an employee).

In summary, I find that the sole motivation for the change in Dwyer's shift assignment on May 26, 2008, lay in his refusal to sign the Form B and the desire to increase the likelihood that a second attempt to obtain an affidavit from him would be successful. I further find that the General Counsel has failed to show by a preponderance of the evidence that Dwyer's protected activity was a motivating factor in Cohen's decision to change Dwyer's assignment on May 26, 2008, from the evening shift to the day shift. Thus, the General Counsel has failed to establish a prima facie case as required under the first part of the *Letterkenny* framework and it is unnecessary to discuss the second part of that framework.

The General Counsel has failed to establish that the Respondent violated section 7116 (a)(1) and (2) of the Statute as alleged. Accordingly, I recommend that that Authority adopt the following order:

ORDER

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

Issued, Washington, D.C., May 25, 2010.

CHARLES R. CENTER
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION, issued by **CHARLES R. CENTER**, Chief Administrative Law Judge, in Case No. CH-CA-08-0486, were sent to the following parties:

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Dated: May 25, 2010
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