

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

UNITED STATES DEPARTMENT OF THE AIR FORCE RANDOLPH AIR FORCE BASE SAN ANTONIO, TEXAS Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1840, AFL-CIO Charging Party	Case No. DA-CA-02-0022

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 **JUNE 16, 2003**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 "K" Street, NW., 2nd Flr.
Washington, D.C. 20424

SUSAN E. JELEN

Judge

Administrative Law

Dated: May 15, 2003
Washington, DC

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

MEMORANDUM

DATE: May 15, 2003

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: UNITED STATES DEPARTMENT OF THE AIR FORCE
RANDOLPH AIR FORCE BASE
SAN ANTONIO, TEXAS

Respondent

and
CA-02-0022

Case No. DA-

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1840, 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 03-28
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF THE AIR FORCE RANDOLPH AIR FORCE BASE SAN ANTONIO, TEXAS Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1840, AFL-CIO Charging Party	Case No. DA-CA-02-0022

Maj. Ferdinando P. Cavese, Esquire
David W. Chappell, Esquire
For the Respondent

Anne E. McFearin, Esquire
William D. Kirsner, Esquire
For the General Counsel

David J. McKibbin, Representative
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an unfair labor practice charge filed by the American Federation of Government Employees, Local 1840 (the Union), against the U.S. Department of the Air Force, Randolph Air Force Base, San Antonio, Texas (the Respondent), as well as a Complaint and Notice of Hearing issued by the Regional Director of the Dallas Region, Federal Labor Relations Authority (FLRA). The complaint alleged that the Respondent violated section 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, *et seq.* (the Statute), on or about October 12, 2001, by issuing Joseph A. Hendrix a notice of

decision to suspend him for 30 days. The complaint alleged that the suspension constituted disparate treatment of Hendrix because he engaged in protected activity.

A hearing in this matter was held in San Antonio, Texas, on December 19, 2002. The parties were represented and afforded a full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses and file post-hearing briefs. Both the General Counsel and the Respondent filed timely 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.

Statement of the Facts

Background Information

Randolph Air Force Base is the command, or headquarters, base for the Air Education and Training Command. (Tr. 175-76) At all times material to the complaint in this case, Mary Eddy was employed at Randolph Air Force as the lodging hotel manager. (Tr. 175) As such, she was responsible for managing the lodging facility, which consists of just under 600 rooms and 13 buildings and a staff of approximately 90 employees. (Tr. 175) The lodging facility, which some witnesses referred to as Randolph Inn, houses all transient guests at Randolph Air Force Base and all permanent parties moving in and out of Randolph Air Force Base. (Tr. 171, 175) Approximately 80,000 active duty military, retired military and civilian guests are housed in the lodging facility in a year and approximately 20,000 of those are considered "distinguished" visitors, that is, individuals at, or equivalent to, the military rank of full colonel or above and congressmen. (Tr. 176-77, 268, 278) The front desk for the lodging facility is located in a lobby in Building 112. (Tr. 96, 152) Every guest must pass through that lobby at some point during their stay. (Tr. 177)

Joseph A. Hendrix, a non-appropriated fund (NAF) employee of the Respondent, who was at all times material employed as a maintenance worker assigned to the lodging facility, also served as the NAF Vice President of the Union since November 2000. (Tr. 15-16) As Vice President, Hendrix filed a number of unfair labor practice (ULP) charges that involved Eddy, who at the time of the incident that is the focus of the complaint in this case was Hendrix's third-level supervisor. (Tr. 17, 24) As a consequence of a settlement in some of the ULP cases, Eddy

was required to attend labor relations training. (Tr. 17, 243-44) In August 2001, Hendrix sent an e-mail to a number of individuals, including Eddy and her first and third level supervisors, Randy Harris and George DeCoux, in which he made allegations that Eddy, DeCoux and Maj. Marasco, Eddy's second-level supervisor, had failed to properly maintain a particular form as required when they used government vehicles. (Tr. 33-36, 244-46)

Glen Ybanez was another maintenance worker assigned to the lodging facility.¹ (Tr. 105) Evidence in the record demonstrates that there was a history of discord between Ybanez and Hendrix. Specifically, during the period of 1999 and 2000, Hendrix prepared several memoranda for the record in which he described conduct by Ybanez that Hendrix alleged was inappropriate and either submitted copies of the memoranda to various of their mutual supervisors or informed those supervisors of the contents of the memoranda. (G.C. Exh. 3, attachment I-D) Additionally, Hendrix testified that Ybanez was very "anti-union" and had disliked Hendrix for years. (Tr. 23) For his part, Ybanez made accusations to Eddy that Hendrix had been harassing him for several years and suggested that Hendrix may have been responsible for missing tools and equipment and flat tires that Ybanez had experienced. (Resp. Exhs. 2 & 3; Tr. 206-10)

At the time of the events that are the focus of this case, Douglas Svien was the immediate supervisor of both Hendrix and Ybanez. (Tr. 103-05) Sheree Flood, the Assistant Manager of the Randolph Inn, was their second-level supervisor. (Tr. 162-63)

The September 12, 2001, Incidents

Several witnesses testified regarding the events of September 12, 2001, and there are some discrepancies in their accounts. Taking all of the testimony and documentary evidence into consideration I find as follows.

With relatively minor exceptions that I will discuss later, I generally credit the testimony of Eddy, Milton Banas, Sgt. Robert Sedillo, Flood, and Sharon Smith with respect to their descriptions of the encounters between Eddy and Hendrix that occurred on that day. I find their testimony convincing, mutually corroborative and consistent with other evidence submitted. In general, I find their accounts more credible than that given by Hendrix.

1

Subsequent to the events that are the subject of the complaint but prior to the hearing in this case, Ybanez was terminated. (Tr. 178-79)

The Incident between Hendrix and Ybanez

On the day prior to September 12, 2001, Hendrix was instructed by his supervisor, Svien, to get some keys duplicated. (Tr. 21) Hendrix borrowed keys from Ybanez and another employee, Victor Douglas, to do so. (Tr. 21) Early on September 12, in response to a request by Ybanez to return his keys, Hendrix gave him some keys. (Tr. 21) Ybanez contended, however, that Hendrix had not returned the key to the furniture warehouse and Hendrix replied that he had borrowed that particular key from Douglas not Ybanez.² (Tr. 21) According to Hendrix, Ybanez got upset and demanded his key back; however, Hendrix insisted that he didn't have Ybanez's key. (Tr. 21, 22) Hendrix offered to unlock the furniture warehouse for Ybanez and they proceeded to go there. (Tr. 22) Ybanez stopped off, however, and Hendrix arrived to find two other maintenance workers, Garza and Leandrew Miller, waiting for someone to let them into the warehouse. (Tr. 22) When Ybanez arrived, he again demanded his key. (Tr. 22) Hendrix again denied having Ybanez's key and Ybanez threatened to call the security police. (Tr. 23) According to Hendrix, he responded to Ybanez's threat by telling Ybanez that if Ybanez went to the security police, both of them could get in trouble. (Tr. 23) In his testimony, Hendrix described Ybanez as "upset" and "angry" during this exchange. (Tr. 23) Hendrix did not state whether either he or Ybanez raised their voices during this exchange. During the hearing in this case, Garza described Hendrix and Ybanez as arguing in a "high-pitched tone" but testified that neither raised their voice.³ (Tr. 86, 87, 91) Garza testified that Hendrix did not make any "rude" comments during their exchange, but Ybanez did and identified those comments as consisting of Ybanez stating that he was "going to call the MPs and other harassment." (Tr. 88)

Eddy's Investigation of the Hendrix/Ybanez Incident

Subsequent to the incident between Ybanez and Hendrix, Eddy received a call from Smith who told her that there had been an encounter between Ybanez and Hendrix and that Ybanez

2

Both Hendrix and Svien testified that Ybanez had a reputation for losing keys. (Tr. 22, 126)

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Garza stated that although Ybanez started to raise his voice, he "settled down." (Tr. 87)

was shaken up and wanted to come and talk to her about it.⁴ (Tr. 177) When Ybanez came to Eddy's office and told her what happened, she asked him to prepare a written statement. (Tr. 178) Eddy's description of Ybanez was that he was nervous and upset and expressed concern about what was going to happen between him and Hendrix. (Tr. 178) The statement that Ybanez prepared and gave to Eddy alleged, among other things, that Hendrix had threatened, harassed, slandered and treated him in an uncivil manner over a long period. (Tr. 203; Resp. Exh. 2)

Shortly thereafter, Eddy and Hendrix encountered each other in the lobby of the Randolph Inn. Eddy requested that Hendrix prepare a written statement about the incident with Ybanez, which he did.⁵ (Tr. 25, 180) In his statement, Hendrix described the incident as Ybanez demanding his key for building 1139, Hendrix denying that he had the key, and Ybanez speaking very loudly and in threatening tones. (Resp. Exh. 1) According to his statement, Hendrix told Ybanez, in response to a threat by Ybanez to call the police, that if Ybanez did that either of them "could possibly be fired." (Resp. Exh. 1)

On September 12, Eddy also obtained written statements from Garza and Miller. (Tr. 210-12; Resp. Exhs. 4 & 5) Garza's account of events was that he asked Ybanez for the key to the furniture warehouse and Ybanez went to look for Hendrix. (Resp. Exh. 4) Hendrix then appeared and a verbal exchange ensued between him and Ybanez about giving the key back. (Resp. Exh. 4) In his statement, Garza described Ybanez as "blowing off" Hendrix and the latter as trying to "make [Ybanez] understand." (Resp. Exh. 4) According to Garza's statement, Ybanez said that he was "going to get the MP's on [Hendrix]." (Resp. Exh. 4) In his statement, Miller described the encounter as involving a disagreement between Ybanez and Hendrix over whether the former had given

4

On September 12, 2001, Smith was the housekeeping manager at the lodging facility. (Tr. 151, 177) Subsequent to that date, she became Hendrix's first-line supervisor. (Tr. 151)

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Hendrix testified that after admitting Garza and Miller to the furniture warehouse, he went to Building 112 to proceed with his work and upon entering the lobby he saw Eddy and Ybanez coming down a flight of stairs into the lobby. (Tr. 24) Eddy and Hendrix offered conflicting accounts as to which one initially approached the other. I do not find that resolving the differences in their testimony on this point is necessary to deciding this case. Suffice it to say, Eddy did not have to go to great lengths to seek Hendrix out to obtain a statement.

the latter a key. (Resp. Exh. 5) According to Miller, the two were yelling at each other over who had the key last and Ybanez "kept telling" Hendrix that he was going to call Security Forces because Hendrix was yelling at him. (Resp. Exh. 5)

Eddy's Encounters with Hendrix in the Parking Lot

Eddy testified that shortly after Hendrix completed his statement, she had two encounters with him in the parking lot outside the main lodging building. (Tr. 181) In the first, Hendrix told her that he wanted to go to the security force and make a statement and she responded that was fine. (Tr. 181-82) In the second, which occurred approximately, 10-15 minutes after the first, Hendrix approached her in the parking lot and told her that he had gone to the union office where he was advised not to go to the security force but to report back to work. (Tr. 182) Hendrix did not recall the parking lot encounters that Eddy testified to and denied that he ever told Eddy that he was thinking about going to the security force or that he went to the union office. (Tr. 61-62)

I credit Eddy's testimony regarding these two encounters. On the whole, I found her to be more forthcoming and convincing as a witness than Hendrix and that her testimony was generally more consistent with that offered by other witnesses. Also, I find it very possible that in response to Ybanez's threat to do so Hendrix would have considered going to the security police as well, especially after he learned that Ybanez had reported the incident to Eddy. Such action would be consistent with Hendrix's past history of reporting what he felt were improprieties on Ybanez's part to supervisors. (G.C. Exh. 3, attachment I-D) Moreover, in view of Hendrix's expressed apprehension of the possible consequences if Ybanez went to the security force, it would be logical for him to consider going there in order to get his side of the story before them. I make no findings as to whether Hendrix actually went to the Union office.

Hendrix's First Phone Call to Eddy

Later in the morning of September 12, Eddy received a call from Tech. Sgt. Robert Sedillo of the security force who told her one of her employees was with him and requested

that she come to the law enforcement desk.⁶ (Tr. 137, 183-84) Eddy went and Ybanez was there. Both Sedillo and Eddy described Ybanez as very upset, teary-eyed, and shaken. (Tr. 135, 184) Sedillo, who had interviewed Ybanez when he came to the security force office, informed Eddy that he was concerned that the chemistry between Ybanez and Hendrix had evolved to a point that there was potential for work-place violence and recommended that Ybanez be sent home for the rest of the day or, in the alternative, taken into custody for evaluation. (Tr. 137-38, 184)

While Eddy was with Sedillo, she received a call on her cell phone from Hendrix. (Tr. 185) When Eddy answered the call, what ensued was described by both her and Sedillo as a stream of screaming and yelling by Hendrix. (Tr. 140-41, 185-86) Eddy testified that Hendrix was yelling something about the investigation that she was conducting into the incident between him and Ybanez and that she wasn't working quickly enough on it. (Tr. 185) Sedillo testified that although he could hear a stream of screaming and yelling coming from the phone, what was being said was generally unintelligible to him. (Tr. 140-41) Sedillo and Eddy described the call as one-way with Hendrix yelling and Eddy unsuccessfully trying to get a word in. (Tr. 140-41, 185-86) Sedillo testified that Eddy tried to tell Hendrix that she was involved in something and would have to get back to him but could not get a word in edge-wise. (Tr. 140)

Both Sedillo and Eddy testified that at one point Eddy moved the phone away from her ear and held it at arms-length. (Tr. 140, 147, 185, 232) Sedillo testified that while the phone was away from her ear, he heard the word "union" come from the phone but did not hear the context in which it was used. (Tr. 141) Eddy testified that she did not hear Hendrix speak the word union or make any request for official time during the call but acknowledged there was a possibility that Hendrix might have used the word union while she was holding the phone away from her ear. (Tr. 231-32) Eddy testified that the call ended with her telling Hendrix that she had to go, and would get back to him later and hanging up. (Tr. 186) Eddy and Sedillo each estimated that the call lasted about 2 or 3 minutes. (Tr. 148, 186)

6

Sedillo, a detective with the San Antonio, Texas, police department, was a reservist who was activated on September 11, 2001, and assigned in his military capacity to the security force at Randolph Air Force Base. (Tr. 131-32)

Sedillo testified that Eddy did not raise her voice during the call. (Tr. 142) Sedillo testified that although Eddy maintained her composure during the call, she appeared distressed and had tears in her eyes when the call was over. (Tr. 141-42) Sedillo and Eddy testified that after the phone call from Hendrix, Sedillo told Eddy that she didn't have to "take personal abuse by anybody" (Sedillo's version--Tr. 142) or "put up with that shit" (Eddy's version--Tr. 186).

The description of this telephone conversation offered by Hendrix differed from that of Eddy and Sedillo. Hendrix testified that he called Eddy and told her that she was blowing the situation out of proportion and as a union steward, he felt he was being discriminated against and treated unfairly. (Tr. 25-26) Hendrix testified that he told Eddy that he wanted to request official time to speak with DeCoux and that Eddy responded that she wanted to make an appointment with DeCoux and wanted to be in the meeting along with Hendrix. (Tr. 26) Hendrix testified he told Eddy that as a union NAF vice president, he had the right to speak to DeCoux alone, he wanted to do that and just needed official time to be released to talk to DeCoux. (Tr. 26) According to Hendrix, Eddy stated in an "angry," "heated" voice that she would get back with him and just hung up. (Tr. 26)

I credit Eddy and Sedillo rather than Hendrix insofar as the description of this cell phone call. I find their testimony is mutually corroborative and that overall they were more forthcoming in their testimony than Hendrix was.⁷ Moreover, their description of Hendrix behaving in an overly aggressive and intimidating manner toward Eddy is consistent with subsequent conduct on his part that occurred the same day. Additionally, their description of Eddy responding to Hendrix during their encounter in a non-aggressive and superficially calm manner when she was actually intimidated by his behavior and wanted to avoid confrontation with him

7

In particular, it was only during cross-examination that Hendrix acknowledged a subsequent telephone call to Eddy in which she offered to have her supervisor, Harris, speak with him. (Tr. 62-63)

is consistent with the pattern that she manifested during later events.⁸

I find that during this first cell phone call, Hendrix more than likely made a statement to the effect that as a union steward, he was being treated unfairly or being discriminated against. I find, however, there is no credible evidence that he requested to talk to DeCoux or requested official time to do so during this particular telephone call. That the term "union" was used by Hendrix during this call is corroborated by Sedillo. Additionally, in the response to a proposal of disciplinary action against Hendrix based, in part, on the incidents of September 12, the claim was made that Hendrix stated during the call that he felt he was being harassed as a Union steward. (G.C. Exh. 3) That response does not, however, make any claim that Hendrix said anything about seeing DeCoux until an incident that occurred later in the day and which will be discussed later herein. (G.C. Exh. 3) Moreover, Hendrix's description of the context in which he allegedly requested to see DeCoux and official time to do so, that is, a dialog between him and Eddy in which she insisted on being included in any meeting with DeCoux, is contradicted by the testimony of both Eddy and Sedillo. Thus, I find that during this first cell phone call, the only reference that Hendrix made relating to the union was that he felt he was being treated unfairly or discriminated against as a Union steward. I find that the comment was folded in with other complaints that Eddy was conducting the investigation into the incident between him and Ybanez in a manner that was not to his liking.

Hendrix's Second Phone Call to Eddy

The next event between Eddy and Hendrix occurred in the early afternoon. Eddy testified that she was in a meeting with Harris and Marasco talking about the investigation when Hendrix called her on her cell phone "yelling" about the investigation. (Tr. 187-88) Eddy testified that during the course of that call, she asked if Hendrix would like to talk to her supervisor, Harris, if he was unhappy with what she was doing. (Tr. 189) When Hendrix responded that he would like that, she went to find Harris who had left the room.

8

Some illustrations of Eddy's feeling of intimidation and desire to avoid personal confrontation with Hendrix, which will be described in greater detail later, were her action in calling her subordinate managers and telling them that Hendrix was agitated and they should stay out of his way (Tr. 168, 199) and her willingness to refer Hendrix to her supervisors. (Tr. 189, 198)

(Tr. 189) Eddy stated that when she located Harris, she called Hendrix and told him Harris was available to talk to him. (Tr. 189-90) Eddy testified that Hendrix asked why would he want to talk to Harris and told her that if he talked to Harris, he would have to talk to his Union representative. (Tr. 190-91) On direct examination, Hendrix indicated that after the first cell phone call, his next contact with Eddy was the lobby incident. (Tr. 27-28) On cross-examination, however, Hendrix acknowledged having a telephone conversation with Eddy that involved her offering to let him speak to Harris and him declining unless he had his union representative present. (Tr. 62-63) I credit Eddy's account of these two cell phone calls.

The Lobby Incident

Later in the afternoon, Eddy was standing in the lobby of the main lodging facility with Flood and Smith discussing a work-related matter. (Tr. 152, 163, 192) At the time, desk clerks and guests who were checking in were also present in the lobby. (Tr. 98, 101, 152-53, 165, 193) Hendrix approached and interrupted the conversation impatient to talk to Eddy. (Tr. 152, 163, 192) In their testimony, Flood and Smith described Hendrix as very upset (Tr. 152), aggressive (Tr. 152, 164), talking to Eddy in a very loud tone of voice (Tr. 153, 164) or shouting (Tr. 169-70), and unresponsive to Eddy's request that he wait until the three women finished their conversation. (Tr. 153, 163) Flood and Smith testified that they abandoned efforts to continue their conversation with Eddy and left the lobby after a couple of minutes and before the encounter between Eddy and Hendrix ended. (Tr. 156-57, 171) Neither Flood nor Smith could testify as to what specifically Hendrix was saying to Eddy other than it had something to do with Ybanez and he needed to talk to Eddy right away. (Tr. 156-57, 163-64) Flood testified that the group was recognizable as employees because they were dressed in uniforms. (Tr. 165-66) Smith testified that Eddy was trying to get Hendrix to calm down. (Tr. 154) Flood testified that Eddy raised her voice only to the point of showing that she was "forceful." (Tr. 165) Smith testified that she felt embarrassed by what was going on. (Tr. 154) Flood testified that she was worried about the impact of an employee shouting in the lobby in front of guests. (Tr. 165, 169)

Another witness who testified to the lobby incident was Banas, who was working at the front desk as an agent at the

time of the incident.⁹ (Tr. 96, 97; Resp. Exh. 6) Banas testified that his attention was drawn to the incident when Hendrix's voice escalated, though he witnessed only a portion of the exchange between Hendrix and Eddy. (Tr. 102, 97) Banas testified that the thrust of the exchange was that Hendrix stated that he wanted to see someone; that as a union official, he had a right to see that individual; and Eddy responded that they should go to her office and call to see if the individual was there before Hendrix went. (Tr. 97-99) Banas testified that Hendrix and Eddy repeated this exchange several times and that as the repetition went on, Hendrix became more excited. (Tr. 98-99) Banas testified that he did not remember Hendrix discussing the issue of official time. (Tr. 98) Banas testified that he thought it was an inappropriate type of conversation to occur in the lobby in the presence of guests and employees and that it was disruptive of operations. (Tr. 101) Banas also testified that he perceived Eddy as trying to de-escalate the level of tension during the exchange. (Tr. 102) Banas estimated the length of the portion of the exchange that he witnessed as 5 minutes at most. (Tr. 97)

Eddy provided a more dramatic account of what happened in the lobby than that given by Smith, Flood and Banas. The description that Eddy provided in her testimony is as follows. Hendrix forcefully barged into her ongoing conversation with Smith and Flood, came within a foot of her and began "screaming" at her. (Tr. 192-93) At the time, there were two or three employees in addition to Smith and Flood and two or three guests present in the lobby.

(Tr. 193) Eddy noticed the guests turning and looking to see what was going on. (Tr. 194) In an effort to calm the situation, she initially lowered her voice hoping that Hendrix would follow suit and when that was unsuccessful, she raised her voice in hopes of getting his attention.

(Tr. 194-95) The way Hendrix "came at" her combined with the fact that he is a much larger person than she scared her;¹⁰ she was shocked that he was behaving the way he was in the lobby and felt that he was unstable and out of control; and her main objective was to get him out of the lobby and get him away from her. (Tr. 195, 198-99, 267) Hendrix was "screaming" at her about the investigation and

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"Agents" check in guests, resolve guest complaints and make reservations. (Tr. 96) I find that the terms agent and desk clerk are synonymous.

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Although Eddy described Hendrix as weighing 270 pounds (Tr. 257), I do not know the exact heights and weights of Hendrix and Eddy. From my observation, however, Hendrix is much larger than Eddy.

told her that he wanted to go see DeCoux. (Tr. 193, 197) During the exchange, Eddy asked Hendrix if he had an appointment with DeCoux and he responded that he was a union official and could walk in whenever he wanted. (Tr. 197-98) Eddy suggested to Hendrix that they go upstairs to her office and call to set up an appointment with DeCoux. (Tr. 198) Hendrix followed her upstairs and she took him to Sgt. Vela, the "admin" person for DeCoux; she told Vela that Hendrix wanted to talk to DeCoux or Marasco; then she left and went back to her office. (Tr. 198) Eddy estimated the length of the exchange in the lobby as five minutes. (Tr. 197) After she returned to her office, she called her managers to warn them that Hendrix was extremely upset, they needed to be careful and were free to go home if they felt it necessary. (Tr. 199) After the incident, she was shaken and apprehensive to the point of looking to see if she could hide under her desk if Hendrix came at her again, looking out the window to make sure that Hendrix was not there before going to her car, checking the tires on her car, and looking over her shoulder. (Tr. 199-201)

Eddy testified that Hendrix did not request official time during the lobby incident and that she did not believe that by giving consent to Hendrix to go upstairs, she was authorizing official time. (Tr. 235, 257-58)

Eddy testified that shortly after the lobby incident, Banas came to her office and asked if she was alright. (Tr. 202) Eddy testified that she responded that she needed some time but would be okay and that she gave this response because she needed to present a strong image before her employees.¹¹ (Tr. 202)

Hendrix's description of the lobby incident differs from that given by the other witnesses. On direct examination, Hendrix stated that he waited for Eddy to get back to him as she said she would during their telephone conversation and went outside to do some work.¹² (Tr. 27) At one point, he went into the lobby of building 112 and noticed Eddy there speaking with Smith and Flood. (Tr. 27-28) According to Hendrix's testimony, he stood about 6

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Banas testified that he did not recall having such a conversation with Eddy but that it was possible that he did. (Tr. 102)

¹²

The telephone conversation to which Hendrix referred was the one that Eddy received while she was with Sedillo at the security force office. During direct examination, Hendrix did not acknowledge that there were any telephone conversations between him and Eddy subsequent to that one.

feet away waiting for them to finish when Eddy noticed him and ended her conversation. (Tr. 28) Hendrix testified that Smith and Flood left the lobby, he and Eddy approached each other, and he asked if it would be okay for him to be released on official time so that he could speak to DeCoux. (Tr. 28) Hendrix testified that he told Eddy that he wanted to speak to DeCoux because he felt that "this" was being blown out of proportion and felt that as NAF vice president, he was being discriminated against. (Tr. 28) In his testimony, Hendrix stated that Eddy "again" said she wanted to go with him to the meeting and he "again" told her that as union steward, he had a right to see DeCoux alone. (Tr. 28) Hendrix testified that Eddy got increasingly frustrated, her tone of voice raised, his did equally, she told him that DeCoux was not in and maybe they should phone, he responded that they were only about 20 steps from upstairs and couldn't he please just be released to go upstairs and talk to DeCoux. (Tr. 28-29) According to Hendrix, in response to Eddy's statement that DeCoux was not in, he asked to talk to Marasco and Eddy got upset, threw up her hands and said that he was going to do what he wanted to do and to just go ahead and go. (Tr. 28-29) Hendrix estimated that the encounter in the lobby lasted approximately 3 or 4 minutes. (Tr. 30)

I credit the testimony of Eddy, Smith, Flood and Banas rather than that of Hendrix as providing a more accurate description of what occurred in the lobby. I found the accounts of Eddy, Smith, Flood and Banas generally consistent with each other and consistent with other events that transpired that day, i.e., the telephone calls between Hendrix and Eddy. I find that Eddy's perception of Hendrix' behavior was likely colored by her earlier experiences with him on the phone, which left her sensitive to and apprehensive about his aggressiveness and apparent volatility. I find that her perception of the level of aggressiveness that Hendrix displayed toward her in the lobby was somewhat exaggerated. I find, however, that Hendrix interjected himself into Eddy's conversation with Smith and Flood in an aggressive manner and although he did not scream at her, he spoke to her in a very loud, aggressive tone of voice and behaved in an intimidating manner toward her.

I find that there were guests as well as employees in addition to Banas, Flood and Smith present in the lobby and that Hendrix's conduct was loud and disruptive enough to draw and hold their attention to the confrontation that he instigated with Eddy. Thus, Hendrix's treatment of Eddy was witnessed by guests and employees who were Eddy's subordinates. I find, contrary to Hendrix's description,

that Eddy did not respond aggressively or escalate the decibel level of the conversation, but rather attempted to control the scene that Hendrix was creating by getting him to leave the lobby. I find that during the confrontation in the lobby, Hendrix expressed dissatisfaction with Eddy's actions regarding the Hendrix-Ybanez incident, demanded to see DeCoux and contended that it was his right as a Union officer or representative to do so. Eddy responded by asking if he had an appointment to see DeCoux and suggesting that they go upstairs and telephone to see if DeCoux or Marasco was available.

I find that during this exchange, Hendrix did not make a precisely stated request for official time. I find that Hendrix did, however, make clear that he was demanding to see DeCoux or Marasco in his capacity as a union representative, and that implicit in that demand was a request for official time. Although Eddy permitted Hendrix to go upstairs and arrange to see DeCoux or Marasco, she did not explicitly authorize official time. Hendrix, however, reasonably believed that authorization for official time was packaged in with permission to go up and arrange to see DeCoux or Marasco. In any event, as will be discussed later, what is critical to resolving the dispute in this case is not whether Hendrix was on official time but whether he was engaged in protected activity.

Other Events on September 12

At some point during September 12, 2001, Ybanez, who left to go home after his meeting with Sedillo and Eddy, returned and handed Eddy a notarized statement, which, among other things, made allegations that an incident occurred between him and Hendrix on approximately April 20. (Tr. 209-10; Resp. Exh. 3) Specifically, in the notarized statement Ybanez alleged that Hendrix threatened to meet him in a park and fight and attempted to intimidate him by slamming a hammer on a desk. (Resp. Exh. 3)

The Disciplinary Action Against Hendrix

On or about October 1, 2001, Eddy issued a notice of proposed suspension to Hendrix in which she proposed to suspend him for a 30-day period for "inappropriate behavior, rudeness and insolence." (G.C. Exh. 2) The proposed suspension cited several incidents that occurred on two dates as the basis for the suspension. The incidents cited were as follows:

a "loud" verbal confrontation with Ybanez in full view of other employees that occurred on September 12, 2001;

a verbal confrontation with Ybanez that occurred on or about April 20, 2001, during which Hendrix picked up a hammer and slammed it on a desk;

a cell phone call to Eddy on September 12, 2001, in which Hendrix yelled at Eddy and told her in an angry tone that since she wasn't doing anything about what had taken place that morning between him and Ybanez, he had conducted his own investigation; and

Hendrix's interruption of Eddy while she was having a conversation with some employees during the afternoon of September 12, 2001, and repeatedly demonstrating insolent behavior and rudeness during the conversation that ensued between him and Eddy.

A response to the proposal dated October 9, 2001, was filed on Hendrix's behalf. (G.C. Exh. 3) The response denied that Hendrix had a loud verbal confrontation with Ybanez and asserted that written and oral witness statements from Garza and Miller obtained by the Respondent and the Union showed that it was Ybanez, not Hendrix, who yelled and was rude. (G.C. Exh. 3) Moreover, the response cited and provided a statement from Garza asserting that on September 12, 2001, Ybanez came up to him yelled at him about not picking up cigarette butts and trash. (G.C. Exh. 3) The response argued that Hendrix's long and clean employment record should be taken into consideration and in view of the conflicting statements from Miller and the statements from Garza that Hendrix should be given the benefit of the doubt.¹³ (G.C. Exh. 3)

With respect to the April 2001 incident, the response asserted that the incident was a fabrication on Ybanez's part and that, in fact, Hendrix was on leave from April 18-25, 2001. (G.C. Exh. 3)

As to the interactions between Hendrix and Eddy cited in the proposal, the response asserted that both conversations were protected activity because Hendrix was talking to Eddy in his union capacity. (G.C. Exh. 3) Additionally, the response asserted that although the conversations were loud, both Hendrix and Eddy had raised their voices and, as a union representative, Hendrix had "a

13

In support of the claim that Miller provided conflicting statements, the response included a written statement from Garza asserting that Miller told him that Ybanez yelled and Hendrix did not. (G.C. Exh. 3, attachment I-B)

right" to become confrontational with a manager. (G.C. Exh. 3)

The response argued that the penalty was too severe and was disproportionate when compared to another instance in which a memo for record was placed in the personnel folder of an employee for only 1 year because of friction with several employees. (G.C. Exh. 3)

By memorandum dated October 12, 2001, Eddy notified Hendrix of her decision to suspend him for 30 calendar days. (G.C. Exh. 4) The decision relied on the same incidents that were cited in the proposal. (G.C. Exh. 4)

Ybanez was issued a proposal and, subsequently, a decision to suspend him for 3 calendar days because he engaged in verbal confrontations with Hendrix on September 12, 2001, and on or about April 20, 2001. (Resp. Exhs. 11 & 13)

In testimony at the hearing in this case, Eddy explained her rationale for imposing discipline on Hendrix and the penalty chosen stating that she believed Ybanez that an altercation occurred between him and Hendrix in April, 2001. (Tr. 263) Eddy testified that she considered both Ybanez and Hendrix at fault for the two altercations that occurred between them. (Tr. 222, 228) Eddy testified that it was clear to her that a conflict occurred between Hendrix and Ybanez on September 12 that disrupted the workplace and although there were conflicting statements about what happened, she was persuaded by Hendrix's statement that he cautioned Ybanez not to go to the security force that both were at fault. (Tr. 221-22, 250-51) Eddy testified that if Hendrix's conduct had been limited to the incidents with Ybanez, she would have suspended Hendrix for the same period as Ybanez, i.e., 3 days. (Tr. 228)

As to Hendrix's conduct during his telephone call to her and in the lobby, Eddy testified that in making her decision regarding the disciplinary action, she considered the location where Hendrix confronted her, i.e., the lobby, which she characterized as the "hub" of the lodging operation; the people who were there, i.e., lodging guests and her subordinates; how afraid he made her; and how he disrupted the front desk; i.e. guests don't like to see confrontations in the lobby especially between an employee and the "top manager of the whole place." (Tr. 219)

Discussions

General Counsel

Counsel for the General Counsel contends that the Respondent violated section 7116(a)(1) and (2) by taking the disciplinary action against Hendrix, which was motivated by or based on his protected activity. In this regard, the General Counsel argues that this case involves two types of protected activity: (1) Hendrix's actions with respect to filing multiple unfair labor practices and grievances about Eddy's actions; and (2) Hendrix's actions in requesting official time to speak to Eddy's supervisors in his capacity as a Union representative during his conversations with Eddy on September 12.

With respect to the first, the General Counsel contends that Eddy was aware of Hendrix's protected activity and, in fact, was required to attend labor-management training as the result of some of that activity. The General Counsel argues that the evidence shows that Ybanez was unstable and unreliable and this casts suspicion on Eddy's claim that she gave weight to his version of events. The General Counsel contends that the evidence shows that Eddy's decision to discipline Hendrix because of the incidents involving Ybanez lacked legitimate basis and Eddy's stated reasons were false or pretextual.¹⁴ The General Counsel argues that, absent legitimate basis for Eddy's action, the only possible explanation is that Hendrix's protected activity motivated the disciplinary action.

With respect to the second, the General Counsel contends that evidence that should be credited shows that during the telephone call to Eddy and his encounter with her in the lobby, which were the subjects of the disciplinary action, Hendrix was requesting official time and to meet with Eddy's supervisor(s) in his role as a Union representative.¹⁵ The General Counsel argues that an official time request does not need to be approved for an employee to be engaged in protected activity. In any event, the General Counsel asserts that Eddy did not deny Hendrix's

14

The General Counsel requests that an adverse inference be drawn for Respondent's failure to call Leandrew Miller or Glen Ybanez as witnesses.

15

The General Counsel notes that although Eddy testified that there were interactions between herself and Hendrix on September 12 in addition to the two referred to in the disciplinary action, Hendrix did not recall the encounters. The General Counsel does not address those additional encounters asserting that they were not referenced in the disciplinary action.

request for official time and eventually granted his request to meet with her supervisor(s).

The General Counsel acknowledges that Hendrix "vigorously and perhaps even boisterously pressed his request" but argues that, viewed against the factors cited in *Department of the Air Force, Grissom Air Force Base, Indiana*, 51 FLRA 7 (1995) (*Grissom AFB*), Hendrix's actions did not amount to flagrant misconduct. (G.C. Brief at 19) The General Counsel argues there is no evidence that Hendrix ever touched Eddy, engaged in verbal threats or used intemperate language. The General Counsel contends that although Hendrix "may have raised his voice beyond traditional levels for the lobby," Eddy raised her voice also. (G.C. Brief at 22) The General Counsel characterizes Eddy's testimony about the level of fear that Hendrix's actions provoked in her as unsupported puffery and undercut by her failure to call the security force and willingness to escort Hendrix out of the lobby. The General Counsel contends that there is no evidence that Hendrix's conduct was planned and that it was provoked by Eddy's failure to respond to his request to speak to her supervisors. As to the location of the lobby incident, the General Counsel asserts that it occurred on a military base in an area not open to non-federal or non-military personnel and that there is no evidence that any members of the public were present.

As remedy, the General Counsel requests a cease and desist order, posting of a notice to employees, and an order requiring that Hendrix be made whole, with interest, for the 30-day suspension and that the suspension be expunged from his record.

Respondent

The Respondent argues that it is clear that a loud verbal confrontation occurred on September 12, 2001, between Hendrix and Ybanez and that based on the information available to her it was reasonable for Eddy to conclude that both were partly at fault.¹⁶

The Respondent argues that Hendrix was not engaged in protected activity at the time of his first telephone call to Eddy and his encounter in the lobby with her on

16

Respondent states that by the time of the hearing in this case, Ybanez's employment had been terminated and they could not locate him. Respondent argues that, under this circumstance, no adverse inference should be drawn from its failure to produce Ybanez as a witness.

September 12, 2001, but was in the capacity of an ordinary employee. In support of this argument, Respondent contends that Hendrix was not on official time during either of those events. Respondent asserts that Hendrix did not clearly communicate to Eddy that he intended the telephone call to constitute a protected activity and even if he did mention being a union official during the call this did not mean that he was necessarily engaged in union business. Respondent suggests that management acquiescence or agreement to conduct union business is a necessary element for such interactions to constitute protected activity. The Respondent contends that Hendrix's claim that he was engaged in union business, as contrasted with personal business, is further undercut by the fact that he told Eddy in the parking lot that the Union office advised him to go back to work and told her in response to her offer to let him talk to Harris, that he would need to talk to his union representative.

The Respondent asserts that it was not until late in the encounter in the lobby that Hendrix first communicated that he was functioning in his capacity as a union official. Respondent argues that belated mention of union status should not provide retroactive protection for inappropriate conduct. Respondent contends that even assuming that the first telephone call and the encounter in the lobby constituted union activity, Hendrix engaged in flagrant misconduct and, consequently, his activity was unprotected. In support of this contention, the Respondent argues that both confrontations occurred in areas that were public rather than private places and inappropriate locations for rude and insolent conduct and that they concerned Hendrix's personal frustrations rather than union-related business. Respondent asserts that viewed in the totality of the circumstances, Hendrix's conduct was designed rather than impulsive and unprovoked by Eddy. Respondent contends that Hendrix's conduct amounted to assault and disrupted the operations of the lodging facility.

Respondent argues that although it is undisputed that Hendrix engaged in protected activity prior to September 12, 2001, the General Counsel has failed to establish a *prima facie* case that Hendrix was disciplined as a result of that activity. Respondent asserts that any relationship between the timing of the disciplinary action and Hendrix's protected activities was a product of Hendrix's choice of when he engaged in the conduct that precipitated the discipline. Moreover, Respondent contends that there is no evidence that Eddy harbored any union animus. Respondent argues that even assuming that a *prima facie* case has been established, it has shown that it had a legitimate justification for

disciplining Hendrix, namely, misconduct that met the guidelines for the penalty imposed, and that it would have taken the same action in the absence of protected activity.

Analysis

The Analytical Framework

Section 7102 of the Statute guarantees employees the right to form, join, or assist any labor organization or refrain from such activity without fear of penalty or reprisal. Under section 7116(a)(2) of the Statute, it is an unfair labor practice for an agency to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment.

In *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*), the Authority articulated an analytical framework for addressing allegations of discrimination claimed to violate section 7116(a)(2). Under that framework, the General Counsel has at all times the overall burden to establish by a preponderance of the evidence that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in connection with hiring, tenure, promotion, or other conditions of employment. *Indian Health Service, Crow Hospital, Crow Agency, Montana*, 57 FLRA 109, 113 (2001) (*Crow Hospital*); *Letterkenny*, 35 FLRA at 118. As a threshold matter, the General Counsel must offer sufficient evidence on these two elements to withstand a motion to dismiss. See, e.g., *Crow Hospital*, 57 FLRA at 113. Whether the General Counsel has established a *prima facie* case is determined by considering the evidence in the record as a whole, not just the evidence presented by the General Counsel. *Department of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 55 FLRA 1201, 1205 (2000).

Satisfying this threshold burden establishes a violation of the Statute only if the respondent offers no evidence that it took the disputed action for legitimate reasons. Where the respondent offers evidence that it took the disputed action for legitimate reasons, it has the burden to establish, by preponderance of the evidence, as an affirmative defense that: (1) there was a legitimate justification for its action; and (2) it would have taken the same action even in the absence of protected activity. See, e.g., *id.* The General Counsel may seek to establish

that the agency's reasons for taking the action were pretextual. *See, e.g., id.*

The Authority has held that although closeness in time between an agency's employment decision that is the focus of a discrimination allegation and protected activity may support an inference of illegal motivation, it is not conclusive proof of a violation. *See, e.g., id.*

Where the alleged discrimination concerns discipline for conduct that occurred while the employee was acting in his/her capacity as a union representative, a necessary part of the respondent's defense is that the conduct constituted flagrant misconduct. *See, e.g., Federal Bureau of Prisons, Office of Internal Affairs, Washington, D.C., 53 FLRA 1500, 1514 (1998).* If flagrant misconduct is established, the conduct loses its protection under the Statute. *See, e.g., id.* at 1515. In determining whether an employee has engaged in flagrant misconduct, the Authority balances the employee's right to engage in protected activity under section 7102, which permits leeway for impulsive behavior against the employer's right to maintain order and respect for its supervisory staff on the job site. *E.g., Grissom AFB, 51 FLRA at 11-12.* Relevant factors in striking this balance include: (1) the place and subject matter of the discussion; (2) whether the employee's behavior was impulsive or designed; (3) whether the behavior was in any way provoked by the employer's conduct; and (4) the nature of the intemperate language and conduct. *E.g., id.* The foregoing factors need not, however, be cited or applied in any particular way in determining whether an action constitutes flagrant misconduct. *E.g., id.*

The Incidents Between Hendrix and Ybanez

In this case, the General Counsel makes no claims that Hendrix was engaged in protected activity during his encounters with Ybanez. Rather, the General Counsel argues that the disciplinary action taken against Hendrix for his encounters with Ybanez was motivated by his prior Union activity.

It is undisputed that Hendrix engaged in Union activity and during the course of that activity challenged some of Eddy's actions. Moreover, it is clear from the evidence that Eddy knew of Hendrix's activity and that her actions were the subject of at least some of his complaints. However, I am not persuaded by the General Counsel's claim that Eddy's acceptance of Ybanez's claim that an incident occurred between him and Hendrix in about April 2001 and her conclusion that Hendrix bore some responsibility for that

and the September 12 confrontation between himself and Ybanez were baseless and, therefore, must have been motivated by his prior union activity. Although another person might not necessarily have reached the same conclusions that Eddy did, I find, based on the record as a whole that the position she adopted regarding the incidents between Hendrix and Ybanez was not unreasonable. It is clear from the record in this case that there was a history of friction and conflict between Hendrix and Ybanez and Eddy knew it. It is also clear from the record that a reasonable person could have concluded that both men contributed to the difficulties between them. Evidence shows that at the time Eddy took the disciplinary action against Hendrix, she relied on information obtained from witnesses that lent support to her action. The fact that reasonable people might differ regarding the weight that should have been given to that evidence, does not mean Eddy's perception of what was before her at the time she took the disciplinary action was unreasonable.¹⁷ I do not find Eddy's conclusion that the incidents between Hendrix and Ybanez cited in the disciplinary action happened and that Hendrix and Ybanez shared culpability was suspicious or in bad faith.

I do not find that the timing of the events involved supports a finding that the disciplinary action against Hendrix was motivated by his protected activity. Although Hendrix engaged in protected activity that involved challenges to actions taken by Eddy prior to the disciplinary action, there is nothing that suggests the link between the two was a product of anything more than the order in which his protected activity and the incidents on which the discipline was based either occurred or were brought to Eddy's attention. There is no direct evidence of a causal relationship between his protected activity and the

17

I deny the General Counsel's request that I draw an adverse inference based on Respondent's failure to call Ybanez and Leandrew Miller as witnesses at the hearing in this case. The General Counsel made this request in support of its argument that information that the two gave Eddy was unreliable. I do not find that testimony Ybanez and Miller might have given in the proceedings in this case might allow me to make findings as to the reliability of the information they provided Eddy or would be material in determining whether Eddy's action in taking disciplinary action against Hendrix was motivated by his Union activity. Even if a trier of fact in a subsequent proceeding might discount the statements and information that Ybanez and Miller provided Eddy as unreliable, what is material is whether they gave Eddy the information and she relied on it in apparent good faith.

disciplinary action taken with respect to the incidents between him and Ybanez. Additionally, I find that taking disciplinary action was within the range of reasonable reactions to the information provided to Eddy. Also, it is notable that the same discipline was meted out to both participants in the incidents and there is no evidence that Eddy imposed a penalty on Hendrix that was disproportionate to that imposed on Ybanez.¹⁸

I find that the record, as a whole, does not establish a *prima facie* case that Hendrix's protected activity was a motivating factor in the disciplinary action taken against Hendrix based on the incidents involving him and Ybanez.

The Incidents between Hendrix and Eddy

The General Counsel asserts that Hendrix was engaged in protected activity during the telephone conversation with Eddy and the meeting in the lobby for which he was disciplined. Assuming that was the case, the disciplinary action based on those incidents would have violated the Statute unless Hendrix engaged in flagrant misconduct.

It is important to note that Hendrix's status as NAF Vice-President of the Union does not automatically cloak every employment-related activity in which he engages with the protection of the Statute or immunize him from discipline. See, e.g., *Long Beach Naval Shipyard, Long Beach, California and Long Beach Naval Station, Long Beach, California*, 25 FLRA 1002, 1005 (1987). Rather, Hendrix remains subject to discipline for activities that are not specifically on behalf of a union or which exceed the boundaries of protected activity. See, e.g., *id.*

I find that a preponderance of the evidence does not establish that Hendrix's telephone call to Eddy was an activity specifically on behalf of the Union. The incident and ensuing investigation that prompted Hendrix's telephone call to Eddy did not involve any union activity on the part of Hendrix. Rather, it involved a dispute between two employees *qua* employees--one of whom was coincidentally a union representative. The evidence does not establish that at any point during his call to Eddy, Hendrix advised her that he was calling in his union capacity or that such status was reasonably apparent from the content or the context of his call. Rather, the evidence shows that the call consisted of Hendrix vehemently expressing displeasure

18

I credit Eddy's testimony that if Hendrix's actions had been limited to the incidents with Ybanez, Hendrix would have received the same penalty, i.e., a 3-day suspension.

with Eddy about what she was or was not doing in response to an incident that occurred between him and Ybanez. During the course of that call, I find that the only mention of union activity that Hendrix made was a complaint that he felt he was being discriminated against as a union representative. I find that this single mention was packaged into Hendrix's tirade about Eddy's investigation and unaccompanied by a reasonably discernable indication that Hendrix was raising an issue on behalf of or with the assistance of the union. Consequently, I find that Hendrix's single comment that he was being discriminated against as a union representative was insufficient to establish that the call constituted union activity rather than a personal undertaking. Cf. *Crow Hospital*, 57 FLRA at 125 (seeking union assistance, pursuing grievances and having union deal with employer on their behalf constituted protected activity by employees); *U.S. Department of Agriculture, Food Safety and Inspection Service, Washington, D.C.*, 55 FLRA 875, 879-81 (1999) (attendance at meeting in capacity as acting union president constituted protected activity); *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, 1401-02 (1992) (*El Paso Border Patrol*) (employee was engaged in protected activity when he sought approval of official time and leave without pay (LWOP) requests to conduct union business).

With respect to the encounter between Hendrix and Eddy in the lobby, I find that regardless of whether it began that way, it clearly became a demand by Hendrix to see DeCoux or Marasco in his union capacity. The fact that Hendrix was not on official time or may not have made an express request for official time during the incident in the lobby did not nullify the fact that he was engaged in protected activity. See, e.g., *El Paso Border Patrol*, 44 FLRA at 1395 (activity by employee that occurred when he was off duty and during which he requested official time and LWOP in order to conduct union business was protected). There is nothing in the Statute that indicates that section 7131 and agreements reached thereunder are intended to be

coterminous with activity protected under section 7102.¹⁹ In fact, some activities covered under section 7102 are not covered by the terms of section 7131. See, e.g., *Internal Revenue Service, North Atlantic Service Center*, 7 FLRA 596 (1982) (distribution of union literature by employees on behalf of a rival to the incumbent exclusive representative during non-work time is a protected activity under the Statute). In view of the fact that Hendrix was clearly requesting to meet with an agency representative as a union representative, I find that his activity in the lobby was specifically on behalf of the union.

The next question is whether Hendrix's actions during the encounter in the lobby constituted flagrant misconduct and, consequently, lost the protection of the Statute. As I discussed above, the Authority has identified relevant factors for use in striking the balance between an employee's right to engage in protected activity and the agency's right to maintain order and respect for its supervisory staff on the job site. See, e.g., *Grissom AFB*, 51 FLRA at 12.

As to the place of the incident, I find that although the lobby where Hendrix's conduct occurred was not open to the general public, it was nevertheless a public location in that it was open to and used by guests at the lodging facility and anyone else doing business at the lodging facility. Moreover, maintaining decorum in the lobby was important to the business operations of the lodging activity. The evidence establishes that other employees were present in addition to guests when the incident occurred and that the incident was loud enough to draw their attention. Although Eddy acknowledged that she did not

19

Section 7131 of the Statute addresses the availability of official time for employees who are engaged in activity under the Statute. As relevant to this case, there is no statutory entitlement to perform many representational activities that are covered and protected by the Statute on official time. Rather, official time with respect to the types of matters encompassed by section 7131(d) is subject to negotiation. It does not follow that otherwise protected activity loses protection simply because a negotiated agreement does not authorize official time for it. Cf. *U.S. Department of the Air Force, HQ Air Force Materiel Command and American Federation of Government Employees, Council 214*, 49 FLRA 1111, 1119-21 (1994) (Although union was free to designate as many representatives as it chose, those representatives could not perform their duties on official time for matters covered by section 7131(d) unless the parties negotiated an agreement to that effect.)

receive any complaints from guests (Tr. 280), this does not mean that the incident did not have a negative impact on the business image of the lodging activity.

Although it is difficult to gauge the degree of disruption that Hendrix's actions caused in the lobby, it is clear that there was some. Hendrix interrupted a business conversation that Eddy was having with two other employees and caused its premature termination. His actions undermined Eddy's authority and professional image in front of her subordinate employees and the guests present in the lobby. Hendrix's actions also presented a negative image to guests who would reasonably expect the lodging activity operations, particularly those in the lobby, to be conducted in a professional, business-like manner. Insofar as the location of the incident, I find that the circumstances here are distinguishable from those involved in cases in which the Authority found no flagrant misconduct. *Cf., e.g., United States Department of Energy, Oak Ridge, Tennessee*, 57 FLRA 343, 346 (2001) (*Oak Ridge*) (facts that allegations were not publicly made and were confined to appropriate officials and witnesses weighed against finding flagrant misconduct); *Grissom AFB*, 51 FLRA at 12 (no contention that remarks were made in front of other employees on job site or that they disrupted the work of the unit); *El Paso Border Patrol*, 44 FLRA at 1402 (remarks were made in a private telephone conversation). In this case, Hendrix's conduct occurred publicly, loudly, and in front of inappropriate witnesses.

As to the subject matter of the incident, I find that it concerned Hendrix's displeasure regarding Eddy's action in investigating the incident between him and Ybanez and his demand to meet with DeCoux or Marasco to discuss the matter. Thus, I find the subject matter included a labor-management relations issue, among other things.

Whether Hendrix's action was impulsive or designed is not clear-cut. One interpretation that could be attached to Hendrix's behavior was that the series of actions he engaged in was a deliberate, calculated campaign to intimidate Eddy and influence her actions with respect to the Hendrix/Ybanez incident. However, a more likely interpretation is that Hendrix's anxiety and irritation about the events involving Ybanez and their aftermath stirred him to actions that were more impetuous than calculated. I find this latter interpretation more consistent with the erratic course of Hendrix's behavior than the former interpretation. Specifically, Hendrix initially appeared relatively calm in his encounters with Eddy in the parking lot; shortly thereafter, he launched into a tirade in a call to Eddy that

he initiated and that she received at the security force office; in a subsequent call that he also initiated, he responded receptively to Eddy's offer to arrange for him speak to her first-level supervisor but, once the supervisor was available to talk to him, Hendrix rejected the offer on the basis that he would need union assistance before doing so; then, shortly thereafter, he demanded to speak to her second or third-level supervisor right away and apparently without any other union representative involved. Although I find Hendrix's actions were more impulsive than designed, I also find that Hendrix's motives consisted both of venting his anxiety and irritation as well as a desire, perhaps instinctive, to pressure Eddy and influence her response to the incident between him and Ybanez.

I do not find that Hendrix's actions were provoked by Eddy's actions. Based on my credibility findings above, I find that all that Eddy had done was receive an allegation from Ybanez and taken steps to investigate it. As noted above, I find that prior to the lobby incident, Hendrix had not requested to speak to DeCoux or Marasco and had even turned down Eddy's invitation to speak with Harris. Thus, I do not find that there was any action by Eddy with respect to a labor-management relations issue or an ongoing labor-relations dispute for Hendrix to respond to. Cf. *Oak Ridge*, 57 FLRA at 346 (conduct was the culmination of a heated dispute that was ongoing between the union representative and the respondent); *Grissom AFB*, 51 FLRA at 12 (comments were in reaction to a letter from the respondent canceling certain previously agreed-upon negotiations about which the union had received no notification). I find that at the time of the lobby incident, Hendrix's agitation about the incident between him and Ybanez and its possible aftermath was not provoked by any action on the part of Eddy concerning a labor-management relations matter.

As to the nature of his language and conduct, there is no evidence that the language Hendrix used was offensive or threatening. Rather, it was the tone of voice Hendrix used and the manner in which he treated Eddy that were troublesome. As set forth above, I find that Hendrix displayed aggression and intimidation toward Eddy and was loud, disrespectful, and insubordinate toward her. Moreover, he displayed this behavior toward Eddy in a public place in full view of her subordinate employees and individuals who were her business associates and customers.

Considering the above factors as a whole, I find, on balance, that Hendrix engaged in flagrant misconduct during the lobby incident. Consequently, his actions lost

protection that they otherwise would have had under the Statute.

Accordingly, I find that the General Counsel has not established a *prima facie* case that Respondent's action in disciplining Hendrix based on the two incidents involving him and Ybanez was motivated by Hendrix's union activity. I find that Hendrix was not engaged in protected activity during his telephone conversation with Eddy for which he was disciplined. I find that although Hendrix was engaged in protected activity during the lobby incident for which he was disciplined, he engaged in flagrant misconduct.

Therefore, I conclude that the Respondent did not violate section 7116(a)(1) and (2) of the Statute as alleged. I recommend dismissal of the complaint in this case.

It is therefore recommended that the Authority adopt the following Order:

ORDER

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

Issued, Washington, DC, May 15, 2003.

SUSAN E. JELEN

Judge

Administrative Law

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. DA-CA-02-0022, were sent to the following parties:

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DATED: MAY 15, 2003
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