73 FLRA No. 87

DEPARTMENT OF THE NAVY
SUPERVISOR OF SHIPBUILDING
PASCAGOULA, MISSISSIPPI
(Respondent)

and

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES
LOCAL R5-135
(Charging Party)

AT-CA-20-0136

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DECISION AND ORDER

March 1, 2023

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

The Federal Labor Relations Authority's (FLRA's) General Counsel (GC) issued a complaint alleging that the Respondent (the Agency) violated § 7116(a)(l) and (2) of the Federal Service Labor-Management Relations Statute (the Statute)[1] by terminating a probationary employee (the employee) for engaging in protected activity under § 7102 of the Statute.[2] In the attached recommended decision, FLRA Chief Administrative Law Judge David L. Welch (the Judge) found the Agency did not violate § 7116(a)(1) or (2).

The Charging Party (the Union) filed exceptions, arguing the Judge erred in his credibility determinations and findings of fact, and in finding no violation. For the following reasons, we adopt the Judge's findings, conclusions, and recommendations, and we dismiss the complaint.

II. Background and Judge's Decision

We summarize the relevant facts briefly, as they are set out in more detail in the Judge's decision.

The Agency oversees certain shipbuilding contracts and uses nondestructive testing (NDT) methods for quality control, including ultrasonic testing (UT). To fill a need for an UT level III examiner, the Agency hired the employee as a quality-assurance specialist on September 4, 2018, subject to a two-year probationary period. The employee had approximately ten years' private-sector experience in UT level III work. Upon hire, the employee's supervisors informed him they expected him to pass the UT level III certification exam (UT exam) to become UT level III certified (UT certified). An Agency regulation authorizes an employee to take the UT exam up to three times in a year. If the employee fails three times, then the employee must wait twelve months before attempting the UT exam again (the waiting period).

In December 2018, the employee failed his first UT exam. The employee's second-line supervisor recommended terminating the employee, but the employee's third-line supervisor and the Agency's quality-assurance manager declined. In February and May 2019, the employee failed a second and third UT exam, respectively. After each failure, the second-line supervisor recommended termination. After the third failure, the third-line supervisor agreed.

Nevertheless, in May 2019, as an alternative to termination, the employee's supervisors asked the Agency to waive the waiting period. The Agency director overseeing the NDT programs authorized the waiver so the employee could take a fourth UT exam, contingent on the employee attending UT training at another naval shipyard. The Agency sought such training, and the Puget Sound Naval Shipyard informed the Agency it could provide the UT training in October 2019 after a scheduled NDT audit. The employee ultimately did not receive the UT training.

Meanwhile, on May 14, 2019, the employee's first-line supervisor emailed the employee regarding his failure to input data at least 70% of the time (70% requirement) in the Technical Support Management system (TSM), a web application used to document daily work performance. The email also discussed the employee's preparation for the Defense Acquisition Workforce Improvement Act level II certification (DAWIA certification). The employee's position requires that certification, which must be completed within twenty-four months of the employee's start date. The email directed the employee to complete the online portion of the DAWIA training by December 31, 2019.

On October 3, 2019, the first-line supervisor assigned the employee training for liquid penetrant testing (PT) certification. On October 8, 2019, the Union filed a grievance on the employee's behalf, alleging that a PT certification was not part of the employee's position description (PD). On October 18, 2019, the second-line

[1] 5 U.S.C. § 7116(a)(1), (2).

[2] *Id.* § 7102.

supervisor denied the grievance. Several days later, a meeting to discuss the grievance was held between the second-line supervisor, a labor and employee relations specialist (specialist), the Union president, and the employee. At the meeting, the second-line supervisor stated that management expected the employee to be UT certified and certified in all other NDT methods. The Union president objected, but the employee agreed to pursue the certifications.

From October 2019 through January 2020, management met with the specialist to discuss the employee's termination, primarily because of the UT exam failures. In January 2020, management also realized the employee did not complete DAWIA training by December 31, 2019, as directed. On January 24, 2020, the Agency issued the employee a termination letter. The letter stated that the termination was based on several performance-related issues, including failing to obtain all required levels of NDT certifications, failing to properly document work in TSM as directed, and "failing to 'master the [DAWIA] curriculum and testing'" necessary to get the DAWIA certification.[3] The Agency terminated the employee within the probationary period.

On February 4, 2020, the Union filed an unfair-labor-practice (ULP) charge. Subsequently, the GC issued a complaint and notice of hearing, alleging the Agency violated § 7116(a)(1) and (2) of the Statute by terminating the employee for engaging in the protected activity of filing a grievance.

Applying the framework established in *Letterkenny Army Depot* (*Letterkenny*),[4] the Judge first found it undisputed that the employee engaged in protected activity by filing a grievance and meeting with management to discuss the grievance.

Next, the Judge noted the GC's arguments that the grievance was a motivating factor in the employee's termination because: (1) the termination was "initiated" within a month of the grievance; (2) management did not require the employee to become certified in multiple testing methods until he filed the grievance; and (3) the first-line supervisor warned the employee that filing a grievance "would not look good."[5]

However, the Judge rejected these arguments, first finding that the "close timing" of the grievance and the third-line supervisor's termination recommendation was "coincidental."[6] The Judge reasoned that management began considering termination in May 2019, five months before the employee engaged in protected activity. The Judge stated that the "sentiment in favor of terminating" the employee arose when he first failed the UT exam and "grew with each subsequent failure," such that his supervisors "began to doubt [the employee's] abilities" after the second failure.[7] The Judge found the Agency initially pursued a "training-and-waiver" option as an alternative to termination because it needed someone to perform the UT level III duties.[8] However, the Judge found that the October 2019 training at the Puget Sound Shipyard "became impossible due to Puget Sound's need to complete its audit before being able to provide . . . training."[9] Considering the employee's probationary status and "overall lack of progress in timely achieving the requirements of [the] PD,"[10] the Judge found that termination was the Agency's "sole remaining option."[11]

Additionally, the Judge found management did not consider the grievance when deciding to terminate. The Judge determined the grievance was not a motivating factor because it was resolved and the employee agreed to obtain the disputed certifications. The Judge also credited the third-line supervisor's testimony that this supervisor could not remember when the grievance was filed. As to the employee's testimony that the first-line supervisor stated filing a grievance would not "look good," the Judge found the statement was based solely on the supervisor's speculation.[12] The Judge also found this same supervisor presented upper management with options other than termination, and was not involved in the ultimate termination decision. Finally, the Judge noted the quality-assurance manager's testimony that management understood the right to file, and the benefits of, grievances, and the Judge found this testimony did not indicate that the grievance affected supervisory actions. Therefore, the Judge concluded that management's testimony did not support finding anti-union animus.

The Judge also considered the GC's arguments that the Agency's stated reasons for termination were pretextual because: (1) the Agency falsely relied on the employee's UT exam failures; (2) the employee testified that the specialist told him that the Agency "couldn't fire [him] for not passing the exams that were not in the PD";[13] (3) the requirement that the employee become UT certified was not in the PD; (4) the Agency "abandoned"[14] the UT training; and (5) the employee did not fail to follow

[3] Judge's Decision (Decision) at 8 (quoting the termination letter).
[4] 35 FLRA 113, 118 (1990).
[5] Decision at 10.
[6] *Id.* at 13.
[7] *Id.* at 14.
[8] *Id.*
[9] *Id.*
[10] *Id.* at 16.
[11] *Id.* at 14.
[12] *Id.*
[13] *Id.* at 16.
[14] *Id.* at 15.

management directions for TSM entry and DAWIA training. However, the Judge rejected these arguments.

Regarding the exam failures, the Judge credited both the supervisors' testimony that those failures were the primary reason for the termination, and the employee's testimony that management was disappointed with his second and third failures. The Judge found this testimony was consistent with evidence that the Agency hired the employee with the primary work objective that the employee would become UT certified. As to the specialist's alleged statement that the Agency "couldn't fire [employees] for not passing the exams that were not in the PD," the Judge found that the employee's testimony supporting this statement was not corroborated by "additional consistent testimony or documentary evidence."[15] Instead, the Judge credited the specialist's testimony that she agreed with management that the employee could be terminated for failing to become UT certified. The Judge also relied on other evidence showing that management began to consider termination in May 2019 for failing to become UT certified, and "management continued to hold this belief, with [the specialist's approval], after [the employee's] grievance was closed in October."[16] Additionally, the Judge found the employee was not terminated solely for failing to pass the UT exam. Based on these findings, the Judge rejected the GC's claim that the Agency's reliance on the UT exam failures was pretextual.

Next, the Judge found that nothing in the PD prevented the Agency from requiring the employee to become UT certified. The Judge credited evidence that, as a "matter of practice, it was not unusual to assign employees working under" the PD to become UT certified.[17] The Judge also found the parties agreed that the employee's "background and skills" upon hiring were "consistent with his primary work objective to become UT . . . certified."[18] Further, the employee acknowledged taking the UT exam three times to meet that objective. The Judge also found no evidence that the Agency deliberately "abandoned" additional UT training for the employee.[19] Rather, the Judge found that at some point this training "became impossible" because of Puget Sound Naval Shipyard's NDT audit and resultant inability to provide the training.[20]

Additionally, the Judge found the employee's failure to comply with TSM and DAWIA instructions, together with his failure to obtain all required NDT certifications, supported the Agency's decision to terminate. Regarding TSM, the Judge found the employee's "entry rate of only 55.8% in November 2019" fell below the 70% requirement, even after the employee received TSM training.[21] Regarding DAWIA, the Judge acknowledged that the parties disputed whether the employee completed one or none of the courses by December 31, 2019. However, he found this dispute irrelevant because, in either case, the employee failed to complete *most or all* of the courses, as directed.[22] The Judge therefore concluded the GC failed to demonstrate a prima facie case of discrimination based on protected activity.

The Judge nonetheless proceeded to consider the Agency's affirmative defense, and concluded that the Agency had legitimate justifications for the termination.[23] Specifically, the Judge determined the justification regarding the UT exam failure was legitimate because: (1) despite his private-sector experience, the employee appeared unable to pass the UT exam without training; (2) no UT training was immediately available, and it was uncertain whether the employee could pass the UT exam even with such training; (3) there was not enough work for the employee to perform without the UT certification; and (4) the employee would be underutilized until at least April 2020, when he would be eligible for the next UT exam. The Judge also determined the TSM and DAWIA issues were legitimate justifications for the termination. The Judge further found the Agency would have terminated the employee, even absent the employee's protected activity, because, for the reasons already discussed, he was unable to do the job for which he was hired during his probationary period.

Therefore, the Judge concluded that the Respondent did not violate § 7116(a)(1) and (2), and he recommended dismissing the complaint.

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[15] *Id.* at 16.
[16] *Id.*
[17] *Id.*
[18] *Id.* at 17. Earlier in his decision, the Judge found that, upon his hire, the employee met with his managers, who communicated the expectation that his "top priority" was to become UT certified. *Id.* at 3. The Judge also found that the employee agreed to obtain UT certification in the grievance meeting. *Id.* at 7.
[19] *Id.* at 15.
[20] *Id.* The Judge stated that if the training fell through before the grievance was filed, the GC's argument would be a "non-starter," and that even if the training fell through after the grievance, the GC presented no evidence indicating that the Agency deliberately failed to pursue such training. *Id.*
[21] *Id.* at 17.
[22] *Id.* (noting that "[n]either one nor no courses bode well for [the employee] to become DAWIA . . . certified by September 2020, as required").
[23] *Id.* ("Even if the GC had established a prima facie case, it is abundantly clear that the [Agency] had a legitimate justification for terminating [the employee], and that the [Agency] would have taken the same action even in the absence of protected activity.").

The Union filed exceptions to the decision on April 11, 2022, and the Agency filed an opposition to the exceptions on May 2, 2022.

III. Analysis and Conclusions

A. The Union does not demonstrate that the Judge erred in credibility determinations or factual findings.

The Union argues the Judge erred in making witness-credibility determinations and factual findings to conclude that the Agency demonstrated a non-discriminatory basis for the employee's removal.[24] "Generally, in assessing challenges to a judge's factual findings, the Authority determines whether a preponderance of the record evidence supports those findings."[25] Further, the Authority will not overrule a judge's credibility determination unless a clear preponderance of all relevant evidence demonstrates that the determination is incorrect.[26]

The Union makes several arguments that the Judge erred by finding the employee failed to comply with management's instructions on DAWIA.[27] First, the Union argues the Judge erred by concluding the employee did not complete any online self-training for the DAWIA certification.[28] According to the Union, the Judge ignored a training coordinator's inconsistent testimony, as well as evidence demonstrating the employee completed two courses.[29]

However, the Judge acknowledged the cited evidence. As the Judge noted, the evidence showed only the completion of an orientation and one course for the DAWIA certification and thus did not support the employee's testimony that he had completed three-fourths of the required training.[30] Therefore, the record supports the Judge's finding that the employee failed to complete *most or all* of the DAWIA training by December 31, 2019, as directed.[31] Moreover, the employee's testimony that he did not complete all of the online study for the DAWIA training by December 31 supports the Judge's finding.[32] Therefore, the Union does not demonstrate that the Judge erred.

The Union also contends the Judge erred by crediting, over conflicting evidence, the first-line supervisor's testimony that he required the employee to complete the online study portion of DAWIA training by December 31.[33] The Union asserts that a May 14, 2019 email from this supervisor only expresses a *preference* that the employee complete the training by December 31.[34] The email states the employee should "[w]ork on [the DAWIA certification training] a couple of hours a day/[ten] hours weekly [and I] [w]ould like for you to have the on-line study part completed by Dec[ember] 31[,] 2019."[35] The first-line supervisor testified the email set a deadline, not a preference.[36] The Union does not demonstrate that the email contradicts the credited testimony.[37]

Relatedly, the Union argues the Judge erred in crediting the first-line supervisor's testimony regarding the DAWIA training deadline because, according to the Union, this supervisor testified non-credibly on visual/dimensional testing (VT), another NDT method.[38] However, the Judge did not rely on the VT testimony

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[24] Exceptions Br. at 11-18.

[25] *Dep't of VA, VA Med. Ctr., Decatur, Ga.*, 71 FLRA 428, 432 n.55 (2019); *see also Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 55 FLRA 43, 47 (1998) ("The Judge's factual finding . . . is supported by a preponderance of the record evidence." (citing *Air Force Material Command, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 53 FLRA 1092, 1093 (1998))).

[26] *SSA, Region VII, Kan. City, Mo.*, 70 FLRA 106, 110 (2016) (*Region VII*) (citing *SSA*, 69 FLRA 363, 366 (2016) (*SSA*) (Member Pizzella concurring)). Where a party raises exceptions to credibility determinations based on considerations other than witness demeanor, the Authority reviews those determinations based on the record as a whole. *U.S. Dep't of Com., Nat'l Oceanic & Atmospheric Admin., Nat'l Ocean Serv., Coast & Geodetic Surv., Aeronautical Charting Div., Wash., D.C.*, 54 FLRA 987, 1005 (1998) (*NOAA*) (Member Wasserman concurring in part, dissenting in part) (citing *Vance v. NLRB*, 71 F.3d 486, 492 (4th Cir. 1995)).

[27] Exceptions Br. at 7-8, 12, 15.

[28] *Id.* at 12.

[29] *Id.* (citing GC Ex. 2, 3 (Defense Acquisition University Certificates of Completion for two courses on May 22 and 23, 2019)).

[30] Decision at 10.

[31] *Id.* at 17-18.

[32] Tr. at 37-38; *see also* Decision at 10 (citing Tr. at 37-38).

[33] Exceptions Br. at 15.

[34] *Id.*

[35] Joint Ex. 7 at 2.

[36] Tr. at 139.

[37] The Union also asserts that an Agency manual does not set a December 31 deadline for the DAWIA certification training, Exceptions Br. at 15, but the record does not reflect that the Union raised this argument before the Judge. Nor is there any indication that the Union could not have raised it below. Decision at 11 (setting forth GC's argument regarding employee's deadline for completing DAWIA certification); *see id.* at 5-6, 8 (citing Tr. at 38-39, 139, 185-86, 190-91, 358 (disputing whether employee completed DAWIA certification training by December 31, 2019)). Accordingly, this argument is barred under § 2429.5 of the Authority's Regulations, and we dismiss it as such. 5 C.F.R. § 2429.5 ("[T]he Authority will not consider any . . . arguments . . . that could have been, but were not, presented in the proceedings before the . . . [j]udge."); *Mich. Army Nat'l Guard*, 69 FLRA 393, 394 (2016).

[38] Exceptions Br. at 15. Specifically, the Union asserts that the first-line supervisor testified the employee objected to getting VT certified, but that other evidence demonstrates the employee did not object. *Id.*

because, as the Union acknowledges, VT certification was "not as central to the justification for termination."[39] Moreover, based on the DAWIA training evidence discussed above, the Union does not demonstrate that the Judge erred in finding the first-line supervisor's testimony regarding DAWIA training credible.

Next, the Union contends the Judge erred by finding the employee failed to meet management's TSM requirements.[40] The Union argues that, in finding the employee did not meet the 70% requirement, the Judge erroneously credited and relied on the quality-assurance manager's testimony that employees do not routinely fail to meet that requirement.[41] The Union argues the testimony conflicts with a table in the GC's brief, which indicates employees missed the 70% requirement more often than they met it.[42] However, the Union does not dispute that the Agency had a 70% requirement, and the employee did not meet it.[43] The alleged failure of other, non-probationary employees to meet the requirement does not demonstrate the Judge erred in finding *the employee* failed to meet the requirement.[44]

The Union also challenges the Judge's reliance on the specialist's testimony to conclude that the termination was performance based.[45] The Union argues that, contrary to the Judge's finding,[46] an alleged statement attributed to the specialist – that the Agency could not terminate an employee for not being certified in a method that was not included in his PD – was corroborated.[47] As evidence of corroboration, the Union cites an email by the Union president withdrawing the grievance and "reiterat[ing] his belief that the [Agency] could not require certifications that were not outlined in the employee's PD."[48] The Judge found the alleged specialist statement had little "legal significance" because the specialist testified she told management the employee could be terminated for failing to become UT certified.[49] The Judge found, and the record supports, that this testimony was corroborated by the second-line supervisor's testimony that the specialist agreed the employee could be terminated for failing to become UT certified.[50]

The Union further challenges the Judge's reliance on the specialist's testimony about a discussion she had with management regarding termination based on the employee's performance. The Union alleges that the evidence is conflicting about whether the discussion took place before or after the grievance was filed.[51] If the discussion took place after the grievance was closed, the Union asserts there were no "new" performance issues to raise.[52]

The specialist testified that she: (1) recommended termination when she spoke with the second-line supervisor about the employee's performance issues a "short time" after his hire;[53] (2) had additional conversations with upper management about the employee's performance in August or September 2019;[54] and (3) discussed the employee's performance with management and reviewed documents after management made the "decision to terminate."[55] This testimony reflects that the specialist and management discussed the employee's performance both *before* and after the grievance. The Union does not demonstrate that the Judge erred in his findings regarding this sequence of events.[56]

To the extent that the Union asserts the specialist was not credible based on other testimony, the Judge did not rely solely on her testimony to conclude that the Agency terminated the employee for his performance. Rather, the Judge also relied on testimony from the third-line supervisor, the quality-assurance manager, and the executive director, who met several times after the grievance to discuss terminating the employee based on *continuing*, not "new," performance issues.[57] Even if the Union's witnesses testified differently from these witnesses, that does not demonstrate the Judge erred in finding the Agency terminated the employee for performance reasons.[58]

Additionally, the Union contends the Judge misconstrued the first-line supervisor's statement that "the grievance would not look good to upper[]management"[59] as meaning that this *supervisor* took offense to the grievance. According to the Union, this statement was a "warning" to the employee that *upper management* would take offense and retaliate for filing the grievance.[60] However, the Judge did not construe the testimony as alleged. Rather, the Judge found the statement was based

[39] *Id.*
[40] *Id.* at 7-8, 16.
[41] *Id.* at 16.
[42] *Id.*
[43] *See* Tr. at 53 (Union president testifying that Agency had 70% requirement).
[44] GC's Post-Hr'g Br. at 5.
[45] Exceptions Br. at 13-14.
[46] Decision at 14.
[47] Exceptions Br. at 13.
[48] *Id.*
[49] Decision at 16; *see also* Tr. at 90-91, 102.
[50] Decision at 16; Tr. at 172.
[51] *See* Exceptions Br. at 13-14.
[52] *Id.* at 14.
[53] Tr. at 90-91.
[54] *Id.* at 102.
[55] *Id.* at 91.
[56] Decision at 7-8.
[57] *Id.* at 9 (citing Tr. at 231, 282-83, 315-16); *see also* Tr. at 101, 230-31, 282, 327-29.
[58] Decision at 16.
[59] Exceptions Br. at 14 (emphasis omitted).
[60] *Id.*; *see id.* at 7.

only on the first-line supervisor's "speculation."[61] Thus, the Union's claim is unavailing.

Further, the Union argues that, in finding the third-line supervisor had no retaliatory motive, the Judge erred by relying on that supervisor's testimony that he did not know when the grievance was filed.[62] The Union contends that, although the supervisor may not have known *when* the grievance was filed, the supervisor's other testimony demonstrates an *awareness* of the grievance.[63] As discussed above, the Judge relied on testimony from several other witnesses who had a series of meetings at various points after the grievance to discuss terminating the employee based on ongoing performance issues.[64] Additionally, the Judge found management began considering termination well before the grievance was filed.[65] For the reasons stated above, the Judge determined the termination was not based on a retaliatory motive.[66] The Union's cited testimony regarding this supervisor's awareness of the grievance does not demonstrate that the Judge erred.[67]

The Union also argues the Judge wrongly credited a statement by an "[u]nknown [r]espondent," discussed in the specialist's testimony, that senior leadership was having "continued issues" with the employee's inability to get certified.[68] The Union does not specify what evidence conflicts with the Judge's findings, and the record does not support the Union's argument that the Judge credited an "unknown respondent."[69] Therefore, this argument provides no basis for finding that the Judge erred.[70]

Additionally, the Union asserts the Judge erred by making "generalizations" concerning Agency witness testimony because the testimony credited by the Judge was either self-serving or did not support these generalizations.[71] Although the Union characterizes the testimony differently than the Judge, as discussed above, it has not demonstrated that the Judge erred in any credibility determinations or factual findings.[72]

Finally, separate from its challenges to the Judge's credibility-based findings, the Union challenges factual findings the Judge relied on in concluding the Agency terminated the employee for lawful reasons. First, the Union argues the Judge erred by finding the Agency could require the employee to become UT certified, because the PD does not require UT certification.[73] However, the PD states that "training and knowledge must meet the requirements . . . for . . . *at least* that of . . . [l]evel II . . . for the . . . UT discipline."[74] Therefore, the record supports the Judge's finding that the PD did not prohibit the Agency from requiring the employee to take the UT exam or become UT certified.[75] In addition, the Judge found the Agency hired the employee with the "primary work objective" of becoming UT certified,[76] as evidenced by the employee taking the UT exam three times.[77] Further, the Judge found the parties agreed that

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[61] Decision at 14.
[62] Exceptions Br. at 17.
[63] *Id.*
[64] Decision at 9 (citing Tr. at 231, 282-83, 315-16); *see* Tr. at 101, 230-31, 282, 327-29.
[65] Decision at 13-14.
[66] *Id.* at 14-15.
[67] *SSA*, 69 FLRA at 366 (rejecting argument that judge's credibility determination was not supported by a preponderance of the evidence because some testimony conflicted with the testimony on which the judge relied). The Union also argues, citing several portions of the third-line supervisor's testimony, that this testimony is inconsistent and to the extent that it "serv[es] any [Agency] argument, should be discredited." Exceptions Br. at 16-17. But this argument does not demonstrate that the Judge erred. *See Dep't of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 55 FLRA 1201, 1203-05 (2000) (*Air Force*) (rejecting claim that judge erred in credibility determination merely because testimony was self-serving).
[68] Exceptions Br. at 17; *see id.* at 18.
[69] The specialist testified that she had discussions with "senior leadership" in the employee's "management chain." Tr. at 92, 102. The Judge noted that the second-line supervisor, the third-line supervisor, the quality-assurance director, the deputy quality assurance director, and the executive director all had discussions regarding the employee's performance and his possible termination at various points before and after the grievance. Decision at 5, 7-8. The Union does not dispute that these management officials were in the employee's chain of command and senior to the first-line supervisor. Therefore, we disagree with the Union's contention that the specialist's testimony regarding "senior leadership" referenced unknown persons. Exceptions Br. at 17.
[70] *See* 5 C.F.R. § 2423.40(a)(2) (requiring exceptions to include "[s]upporting arguments, which shall set forth . . . all relevant facts with specific citations to the record"); *Region VII*, 70 FLRA at 110-11 (failing to specify what evidence contradicted judge's findings); *U.S. Dep't of the Interior, U.S. Geological Survey, Great Lakes Sci. Ctr., Ann Arbor, Mich.*, 68 FLRA 734, 741 (2015) (same).
[71] Exceptions Br. at 18.
[72] *Air Force*, 55 FLRA at 1203-05.
[73] Exceptions Br. at 5-7.
[74] Joint Ex. 6 (PD) at 3 (emphasis added); *see also* Decision at 7 (quoting PD at 3).
[75] Decision at 18; *id.* at 7 (citing PD at 3).
[76] *Id.* at 17; *see also id.* at 2-3 (finding that the Agency sought to hire its own UT examiner because its current practice of bringing in an external examiner was "costlier . . . and resulted in less robust oversight, and because there was an increase in demand for UT work" and that the first-line and third-line supervisors informed the employee upon hiring "that his top priority would be to pass the UT . . . exam and become UT . . . certified").
[77] Tr. at 27-28.

the employee's skills upon hiring were consistent with this objective.[78]

The Judge also found that, as a "matter of practice," the Agency assigned employees working under the same PD to become UT certified.[79] The Union does not dispute this finding, but argues the Judge failed to credit the Union president's testimony regarding whether the Agency required the Union president to become UT certified.[80] The Union fails to specify what testimony contradicts the Judge's findings. Moreover, although the Union argues the Judge ignored that the Agency could have, but did not, assign the employee to a different PD explicitly requiring UT certification,[81] that does not demonstrate the Judge made factual errors affecting his conclusions.[82]

Accordingly, we find the Union does not demonstrate the Judge erred in his credibility determinations and factual findings.

B. The Judge did not err in his conclusions of law.

It is well settled that a probationary employee can be terminated for a good reason or even for no reason at all, but cannot be terminated for an illegal reason.[83] Termination for a reason in violation of the Statute constitutes a ULP.[84]

Under § 7116(a)(2) of the Statute, it is a ULP "to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment."[85] In *Letterkenny*, the Authority established that to demonstrate an agency action violates this provision, the GC must show by preponderant evidence: (1) that the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) that such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment.[86] If the GC proves these elements, then it has established a prima facie case of retaliation.[87] The existence of a prima facie case is determined by considering the evidence in the record as a whole, not just the evidence presented by the GC.[88]

However, even if the GC makes the required prima facie showing, the agency will not be found to have violated § 7116(a)(2) if it can demonstrate, by a preponderance of the evidence, that: (1) there was a legitimate justification for its action; and (2) the same action would have been taken even in the absence of protected activity.[89]

Here, there is no dispute that the grievance filing and meeting constituted protected activity, thereby satisfying the first element of the prima facie case.[90] As to the second element, the Judge concluded the employee's protected activity was not a motivating factor in the Agency's decision to terminate.[91] The Union argues the Judge failed to properly analyze the timing of the protected activity and the termination by improperly focusing on events that occurred five months before the Agency initiated the termination.[92] We find this argument unavailing. As the Judge correctly noted,[93] Authority precedent holds that while the "closeness in time between an agency's employment decision and protected union

[78] Decision at 17 ("Firing [the employee] for failing to carry out a goal established from the beginning of [his] employment is not pretextual.").
[79] *Id.* at 16 (referencing Agency Ex. 11 at 1-2 (email from first-line supervisor to other supervisors recommending that first-line supervisor or Union president become UT certified)).
[80] Exceptions Br. at 6.
[81] *Id.*
[82] *SSA, 69 FLRA at 366; U.S. DOD, Def. Language Inst., Foreign Language Ctr., Monterey, Cal.*, 64 FLRA 735, 745 (2010). As part of its argument that the Judge erred in his legal conclusions, the Union asserts the Judge erroneously concluded that the Agency can require more certifications than what is in the PD, which "runs counter to all of the procedures [under the Statute] that are in place for the protection of the federal workforce." Exceptions Br. at 6. However, the Judge made no such conclusion and the Union specifies no legal authority to support its argument. Therefore, we reject the Union's argument as unsupported. *See* 5 C.F.R. § 2423.40(a)(2) (Exceptions must contain "[s]upporting arguments, which shall set forth, in order: all relevant facts with specific citations to the record; the issues to be addressed; and a separate argument for each issue, which shall include a discussion of applicable law.").
[83] *USDA, Food & Nutrition Serv., Alexandria, Va.*, 61 FLRA 16, 22 (2005) (Member Pope dissenting on other grounds) (citing *Indian Health Serv., Crow Hosp., Crow Agency, Mont.*, 57 FLRA 109, 114 (2001) (Chairman Cabaniss dissenting)).
[84] *Id.*
[85] 5 U.S.C. § 7116(a)(2).
[86] *Letterkenny*, 35 FLRA at 117-18.
[87] *Id.*
[88] *U.S. DOD, U.S. Air Force, 325th Fighter Wing, Tyndall Air Force Base, Fla.*, 66 FLRA 256, 261 (2011) (*Tyndall*) (citing *Air Force*, 55 FLRA at 1205).
[89] *Id.* (citing *U.S. Dep't of VA, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 58 FLRA 44, 47 (2002)).
[90] Decision at 13.
[91] *Id.* at 13-15.
[92] Exceptions Br. at 4-5.
[93] Decision at 13.

activity . . . may support an inference of illegal . . . motivation, it is not conclusive proof of a violation."[94]

The Judge correctly recognized that the filing of the grievance and the third-line supervisor's formal recommendation that the employee be terminated in October 2019 were "close" in time.[95] However, we agree with the Judge that, "[w]hen viewed in context" with the totality of the circumstances, the timing was "coincidental."[96] Contrary to the Union's argument, it was relevant for the Judge to examine the employee's performance and events throughout the employee's probationary period leading up to the termination.[97] Based on this examination, the Judge found significant that the "sentiment in favor of terminating" the employee arose when the employee first failed the UT exam in December 2018, "grew with each subsequent failure" as the supervisors doubted the employee's abilities, and by May 2019, the employee's second- and third-line supervisors agreed the employee should be terminated.[98] The Judge further found that after the "training-and-waiver" alternative to termination fell through, termination was the Agency's "sole remaining option" given the employee's probationary status.[99]

These findings amply support the Judge's conclusion that the Agency's motivation for terminating the employee did not commence with the grievance's filing. Accordingly, the Union has not established that the timing of the termination relative to the protected activity supports an inference of illegal anti-union motivation.[100]

Further, the Union contends the Judge erroneously concluded the amicable resolution of the grievance was evidence that anti-union animus was not a motivating factor for termination.[101] The Union asserts it "still had issues with what the correct PD required and raised those issues" to management.[102] While the Judge acknowledged that the Union president "expressed frustration" to management regarding the PD requirements,[103] the Union does not dispute the Judge's findings that the employee agreed at the grievance meeting to obtain the required certifications[104] and that the Union also withdrew the grievance.[105] Moreover, as discussed above, the Judge made additional findings to support the conclusion that the employee's protected activity was not a motivating factor in the termination.[106] Accordingly, the Union does not demonstrate the Judge erred by concluding that the termination was not based on the grievance.

Additionally, the Union argues the Judge erred by concluding that the Agency's lawful reasons for terminating the employee were not pretextual.[107] Specifically, the Union contends the Judge's reliance on the employee's failure to meet the 70% requirement and master the DAWIA curriculum is contrary to Authority precedent because those reasons "should not have been considered . . . and were only added to justify an inappropriate termination."[108] However, the decision cited by the Union does not establish that the Judge was precluded, as a matter of law, from considering this evidence.[109] As such, the Union does not demonstrate that the Judge improperly considered these training deficiencies as lawful bases for the termination.[110]

To the extent the Union argues that these deficiencies were "non-issues,"[111] the Judge found they were not the exclusive reasons for termination, but rather, when *taken together* with the employee's failure to obtain the UT certification, constituted the Agency's reasoning.[112] Moreover, the Union does not establish that the employee's failure to obtain UT certification, standing alone, would not constitute a lawful basis for terminating a probationary employee. Thus, we reject the Union's argument.

The Union also argues the Judge's decision is contrary to *Letterkenny* because the Judge erroneously

[94] *Tyndall*, 66 FLRA at 261 (citing *U.S. DOL, Wash., D.C.*, 37 FLRA 25, 37 (1990)).
[95] Decision at 13.
[96] *Id.*
[97] *Air Force*, 55 FLRA at 1206 (finding judge did not err by considering events preceding protected activity in determining retaliatory motive).
[98] Decision at 14.
[99] *Id.*
[100] *Air Force*, 55 FLRA at 1206.
[101] Exceptions Br. at 5.
[102] *Id.*
[103] Decision at 7.
[104] *Id.* at 14; *see also id.* at 7.
[105] *Id.* at 7. The record indicates that when it notified the Agency that the grievance was "closed," the Union separately raised concerns about "inconsistenc[ies]" in the NDT testing program regarding certifications and training that had been ongoing for "five to six years" that it wanted the Agency's executive director to review. Tr. at 63 (testimony of Union president).
[106] Decision at 14-15.
[107] Exceptions Br. at 7-8.
[108] *Id.* at 7.
[109] *NOAA*, 54 FLRA at 1004 (finding that reprimand was based on anti-union animus because agency was "preoccupied" with employee's union activity and was immediately preceded by multiple specific instances of protected activity).
[110] *See, e.g.*, *Letterkenny*, 35 FLRA at 119, 123 (explaining that whether a respondent rebuts prima facie showing is based on the entire record).
[111] Exceptions Br. at 8.
[112] Decision at 17.

placed the burden of proving pretext on the GC when the Agency did not provide evidence that there was a non-discriminatory reason for the Agency's "abandonment" of the UT training.[113] However, the Judge did not shift the burden to the GC. Rather the Judge considered the Agency's evidence regarding the employee's UT training.[114] On this point, the record demonstrates that the Puget Sound Naval Shipyard notified the Agency around early October that it could no longer provide the training[115] because a requisite audit occurred later than originally expected.[116] The Judge found, and we agree, that the Union provided no evidence to indicate the Agency deliberately failed to pursue this training.[117] To the extent that the Union argues the Judge otherwise erred in concluding the Agency established its affirmative defense, it is unnecessary to determine whether the Judge's conclusion is correct because, as explained above, the Judge correctly found that the GC failed to establish a prima facie case.[118]

IV. Order

We dismiss the complaint.

[113] Exceptions Br. at 9-11.
[114] Decision at 5-6.
[115] Tr. at 290.
[116] Decision at 14, 16.
[117] *Id.* at 15.

[118] *See U.S. Dep't of VA, Med. Ctr., Leavenworth, Kan.*, 60 FLRA 315, 320 n.5 (2004) (Member Armendariz dissenting in part) (finding it unnecessary to review GC's exception to judge's finding that agency established affirmative defense because GC failed to establish prima facie case).

DEPARTMENT OF THE NAVY
SUPERVISOR OF SHIPBUILDING
PASCAGOULA, MISSISSIPPI

RESPONDENT

AND

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R5-315

CHARGING PARTY

AT-CA-20-0136

Brian R. Locke
For the General Counsel

Meranda L. Jackson
Christopher C. Dopke
For the Respondent

David A. Perkins
For the Charging Party

Before: DAVID L. WELCH
Chief Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101-7135 (the Statute), and the Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. part 2423.

On February 4, 2020, the National Association of Government Employees, Local R5-315 (the Union), filed an unfair labor practice charge against the Department of the Navy, Supervisor of Shipbuilding (also referred to as "SUPSHIP"), Pascagoula, Mississippi (the Agency or Respondent). GC Exs. 1(a) & 1(h). After investigating the charge, the Regional Director of the FLRA's Atlanta Region issued a Complaint and Notice of Hearing on May 7, 2021, on behalf of the FLRA's Acting General Counsel (GC). The Complaint alleges that the Agency violated § 7116(a)(1) and (2) of the Statute by terminating employee Robert Ladnier's employment because he engaged in protected activity under § 7102 of the Statute, specifically, filing a grievance and meeting with management to discuss the grievance. GC Ex. 1(b). The Respondent filed its Answer to the Complaint on May 26, 2021, denying it violated the Statute. GC Ex. 1(c).

A hearing was held in this matter on October 5-7, 2021, via the WebEx video platform. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The GC and the Respondent filed post-hearing briefs, which have been thoroughly reviewed and fully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, the undersigned makes the following findings of fact, conclusions of law, and recommendation.

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. The Union is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of a bargaining unit of the Respondent's employees. GC Exs. 1(b) & 1(c). The Respondent and the Union were parties to a collective bargaining agreement (CBA) covering the employees of the bargaining unit; the CBA was in effect at all relevant times. GC Ex. 1(i) at 2; Resp. Ex. 3.

The Respondent, a field activity under the Naval Sea Systems Command (NAVSEA), oversees new construction shipbuilding contracts along the Gulf Coast. Tr. 310; *see* Resp. Ex. 9 at 1. The Respondent's Quality Assurance Department (also referred to as Code 300), performs multiple methods of nondestructive testing (NDT), including ultrasonic testing (UT). *See* Tr. 22-23, 201, 321; Jt. Ex. 6 at 1-2.

In 2018 and before, the Respondent brought in an individual from SUPSHIP Bath in Maine once or twice per year to perform the UT Level III examiner work. Because this was costlier than having a UT Level III examiner on-site and resulted in less robust oversight, and because there was an increase in demand for UT work, the Respondent sought to hire its own UT Level III examiner. Tr. 262.

William "Robert" Ladnier applied for the vacant position. Ladnier had spent approximately ten years performing UT Level III work in the private sector and thus appeared qualified with the skill set for which the Respondent posted the position. Tr. 127, 261; GC Ex. 1(i).

After interviewing and vetting, the Respondent engaged Ladnier on September 4, 2018. Based upon superior qualifications, the Respondent hired Ladnier at an increased step level. As a new employee, Ladnier was subject to a two-year probationary period. GC Ex. 1(i) at 1; Resp. Ex. 14; Tr. 206.

The requirements of Ladnier's position, Quality Assurance Specialist (also referred to as an

NDT Examiner), were outlined in his position description, PD 13355. Resp. Ex. 13; Tr. 22. Ladnier likely had the impression that he was working under a different position description, PD F0095, which was shown to Ladnier during his job interview with Timothy Hughes, the Quality Assurance Director (Tr. 260), and Jonathan Graves, the Deputy Quality Assurance Director. Tr. 202. PD F0095 was tailored to the NDT Level III methods that management ultimately desired Ladnier to become certified, specifically, UT, RT (radiographic testing), and VT (visual/dimensional testing). Because PD F0095 remained in the process of being classified, Ladnier was hired and worked under, PD 13355. *See* Tr. 30, 235, 239; Jt. Exs. 5 & 6.

Initially, Ladnier met with Kelvin Howard, who would be Ladnier's first-line supervisor, and Carl Fehrenbach, a Division Manager, and Ladnier's third-line supervisor, to discuss Ladnier's work plan. Fehrenbach and Howard informed Ladnier that his top priority would be to pass the UT Level III certification exam and become UT Level III certified. In another meeting early on, Hughes similarly told Ladnier that the plan was for Ladnier to get UT certified and later RT certified. Tr. 23, 121, 202, 210, 267. Under NAVSEA regulations, Ladnier would be able to take the UT Level III certification exam three times within one year of his first attempt. Resp. Ex. 9 at 10.

Ladnier also communicated with Lee Robinson, who briefly served as Ladnier's first-line supervisor, about TSM, a web application used to document daily work performance. As the end of the calendar year was approaching, and since Howard would soon be taking over as Ladnier's first-line supervisor, Robinson told Ladnier that he should focus on new-employee training in preparation for Howard instructing Ladnier in TSM. Tr. 40, 221.

In December 2018, the Respondent sent Ladnier to the Portsmouth Naval Yard in Maine to take the UT Level III certification exam. Ladnier failed the exam. Tr. 128, 130; Resp. Ex. 5.

Ladnier's exam failure concerned Joseph Thomas, a Quality Assurance Manager and Ladnier's second-line supervisor. Tr. 23, 164. Ladnier's failure led Thomas to ask Fehrenbach, "[A]re you sure we did the right thing by hiring this guy?" Tr. 168-69. Thomas recommended that Ladnier should be terminated, but Hughes and Fehrenbach declined. Tr. 241.

In February 2019, Ladnier took the UT Level III exam at Portsmouth for the second time and again failed, as well as the RT Level III certification exam. Resp. Ex. 6; Tr. 132-33. After Ladnier's second UT Level III exam failure, Thomas continued to believe that Ladnier should be terminated, about which Hughes was aware. Similarly, Ladnier's second failure led Hughes and Fehrenbach to "start to lose some confidence in [Ladnier's] abilities," Fehrenbach testified. Tr. 241, 288. Ladnier himself could sense that management was disappointed after his second exam failure, writing that he was "mentally devastated," that management was "not happy with me," and that Howard was the only supervisor who would talk to him after the failed exam. GC Ex. 1(a). Although disappointed, management decided to allow Ladnier to take the exam the third time within the one year period. The reasoning, Fehrenbach explained, was that the NAVSEA regulations "give him three attempts in a year, we're going to give him that third attempt." Tr. 241.

In March 2019, management formally classified PD F0095. Jt. Ex. 5 at 1; Tr. 239. Although management had originally planned to move Ladnier to that position description, Fehrenbach explained that management would "hold off to see how [Ladnier's] third attempt went before we went through . . . all the paperwork" that would be involved in giving him a new position description. Tr. 239-40.

In May 2019, Ladnier went to Portsmouth again for testing. Ladnier passed the RT Level III exam, but failed the UT Level III exam for the third time. Resp. Ex. 7; Tr. 27, 134-35, 287.

Management was displeased with Ladnier after his third failure on the UT Level III exam. Howard recognized, as did Ladnier, who wrote that management was "not pleased" that he had failed the UT Level III exam, and that "[n]one of them [management] said a word to me or even looked at me except for my supervisor." Tr. 136; GC Ex. 1(a) at 8. Thomas was "shocked," explaining that it was simply not normal for someone to fail the exam three times. Tr. 167-68. After Ladnier's third failure, Fehrenbach joined Thomas in concluding that Ladnier should be terminated and expressed that sentiment to Hughes, though Fehrenbach stopped short of formally recommending Ladnier's immediate termination. *See* Tr. 241-42, 269, 288.

Ladnier's third failure created practical difficulties for management. Because Ladnier was not UT Level III certified, Hughes testified, there was "[v]ery little" quality assurance specialist work for Ladnier to perform. Ladnier had become RT Level III certified, but there was little RT work that needed to be performed. Tr. 272. Management sought to qualify Ladnier for certification in other methods of quality control, but Hughes testified, that management took these steps mostly "because [Ladnier] couldn't pass the UT, and we had to give him something to do, not just sitting around at his desk all day." Tr. 289.

Ladnier believed it was "obvious" after his third exam failure that he was "not going [to] pass this [UT Level III exam] without going through . . . training." Tr. 27. Ladnier asked Howard if he could get training at Portsmouth Naval Shipyard, and Howard responded affirmatively. A couple of weeks later, Howard told Ladnier he was still looking into Ladnier's training request; the two did not discuss the matter subsequently. Tr. 27-28.

To resolve these issues, Hughes met with his leadership team and asked if there were options other than termination. Because their need for a certified UT Level III examiner in-house was necessary to meet their quality standards, rather than continually having to hire outside examiners to address the increasing Level III workload, he pursued any additional means to enhance Ladnier's success. Specifically, Hughes asked whether it would be possible to obtain a waiver of the NAVSEA regulations to allow Ladnier to take the UT Level III exam a fourth time within the one-year period. Tr. 218, 268-69. Hughes further testified that he sought to explore alternatives to terminating Ladnier because it had been lengthy and challenging for the Respondent to hire a Level III examiner, and there was "nobody waiting to take [Ladnier's] place." Tr. 269-70. Hughes directed Fehrenbach and Thomas to inquire if a waiver could be obtained, a task that was ultimately delegated to Howard. Tr. 243.

On May 23, 2019, Howard emailed his findings to Hughes, Fehrenbach, Thomas, and Graves. Howard wrote that Jason Hence, the NAVSEA director responsible for overseeing NDT programs, would authorize a waiver under certain conditions, specifically, that Ladnier attends a training course or receives on-the-job training at another Naval Shipyard. Tr. 202, 215; Resp. Ex. 11 at 1. Howard recommended that the Respondent send Ladnier to another Naval Shipyard for two weeks of training, adding that "[w]e can pull [Ladnier] back early if the [Naval Shipyard] believes that he is at the point where they can provide no further meaningful assistance." Resp. Ex. 11 at 2. Howard noted that the hosting Naval Shipyard would still have to confirm their availability to provide Ladnier training. *Id.* Alternatively, Howard wrote, the Respondent could: wait until a Naval Shipyard had a class scheduled; allow Howard to become UT Level III certified; prepare another employee for UT Level III certification; or ask David Perkins, an NDT Level III examiner and the Union's president, to attempt UT Level III certification. *Id*. Management agreed that they should try to get Ladnier training at another Naval Shipyard. *See* Tr. 215.

Meanwhile, in the wake of Ladnier's third exam failure, Howard sent Ladnier an email on May 14, 2019, with additional tasks and assignments to address in place of being able to work on his Level III certification. Tr. 137; Jt. Ex. 7. One action item involved TSM. Thomas noted that Ladnier was not inputting his TSM data (as much as normally expected which is 70 percent of time recorded on TSM to be performed and documented for one's main "deck plate" functions; referred to as "the 70 percent requirement"), and asked Howard to address Ladnier accordingly. Tr. 53, 179, 222-23. In his email, Howard asked Ladnier to meet to review "observation creation" entries in TSM. Howard told Ladnier that he could backdate observations in the system. In another email, Howard told Ladnier that he could consult with Perkins if Ladnier needed more help with TSM. Tr. 50, 138-39; Jt. Ex. 7. Shortly after Howard's email, Ladnier studied the procedure for complying with TSM entries and started inputting TSM data. Howard and Ladnier met regarding TSM in July 2019. It is noted that on August 20, 2019, Howard asked Ladnier to complete two overdue TSM tasks that week. Resp. Ex. 4; Tr. 42, 141-42.

Another assignment addressed in Howard's May 14, 2019 email was for Ladnier to commence obtaining a DAWIA (Defense Acquisition Workforce Improvement Act) Level II certification, another requirement of Ladnier's position that required completion within 24 months of his start date. Howard wrote that Ladnier should spend about 10 hours per week on this DAWIA certification, and further that he would like Ladnier to complete his online study part of the DAWIA training process by December 31, 2019. *See* Tr. 38-39, 139, 185-186; Jt. Ex. 1; Jt. Ex. 7 at 2; Resp. Ex. 16 at 2.

After Howard's May 23, 2019 email to management, Hughes and Howard learned that Puget Sound Naval Shipyard appeared to be able to provide training for Ladnier in October 2019. Hughes noted Puget Sound would not be able to train Ladnier until after finishing their NAVSEA headquarters NDT audit scheduled in the fall. Tr. 153, 270. Through no fault of Ladnier, he did not receive the additional training required to obtain the waiver to take the exam a fourth time. Tr. 290.

In the fall of 2019, Howard informed Ladnier of his intention to have Ladnier become certified in MT (magnetic particle testing) and PT (liquid penetrant testing). Tr. 30; Resp. Ex. 9 at 13. Ladnier replied that he worked under job description PD F0095, which did not require MT or PT certification, and that he was told during his job interview that he would not need to be MT or PT certified because Howard and Perkins already had those certifications. Tr. 30. Ladnier testified that Howard was "obviously not happy that I told him that—that I was going to have to push back on taking those certs and get with the Union about it." Tr. 30-31.

On October 3, 2019, Howard sent Ladnier an email assigning Ladnier to attend PT training class the week of October 14, 2019. Howard also assigned Ladnier to undertake VT training. *See* Jt. Ex. 2 at 1; Tr. 31.

On October 8, 2019, Perkins filed a grievance on Ladnier's behalf alleging that Ladnier was being assigned work, attending a PT Level II class, that was not required in Ladnier's position description. GC Ex. 1(i) at 2; Jt. Ex. 2 at 1. The grievance alleged that management violated the collective bargaining agreement (CBA) by failing to provide the Union written notification of this change or of a plan to change Ladnier's position description. As a remedy, Ladnier requested that he be removed from the PT Level II certification, or that management change his position description to PD 13355. Jt. Ex. 2 at 1.

A short time thereafter Howard called Ladnier into his office and told him that filing a grievance "[wasn't] going to look good to upper management, especially since [Ladnier] was on probation." Tr. 31.

On October 18, 2019, Thomas issued the Agency's Step I decision denying the grievance. (Howard would have responded, but he was out on leave.) Tr. 88. Thomas wrote that there was no change in Ladnier's position description, that it was reasonable for management to assign Ladnier to PT training and certification testing since that was consistent with his position description and within management's rights, and that the assignment did not constitute a change in working conditions. Thomas also denied Ladnier's request to be removed from the PT Level II certification class. Jt. Ex. 3.

Upon receiving the Step I decision, Ladnier emailed Thomas to thank him for clarifying that Ladnier was working under PD 13355. Ladnier added that UT Level III certification was not in his position description and that by becoming RT Level III certified, he exceeded the requirements of PD 13355 concerning UT and RT. Resp. Ex. 12 at 4. It is noted that PD 13355 requires the incumbent to attain Level III certification in VT, MT, and PT, as well as Level II certification in either UT or RT, within 12 months of accepting the position. Jt. Ex. 6 at 2. PD 13355 also states that "training and knowledge must meet the requirements . . . for . . . at least that of Inspector (Level II) for the RT or UT discipline." *Id*. at 2-3.

Several days later, Thomas asked Ladnier and Perkins to meet with Labor and Employee Relations Specialist Tiffany McFadden. Tr. 33, 76. Thomas viewed the meeting as an opportunity to finally resolve the grievance. Tr. 174-75. Ladnier, however, viewed Thomas's response as showing that Ladnier's previous email "obviously made [Thomas] mad." Tr. 33.

At the meeting, Thomas told Ladnier that management expected him to be Level III certified in UT and all other methods. Perkins objected, arguing the difficulty to accomplish it. GC Ex. 1(a); Tr. 33. Thomas and McFadden replied that management had the right to assign training. *See* Tr. 34, 174. At the hearing, Ladnier recalled: McFadden stating that the Agency "couldn't fire us for not passing the exams that were not in the PD [position description]. And we agreed. . .. [W]hen we walked out, we told them that we would go get the certifications." Tr. 34. For his part, Thomas testified that the meeting went smoothly, though he noted that McFadden was "getting a little mixed up with the PD . . . acronyms." Tr. 174.

On October 23, 2019, Perkins sent an email to Executive Director Nadia Herron advising that Ladnier's grievance was closed and would not be advanced to Step 2. GC Ex. 1(i); Tr. 309. Perkins expressed frustration that Ladnier was directed to obtain certifications that were not in his PD 13355, and that required travel to Portsmouth on multiple occasions. Resp. Ex. 12 at 1-2.

In early to mid-October, Thomas contacted McFadden to inquire about the possibility of terminating Ladnier due to his failures on the UT Level III certification exam. *See* Tr. 90-91, 97-98, 102, 172, 241-42. McFadden and Thomas provided different background details, but the undersigned finds it is more likely than not that they both testified about their identical conversation. McFadden suggested that Thomas talk to leadership about Ladnier's performance issues and that since Ladnier was in his probationary period management could consider terminating Ladnier if he was failing to show that he would be able to meet the requirements of the position by failing to become UT Level III certified. Tr. 90-91, 172. Thomas indicated that he would talk with leadership as McFadden recommended. Tr. 91. Notably, both McFadden and Thomas recalled this discussion as pertaining to Ladnier's performance. There was no mention of Ladnier's grievance. Tr. 90-91, 172.

In the middle of October 2019, Fehrenbach formally recommended to Hughes that Ladnier be terminated. Tr. 241-42. Fehrenbach was not involved in Ladnier's grievance, and Fehrenbach testified credibly that he did not know when Ladnier's grievance was filed, or even whether it was filed before or after October 2019. Tr. 242.

In early November 2019, Hughes met with McFadden to discuss Ladnier's termination, and in mid-November, the two met with attorneys to discuss the matter further. Tr. 277-78, 286-87. McFadden testified

that after Ladnier's grievance was closed, senior leadership "came to me and indicated, again, that they were having continued issues," specifically, Ladnier's "inability to get certified." McFadden recommended that Ladnier be terminated, just as she had advised Thomas. Tr. 91, 97-98, 102.

Because the shipyards close around the middle of the month of December for holidays there appeared to be a pause in activities concerning these matters. In January 2020, McFadden prepared a packet of information regarding terminating Ladnier for Herron's review and approval. Tr. 293-94. By January, it was apparent that Ladnier had failed to complete his online DAWIA training by December 31, 2019, as earlier assigned. According to the Agency's records, Ladnier had not completed any of the nine online classes that were needed to receive DAWIA Level II certification. Jt. Ex. 7 at 2; Resp. Exs. 16 & 17; Tr. 190-91, 358.

On January 17, 2020, Fehrenbach emailed McFadden (and copied Hughes) a justification for Ladnier's termination, including Fehrenbach's belief that Ladnier was so far behind in his DAWIA work that it would be impossible for him to be certified within 24 months of his start date, as required. Resp. Ex. 16 at 2. It is noted that Perkins believed an employee who was not "over tasked" could finish DAWIA training in six months. Tr. 51-52. Herron reviewed Fehrenbach's submission and approved Ladnier's termination. *See* Tr. 315-17, 319-20; Resp. Ex. 16; Jt. Ex. 1.

On January 24, 2020, Herron issued Ladnier's termination letter, making essentially the same points that Fehrenbach made in his January 17, 2020 email. Jt. Ex. 1; Resp. Ex. 16. In the termination letter, Herron advised Ladnier that "[a] number of concerns relating to your performance . . . have been brought to the attention of management over the past year." Jt. Ex. 1 at 1. Specifically, Ladnier had failed to obtain "all required levels of NDT certifications." Jt. Ex. 1 at 1. Further, Herron wrote that Ladnier had "struggled with accomplishing assigned tasks," as he was failing to properly document work in TSM as directed and failing to "master the [DAWIA] curriculum and testing" that was needed to become DAWIA Level II certified in the "authorized timeframe" as required by PD 13355.

Ladnier's termination occurred within his two-year probationary period. GC Ex. 1(i) at 1. Ladnier never obtained UT Level III certification. Tr. 27. At the time of his termination, Ladnier had filled out paperwork to take the UT Level III exams again in April 2020. GC Ex. 1(a) at 9. Ladnier had not been scheduled for Level III certification exams in VT, MT, or PT. Tr. 36.

Numerous disputed issues about Ladnier's termination were raised during the hearing. First, witnesses presented conflicting interpretations of PD 13355. Ladnier testified that PD 13355 required only Level II certification in UT or RT. Tr. 36. Fehrenbach countered that PD 13355 permitted management to require Ladnier to become UT Level III certified because it states that training and knowledge requirements will be "at least" Level II for UT and RT. Tr. 212. Fehrenbach noted that PD 13355 is more comprehensive than PD F0095, that NDT Level III Examiners Perkins and Howard were working under PD 13355, and that Howard was UT Level III certified; Howard became UT Level III certified in February or March 2021. Tr. 236-37, 247, 250; *see also* Tr. 119-20, 146.

Witnesses also provided context to Ladnier's exam-related struggles. When asked whether waivers of the NAVSEA's three-exams-per-year rule were normally required, Hughes answered, "No. I mean, not at all." Tr. 272. Hughes and Fehrenbach indicated that someone in Ladnier's position should not have needed any training to pass the UT Level III certification exam. Tr. 217, 270. Indeed, Howard passed the UT Level III exam upon initially taking the exam, in February or March 2021, and did so without receiving any formal training specific to UT Level III in the months leading up to the exam. Howard had received hands-on UT training at Portsmouth Naval Shipyard in 2007, and he did some minor refresher training before his UT Level II recertification exam in late 2020 or early 2021. *See* Tr. 120, 135-36, 168. In contrast, Perkins had recently failed three UT examinations required in PD 13355, though Perkins stated that this was because he hardly uses the UT method at all. Tr. 55.

As for why Ladnier was terminated, Herron, Hughes, and Fehrenbach consistently indicated that Ladnier was fired primarily because he could not pass the UT Level III exam and attain UT Level III certification. Tr. 231, 282-83, 315-16. Hughes stated Ladnier was terminated because "he couldn't pass UT Level III, which is the primary reason I brought him onboard and paid him extra money." Tr. 282-83. Fehrenbach similarly stated, "[W]e really needed [Ladnier] to pass this UT examiner test, and he failed to demonstrate his qualifications for continuing employment by not passing that." Tr. 231. Fehrenbach added that Ladnier's failure meant the Respondent would have to bring in a UT Level III examiner from elsewhere, resulting in extra costs and burdens. Tr. 214. Relatedly, while Howard testified that Ladnier's work was satisfactory, Howard also acknowledged that "in some areas [Ladnier] . . . didn't meet the requirements," including in ultrasonic testing. Tr. 142, 157. Howard added that Ladnier "wasn't where we expected him to be with his DAWIA certification." Tr. 142.

Herron, Hughes, Fehrenbach, and McFadden all denied that Ladnier's grievance was a motivating factor behind Ladnier's termination. *See* Tr. 101, 230-31, 282, 327-29. Thomas similarly testified that he did not take Ladnier's grievance personally. Tr. 178.

On the matter of protected activity generally, Fehrenbach testified that he had been involved in resolving grievances and that grievances did not upset him or result in treating employees who had filed grievances differently. Tr. 219-20. Hughes similarly testified that he promoted people who had filed grievances and awarded people after they filed grievances. Tr. 277. Hughes also stated that "all grievances aren't bad," that employees sometimes need grievances to "understand something better they're just not getting from his supervisor. I mean, it would be better if he just come to my open door and ask me, but they don't always do that." Tr. 274. Hughes acknowledged that employees have a right to file grievances (Tr. 282), and also stated that resolving a grievance at Step 1 "is clearly a win-win for both the employees, the union and management" because the employee "understands what the issue is, he's been well represented by the union, and we—we also have lessons learned too from grievances, hey, we're not communicating, for example." Tr. 276.

Herron and Fehrenbach indicated that they would have taken the same action against Ladnier regardless of whether he had filed a grievance. Tr. 231, 330.

Additional reasons for Ladnier's termination were his "inability to follow [his] supervisor's direction in the area of TSM entry and DAWIA," Hughes testified. Tr. 279. Concerning TSM, Fehrenbach testified that Ladnier didn't make any entries for the month of March 2019, and Hughes testified that Ladnier's use of TSM was "sporadic." Tr. 226, 281. Perkins countered that other (non-probationary) employees failed to meet the 70 percent requirement and that the worst penalty for that offense would be a discussion with management. Tr. 54, 70-72; Jt. Ex. 4. Howard similarly testified that it was not usual for employees to miss the 70 percent mark. Tr. 154. Fehrenbach stated that it was reasonable for the Respondent to treat Ladnier's failure to meet the 70 percent requirement differently, because only Ladnier was a probationary employee, and probationary employees are held to a higher standard. *See* Tr. 226-27, 232.

Concerning Howard's August 20, 2019 email to Ladnier about two overdue TSM tasks, Howard testified that he did not consider the interaction about the overdue issues to be significant. It was the only time he'd discussed overdue issues with Ladnier, and it was not unusual for employees to have two overdue TSM tasks. *See* Tr. 43, 157. Ladnier testified that he was sometimes assigned work that was already overdue. Tr. 345.

Concerning DAWIA, Ladnier acknowledged that he did not complete the DAWIA self-study that he was directed to have completed by December 31, 2019. Tr. 37-38. Ladnier claimed that he put in over 100 hours of DAWIA training and that he completed about three-fourths of what was required, but this was supported by only two documents, one showing Ladnier completed an orientation session, which did not count towards his certification, and another indicating the completed Quality Assurance Auditing, but it was not revealed on the transcript kept by the Agency. Tr. 37, 356-58; GC Exs. 2 & 3. Howard did not check Ladnier's progress on DAWIA. Ladnier had until September 2020 to be certified, and Ladnier did not receive a reminder to finish his DAWIA work by the end of the year. Tr. 38, 154.

POSITIONS OF THE PARTIES

General Counsel

The GC asserts that the Respondent violated § 7116(a)(1) and (2) of the Statute when it terminated Ladnier's employment for engaging in protected activity, specifically, filing and pursuing his grievance. GC Br. at 11, 22.

The GC argues that Ladnier's protected activity was a motivating factor in the Respondent's decision to terminate. The GC asserts that after the grievance was filed, Howard warned Ladnier that his grievance would not look good to upper management, especially because Ladnier was still a probationary employee. *Id.* at 11-12. The GC argues that it was not until the grievance meeting that Thomas announced Ladnier would be required to be certified in all NDT methods. Further, the GC asserts, the Respondent initiated the termination process less than one month after the grievance was filed. The GC adds that the Respondent did not point to any incident occurring in that limited window of time that would explain why it decided to begin the termination process at that time. *Id.* at 12. The GC notes McFadden assured Ladnier at the grievance meeting that he could not be fired for failing to earn a certification outside his position description. *See id.* at 12-13. The GC also urges that the undersigned ignore self-serving testimony from management's witnesses that Ladnier's protected activity had nothing to do with his termination. *Id.* at 13.

In addition, the GC contends that the Respondent's asserted reasons for terminating Ladnier are wholly pretextual. *Id.* The GC suggests that Ladnier's exam failures could not have been the reason for his termination, since the Respondent waited at least five months after Ladnier's third failure to initiate the termination process. *See id.* at 14. The GC also asserts that the Respondent failed to explain why it "abandoned" its plan to get Ladnier trained in October 2019 at the

Puget Sound Naval Shipyard "shortly after Ladnier engaged in protected activity," and that the Respondent failed to explain why it gave Howard, but not Ladnier, training before the UT Level III exam. *Id.* The GC also contends that if Ladnier's exam failures were the real reason for his termination, then McFadden would not have told Ladnier at the grievance meeting that he could not be fired for failing to earn a certification outside his position description. Indeed, the GC argues, PD 13355 shows that Ladnier was not required to be UT Level III certified. *Id.* at 15. Further, the GC submits that Ladnier's TSM issues were not the real reason for Ladnier's termination, given that the Respondent hadn't expressed concern about his TSM entries from August to December 2019, and given that other (non-probationary) employees had similar TSM issues but were not fired for such offenses. *See id.* at 18-19 & n.19. Finally, the GC asserts that Ladnier's failure to become DAWIA Level II certified was not the real reason for his termination, given that (a) Howard merely told Ladnier that he'd "like" him to be finished with this DAWIA training by December 31, 2019; (b) Howard never followed up with Ladnier because Ladnier had until September 2020 to become certified; and (c) Ladnier's termination letter did not cite his failure to be trained by December 31, 2019, as a basis for his termination. *Id.* at 20-21.

Respondent

The Respondent asserts that the GC has failed to establish a prima facie case because it has failed to show that Ladnier's termination was unlawfully motivated. R. Br. at 9, 11, 27. With respect to timing, the Respondent notes that Ladnier wasn't terminated until months after his grievance was closed. *Id.* at 11-12. Furthermore, the Respondent asserts that Ladnier's grievance was resolved amicably at Step 1; that Herron, Hughes, and McFadden denied being influenced by Ladnier's grievance; that Herron oversaw a thorough and fair review of Ladnier's termination; that Herron was not involved in Ladnier's grievance; and that the Respondent held no animus concerning Ladnier's protected activity or protected activity generally. *Id.* at 11-12, 23-26.

The Respondent contends that Ladnier was terminated for legitimate reasons, specifically, his failure to obtain UT Level III certification, his failure to properly document daily work performance in TSM as directed, and his failure to obtain DAWIA Level II certification within the directed timeframe. The Respondent argues that it was entitled to require that Ladnier obtain UT Level III certification, based on Ladnier's position description. Further, they argue that Ladnier worked under the identical position description for other UT Level III examiners and that the Respondent's practices were consistent in treating Ladnier. In addition, the Respondent points out management's right to assign work and employees under § 7106 of the Statute. *Id.* at 13-15, 18-23. Given Ladnier's pre-hiring work experience, the Respondent contends that it was reasonable to expect he would pass the UT Level III exam without any additional training. *Id.* at 15-17, 21. The Respondent notes that Ladnier's failures meant that the Respondent would have to return to using a UT Level III examiner from a facility other than the Respondent's. *Id.* at 21-22.

Finally, the Respondent asserts that termination was appropriate in light of Ladnier's probationary status and that Herron, Fehrenbach, and Hughes all testified that the Respondent would have fired Ladnier in the absence of his protected activity. *See id.* at 18-19, 23.

ANALYSIS AND CONCLUSIONS

It is well established that an agency may remove a probationary employee without cause. *Dep't of the Navy, Naval Weapons Station Concord, Concord, Cal.*, 33 FLRA 770, 771 (1988) (citing *U.S. Dep't of Justice, INS v. FLRA*, 709 F.2d 724 (D.C. Cir. 1983)). Thus, it is permissible to terminate a probationary employee for "[g]ood reason or even no reason at all." *Indian Health Serv., Crow Hosp., Crow Agency, Mont.*, 57 FLRA 109, 114 (2001) (Indian Health Service). However, a probationary employee cannot be terminated for an illegal reason, and termination for a reason in violation of the Statute constitutes an unfair labor practice. *Id.* Ladnier was a probationary employee at the time of his termination.

Under § 7116(a)(2) of the Statute, it is an unfair labor practice "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* (*Letterkenny*) 35 FLRA 113 (1990), the Authority established the analytical framework for determining whether an agency action violates this provision of the Statute. *Id.* at 117-18. The GC always bears the burden of establishing, by a preponderance of the evidence, that an unfair labor practice was committed. *Id.* at 118. First, the GC must show by preponderant evidence: (1) that the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) that such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment. *Id.* A finding that protected conduct was a motivating factor in the employer's decision may be based on circumstantial as well as direct evidence. *See U.S. Dep't of the Air Force, 315th Airlift Wing, Charleston AFB, Charleston, S.C.*, 56 FLRA 927, 927, 931 (2000). If the GC proves these elements, then it has established a prima facie case of retaliation. *Id.* The existence of a prima facie case is determined by considering the evidence in the record as a

whole, not just the evidence presented by the GC. *U.S. DOD, U.S. Air Force, 325th Fighter Wing, Tyndall AFB, Fla.*, 66 FLRA 256, 261 (2011) (*Tyndall AFB*).

Even if the GC makes the required prima facie showing, the agency will not be found to have violated § 7116(a)(2) if it can demonstrate, by a preponderance of the evidence, that: (1) there was a legitimate justification for its action; and (2) the same action would have been taken even in the absence of protected activity. *Letterkenny*, 35 FLRA at 118.

It is well settled that the pursuit of a grievance, including the filing of a grievance and attendance at grievance meetings, constitutes protected activity within the meaning of § 7102 of the Statute. *See U.S. Dep't of the Air Force, Aerospace Maintenance & Regeneration Ctr., Davis Monthan AFB, Tucson, Ariz.*, 58 FLRA 636, 636 (2003); *EEOC*, 24 FLRA 851, 855 (1985). Ladnier engaged in protected activity by filing a grievance and meeting with management to discuss it, and the Respondent admits that Ladnier engaged in protected activity. GC Ex. 1(c) at 2. Accordingly, the undersigned turns to the question of unlawful motivation.

The undersigned finds that Ladnier's protected activity was not a motivating factor in the Agency's decision to terminate his employment, and the reasons given by the Respondent for terminating Ladnier are not pretextual.

The Authority has long considered the timing of a management action significant in determining whether a prima facie case of discrimination has been established under § 7116(a)(2). *E.g., U.S. Dep't of Transp.*, FAA, 64 FLRA 365, 368 (2009). However, while the proximity in time between an agency's employment decision and an employee's protected activity may support an inference of unlawful motivation, it is not conclusive proof of unlawful motivation or a violation. Rather, timing must be evaluated within the totality of the evidence. *Dep't of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 55 FLRA 1201, 1205. The words and conduct of supervisors may also shed light on a respondent's motivation. *FAA*, 64 FLRA at 369. Further, a supervisor's anti-union animus can shed light on the supervisor's motivation concerning his or her activity. *See U.S. Dep't of Transp., FAA, El Paso, Tex.*, 39 FLRA 1542, 1552-53 (1991).

In establishing an unlawful motivation, the GC may seek to establish that the respondent's asserted reasons for taking the allegedly discriminatory action were pretextual, *Tyndall AFB.*, 66 FLRA at 261, i.e., that the proffered, lawful reasons for the respondent's actions did not motivate the respondent, *see AFGE, Local 1345, Fort Carson, Colo.*, 53 FLRA 1789, 1794 n.4. *See also U.S. Dep't of the Air Force, Seymour Johnson AFB, Goldsboro, N.C.*, 50 FLRA 175, 183 (1995) (respondent's justification for its action was neither frivolous nor improbable). In addition, the disparate treatment that is unexplained except as retaliation for protected activity supports a finding that an agency's reason for taking its action was pretextual. *Indian Health*, 57 FLRA at 114.

At first glance, the timing, in this case, appears suspect, at least when focusing only on the fact that Ladnier filed his grievance on October 8, 2019, and Fehrenbach formally recommended to Hughes in mid-October 2019 that Ladnier be fired. When viewed in context, however, it becomes clear that the close timing is coincidental, and that Ladnier's grievance was not a motivating factor in his termination.

Significantly undermining the GC's timing argument is the fact that Ladnier's termination was essentially decided as one of two options for Ladnier in May 2019, five months before Ladnier engaged in protected activity. The sentiment in favor of terminating Ladnier's employment came into being with his first exam failure and grew with each subsequent failure. Specifically, Thomas believed Ladnier should be fired after his first exam failure in December 2018, Hughes and Fehrenbach began to doubt Ladnier's abilities after his second exam failure in February 2019 (and Hughes was aware at that time of Thomas's view that Ladnier should be terminated), and Fehrenbach concluded that Ladnier should be terminated after his third exam failure in May 2019. In May 2019, Hughes decided, contrary to the views of Thomas and Fehrenbach, that the Agency should pursue a training-and-waiver option as an alternative to terminating Ladnier, and arrangements were pursued for Ladnier to receive training at Puget Sound in October 2019. The training option at Puget Sound became impossible due to Puget Sound's need to complete its audit before being able to provide Ladnier training. This left the Respondent with termination as its sole remaining option, one it had considered initiating as early as May 2019. That Ladnier's termination was seriously contemplated in May 2019, months before his protected activity, and was carried out after the extraordinary step of considering the failed attempt to obtain training to obtain permission for Ladnier to take the Level III examination a fourth time within one year, strongly contradicts the argument that Ladnier's grievance was a motivating role in the termination process.

Furthermore, significant additional evidence bolsters the conclusion that Ladnier's termination was not motivated by his grievance. First, it is unlikely that Ladnier's grievance would motivate the Respondent to retaliate against him, given that Ladnier agreed at the end

of the grievance meeting to obtain the certifications that management required.

Second, no testimony or documentary evidence was introduced into evidence indicating that Herron, Hughes, Fehrenbach, Thomas, or McFadden considered Ladnier's grievance when deciding he should be terminated. That Fehrenbach could not remember when Ladnier's grievance was filed, or even whether it was before or after October 2019 (the month when Ladnier formally recommended that Ladnier be terminated), strongly supports the conclusion that management's decision to terminate Ladnier was unrelated to Ladnier's grievance.

Third, while Howard told Ladnier that his grievance "[wasn't] going to look good to upper management," there is no indication that this was based on anything other than Howard's speculation. Neither is it surprising that any party to a labor dispute would not be pleased with the necessity of having to file a grievance. Further, had Howard's comments been indicative of his displeasure with the filing of Ladnier's grievance, his having presented upper management with extraordinary options on behalf of Ladnier after his third exam failure is indicative that the grievance was not the motivating factor of management to pursue Ladnier's termination. Lastly, there is no indication that Howard was involved in discussions as to whether Ladnier should be terminated.

The undersigned does not infer animus from Hughes's comment that it would be better if an employee met with him rather than filing a grievance. Tr. 274. When viewing Hughes's testimony as a whole, it is clear that he understands the right of employees to file grievances and the potential benefit of grievances, and he made no statement indicating he was specifically affected by Ladnier's grievance. Tr. 276, 282.

The GC's pretext claims fail. The GC suggests generally that the Respondent's reliance on Ladnier's exam failures was mere pretext. That, however, ignores the credible testimony of management's witnesses that Ladnier's exam failures were the primary reason for his termination. Further, it also ignores the observations of Ladnier himself, who noted that management was so disappointed after the second and third exam failures that only Howard would speak to him. GC Ex. 1(a). The reactions Ladnier observed are consistent with the interview process Ladnier experienced in being hired. They are consistent with the directions and priorities the Respondent provided Ladnier after being hired, i.e. to work on passing the Level III examination. Hence, Ladnier's noticing the disappointment by management after failing the exam repeatedly is also consistent with the view that Ladnier's repeated failures to pass the UT Level III exam made it impossible for him to do the work he was hired to do. The Respondent hired an experienced examiner like Ladnier because it needed someone who could be certified to perform Level III examiner work. By repeatedly failing to become UT Level III certified, Ladnier defeated that purpose and thus presented a real, rather than pretextual, basis for his termination.

The GC suggests it was a retaliatory scheme by the Respondent that caused Ladnier's October 2019 training at Puget Sound to fail to materialize. First, it is unclear exactly when Ladnier's training at Puget Sound became impossible. If Ladnier's training fell through before his grievance was filed, the GC's argument would be a non-starter. But even if Ladnier's training fell through after his grievance was filed, the GC has failed to cite evidence supporting the suggestion that the Respondent deliberately "abandoned" training in response to Ladnier's protected activity. *See* GC Br. at 14. In the absence of such evidence, the undersigned cannot conclude that the Respondent's failure to get Ladnier training at Puget Sound was a ruse that was concocted in retaliation for Ladnier's grievance---particularly in light of the evidence in the record of the consistent and persistent efforts the Respondent took to obtain their Level III examiner to remain compliant with their audit requirements and to avoid the continuing extra expense of retaining an outside Level III examiner to perform required duties.

The GC argues that the Respondent treated Ladnier differently from Howard with training given before the UT Level III exam. However, the record supports Respondent's position that someone with Ladnier's experience should not have needed additional training to pass the exam. Likewise, why would the Respondent have made any effort to get Ladnier additional training after his third exam failure but for their true motivation to fulfill their need for a Level III examiner? While Howard had received such training in the distant past, he did not require UT Level III specific training in the months leading up to his exam. For all of these reasons, the GC's argument alleging disparate treatment fails.

The GC suggests that Ladnier's exam failures could not have been the basis of his termination because months passed between Ladnier's third failure in May 2019 and Fehrenbach's initiation of the termination process in mid-October 2019. Unfortunately, the record is unclear about precisely when Ladnier's planned October 2019 training at Puget Sound fell through. Absent evidence linked to the Puget Sound training and the timing of the grievance the undersigned is unable to find anything inherently nefarious about the timing of the termination. Again, it is understandable that management did not want to terminate Ladnier immediately after his third exam failure, especially given the difficulty the Agency had in hiring an NDT examiner with UT Level III experience, and

it likely took the Agency time to coordinate a plan for Ladnier's training at Puget Sound. At some point, later on, Ladnier's training option fell through, leaving management with no alternative but to terminate Ladnier. A more likely scenario is that, after seeking extraordinary steps to try to get Ladnier eligible to take the exam a fourth time, when Puget Sound delayed offering Ladnier training before the end of the year, management concluded, in light of Ladnier's prior three exam failures and his overall lack of progress in timely achieving the requirements of PD 13355, termination became the paramount option in light of his probationary status. In this view, the filing of the grievance pales in significance to the timing of events leading to Ladnier's termination.

The GC contends that Ladnier's exam failures cannot be the real reason for his termination because, according to Ladnier, McFadden stated at the grievance meeting in October 2019 that the Agency "couldn't fire us for not passing the exams that were not in the PD." Tr. 34. Ladnier was not terminated solely for failing to pass his Level III exam. He was also cited in his termination letter for his inability to follow his supervisor's direction in the area of TSM entry and DAWIA. These additional facts undermine the legal significance of the GC's contention in light of their citing McFadden's statement. As cited above it is well established that probationary employees can be terminated for any lawful reason. Moreover, McFadden agreed in conversations with Thomas and senior leadership that Ladnier could be fired for failing to become UT Level III certified.

It is further noted that Ladnier's recollection of McFadden's statement lacks corroboration by the lack of additional consistent testimony or documentary evidence in the record. Overshadowing McFadden's statement is the evidence that management began to consider termination as early as May 2019 for failing to become UT Level III certified. Further, management continued to hold this belief, with McFadden's approval, after Ladnier's grievance was closed in October 2019. There is nothing false or pretextual about the Agency's consistent position that Ladnier was hired to perform Level III work and repeatedly failed to pass the qualifying examination during his probationary employment period to be able to perform such work.

The GC argues that terminating Ladnier for failing to become UT Level III certified is pretextual because it is contrary to the requirements outlined in his position description, PD 13355. Nothing in PD 13355 prevented the Respondent from requiring an employee to take the UT Level III exam or become UT Level III certified. The record supports the fact that as a matter of practice, it was not unusual to assign employees working under PD 13355 to become UT Level III certified. Howard proposed options that NDT Examiners working under PD 13355, specifically Howard himself or Perkins, become UT Level III certified in his May 23, 2019 email, and Howard ultimately became UT Level III certified. Regardless of PD 13355's wording, the parties agree that the Respondent lawfully hired Ladnier and placed him in PD 13355. Consistent therewith, the parties also agree that Ladnier's UT background and skills are consistent with his primary work objective to become UT Level III certified which is borne out by Ladnier's testimony of his taking the exam three times. Firing Ladnier for failing to carry out a goal established from the beginning of Ladnier's employment is not pretextual.

The GC argues that Ladnier's DAWIA and TSM issues were not real reasons for Ladnier's termination. The Respondent never claimed that Ladnier's failure to meet DAWIA and TSM expectations were the exclusive reasons for his termination. Rather, the Respondent clearly and consistently indicated that Ladnier was primarily terminated for failing to become UT Level III certified. That reason, i.e., Ladnier's failure to "obtain[] all required levels of NDT certifications," including UT Level III certification, was outlined in his termination letter, along with his shortcomings regarding TSM and DAWIA. Together they were a sufficient justification for terminating a probationary employee. Moreover, there is nothing unreasonable about the Respondent including Ladnier's issues with TSM and DAWIA among its reasons for his termination. While Ladnier's problems with TSM were relatively small, they were not negligible. Ladnier's entry rate of only 55.8 percent in November 2019 was well below the 70 percent requirement, and further, this was after Howard had trained Ladnier in TSM. Furthermore, it was rational to scrutinize Ladnier differently than other employees who were not on probation for these failures. As for DAWIA, although asked in May of 2019 to complete courses, it was disputed whether Ladnier completed either one or any of the nine courses by December 31, 2019. Neither one nor no courses bode well for Ladnier to become DAWIA Level II certified by September 2020, as required, even if other employees could have finished DAWIA training in six months, as Perkins claimed.

While Perkins testified he recently failed three UT examinations required in his position description, this is not a sign of disparate treatment, as Perkins and Ladnier were not similarly situated. Unlike Ladnier, Perkins was not a probationary employee, and while Ladnier was hired primarily to perform UT Level III work, Perkins hardly uses the UT method at all.

Given the totality of the evidence in the record, the GC has failed to demonstrate that Ladnier's termination was unlawfully motivated, and failed to demonstrate that the multiple reasons by the

Agency for terminating Ladnier were pretextual or unjustified. Accordingly, the GC has failed to establish a prima facie case.

The Respondent has demonstrated, by a preponderance of the evidence, that there were multiple legitimate justifications for terminating Ladnier, and that the record supports the identical termination being justified in the absence of Ladnier's protected activity.

Even if the GC had established a prima facie case, it is abundantly clear that the Respondent had a legitimate justification for terminating Ladnier, and that the Respondent would have taken the same action even in the absence of protected activity. *Letterkenny*, 35 FLRA at 118.

It is not in dispute that the Respondent had legitimate reasons to terminate Ladnier's employment. Ladnier was hired for his UT skills and told early on that he was to obtain UT Level III certification. After three attempts, however, Ladnier failed to become UT Level III certified. Ladnier's repeated failure to be certified in the method he was hired to perform is more than enough reason to establish a legitimate justification for the Respondent's decision to terminate Ladnier's employment. Adding to the legitimacy of that decision are the facts that: (1) Ladnier showed no sign of being able to pass the exam after a fourth attempt without remedial training; (2) no training was immediately available (and given Ladnier's past failures, it is far from certain that he could pass the fourth attempt even with additional training); (3) without a UT Level III certification, there was not enough work for Ladnier to perform; and (4) it appeared that Ladnier would continue to be underutilized until at least April 2020, which was the next time Ladnier would become eligible to take the UT Level III absent the extra training. That Ladnier failed to complete most or all of his DAWIA training within the timeframe requested and had relatively small but not trivial issues with TSM further bolsters the conclusion that there was a legitimate justification for the Respondent's decision to terminate Ladnier's employment.

It is also clear that the Respondent would have terminated Ladnier even in the absence of his protected activity. Management reasonably viewed the probationary period as a time to determine whether employees were qualified to do their jobs (*see* Tr. 90-91), and Ladnier had demonstrated to management over the course of three failed UT Level III exam attempts that he was not qualified to do his job. That members of the management team had considered as early as May 2019, months before Ladnier's protected activity, that Ladnier might warrant termination, provides further support for the conclusion that the Respondent would have terminated Ladnier even in the absence of his protected activity. The Respondent's termination decision is all the more reasonable given Ladnier's additional shortcomings, specifically, his issues with TSM and his failure to complete most or all of his required DAWIA training in a timely manner. Absent proof of motivations based upon the protected activities, the Respondent acted in conformance with concerns designed to oversee and manage lawfully hired probationary employees.

Summary

Based on the foregoing, the undersigned finds that the evidence is insufficient to support the allegation that the Agency terminated Ladnier's employment because of his protected activity. The undersigned concludes that the GC failed to prove a prima facie case of discrimination and that in any case, the Respondent demonstrated legitimate justification for terminating Ladnier, as a probationary employee.

ORDER

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

Issued, Washington, D.C. March 10, 2022

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DAVID L. WELCH
Chief Administrative Law Judge