

**OFFICE OF ADMINISTRATIVE LAW JUDGES**

**WASHINGTON, D.C. 20424-0001**

DEPARTMENT OF VETERANS AFFAIRS

MEDICAL CENTER, DENVER, COLORADO

Respondent

and

Case No. DE-CA-50140

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,  
AFL-CIO, LOCAL 2241

Charging Party

Stephen T. Patterson, Esq. For Respondent

Hazel E. Hanley, Esq. For the General Counsel of the FLRA

Emma Sneed, President Melvin Ingram, Jr., Vice President For Charging Party

Before: SAMUEL A. CHAITOVITZ Chief Administrative Law Judge

**DECISION**

**Statement of the Case**

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, *et seq.* (Statute), and the Rules and Regulations of the Federal Labor relations Authority (FLRA or Authority), 5 C.F.R. § 2411, *et seq.*

Based upon an unfair labor practice charge, as amended, filed by the American Federation of Government Employees, AFL-CIO (AFGE), Local 2241 (AFGE Local 2241 or Union) against Department of Veterans Affairs (VA), Medical Center, Denver, Colorado (VAMC), a Complaint and Notice of Hearing was issued on behalf of the General Counsel (GC) of the FLRA by the Regional Director for the Denver Region of the FLRA. The complaint alleged that VAMC violated §§ 7116(a)(1), (5) and (8) of the Statute by failing to notify AFGE Local 2241 of two formal discussions with a member of the unit represented by the Union and by failing to give the Union an opportunity to be present at the meetings and by bypassing the Union in attempting to settle a grievance. VAMC filed an answer denying that it had violated the Statute.

A hearing in this matter was held in Denver, Colorado. All parties were represented and were afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Post hearing briefs were filed and have been carefully considered.

Based upon the entire record<sup>(1)</sup>, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

## **Findings of Fact**

### A. Background

AFGE is the exclusive collective bargaining representative of a nationwide unit of VA employees, including employees of VAMC. AFGE Local 2241 is AFGE's agent for purposes of representing the unit employees at VAMC. At all material times Emma Sneed has been a unit employee and the president of AFGE Local 2241 and Mel Ingram has been a unit employee and vice president of AFGE Local 2241.

At all material times, at VAMC, Thomas A. Trujillo has been the Medical Center Director, Ada I. Neale has been the Assistant Medical Director, Vernell Rhodes has been the Office of Equal Employment Opportunity (EEO) Program Manager, and Toni Williams has been Rhodes' EEO Program Assistant.

### B. Mildred Wright and her duties in the Chaplain Service

Since November 1986 Mildred Wright has been employed by VAMC. On about October 30, 1991, Wright began working in the VAMC Chaplain Service as a secretary/stenographer GS-4.

When Wright joined the Chaplain Service Rev. Raymond Thomas was Chief of the Chaplain Service, Wright's first-line supervisor, and he held that position until about June 3, 1994. During his service as Chief of the Chaplain Service, Thomas spent most of his time in visitation or crisis counseling and less time in his office at the Chaplain Service, located on the first floor of the VAMC's main hospital building. On June 4, 1994 Rev. Daniel Adams became Acting Chief of the Chaplain Service, and served in that capacity until June 1995. When he assumed his duties as Acting Chief, Adams was not a full time employee. He continued working 32 hours per week, until December 1994, when he began working 40 hours per week. Adams' administrative duties as Acting Chief amounted to about 1.4 hours per week.

When Wright began working in the Chaplain Service she was classified as a secretary/stenographer, GS-4. In late 1993, Wright asked Thomas about upgrading her position to the grade of GS-5. Thomas requested Wright to write down a description of all of her duties, after which he developed a position description for a GS-318 secretary (typing), and he submitted it on December 15, 1993 to Herman Nunlee, Jr., Position Classification Specialist. On or about January 20, 1994, Wright's new position description and GS-5 grade became effective. Thomas developed new performance standards for Wright which replaced those attached to her prior performance appraisal for the cycle April 1, 1993 to March 31, 1994, and these new performance standards were attached to the performance appraisal for the cycle April 1, 1994 to March 31, 1995, the time period material to this case.

Neither Thomas nor Adams had any actual participation in contract negotiations or development of contract proposals. They did not participate in handling any grievances concerning disciplinary or adverse actions, with the exception of the matters related to their supervisee, Wright, in 1994. Neither Thomas nor Adams participated in meetings with management and the AFGE Local 2241. They did not attend or participate in meetings at which labor relations matters were discussed and deliberated. Thomas developed a time schedule for the chaplains in Chaplain Service in order to provide coverage on a seven-day basis to the VAMC. Adams attended meetings of the Administrative Executive Board which formulated policy; however, he had no direct or personal involvement in developing policies. Neither Thomas nor Adams participated in the formulation or development of any VAMC labor relations policies. During 1994, the time period material to this case, neither Chief of the Chaplain Service had any responsibility in establishing, interpreting, or implementing personnel or labor relations policies for the VAMC.

Wright's daily routine involved a variety of tasks, many clerical, designed to keep the Chaplain Service operating and providing support services for the chaplains. Her tasks included straightening up racks of printed material, preparing cards dealing with the status of patients, cleaning the office, answering the phone, etc. During all times material to this case, Wright never received opened confidential correspondence. Confidential information, such as SF-50 notices of salary increases, arrived at the Chaplain Service in a sealed in-house envelope or stapled under a pre-printed cover sheet with the left upper corner cut out to reveal the name of the recipient printed on the underlying SF-50, or with the recipient's name written below the words: "The Attached Document Contains Confidential Information, Information is Not to be Viewed by Any Person Other than the Addressee."

Wright and all persons employed in the Chaplain Service had access to the unlocked file cabinet in the outer office where personnel information, including most recent performance appraisals were stored. Although Thomas and Adams were apparently responsible for doing performance appraisals and giving awards to employees in the Chaplain Service, neither included Wright in their deliberations concerning performance appraisals or awards. Wright's participation in the performance appraisal process amounted to typing the cover sheet and filing the finalized appraisal for each chaplain.

Neither Chief of the Chaplain Service included Wright in his deliberations on recommending Chaplain Service employees for cash awards, hiring decisions, special training decisions, or promotion decisions. Wright did not recommend or order any training for the chaplains; however, she reminded the Chiefs about mandatory training such as health and safety.

Wright kept track of the chaplains' time and attendance, and Thomas, and then Adams, would sign and certify the accuracy of those records, with the exception of their own, which were certified through the Assistant Medical Center Director, Ada Neale. Wright made some travel arrangements for Thomas and for another chaplain, Father Woerth, for their non-VAMC travel, to the extent that she called travel agencies for low air fares; however, while she may have filled out various forms for chaplains' travel, Wright did not prepare travel vouchers.

### C. The parking incident

On April 13, 1994, Wright discovered that the VAMC Security Service had ticketed her car for a parking

violation. Wright believed she had been unfairly singled out by Chief Pugh and Officer Gonzales, and she believed that the parking ticket was further harassment. Wright asked Thomas to view her ticketed car from a window in the Chaplain Service, and she stated that another car had been parked in that area had not been ticketed. Wright then went to the Security Office to complain about the ticket. She was unable to resolve the dispute and she returned to the Chaplain Service.

#### D. EEO case, discipline and grievance

After returning to the Chaplain Service, Wright contacted VAMC EEO Manager Program Rhodes. Rhodes advised Wright that she should first consult an EEO counselor, and Rhodes provided a list of such EEO counselors. On about April 15, 1994, Wright contacted EEO counselor LaMone Noles, and they arranged to meet concerning the April 13 incident sometime between April 18 and April 25. On April 25, Noles provided Wright with a Notice of EEO Complaint Rights and Responsibilities.

At about this same time Thomas was informed that Pugh, Gonzales, and the VAMC Director's secretary Joan Funckas had made Reports of Contact concerning Wright's business at the Security Office, and Thomas was ordered to conduct a fact-finding inquiry into the events. Accordingly, on April 28, 1994, Thomas sent Wright a memorandum informing her of the fact-finding he had scheduled in his office at 1:00 p.m. on May 2, 1994, and he advised her that she was entitled to have a Union representative during his questions concerning a traffic violation/disturbance incident on April 13, 1994.

Wright requested the representation of Emma Sneed, Union President, for the May 2, 1994 fact-finding inquiry, and on that date, Thomas conducted the inquiry in the presence of Wright and Sneed. After conducting the fact-finding inquiry, Thomas issued a report on May 11, 1994, with the help of the Office of Human Resources, recommending a five-day suspension for Wright. On May 16, 1994, Thomas gave Wright a memorandum, proposing a five-day suspension. Wright sought the assistance of AFGE Local 2241 concerning the proposed suspension, and on May 26, 1994, the Union, on behalf of Wright, sent Center Director Trujillo a response to the proposed five-day suspension, requesting that he reconsider that decision.

On June 8, 1994, Ada Neale, VAMC Assistant Director, issued a memorandum with the decision to suspend Wright for five days, effective June 20 to June 24. On June 15, 1994, Sneed filed a third step grievance with VAMC Director Trujillo, under Article 13 of the Master Agreement on behalf of Wright, contending that the decision failed to meet the "just cause" criteria required by arbitrators, and requesting that Wright be made whole for the suspension, scheduled to begin the following Monday, June 20, 1994.

Also on June 15, 1994, Noles met with Wright for the final interview for her informal EEO complaint. On June 17, 1994, the last work day before her suspension, Wright received from Noles a memorandum, "Notice of Right to File a Discrimination Complaint." On June 20, 1994, Wright filled out a Veterans Affairs form, "Complaint of Discrimination," alleging harassment from June 9, 1992 to the present; sexual harassment from June 9, 1992 to the present; parking and handicapped discrimination also from June 9, 1992 to the present; and a suspension from June 20 to 24, 1994. Wright indicated that Nora V. Kelly, an attorney, was her representative.<sup>(2)</sup>

Wright raised the issue of her five-day suspension and her unit status in her typed attachment related to

corrective action on the EEO complaint form, but she did not check an item on the form indicating that she had filed a Union grievance for one of the issues in her complaint. In addition, Wright did not inform Sneed that she was including the five-day suspension - the subject of the Union's June 15, 1994 grievance - in her formal EEO complaint.

Although Wright initially intended to file her formal EEO complaint on the first day of her suspension, June 20, she decided to wait until she returned to work. On her first day back, June 27, 1994, she prepared a memorandum designating Sneed to represent her "in any and all relevant [sic] matters pertaining to the suspension that was from June 20, 1994 through June 24, 1994" and "all matters from April 13, 1994, until resolved." On June 30, 1994, at about 12:15 p.m., Wright delivered her formal EEO complaint to Rhodes, who signed her receipt of that formal complaint.

In the meantime, on June 27, 1994, Rhodes contacted Wright to inform her that she had not had counseling on the five-day suspension, and Rhodes advised Wright to seek an EEO counselor for counseling on such suspension. Wright contacted Noles for an informal counseling on the June suspension.

After filing the June 15 grievance on behalf of Wright, Sneed received correspondence from M.K. Huston, of VAMC Employee Relations, to the effect that Wright was not included in the unit represented by AFGE, Local 2241, and informing Sneed that Wright was required to designate her choice of representative in writing. Huston also requested Sneed to agree to extend the time limits for the Director's response to the June 15 grievance, and on June 27, 1994, both Huston and Sneed agreed to extend that meeting and reply until July 18, 1994, at 2:00 p.m.

On July 18, 1994, Wright again prepared a memo, designating Sneed to represent her "on any and all issues of my employment at this VAMC unless you are notified by me in writing of any changes." On July 18, 1994, Sneed and Wright met with Trujillo and Charlotte DeLuca from VAMC Human Resources. DeLuca took notes, and it was she, apparently, who prepared a report, "Minutes From Formal Grievance Meeting," dated July 18, 1994.

On July 21, 1994, Noles signed and dated a VA form, "EEO Counselor's Report: Final Action," and noted that Sneed and Ingram were assisting Wright in an administrative investigation and proposed suspension arising from the incident with Chief Pugh and Officer Gonzales.

On July 25, 1994, Trujillo sent a letter to Wright's attorney, Kelly, to notify her that the VAMC was in receipt of Wright's June 30, 1994 formal EEO Complaint.

In early August 1994, Trujillo requested a meeting with Sneed concerning Wright's third step grievance under Article 13, the negotiated grievance procedure. In the meeting, Trujillo told Sneed that he would reduce Wright's suspension to one day if the Union dropped everything. Sneed agreed to convey that offer to Wright. Wright refused this offer, and told Sneed that if she were to accept any deal, she would be admitting guilt. Sneed agreed, and, on behalf of the Union, Sneed refused Trujillo's offer and prepared to elevate the grievance.

On August 10, 1994, Trujillo issued his decision, denying Wright's grievance.

On August 19, 1994, Trujillo wrote to Kelly, notifying her of the acceptance of Wright's formal EEO complaint filed on June 30, 1994. Trujillo listed Wright's allegations arising from the April 13 incident, but did not include the five-day suspension that Wright had included as an issue in her formal EEO complaint form.

Later in August, or in early September, Toni Williams, EEO Program Assistant, telephoned Wright to ask for Kelly's telephone number. Williams informed Wright that at 10:30 a.m. on September 19 she would have an appointment with an EEO investigator concerning her June 30, 1994 formal EEO complaint.

On September 7, 1994, the Department of Veterans Affairs, Office of Equal Opportunity, Washington, D.C., assigned Joseph C. Baucom as the EEO Investigator for Case No. 94-2047, Wright's June 30, 1994 formal EEO complaint.

Baucom is a self-employed EEO investigator. He was hired and assigned by the VA office in Washington, D.C. to investigate Wright's EEO complaint. By a letter dated September 7, 1994, from the VA in Washington, Baucom was notified of his assignment to investigate Wright's EEO case. A copy of this letter was sent to Wright. VAMC then contracted for Baucom's services by means of a purchase order and VAMC issued Baucom's travel orders. Baucom considers himself a neutral party whose task is to gather the facts on both sides of the EEO dispute. He operates under the guidance of 29 C.F.R. Part 16-14 and EEO Management Directive 110, both issued by the Equal Employment Opportunities Commission.

On about September 8, 1994, Baucom telephoned Wright at work regarding the EEO investigation. Wright told Baucom she could not afford the expense of an attorney during the investigation, as she was using Kelly's services for other matters. Baucom told Wright she did not need Kelly for the investigation. Baucom explained that he would need Wright's written waiver of Kelly as Wright's representative. When Baucom learned that Kelly would not be representing Wright during the EEO investigation, Baucom informed Wright that he was tape recording their conversation for an affidavit. Baucom then spent about two hours questioning Wright about the case, and he administered the oath. Within an hour of that telephone conversation, Baucom telephoned the Chaplain Service, and Father Woerth, a chaplain, took the call, and turned the receiver over to Wright who was in his office. Baucom told Wright that the tape recording had failed, and he would have to prepare her affidavit when he was on site during the week of September 12.

On September 8, 1994, Wright prepared a typed memorandum to Trujillo, originally stating: "I here by [sic] inform you that I no longer need the service of Nora V. Kelly (Attorney At Law) in this EEO matter mention [sic] above." On the same day, September 8, Wright brought the waiver memorandum to Williams in the EEO office. The EEO office was not at Wright's work station.

The following Monday, September 12, 1994, Wright, knowing Baucom was due on site, went over to the EEO office to introduce herself. Baucom had the September 8 waiver memo in her file. Baucom told Wright that he wanted her to change the form, and, among the changes he made to that memo, he wrote, in his own handwriting, the following: "During the investigation stage of my EEO complaint, I authorize Mr. J.C.

Baucom to procede [sic] with [sic] without a representative[.] I make this decion [sic] at [sic] my own free will. But I reserve the right to representation at a later date if necessary." Wright took the September 8 waiver memo, with the written comments, and she returned to her office to make the changes Baucom requested.

In the changed waiver, dated September 12, Wright did not change the original September 8 sentence concerning Kelly. Wright added: "I authorize Mr. Joe Baucom to proceed without her; however I am requesting that Emma Sneed (President of AFGE # 2241) be present." After the sentence about the Union president, Wright typed the remainder of Baucom's revisions to the September 8 waiver. After typing the revision on September 12, Wright delivered the memo to the EEO office, where it was date stamped at 3:59 p.m., and Wright brought it to Baucom.

Baucom invited Wright into his office at the EEO office and he then read the September 12 waiver. Baucom crossed out the sentence about Sneed, and he wrote: "I hereby amend the memo dated 9/12/94, pertaining to representative to delete that portion pertaining to Emma Sneed to read as stated below." Wright returned to her office and made the changes Baucom requested, changing the date to September 13.

At the September 12 meeting, Baucom then told Wright that he had a settlement agreement that he wanted her to review, and he handed her a one page document. Baucom had already drafted a settlement agreement. Wright did not expect the settlement agreement because she believed her appointment with Baucom was not until September 19. Wright reviewed the settlement agreement and found it did not address all the corrective actions she had requested in her formal EEO complaint. Wright noted that Baucom's settlement agreement was different from an earlier settlement she had received in an earlier EEO matter. This settlement agreement was not in the standard VAMC EEO format. Wright did not think the settlement agreement was final because its form and content was unlike her earlier settlement agreement, and because she believed she still had an appointment with Baucom on September 19. Wright believed that on September 19, she would have the opportunity to approve or disapprove the specifics of the settlement agreement or Baucom would proceed with her affidavit if settlement efforts failed. Baucom stated it was a good will gesture to Trujillo to solve the problem. The meeting ended when Wright signed the settlement agreement Baucom offered her. Item 2a of the Settlement Agreement addressed Wright's five day suspension.<sup>(3)</sup> Neither Sneed, nor anyone else representing AFGE Local 2241 was notified of or present at the September 12, meeting.

On September 13, 1994, Wright returned to the EEO office, and she met with Baucom in the spare office provided for him there. Wright gave Baucom the third version of the waiver. Baucom accepted and signed his receipt in the lower left corner. At this meeting Baucom gave Wright another settlement agreement that was in the two page format used by the VAMC EEO. In this settlement agreement item 2a provided that the five day suspension would be reconsidered by the appropriate management official. Again, Wright signed this version of the settlement agreement believing she would have an opportunity at the September 19, 1996 meeting to finally approve or disapprove of any settlement agreement. No official or representative of AFGE Local 2241 was notified of or present at this meeting.

After Wright left the EEO office, Baucom told Rhodes that Wright had signed a settlement agreement. Rhodes was sur-prised because "most people don't sign agreements on the first day." Then after reading the settlement agreement, Rhodes was further surprised, given her knowledge of Trujillo's failed efforts to settle the suspension matter, and given the fact that the settlement agreement was very "general" and offered no specific relief. The agreement that Baucom showed Rhodes was drafted in the same format used by the EEO Program.

There was much conflicting and contradictory testimony concerning how and when the various settlement agreement drafts were prepared, presented and signed. The foregoing is my best analysis of this testimony and evidence, noting that the "September 12" version was a single page form, not similar to the VAMC EEO settlement agreement format and is more consistent with a draft prepared by Baucom, without VAMC help. It was in the nature of very rough draft. This version was never approved or signed by Trujillo. The "September 13" version is a more polished and complete version in the format used by the VAMC EEO program, who were providing staff support to Baucom. Apparently other versions of the settlement agreement were presented by Baucom and signed by Wright subsequent to the September 13 meeting. A version was apparently signed by Trujillo on September 16, 1994.

On September 19, 1994, after some confusion, at 10:30 a.m. or 10:45 a.m., Rhodes telephoned Wright, instructing her to come to the EEO Program Office.<sup>(4)</sup> Wright then reported to the EEO office. Before Wright arrived, Baucom asked Rhodes to meet with him and Wright, because he was afraid Wright might accuse him of sexual harassment, and because he wanted Rhodes to be present when he went over the changes Human Resources had made to the settlement agreement.

At the EEO Program Office, Baucom and Rhodes went with Wright to the same office where Baucom had accepted her September 13 waiver of a representative and gave her the settlement agreement. Baucom gave Wright a copy of the revised settlement agreement. Both Baucom and Rhodes had copies.

According to Rhodes, Wright never signed this version of the settlement agreement, as revised by Human Resources. According to Rhodes, there was no need for Wright's signature, because her signature was already on the second page of "boiler plate," the revised front page replaced the original front page, with the change in item 2a. It apparently reduced the five day suspension to a one day suspension. According to Wright, she felt bewildered because the settlement agreement did not go beyond what she offered in the draft that she had offered on September 13, and it still did not include all of the issues she had identified in her EEO complaint. According to Wright, when she told Baucom and Rhodes that she was not happy or satisfied with the settlement agreement, Baucom snatched the document from her hands, and in an angry voice, threatened to tear it up. Rhodes then told Wright that Joyce, her prayer partner, had been asking for her, and Rhodes advised Wright to get in touch with Joyce to discuss her problems. According to Wright, she told Baucom and Rhodes, "I cannot accept it." Baucom and Rhodes told her that she could not have a statement about Pugh in the settlement agreement, because he was not her supervisor and it was too late to address matters that had occurred in 1992. Rhodes urged Wright to put everything behind her and get on with her life. But Wright told them it was unacceptable.

Rhodes and Baucom told Wright she had been in that office about two hours, they needed to go to lunch, and she had to either accept it or not accept it, there was nothing she could do about it, because she had already signed it. Believing there was nothing really left to discuss, Wright left Rhodes and Baucom, and she returned to her office. No representative of AFGE Local 2241 was notified or present at this September 19 meeting.

During Baucom's on-site investigation, Sneed continued to process Wright's grievance under the negotiated grievance procedure, and on September 12, 1994, under Article 14 of the Master Agreement, Sneed invoked arbitration on behalf of Wright. During his on-site investigation, Baucom happened to meet Sneed in the canteen area. They chatted for a few minutes, and Baucom mentioned that of the cases he was investigating, a



couple had been resolved, and one involved a grievance over the same issue as that in an EEO complaint. At the time of that conversation, Sneed did not know that the case involving both a Union grievance and an EEO complaint was Wright's.

Shortly after her final September meeting with Rhodes and Baucom, Wright was too ill to work for the next few days. On about September 21, an employee told Sneed that Wright had signed a settlement agreement. Sneed telephoned Wright to inquire about it, and then told Wright that Sneed would send Wright rules and regulations concerning her rights through a neighbor, Mr. Freeman, who was a Union official. After receiving the material from Freeman, Wright was still ill, and she called in sick.

On Friday, September 23, Sneed telephoned Wright to inquire how she was doing. Later, Wright learned that Sneed suffered a heart attack. Before her heart attack, Sneed had set up an appointment for Wright and Union vice president, Mel Ingram, with the Union's attorneys. After her discussion with the lawyer, Wright decided to wait until her own health improved and until Sneed was back to work, before taking any action.

Wright returned to work on about September 27, 1994. Williams telephoned Wright and asked her to come to the EEO office in order to sign a document that would allow her to be repaid for four days of her suspension. Wright refused and refused repeated VAMC attempts to have her paid for four of the suspended days.

Sneed returned to work in late October or early November, and on November 1, 1994, Wright prepared a written statement about her September meetings with Baucom and Rhodes. Sneed told Wright one of the Union's attorneys was going to file an unfair labor practice case about the meetings in the EEO Office and the attempt to settle the Union's grievance. On November 3, 1994, Sneed and Wright sent a memorandum to Trujillo, stating that Wright rejected the settlement agreement Trujillo had signed on September 16, 1994 and Wright would refuse any consideration from that agreement such as "monies from any part of the five day suspension." Sneed told Wright to make sure no extra money was deposited by the VA into her account.

The next day, November 4, 1994, Wright discovered additional monies had been deposited in her account, and she returned that amount, \$219.53, in a cashiers check to the Veterans Administration finance office in Austin, Texas. Although the VA never negotiated that check, Wright has refused its deposit back into her own account.

## **Discussion and Conclusions of Law**

### **A. Relevant Statutory Provisions**

Section 7103(a)(13) of the Statute provides:

(13) "confidential employee" means an employee who acts in a confidential capacity with

respect to an individual who formulates or effectuates management policies in the field of labor-management relations;

Section 7112(b) provides that no unit shall be appropriate for collective bargaining if it contains, *inter alia*, "a confidential employee."

Section 7114(a)(2)(A) of the Statute provides:

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at--

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment;

Section 7116(a)(1), (5) and (8) of the Statute provides:

(a) For the purpose of this chapter, it shall be unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

\* \* \* \*

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

\* \* \* \*

(8) to otherwise fail or refuse to comply with any provision of this chapter.

B. Wright is not a confidential employee excluded from the unit

An employee is a "confidential," within the meaning of § 7103(a)(13), if (1) there is evidence of a confidential working relationship between an employee and a supervisor or manager, and (2) the supervisor or manager is significantly involved in labor-management relations. *U.S. Department of Labor, Office of the Solicitor, Arlington Field Office*, 37 FLRA 1371, 1377 (1990)(DOL).

The Authority applies this two-pronged, labor-nexus test to examine the nature of an employee's confidential working relationship. *Id at 1377*. Both factors must be present in order for an employee to be "confidential" within the meaning of § 7103(a)(13). *U.S. Army Plant Representative Office, Mesa, Arizona*, 35 FLRA 181, 186 (1990). Determination of confidential status is therefore determined by the nature of the work performed by the person for whom the employee works, either the employee's supervisor or another management official. Thus, a person who formulates or effectuates management policies in the field of labor-management relations is considered a confidential employee. Thus too, an individual who is privy to the development of labor-management relations policies is excluded from the bargaining unit, because the inclusion of that individual would create a conflict of interest between the employee's duties and the employee's unit membership. *DOL at 1377 and U.S. Department of Housing and Urban Development, Washington, D.C.*, 35 FLRA 1249, 1255-58 (1990).

The bargaining unit eligibility determination is made on the testimony as to the employees actual duties rather than on duties that may exist in the future. Bargaining unit eligibility determinations are not based on evidence such as written position descriptions or testimony as to what duties had been or would be performed by an employee occupying a certain position, because such evidence might not reflect the employee's actual duties. *DOL at 1377*.

At all times relevant to this case, Wright never formulated or effectuated labor-management policies, nor was she involved in any way with such policies. The record in this case further establishes that neither Chief Thomas nor Acting Chief Adams was involved in the development of labor-management relations policies under the test and Wright was not privy to the development of such policies in her relationship with either immediate supervisor. The evidence for all times material to this case establishes that Wright's duties never changed and never included developing labor-management relations policies and did not include being privy to any supervisor's development of any labor-management relations policies.

VAMC seems to contend that because the Chief of the Chaplain Service may exercise relatively ordinary supervisory functions, and merely because Wright was the secretary to such a supervisor, she is privy to the development of labor-management policies. In light of the foregoing discussion and conclusions, this contention of VAMC is rejected.

Accordingly, on the basis of both the Statute and Authority case law, at all times material to this case Wright was not a confidential employee, but rather was a VAMC employee in the unit exclusively represented by AFGE, Local 2241.

C. Baucom was a VAMC representative

The Authority has held that, for the purposes of § 7114(a)(2)(A) of the Statute, a contractor functions as the "representative of the agency" when the contractor conducts the agency's business. *Defense Logistics Agency, Defense Depot Tracy, California*, 39 FLRA 999, 1013 (1991).

Baucom was hired by VA to conduct the agency's investigation of Wright's formal EEO complaint. Both Baucom and Wright were advised that Baucom was assigned by the VA to conduct the investigation of Wright's formal EEO complaint. VAMC then prepared the purchase order and made travel arrangements. Baucom was given the use of an office and staff support by VAMC's EEO Program Office. Further, VA remains responsible for the timeliness and content of Baucom's investigation. See EEOC, EEO Management Directive MD-110, pg. 4-9.<sup>(5)</sup>

In light of the foregoing I conclude that Baucom was a representative of VAMC within the meaning of § 7114(a)(2)(A) of the Statute. *Id.* at 1013 and *Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Region X, Seattle, Washington*, 39 FLRA 298, 311-12 (1991)(SSA).

D. The meeting on September 13, was a formal discussion concerning a grievance under § 7114(a)(2)(A) of the Statute

The Authority holds that the union has the right to be represented at a formal discussion with a unit employee between management and one or more unit employees concerning any grievance or any personnel policy or practice or other general condition of employment, within the meaning of § 7114(a)(2)(A) of the Statute, so that the union may safeguard its interests and the interests of the unit employees in the context of the union's representational responsibilities under the Statute. *General Services Administration*, 50 FLRA 401, 404 (1995).

The Authority requires that all four elements of § 7114(a)(2)(A) be established before the Union's right to be represented obtains. Therefore, the evidence must satisfy the following: (1) there must be a discussion, (2) which is formal, (3) between one or more unit employees and management, (4) concerning a grievance or any personnel policy or practices or other general condition of employment. *DLA*, at 1012.

Authority decisions find that a formal EEO complaint constitutes a "grievance" within the meaning of § 7114(a)(2)(A) of the Statute. *See Nuclear Regulatory Commission*, 29 FLRA 660, 662 (1987); *U.S. Department of Veterans Affairs, Washington, D.C.*, 48 FLRA 991, 1005 (1993); *See also U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution, Ray Brook, New York*, 29 FLRA 584, 589-90 (1987) and *National Labor Relations Board*, 46 FLRA 107 (1992). It is clear that AFGE Local 2241's grievance on behalf of Wright concerning her suspension is, by its very nature, a "grievance" within the meaning of § 7114(a)(2)(A).

The meeting on September 13, involved both the signing of a settlement agreement form and Wright delivering the changed waiver form as agreed upon at the September 12 conversation between Baucom and Wright. The Authority has held that, within the meaning of § 7114(a)(2)(A) of the Statute, a "meeting" is equivalent to a "discussion", and that actual dialogue is not necessary. *Kelly Air Force Base*, 15 FLRA 529

(1984). I conclude that the September 13 meeting between Wright and Baucom, where Baucom accepted Wright's changed waiver and Baucom gave Wright a new and different settlement agreement, different from the one she had signed the previous day, and had her sign this new settlement agreement,<sup>(6)</sup> constituted a "discussion" concerning a grievance within the meaning of § 7114(a)(2)(A) of the Statute.

In determining whether a discussion or a meeting is "formal" within § 7114(a)(2)(A) of the Statute, the Authority considers the totality of facts and circumstances. *Marine Corps Logistics Center, Barstow, CA*, 45 FLRA 1332, 1335 (1992). Among the factors the Authority examines are the following eight indicia of formality:

(1) whether the meeting was held by a first-level supervisor or someone higher; (2) whether other management representatives attended; (3) where the meeting took place; (4) how long the meeting lasted; (5) how the meeting was called; (6) whether a formal agenda was established; (7) whether attendance was mandatory; and (8) the manner in which the meeting was conducted (whether comments were noted or transcribed).

*Defense Logistics Agency*, 48 FLRA 744, 753 (1993).

The indicia of formality apply to the September 13, 1994 meeting/discussion as follows: (1) Baucom, an agent or representative of management, informed Wright, a unit employee, that she had to correct her waiver form dated September 12 to exclude her designation of Emma Sneed, the Union president, while Baucom was using the facilities and the support staff of the VAMC EEO Program; (2) although Rhodes, the EEO Program manager, did not participate in the discussion Baucom conducted when Wright returned with the revised waiver, and Baucom provided a draft settlement agreement, Rhodes was immediately available, and she subsequently discussed with Baucom, Wright's acceptance of the settlement agreement; (3) Baucom conducted the discussion with Wright in his temporary office in the EEO Program Office, not in Wright's worksite; (4) Baucom, in effect, called the meeting by having Wright correct her waiver on September 12, and, when she returned it to the EEO office, he asked her to review the settlement agreement he had revised; (5) the settlement agreement itself was the "agenda" for the remainder of the discussion; (6) Wright's attendance was mandatory to the extent that preparation of a waiver memorandum acceptable to Baucom was necessary for him to proceed with his investigation; and (7) Baucom's discussion with Wright was memorialized to the extent she reviewed and signed the settlement agreement he had revised and prepared.

This discussion was not an informal conversation between Wright and Baucom at which the EEO matter just happened to come up. Rather, the purpose of the meeting, held in the offices of the VAMC EEO Program, was to discuss the EEO complaint, to resolve the waiver matter and then to discuss the settlement agreement prepared and revised by Baucom. A settlement agreement, it must be noted, that would dispose of not only the formal EEO complaint, but also the grievance filed under the collective bargaining agreement. This meeting was surely sufficiently "formal", within the meaning of § 7114(a)(2)(A), to warrant notification of AFGE Local 2241 and to provide it the opportunity to be represented.

Neither Sneed nor any other representative of AFGE, Local 2241, was given notice or the opportunity to be present during Baucom's September 13, 1994 discussion.

The Authority has recognized that the intent and purpose of § 7114(a)(2)(A) of the Statute is to provide the union with an opportunity to safeguard its interests and the interests of bargaining unit employees as viewed in the context of the union's full range of responsibilities under the Statute. Consideration of the intent and purpose of § 7114(a)(2)(A) of the Statute is only a guiding principal to inform judgements in applying the statutory criteria. *General Services Administration*, 50 FLRA 401, 404 (1995)(GSA).

In light of all of the foregoing, I conclude that the September 13 meeting met all of the criteria set forth in § 7114(a)(2)(A) of the Statute, that it was a formal discussion between a unit member and a representative of VAMC concerning a grievance, and AFGE Local 2241 was entitled to notice of the meeting and an opportunity to be represented at it. VAMC's failure to notify AFGE Local 2241 about the meeting denied the Union the opportunity to be represented at the September 13, meeting. VAMC's failure to afford the Union the opportunity to be represented violated § 7116(a)(1) and (8) of the Statute. *Id.*

VAMC argues the September 13 meeting with Baucom was an informal attempt to settle the EEO complaint and this "Settlement/Alternate Dispute Resolution Discussion" was not a formal discussion within the meaning of § 7114(a)(2)(A). *IRS Fresno Center v. FLRA*, 706 F.2d 1019 (9th Cir. 1983) relied upon by VAMC is inapposite because that case involved the informal stage of the EEO procedure. The Court of Appeals explained in a subsequent case:

In that case we found the meetings to be informal only because the EEOC regulatory framework that governed the case explicitly characterized them in that way. Under that framework, the employee was required to try to resolve a complaint on an informal basis before filing a formal complaint.

*Department of Veterans Affairs Medical Center, Long Beach, California v. FLRA*, 16 F.3d 1526, 1532 (9th Cir. 1994).

In light of the foregoing, therefore, I reject VAMC's argument. The subject case involves a formal EEO complaint and the discussion to resolve it comes under the purview of § 7114(a)(2)(A) of the Statute.

Similarly I reject VAMC's arguments that Baucom was a mediator and therefore entitled to secrecy and to exclude the Union. Such an interpretation of the facts is not only contrary to the language of § 7114(a)(2)(A) of the Statute, it would also frustrate the intent of that section.

E. The September 19 meeting was a formal discussion concerning a grievance under § 7114(a)(2)(A) of the Statute

The September 19, 1994 meeting involved another attempt by Baucom to settle Wright's formal EEO complaint, including resolving the dispute over Wright's suspension. Thus it was a meeting concerning a grievance.

As discussed above Wright was an employee in the unit represented by AFGE Local 2241 and Baucom was a representative of VAMC. In addition to Wright and Baucom, Rhodes, VAMC's manager of its EEO Program, was also present during the meeting and participated in the discussions. She was a representative of VAMC.

VAMC did not notify AFGE Local 2241 of the meeting or give it an opportunity to be represented.

I conclude that the September 19 meeting was "formal" within the meaning of § 7114(a)(2)(A) of the Statute. In this regard I rely on the facts that the meeting took place in the EEO Program Offices, not Wright's workplace; that two management representatives were present, including Rhodes who is a relatively high management official; that the participants knew that the discussion was to involve Wright's formal EEO complaint and the attempts to settle it, including the issue of Wright's suspension; that Wright had the meeting scheduled in advance and then was called to the meeting by a program assistant at the EEO Program Office; that the discussion lasted two to two and one-half hours; and that it involved the printed settlement agreement with Wright's and Trujillo's signatures. In light of the foregoing I conclude the September 19 meeting was not an informal or chance meeting, but rather was a formal discussion at which the Union was entitled to an opportunity to be represented, pursuant to § 7114(a)(2)(A) of the Statute.

Accordingly, I conclude that VAMC violated § 7116(a)(1) and (8) of the Statute by not notifying AFGE Local 2241 of the September 19 meeting and affording it the opportunity to be represented.<sup>(7)</sup>

F. VAMC's attempts at the September 13 and 19 meeting to negotiate with Wright concerning her suspension constituted bypassing the Union

The Authority has held that an agency violates § 7116(a)(1) and (5) of the Statute by bypassing the exclusive representative of its employees when it deals directly with an employee concerning grievances. The Authority stated:

Agencies unlawfully bypass an exclusive representative when they communicate directly with bargaining unit employees concerning grievances, disciplinary actions and other matters relating to the bargaining relationship. [Citations omitted]. Such conduct constitutes direct dealing with an employee and is violative of section 7116(a)(1) and (5) of the Statute because it interferes with the union's rights under section 7114(a)(1) of the Statute to act for and represent all employees in the bargaining unit. Such conduct also constitutes an independent violation of section 7116(a)(1) of

the Statute because it demeans the union and inherently inter-feres with the rights of employees to designate and rely on the union for representation.

*Social Security Administration, Seattle, WA, 39 FLRA 298, 311 (1991)(SSA).*

Beginning before Wright filed her formal EEO complaint and throughout the entire processing of the EEO complaint, AFGE Local 2241 continued to process the grievance under the master agreement concerning Wright's suspension. In fact on September 12, 1994, the Union, under Article 14 of the master agreement, invoked arbitration on Wright's behalf.

During the September 13th and 19th discussions between VAMC representatives and Wright, VAMC attempted, as part of the settlement of the EEO matter, to settle the dispute over Wright's suspension. Wright's suspension was an essential part of both the EEO complaint and the grievance filed by the Union. Thus, VAMC was discussing and trying to settle the grievance directly with Wright, without notifying or involving the Union.

I conclude, therefore, that VAMC bypassed the Union when it attempted to settle the grievance, as part of the EEO settlement directly with Wright and without notifying and involving the Union. In so concluding I do not find that any statement by Wright that she did not want Sneed to represent her in the EEO matter relieved the Union of its right, as the collective bargaining representative of the unit and the filer of the grievance, to participate in any discussion or settlement of the grievance processed under the master agreement.

Having concluded that VAMC bypassed the Union, I accordingly conclude that VAMC violated § 7116(a)(1) and (5) of the Statute. *Id.*

#### G. Remedy

The General Counsel requests, as part of the remedial order, that VAMC be ordered to require that the staff employed in the Office of Human Resources and Equal Employment Opportunity Program undergo training consistent with the order in this case and that the personnel files of the staff be annotated to document the training.

I conclude such a requirement is not warranted or justified in this case.

Based upon the above findings and conclusions, I recommend that the Authority issue the following Order:

### **ORDER**



Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, the Veterans Affairs Medical Center, Denver, Colorado, shall:

1. Cease and desist from:

(a) Conducting formal discussions with bargaining unit employees represented by the American Federation of Government Employees, AFL-CIO, Local 2241, the agent of the employees' exclusive bargaining representative, without first notifying the Union and affording it the opportunity to be represented at such formal discussions, concerning any grievance or any personnel policy or practices or other general condition of employment, including meetings at which formal EEO complaints are resolved.

(b) Bypassing the American Federation of Government Employees, AFL-CIO, Local 2241, the agent of the employees' exclusive bargaining representative, and directly dealing with unit employees concerning the resolution of matters being processed under the parties' negotiated grievance procedure during formal discussions involving the resolution of formal EEO complaints.

(c) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights assured them by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) At the request of the American Federation of Government Employees, AFL-CIO, Local 2241, rescind the Settlement Agreement signed by Medical Center Director Trujillo on September 16, 1994 concerning, among other things, the five-day suspension of unit employee Mildred Wright which is the subject of a grievance proceeding under the negotiated grievance procedure.

(b) At the request of the American Federation of Government Employees, AFL-CIO, Local 2241, proceed to arbitration on the merits of the Union grievance on the subject of unit employee Mildred Wright's five-day suspension.

(c) Notify the American Federation of Government Employees, AFL-CIO, Local 2241 concerning any formal discussion of any formal EEO complaint filed by a unit employee and a representative of the agency.

(d) Post at its facility in Denver, Colorado, copies of the attached Notice To All Employees on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Medical Center Director and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Denver Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, August 13, 1996

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SAMUEL A. CHAITOVITZ

Chief Administrative Law Judge

**NOTICE TO ALL EMPLOYEES**

**POSTED BY ORDER OF THE**

**FEDERAL LABOR RELATIONS AUTHORITY**

The Federal Labor Relations Authority has found that Department of Veterans Affairs, Medical Center, Denver, Colorado, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

**We hereby notify our employees that:**

WE WILL NOT conduct formal discussions with bargaining unit employees represented by the American Federation of Government Employees, AFL-CIO, Local 2241, the agent of our employees' exclusive bargaining representative, without first notifying the Union and affording it the opportunity to be represented at such formal discussions, concerning any grievance or any personnel policy or practices or other general condition of employment, including meetings at which formal EEO complaints are resolved.

WE WILL NOT bypass the American Federation of Government Employees, AFL-CIO, Local 2241, the

agent of our employees' exclusive bargaining representative, and directly dealing with unit employees concerning the resolution of matters being processed under the parties' negotiated grievance procedure during formal discussions involving the resolution of formal EEO complaints.

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

WE WILL at the request of American Federation of Government Employees, AFL-CIO, Local 2241, rescind the Settlement Agreement signed by Medical Center Director Trujillo on September 16, 1994 concerning, among other things, the five-day suspension of unit employee Mildred Wright which is the subject of a grievance proceeding under the negotiated grievance procedure.

WE WILL at the request of American Federation of Government Employees, AFL-CIO, Local 2241, proceed to arbitration of the merits of the Union grievance on the subject of a unit employee Mildred Wright's five-day suspension.

WE WILL notify the American Federation of Government Employees, AFL-CIO, Local 2241 concerning any formal discussion of any formal EEO complaint filed by a unit employee and a representative of the agency.

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(Activity)

Date: \_\_\_\_\_ By: \_\_\_\_\_

(Signature)

(Title)

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Denver Region, 1244 Speer Boulevard, Suite 100, Denver, Colorado 80204-3581, and whose telephone number is: (303) 844-5224.

1. The GC of the FLRA filed a Motion to Correct the Transcript. VAMC filed no opposition. Accordingly, the Motion, which is attached hereto as "Attachment", is GRANTED and the corrections set forth therein are hereby made.

2. Wright was paying Kelly \$125 per hour for representation in a related criminal charge Officer Gonzales had filed against her.

3. Item 2a in this settlement agreement reduces the five-day suspension to an admonishment.

4. Both Baucom and Rhodes utilized this contact to urge Wright to return to the EEO office in order to discuss another settlement agreement, as revised in Human Resources and/or in the Director's office. Whatever the scenario, the testimony of all participants in the September 19 meeting is consistent to the extent that Wright was urged to return to the EEO Program Office in order to review the settlement agreement after her original signature on a document, which is neither the September 12 version of the settlement agreement nor the September 13 version.

5. To the extent necessary I take official notice of EEOC, EEO Management Directive MD-110. FLRA Rules and Regulations § 2423.19(o) and *U.S. Department of Treasury, Customs Service, Washington, DC*, 38 FLRA 875, 878 (1990).

6. Although there is some confusion as to exactly which version of the settlement agreement was signed or discussed at which meetings, all versions of the settlement agreement attempted to deal with and resolve the formal EEO complaint and the suspension.

7. I note that § 7114(a)(2)(A) of the Statute grants the union the right to be present at the formal meeting, with or without the employee's consent.