64 FLRA No. 158

UNITED STATES
DEPARTMENT OF THE AIR FORCE
DAVIS-MONTHAN AIR FORCE BASE
TUCSON, ARIZONA
(Respondent)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2924
(Charging Party/Union)

DE-CA-07-0377

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DECISION AND ORDER

May 28, 2010

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members[1]

I. Statement of the Case

This unfair labor practice (ULP) case is before the Authority on exceptions to the attached decision of the Administrative Law Judge (Judge) filed by the General Counsel (GC) and cross-exceptions filed by the Respondent. The Respondent filed an opposition to the GC's exceptions, and the GC filed an opposition to the Respondent's cross-exceptions.

The amended complaint alleges that the Respondent violated § 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by failing to comply with § 7114(a)(2)(A) of the Statute when it held a formal discussion regarding an Equal Employment Opportunity (EEO) complaint filed by an individual bargaining-unit employee (the employee) without providing the Union with notice and an opportunity to be present. The Judge found that the Respondent had not violated the Statute as alleged and recommended an order dismissing the complaint.

For the following reasons, we reverse the Judge and find that the Respondent violated the Statute as alleged in the complaint.

II. Background and Judge's Decision

A. Background

The facts are set forth in detail in the Judge's decision and are only briefly summarized here. The employee filed a formal EEO complaint regarding the Respondent's failure to grant him a reasonable accommodation for a work-related disability. He was not represented by the Union in the processing of his EEO complaint. In an attempt to resolve the EEO complaint, the Respondent and the employee agreed to hold a mediation session with a certified mediator from the Investigations and Resolutions Division of the Department of Defense.

Prior to the mediation, the Respondent's Equal Opportunity (EO) Director and the employee had a conversation in which the employee stated that he did not want the Union to be present at the mediation.[2] *See* Judge's Decision at 3. The Respondent subsequently sent the employee a "Formal Complaint [Alternative Dispute Resolution (ADR)] Election" form. *Id.* As relevant here, the employee initialed on the line of that form that states: "I object to having the [U]nion's presence at the mediation and request [that it] not be present." *Id.* at 4.

The mediator, the employee, and the employee's third-level supervisor (at the time of the incidents alleged in the formal EEO complaint) participated in the mediation. The mediation was held in the Respondent's EO office, which is separate from the employee's and the third-level supervisor's work areas. The mediation ended without a resolution.

Subsequently, the employee informed the Union President that there had been a mediation regarding his EEO complaint. *See id.* at 5. This was the first time the Union was notified that a mediation had been scheduled or held. *See id.* The Union filed a ULP charge, and the GC issued a complaint, alleging that the Respondent had violated § 7116(a)(1) and (8) of the Statute by failing to comply with § 7114(a)(2)(A) of the Statute when it held a formal

1. Member Beck's dissenting opinion is set forth at the end of the decision.

2. In this respect, the Judge specifically credited the testimony of the Respondent's EO Director that the employee "directly told her that he did not want the Union present for the scheduled mediation." Judge's Decision at 3 n.3. In so doing, the Judge rejected the employee's denial that such a conversation had taken place. *See id.*

discussion regarding an EEO complaint without providing the Union with notice or an opportunity to be present.[3] The Respondent admitted in its answer that it held the meeting without informing the Union but noted that the employee had requested that the Union not be present. *See id.*

B. Judge's Decision

Applying Authority precedent, the Judge found that the mediation session was a formal discussion within the meaning of § 7114(a)(2)(A) of the Statute. *See* Judge's Decision at 7-11 (citing *SSA, Office of Hearings & Appeals, Boston Reg'l Office, Boston, Mass.*, 59 FLRA 875, 878 (2004) (*SSA, Boston*); *U.S. Dep't of the Air Force, 436th Airlift Wing, Dover Air Force Base, Dover, Del.*, 57 FLRA 304 (2001) (Chairman Cabaniss dissenting), *aff'd sub nom. Dover Air Force Base v. FLRA*, 316 F.3d 280 (D.C. Cir. 2003) (*Dover*); *Luke Air Force Base, Ariz.*, 54 FLRA 716 (1988), *rev'd sub nom. Luke Air Force Base v. FLRA*, 208 F.3d 221 (9th Cir. 1999), *cert. denied*, 531 U.S. 819 (2000) (*Luke I*)). In so finding, the Judge addressed the Respondent's argument that EEO complaints filed under the Equal Employment Opportunity Commission's (EEOC's) statutory appeals process are not grievances within the meaning of § 7114(a)(2)(A), and she acknowledged that the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) had adopted that view in *Luke Air Force Base v. FLRA*, 308 F.3d 221. However, the Judge found that "the Authority [has] expressly rejected" this argument in decisions that followed *Luke Air Force Base v. FLRA*. Judge's Decision at 10 (citations omitted). Finding that "this case presented no new facts to distinguish it from those prior cases[,]" the Judge concluded that the mediation session involved a grievance within the meaning of § 7114(a)(2)(A) of the Statute. *Id.*

In addition, the Judge rejected the Respondent's argument that the Union's exclusion from the session was warranted because there was a conflict between the Union's institutional rights under § 7114(a)(2)(A) and the employee's individual rights under the Alternative Dispute Resolution Act (ADR Act) and other statutes governing confidentiality. According to the Judge, the Respondent "presented nothing persuasive that has not already been considered and rejected by the Authority[]" in previous decisions *Id.* at 7.

Next, the Judge considered whether the employee's objection to the Union's presence at the mediation "abrogated" the Union's statutory right to prior notice and an opportunity to attend the mediation. *Id.* at 11. The Judge stated that, in *NTEU v. FLRA*, 774 F.2d 1181 (D.C. Circ. 1985) (*NTEU*), when considering whether the union had the right to attend the interview of a bargaining-unit employee in preparation for a Merit Systems Protection Board (MSPB) hearing, the court stated:

> in the case of grievances arising out of alleged discrimination on the basis of race, religion, sex or national origin, Congress has explicitly decided that a conflict between the rights of identifiable victims of discrimination and the interests of the bargaining unit must be resolved in favor of the former. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, provides that the right of an aggrieved employee to complete relief takes priority over the general interests of the bargaining unit. Similarly, a *direct* conflict between the rights of an exclusive representative under § 7114(a)(2)(A) and the *rights* of an employee victim of discrimination should also presumably be resolved in favor of the latter.

Judge's Decision at 11 (quoting *NTEU*, 774 F.2d at 1189 n.12 (internal citations omitted)). Further, the Judge noted that, in *Dover*, 316 F.3d 280, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) found no inherent *per se* conflict between an EEO complainant's rights and the union's right to attend a formal discussion, but nevertheless stated in *dicta* that it did "not foreclose the possibility that an employee's objection to union presence could create a 'direct' conflict that should be resolved in favor of the employee as described in footnote 12 of *NTEU*." Judge's Decision at 12 (quoting *Dover*, 316 F.3d at 287).

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3. Section 7116(a) of the Statute provides, in pertinent part, that it is a ULP for an agency "to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter[,]" or "to otherwise fail or refuse to comply with any provision of this chapter." 5 U.S.C. § 7116(a)(1), (8). Section 7114(a)(2)(A) of the Statute provides, in pertinent part, that:

> [a]n exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at . . . 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[.]"

Applying the foregoing principles, the Judge credited the Respondent's EO Director's testimony that the employee had told her that "the Union's presence would be a waste of time" and that, in response, she had sent the employee the ADR election form. Judge's Decision at 14. The Judge found that, on the form, the employee checked the box indicating that he did not want the Union to be present. *Id.* at 14-15. The Judge also found no evidence that the Respondent "coerced, manipulated or attempted to influence" the employee's decision to object to the Union's presence. *Id.* at 14. In addition, the Judge found that the employee "purposely objected" to the Union's presence and was "aware of the consequences for the Union by the action that he took." *Id.* at 14-15. Further, the Judge determined that the Respondent was not aware of the employee's alleged motivation for not wanting the Union present and that the employee's subsequent testimony regarding that motivation was "of no consequence."[4] *Id.* at 15. Moreover, the Judge found that it was unnecessary for the Respondent "to go beyond" the employee's signed objection form in order to get some explanation from the employee for the actions he took "in the face of such an explicit direction that the union not be present[.]" *Id.*

Citing *Dover*, the Judge determined that "the Union's right to be present was superseded by the individual employee's clear and specific objection to the Union's presence." *Id.* at 15. Accordingly, the Judge concluded that the Respondent's failure to give the Union notice and an opportunity to be present at the mediation did not violate the Statute, and she recommended dismissing the complaint.

III. Positions of the Parties

A. GC's Exceptions

The GC excepts to the Judge's finding that the Union was not entitled to notice of, and an opportunity to participate in, the mediation session. Noting that the D.C. Circuit's statement in *NTEU* referenced "a *direct* conflict" between the rights of an exclusive representative and the rights of an employee, the GC argues that it is necessary to identify "the competing rights that are involved, including the statutory or regulatory basis of such rights." Exceptions at 3-4 (quoting 774 F.2d at 1189 n.12). In this connection, the GC asserts that both *NTEU* and *Dover* indicate that an employee's objection to the Union's presence would not create a direct conflict with a union's right to attend a formal discussion "unless the employee's objection was itself rooted in the exercise of a recognized statutory or regulatory right." Exceptions at 5. According to the GC, "[i]nsisting that an employee's objection be rooted in a recognized right would prevent a [u]nion from having to surrender its legal right to attend a formal discussion in favor of demonstrably frivolous, petty, or vindictive objections, including objections that are entirely illegitimate in nature, such [as] ones that are racially motivated." *Id.*

Further, the GC contends that a "major flaw" in the Judge's decision is that she never identified "the particular *right*" the employee was allegedly exercising through his objection to the Union's presence. *Id.* at 6 (emphasis in original). In this connection, the GC claims that the employee's objection "had absolutely nothing to do with any concerns over EEO-based rights[.]" *Id.* at 8. Rather, the GC states that the employee objected to the Union's presence for the "fairly frivolous reasons[]" that he: (1) was upset that the Union previously had refused to take one of his grievances to arbitration; and (2) believed that the Union was entitled to be present and he was curious to see how the Respondent would react to his objection. *Id.* In addition, the GC argues that the employee specifically testified that his objection was "not based on any concerns over confidentiality, privacy interests, or that the Union's presence might disrupt the mediation process." *Id.* at 8-9. Based on the foregoing, the GC contends that the employee's objection was "both subjectively (from the employee's perspective) and objectively (from management's perspective) unrelated to" any entitlements that the employee might have had as an EEO complainant. *Id.* at 9. Thus, the GC asserts that the objection was not sufficient to create a conflict, either direct or indirect, with the Union's statutory right to be present.

By contrast, the GC asserts that the Union's interest in attending the mediation of formal EEO complaints, as with other formal discussions, is "to represent the bargaining unit as a whole and to make sure that bargaining unit employee rights are not compromised." *Id.* at 7. According to the GC, the Union's presence at such meetings would permit the Union to: (1) track the effect of resulting settlement agreements on bargaining-unit employees;

4. As discussed further below, the employee testified at the hearing that he did not want the Union present because he was upset that the Union previously had refused to take one of his grievances to arbitration, and because he believed that the Union was entitled to be present and he was curious to see how the Respondent would react to his objection. *See* Judge's Decision at 13.

(2) observe the process and make sure that proper EEO procedures were being followed; and (3) identify whether the mediation process or any settlement agreements violated governing laws, rules, regulations, or contract provisions. *Id.* at 7-8.

The GC acknowledges that the EEOC has issued guidance that confidentiality is essential to the success of all ADR proceedings and concedes that there may be circumstances in which an employee's objection to a union's presence might involve the exercise of an EEO-based right to confidentiality. *See id.* at 8. However, the GC notes that, even if the employee's objection could be construed as raising confidentiality concerns, the Authority has held that measures can be taken to ensure that confidentiality of a mediation session is addressed and maintained, such as through the use of confidentiality agreements by all participants, including the union representatives. *See id.* at 9-10 (citing *U.S. Dep't of the Air Force, Luke Air Force Base*, *Ariz.*, 58 FLRA 528 (2003) (Member Armendariz concurring and Chairman Cabaniss dissenting) (*Luke II*)). The Union also notes that the Union President, who is a trained mediator, testified that he would conscientiously maintain the confidentiality of any mediation he attended. *See* Exceptions at 10.

B. Respondent's Opposition

The Respondent argues that an individual's EEO rights must prevail over a union's institutional rights to be present at a formal discussion under § 7114(a)(2)(A) because the union's role in that context is more restricted than its role under the parties' negotiated grievance procedure. *See* Respondent's Cross-Exception & Opp'n at 3-4 (citing *Luke II*, 58 FLRA at 538 (Concurring Opinion of Member Armendariz); *NTEU*, 774 F.2d at 1189 n.12)).

C. Respondent's Cross-Exceptions

The Respondent asserts that the Judge erred in finding that the mediation of a formal EEO complaint concerns a grievance within the meaning of § 7114(a)(2)(A) of the Statute. Respondent's Cross-Exceptions & Opp'n at 7 (citing, *inter alia*, *Luke I*). The Respondent also asserts that the mediation of a formal EEO complaint is not a grievance for purposes of the Civil Rights Act and EEOC rules, and that the Civil Rights Act -- and not the Statute -- "is the governing statute." *Id.* at 8-9.

The Respondent also asserts that requiring it to provide the Union with notice and an opportunity to be represented at the mediation of a formal EEO complaint violates the Civil Rights Act, the Privacy Act, the ADR Act, Supreme Court precedent, other federal court precedent, EEOC rules and mandates, EEOC case law, and the Statute. *See id.* at 1. In this regard, the Respondent asserts that the Civil Rights Act, EEOC rules and mandates, and case law are controlling and mandate confidentiality during the EEO process. *Id.* at 4. The Respondent claims that this mandate would be impossible if unions are allowed to attend the mediation of formal EEO complaints.

D. GC's Opposition

The GC disputes the Respondent's assertion that a formal EEO complaint is not a grievance within the meaning of § 7114(a)(2)(A) of the Statute. In this respect, the GC contends that the Authority has repeatedly held that an employee's formal EEO complaint is a "grievance" that satisfies the subject matter requirement for a formal discussion under § 7114(a)(2)(A) and that this position has been upheld by the D.C. Circuit. GC's Opp'n at 4 (citing *U.S. Dep't of the Air Force, Luke Air Force Base*, *Ariz.* 59 FLRA 16, 23 (2003) (Chairman Cabaniss dissenting); *Luke II*, 58 FLRA at 533-34; *Dover*, 57 FLRA at 308-09; *Luke I*, 54 FLRA at 730-32).

According to the GC, Authority and D.C. Circuit precedent supports the Judge's determination that the authorities cited by the Respondent -- EEOC statutory and regulatory authority, EEOC rules and guidelines, the Privacy Act, and the ADR Act -- do not prohibit a union's presence at the mediation of a formal EEO complaint. GC's Opp'n at 3 (citing *Dover*, 316 F.3d 280). Further, the GC notes that the Authority subsequently confirmed that permitting a union to attend the mediation of formal EEO complaints does not create a conflict with an employee's right to confidentiality under the ADR Act, EEOC regulations, or the Privacy Act. *See* GC's Opp'n at 3-4 (citing *Luke II*, 58 FLRA at 533-34). Finally, the GC reiterates that the employee's objection to the Union's presence did not create a direct conflict between the Union's institutional interests and the employee's right to confidentiality.

IV. Analysis and Conclusions

A. The mediation of a formal EEO complaint concerns a "grievance" within the meaning of § 7114(a)(2)(A) of the Statute.

In order for a union to have a right to be represented under § 7114(a)(2)(A) of the Statute,

there must be: (1) a discussion; (2) which is formal; (3) between a representative of the agency and a unit employee or the employee's representative; (4) concerning any grievance or any personnel policy or practice or other general condition of employment. *See SSA, Boston*, 59 FLRA at 878; *Dover*, 57 FLRA at 306; *Luke I*, 54 FLRA at 723.

There is no dispute that the mediation session was a discussion, which was formal, between a representative of the Respondent and a unit employee. There also is no dispute that the Respondent did not give the Union notice and an opportunity to attend the session. Rather, the Respondent disputes the Judge's finding that the mediation of the formal EEO complaint concerned a grievance. As stated by the Judge, although the Ninth Circuit agrees with the Respondent's position, *see Luke Air Force Base v. FLRA*, the D.C. Circuit and the Authority have repeatedly rejected this approach and held that a formal EEO complaint is a grievance within the meaning of § 7114(a)(2)(A). *See, e.g.*, *Dover*, 316 F.3d 280 (D.C. Cir. 2003), affirming 57 FLRA 304; *Luke I*, 54 FLRA at 723. Consistent with this D.C. Circuit and Authority precedent, we deny the Respondent's cross-exception.

B. The Judge did not err by finding that the Union's presence at the mediation would not conflict with the Civil Rights Act, the Privacy Act, the ADR Act, EEOC statutory and regulatory authority, or EEOC rules and guidelines.

With regard to the Respondent's claim that the Union's presence would violate the Civil Rights Act, the Privacy Act, the ADR Act, EEOC statutory and regulatory authority, or EEOC rules and guidelines, the Authority and the D.C. Circuit previously considered and rejected such claims. *See, e.g., Luke II*, 58 FLRA at 534-36; *Dover*, 316 F.3d at 286-87; *Dover*, 57 FLRA at 310. As found by the Judge, the Respondent has "presented nothing persuasive that has not already been considered and rejected by the Authority." Judge's Decision at 7. Accordingly, consistent with the above-cited precedent, we deny the Respondent's cross-exception.

C. In the particular circumstances of this case, the employee's objection to the Union's presence at the mediation did not provide a basis for the Respondent to deny the Union's statutory right to notice and an opportunity to be present.

In finding that the Union was not entitled to be present at the mediation, the Judge relied on the fact that the employee objected to the Union being present, effectively finding that such an objection, standing alone, is sufficient to trump the Union's formal-discussion rights. For the following reasons, we find that the Judge's decision is not supported by applicable law.

As an initial matter, there are "important policies and purposes behind the Statute's formal discussion right." *Dover*, 57 FLRA at 309. In this connection, "unions have an established interest in how allegations of discrimination are dealt with and resolved[.]" *Id. Accord NTEU*, 774 F.2d at 1188. In addition, "the processing of an individual complaint through EEO procedures can have an effect on the entire bargaining unit, which the union represents[.]" *Dover*, 57 FLRA at 309. In this connection, "by providing formal discussion rights for discrete grievances and not just general personnel policies, the Statute recognizes that the resolution of an individual employee complaint may have an impact on the rights of other unit employees." *Id. Accord Dep't of Veterans Affairs, Denver, Colo. v. FLRA*, 3 F.3d 1386, 1390 (10th Cir. 1993).

Although "neither the Authority nor the courts have ruled that unions have an *absolute* right to attend discussions about EEO complaints[,]" *Dover*, 57 FLRA at 309 (emphasis added), the Authority and the courts also have not held that an employee's objection, without more, is sufficient to deprive a union of its formal-discussion right.[5] In this connection, as noted previously, the D.C. Circuit has stated that "a *direct* conflict between the rights of an exclusive representative under § 7114(a)(2)(A) and the rights of an employee victim of discrimination should . . . *presumably* be resolved in favor of the latter." 316 F.3d at 286 (quoting *NTEU*, 774 F.2d at 1189 n.12 (emphasis added)). The D.C. Circuit also

5. In *Luke I*, the Authority noted the judge's undisputed finding that the employee did not object to the union president's presence at EEO settlement discussions. *See* 54 FLRA at 733. However, the Authority did not hold that an employee's mere objection, without more, would provide a sufficient basis for denying a union's statutory right to be present at EEO settlement discussions.

has stated that it did not "foreclose the possibility that an employee's objection to union presence *could* create a 'direct' conflict that should be resolved in favor of the employee *as described in footnote 12 of NTEU*, 774 F.2d at 1189 n.12." *Dover*, 316 F.3d at 287 (emphasis added). The referenced footnote from *NTEU* states that "Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., provides that *the right of an aggrieved employee to complete relief* takes priority over the general interests of the bargaining unit." *Id.* (emphasis added).

As discussed previously, the Judge found, based on credited testimony, that the employee told the Respondent's EO Director that "the Union's presence would be a waste of time[,]" and the employee checked a box on an ADR election form to indicate that he did not want the Union to be present. Judge's Decision at 14-15. Neither the employee's comments to the EO Director nor his marking on the ADR election form cites any statutory "rights" or explains why the Union's presence would interfere with any such rights. We find that, absent such an explanation, the employee's comments to the EO Director and his marking on the form are not sufficient to demonstrate a direct conflict between the Union's statutory right to be present and any individual rights, including the right to complete relief in the EEO process. Thus, we find that the Respondent had no basis for relying on the employee's comments to find such a direct conflict and to thereby deny the Union's statutory right to notice and an opportunity to attend.

In addition, at the hearing, the employee testified that he did not want the Union to be present at the mediation session because he: (1) was upset that the Union previously had refused to take one of his grievances to arbitration; and (2) believed that the Union was entitled to be present and the mediation and was curious to see how the Respondent would react to his objection. *See* Judge's Decision at 13. As discussed above, the Judge found that these alleged motivations were "of no consequence[]" because the employee did not communicate them to the Respondent. *Id.* at 15. Even assuming that it is appropriate to consider these alleged motivations in assessing whether there was a direct conflict between the respective rights of the Union and the employee, they do not establish the requisite direct conflict. In this connection, the employee's testimony demonstrates a personal preference that the Union not be present, as well as a desire to see how the Respondent would respond to his objection. It does not cite any individual right or explain how the Union's presence would interfere with, much less *directly* interfere with, any right. Moreover, we note that, during the hearing, the employee specifically testified that his objection was "not based on any concerns over confidentiality, privacy interests, or that the Union's presence would disrupt the mediation process." *Id.* at 13. Thus, to the extent that it is appropriate to consider the employee's hearing testimony, that testimony does not demonstrate the requisite direct conflict between any identified employee rights and the Union's statutory right to notice and an opportunity to attend the mediation session.

For the reasons discussed above, we find that, in the particular circumstances of this case, the employee's objection to the Union's presence at his mediation session did not demonstrate a direct conflict between any identified, individual right of the employee and the Union's statutory right to notice and an opportunity to be present.[6] As there is no dispute that the Respondent failed to give the Union notice and an opportunity to be present, as required by § 7114(a)(2)(A) of the Statute, we conclude that the Respondent violated § 7116(a)(1) and (8) of the Statute as alleged in the complaint.

V. Order

Pursuant to § 2423.41(c) of the Authority's Regulations and § 7118 of the Federal Service Labor-Management Relations Statute, the United States Department of the Air Force, Davis-Monthan Air Force Base, Tucson, Arizona, shall:

1. Cease and desist from:

(a) Failing or refusing to provide the American Federation of Government Employees,

6. The dissent's claim that this case demonstrates "at least two specific 'conflicts' between the employee's rights and those of the Union" is unpersuasive. Dissent, slip op. at 13. As for the first asserted conflict – that the employee "chose not to have the Union present as an exercise of his rights under Title VII to seek his own resolution of his own claim of discrimination[,]" *id.* – there is no basis to conclude that the Union's presence during the mediation session would affect the employee's pursuit of his discrimination claim. In this regard, the Union would not attend as the employee's representative and would have no right to interfere with settlement efforts. As for the second asserted conflict – that the employee had the right under § 7102 of the Statute to "refrain from" assisting the Union – no party has raised this statutory argument. In addition, there is no basis for concluding that an employee does anything to "assist" a union when an *agency* complies with its obligation under the Statute to afford a union its right to attend a formal discussion.

Local 2924 (Union) advance notice and the opportunity to be represented at formal discussions with bargaining-unit employees concerning any grievance or any personnel policy or practices or other general conditions of employment, including meetings to mediate settlement negotiations pertaining to formal Equal Employment Opportunity (EEO) complaints filed by bargaining-unit employees.

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

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

(a) Provide the Union advance notice and the opportunity to be represented at formal discussions with bargaining-unit employees concerning mediation of formal EEO complaints.

(b) Post at the United States Department of the Air Force, Davis-Monthan Air Force Base, Tucson, Arizona, copies of the attached Notice to All Employees on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of the forms, they shall be signed by the Commander, Davis-Monthan Air Force Base, and they shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered.

(c) Pursuant to § 2423.41(e) of the Authority's Regulations, notify the Regional Director of the Denver Region, 1391 Speer Boulevard, Suite 300, Denver, Colorado, 80204, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the United States Department of the Air Force, Davis-Monthan Air Force Base, Tucson, Arizona, has violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT fail or refuse to provide the employees' exclusive representative, the American Federation of Government Employees, Local 2924 (Union), advance notice and the opportunity to be represented at formal discussions with bargaining-unit employees concerning any grievance or any personnel policy or practices or other general conditions of employment, including meetings to mediate settlement negotiations pertaining to formal Equal Employment Opportunity (EEO) complaints filed by bargaining-unit employees.

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 provide the Union advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning mediation of formal EEO complaints.

____
(Agency)

Dated: _______ By:__________________________
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Denver Regional Office, whose address is: Federal Labor Relations Authority, 1391 Speer Boulevard, Suite 300, Denver, Colorado, 80204, and whose telephone number is: 303-844-5224.

Member Beck, Dissenting:

The disposition of this case requires us to consider *NTEU v. FLRA*, 774 F.2d 1181 (D.C. Cir. 1985) (*NTEU*) and *Dep't of the Air Force, 436th Airlift Wing*, *Dover AFB v. FLRA*, 316 F.3d 280 (D.C. Cir. 2003) (*Dover*). In *NTEU*, the Court identified two possible scenarios: First, a "conflict" between the rights of an employee claiming discrimination and the interests of the bargaining unit; and second, a "direct conflict" between the rights of the employee claiming discrimination and the rights of the union under 5 U.S.C. § 7114(a)(2)(A). The Court noted that either type of conflict should be resolved in favor of the employee. *NTEU,* 774 F.2d at 1189 n.12.*

Years later, in *Dover*, the Court referred back to the teaching of *NTEU* but found no "direct conflict" between the union's § 7114(a)(2)(A) rights and the employee's rights largely because the employee did not object to a union representative being present at the mediation of the employee's discrimination claim. *Dover,* 316 F.3d at 286-87. In *Dover,* it was the agency -- not the employee -- that asserted that the employee's Title VII rights took precedence over the union's rights, and the agency did so to "evade" its obligations to notify the union of the mediation session. *Id.* at 286. The instant case is materially different from *Dover*; here, the record establishes that the employee made it clear that he did not want the Union to be represented at his mediation session. Judge's Decision at 14-15.

My colleagues find that the employee's testimony here does not "demonstrate[]" a "direct conflict" with the rights of the Union. Majority, slip op. at 9. That determination places a burden on the employee that was not intended or required by the Court in either *NTEU* or *Dover.* Unlike the Majority, I do not agree that the employee is required to meet any further burden once he asserts in clear and unmistakable terms that he does not want the Union present during his mediation session. The record demonstrates that the employee chose not to be represented by the Union in the processing of his discrimination complaint; that he agreed to participate in mediation in an attempt to resolve the complaint; that he told a management official that he did not want the Union to be present at the mediation; and that he signed a form stating specifically, "I object to having the union's presence at the mediation and request they not be present." Judge's Decision at 3-4.

The circumstances of this case demonstrate at least two specific "conflicts" between the employee's rights and those of the Union. First, the employee chose not to have the Union present as an exercise of his rights under Title VII to seek his own resolution of his own claim of discrimination. Second, the employee was free to "refrain from" assisting the Union in the exercise of the Union's § 7114(a)(2)(A) rights. 5 U.S.C. § 7102.

As the Court said in *Dover*, § 7114(a)(2)(A) "does not yield a clear and unambiguous interpretation." *Dover,* 316 F.3d at 285. Consequently, the job of interpreting and applying this provision in particular circumstances is left to the Authority. Our mandate from Congress is to do so "in a manner consistent with the requirement of an effective and efficient Government." 5 U.S.C. § 7102. To force parties to a mediation session to suffer the presence of an unwanted third party is to diminish the efficiency and the likelihood of success of the mediation session. Thus, interpreting § 7114(a)(2)(A) as the Majority does -- to require an employee and his employing agency to include an unwanted union representative in an EEO mediation session -- is inconsistent with the most fundamental goal of our Statute.

I would deny the General Counsel's exceptions and dismiss the complaint.

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* The unfair labor practice charge in *NTEU* asserted that the Agency violated § 7114(a)(2)(A) by failing to notify the Union of its interview of bargaining unit employees in preparation for a hearing before the Merit Systems Protection Board. *NTEU,* 774 F.2d at 1183.

Office of Administrative Law Judges

DEPARTMENT OF THE AIR FORCE
DAVIS-MONTHAN AIR FORCE BASE
TUCSON, ARIZONA
Respondent

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 2924

Charging Party

Case No. CH-CO-04-0601

Michael Farley, Esq.
For the General Counsel

Phillip G. Tidmore, Esq.
Thomas J. Burhenn, Esq.
For the Respondent

John Pennington
For the Charging Party

Before: SUSAN E. JELEN
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 United States Code, 5 U.S.C. §7101, *et seq.* (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. Part 2423.

On May 1, 2007, the American Federation of Government Employees (AFGE), Local 2924 (Union or Local 2924) filed an unfair labor practice charge with the Denver Region of the Authority, against the Department of the Air Force, Davis-Monthan Air Force Base, Tucson, Arizona (Respondent or Davis-Monthan AFB). (G.C. Ex. 1(a)) On December 20, 2007, the Regional Director of the Denver Region of the Authority issued a Complaint and Notice of Hearing, which alleged that the Respondent violated section 7116(a)(1) and (8) of the Statute by failing to comply with section 7114(a)(2)(A) of the Statute in holding a formal meeting regarding a formal EEO complaint filed by an individual bargaining unit employee. (G.C. Ex. 1(b)) On January 11, 2008, the Respondent filed an answer to the complaint, in which it admitted certain allegations while denying the substantive allegations of the complaint. (G.C. Ex. 1(d))[7]

A hearing was held in Tucson, Arizona, on March 6, 2008, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. The General Counsel and the Respondent have filed timely post-hearing briefs, which have been fully considered.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

Davis-Monthan AFB is an activity of the United States Air Force, which is an agency under 5 U.S.C. §7103(a)(3). (G.C. Exs. 1(b) & (c)) During all times material to this matter, Jeffery Peterson was Director of the 576th Aerospace Maintenance and Regeneration Group (AMARG) at Davis-Monthan AFB and was a supervisor and management official under 5 U.S.C. §7103(a)(10) and (11) and acted on behalf of the Respondent. (G.C. Exs. 1(b) & (c); Tr. 84-85) Barbara Dycus has worked in the Military Civilian Equal Opportunity Office at Davis-Monthan AFB and has been the EO Director and Alternative Dispute Resolution (ADR) Champion for Davis-Monthan AFB. (G.C. Exs. 1(b) & 1(c); Tr. 110)

AFGE Local 2924 is a labor organization under 5 U.S.C. §7103(a)(4) and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent. (G.C. Ex. 1(b) and 1(c)). At all times material to this matter, John Pennington has been the President for Local 2924. (Tr. 19)

Davis-Monthan AFB and Local 2924 have a Labor Management Relations Agreement (LMRA), which has been in effect since 1998. (G.C. Ex. 2) Davis-Monthan AFB also has an Alternate Dispute

1. At the hearing, paragraph 9 of the Complaint was amended to insert the correct name. (Tr. 7-9)

Resolution Program Plan that has been in effect since 2005. (G.C. Ex. 3; Tr. 16, 120-121)

Ken Rineer has been a bargaining unit employee in AMARG and was originally hired as an aircraft electronic mechanic. He took disability retirement on August 17, 2007. (Tr. 14, 47) In October 2006, Rineer filed an informal EEO complaint regarding a failure to grant him reasonable accommodations as a result of his work-related disability. He filed a formal complaint on November 13, 2006. (G.C. Ex. 4; Tr. 48-49) Rineer was not represented by the Union in the processing of his EEO complaint. The parties agreed to hold a mediation to attempt to resolve the EEO complaint. (Tr. 49-50)

On January 16, 2007,[8] Dycus sent Rineer an email message, informing him that the mediation was scheduled for February 8, and that Pedro Ledezma would serve as the mediator. (G.C. Ex. 5; Tr. 50) On January 26, Ledezma, who is a certified mediator for the Investigations and Resolutions Division (IRD) of the Department of Defense, confirmed the mediation scheduled for February 8. (G.C. Ex. 6; Tr. 51) In an attachment to all the mediation participants, Ledezma set forth the arrangements for the mediation, as well as setting forth the purpose of the mediation and the need for confidentiality. (G.C. Ex. 7; Tr. 51-52)

Some time prior to January 24, Dycus and Rineer had a conversation in which Rineer indicated that he did not want the Union to be present for the mediation. (Tr. 114, 118, 136-137)[9] Following this conversation, Dycus sent a Formal Complaint ADR Election form to Rineer. The form stated:

1. This notice is to inform you that as a bargaining union employee you are hereby notified that the AFGE 2924 will be advised of your 8 February 2007 mediation and provided the opportunity to attend the mediation.

2. Please provide your position on the union's presence in your mediation by selecting from the following:

____________ I have no objection to the union's presence at any session. (Joint discussions or private caucuses)

____________ I have no objection to the union's presence at the joint discussion but object to having them present at the private caucuses).

____________ I object to having the union's presence at the mediation and request they not be present.

Complainant
Signature/Date________________________

3. You must provide your response to the above no later than 5 Feb 07. If you have any questions or [if] I can provide additional information, please call me at 228-5509.

(G.C. Ex. 10; Tr. 54-55, 134)

Rineer returned the form on the same date and initialed the line that stated "I object to having the union's presence at the mediation and request they not be present." (G.C. Ex. 11; Tr. 55)

On February 8, the mediation was held. Present were the mediator, Pedro Ledezma, Kenneth Rineer and Jeff Peterson. (Tr. 61-62) Peterson was Rineer's third level supervisor at the time of the alleged incidents in the formal EEO complaint. (Tr. 52) The mediation was held in the EO office, which is separate from both Rineer and Peterson's work areas. (Tr. 61-62) At the beginning of the mediation, Ledezma explained the process he intended to use for the mediation and had both parties read and sign an Agreement to Mediate. This document stated, in part, "The parties voluntarily agree to engage in mediation. The parties understand that the mediator's role is to facilitate the process and assist the parties in attempting to reach a satisfactory solution. The mediator has no authority to decide the case and is not acting as advocate for any party." The document also stated "Mediation is a confidential process. Any statements made during the mediation are for resolution purposes only and likewise, any documents submitted to the mediator are for resolution purposes and will not be retained by the mediator." (G.C. Ex. 13; Tr. 62-64)

Rineer made an opening statement and Peterson also made some opening remarks. The mediation lasted about three hours and was terminated just

2. From this point, all dates are in 2007 unless otherwise specified.

3. I credit Barbara Dycus' testimony that Rineer directly told her that he did not want the Union present for the scheduled mediation. I found her testimony sincere and forthright in this manner, and consistent with the processing of the EEO complaint and mediation. I did not find Rineer's denial credible.

before 4:00 p.m. During the mediation, the mediator met with both Rineer and Peterson in separate caucuses. At the end, no resolution was reached, and the mediator closed the mediation. (Tr. 64-66)

Some time after the mediation, in February or March 2007, John Pennington, the Union President, drove through a security gate on Davis-Monthan, where Rineer was detailed as a security guard. At that time, Rineer informed Pennington that a mediation had been held on his EEO complaint. (Tr. 14-15) This was the first time that the Union had been informed that a mediation was scheduled or had been held. (Tr. 15, 24) The Respondent admitted in its answer that the meeting was held without the Union being informed and noted that the bargaining unit employee involved in the meeting had requested that the Union not be present. (G.C. Ex. 1(c); Tr. 66)

Issue

Whether the Respondent violated section 7116(a)(1) and (8) of the Statute by failing to comply with section 7114(a)(2)(A) by holding a formal meeting regarding an EEO complaint filed by an individual bargaining unit employee on February 8, 2007.

Positions of the Parties

General Counsel

Counsel for the General Counsel (GC) maintains that the mediation session held on February 8, 2007, was a formal discussion pursuant to 5 U.S.C. §7114(a)(2)(A). As such, management was obliged to provide the Union with prior notice and an opportunity to attend the mediation session, which management admittedly failed to do. This case presents the circumstance of an employee raising an objection to the Union's presence at the mediation session and whether that action negated the Union's statutory entitlement to attend the meeting as a formal discussion. The GC asserts that there is no evidence that the employee's objection to the Union's presence at the mediation session demonstrated a conflict, either direct or indirect, with the Union's statutory right to be present at the mediation session. The employee's objection never implicated any potential rights he might have as an EEO complainant, and, therefore, could not be construed as demonstrating a conflict between his rights as an EEO complainant and the Union's statutory right to be present at the meeting.

Respondent

The Respondent initially asserts that an EEO complaint should not be considered a grievance under the Statute, and, therefore, section 7114(a)(2)(A) is not applicable to this situation. Since this case involves the mediation of an EEO complaint, the issues involved should be resolved under the Civil Rights Act and the mandates of and the decisions of the EEOC. The Respondent further argues that both the Privacy Act and the Administrative Dispute Resolution Act (ADRA) require the exclusion of the Union from the mediation of EEO complaints. Finally, with regard to the specific facts in this matter, the individual employee expressly requested that the Union not be present at the mediation, and the individual's rights superseded the rights of the Union. Therefore, the Respondent did not violate the Statute by failing to give the Union notice and the opportunity to be present at the mediation.

Discussion and Analysis

As both the GC and the Respondent have correctly stated, the Authority has previously dealt with the issue of whether section 7114(a)(2)(A) applies in situations dealing with mediations in formal EEO complaint cases. First, in *Luke Air Force Base, Arizona,* 54 FLRA 716 (1998)*rev'd Luke Air Force Base v. FLRA,* 208 F.3d 221 (9th Cir. 1999), cert. denied, 121 S. Ct. 60 (2000) *(Luke I),* the Authority found the mediation/investigation of the EEO complaints was a discussion, which was formal, between a representative of the Respondent and a bargaining unit employee concerning a grievance, within the meaning of section 7114(a)(2)(A) of the Statute. In *U.S. Department of the Air Force, 436th Airlift Wing, Dover Air Force Base, Dover, Delaware,* 57 FLRA 304 (2001)*(Dover),* the Authority noted "In light of the 9th Circuit's recent reversal of *Luke*, we take this opportunity to thoroughly review this issue in this case. Our review of the language, legislative history, and purpose of the Statute supports the conclusion that complaints pursued through the EEOC procedures are grievances. Accordingly, we reject the Respondent's arguments regarding this issue and do not acquiesce in the 9th Circuit's view of the scope of the term grievance."

And in *United States Department of the Air Force, Luke Air Force Base, Arizona,* 58 FLRA 528 (2003) (Cabaniss dissenting) *(Luke II)*, the Authority specifically stated, "We reaffirm the Authority's previous view set forth in *Dover*, as affirmed by the D.C. Circuit in *Dover AFB v. FLRA*, that the broad

definition of 'grievance' under the Statute encompasses complaints filed under a NGP as well as complaints filed under alternative statutory procedures of the EEOC. (Footnote omitted) For the reasons set forth in those decisions, and those that follow, we respectfully disagree with the Ninth Circuit's determinations to the contrary that the formal discussion right under §7114(a)(2)(A) does not apply to complaints filed under EEOC's statutory procedure because they are discrete and separate from the grievance process." 58 FLRA at 534; *see also*, *United States Department of the Air Force, Luke Air Force Base, Arizona,* 59 FLRA 16 (2003)(Cabaniss dissenting)*(Luke III).*

In *Luke II*, the Authority again considered and rejected the Respondent's position that there is a conflict between the Union's institutional rights under §7114(a)(2)(A) and the employee's individual rights under the ADRA and other statutes governing confidentiality that warrants exclusion of the Union from these sessions. In this matter, the Respondent raises defenses that have been previously rejected by the Authority in the above cases. While I have carefully considered all of the Respondent's arguments in this matter, I find the Respondent has presented nothing persuasive that has not already been considered and rejected by the Authority.

Framework for analysis

In order for a union to have the right to representation under section 7114(a)(2)(A) of the Statute, there must be: (1) a discussion; (2) which was formal; (3) between a representative of the agency and a unit employee or the employee's representative; (4) concerning any grievance or any personnel policy or practice or other general condition of employment. *Dover,* 57 FLRA at 306*; Luke,* 54 FLRA at 723*; Social Security Administration, Office of Hearings and Appeals, Boston Regional Office, Boston, Massachusetts,* 59 FLRA 875, 878 (2004).

1. The meeting regarding the EEO Complaint was a discussion.

The Respondent does not dispute that the mediation held on February 8 was a discussion. The Respondent does dispute all the remaining elements.

2. The meeting was formal

The determination as to whether a discussion is formal is based on the totality of the facts and circumstances presented. *See F.E. Warren Air Force Base, Cheyenne, Wyoming,* 52 FLRA 149, 155-57 (1996)(*F.E. Warren*)**.** In making that determination, the Authority has stated that a number of factors are relevant: (1) the status of the individual who held the discussions; (2) whether any other management representatives attended; (3) the site of the discussions; (4) how the meetings for the discussions were called; (5) how long the discussions lasted; (6) whether a formal agenda was established for the discussions; and (7) the manner in which the discussions were conducted. *See General Services Administration, Region 9,* 48 FLRA 1348, 1355 (*GSA*). However, these factors are illustrative, and other factors may be identified and applied as appropriate. *Dover,* 57 FLRA at 307.

On January 16, Dycus sent Rineer an email message, informing him that the mediation was scheduled for February 8, and that Pedro Ledezma would serve as the mediator. (G.C. Ex. 5) In an attachment to all the mediation participants, Ledezma set forth the arrangements for the mediation, as well as setting forth the purpose of the mediation and the need for confidentiality. (G.C. Ex. 7) On February 8, the mediation was held. Present were the mediator, Pedro Ledezma, Kenneth Rineer and Jeff Peterson. The mediation was held in the EO office, which is separate from both Rineer and Peterson's work areas. At the beginning of the mediation, Ledezma explained the process he intended to use for the mediation and had both parties read and sign an Agreement to Mediate. (G.C. Ex. 13) During the mediation, the mediator met with both Rineer and Peterson in separate caucuses. The mediation itself lasted about three hours. No resolution was reached regarding the underlying EEO complaint and the mediator closed the session.

Although the mediation session does not meet all of the criteria set forth in *Dover*, I find that a sufficient number of criteria are present to constitute a formal discussion within the meaning of the Statute. In that regard, Rineer and Peterson had advance notice of the mediation session, the site of the mediation was at a neutral location away from the work locations of both Rineer and Peterson, and the discussions lasted about three hours. Peterson, who had the authority to resolve the matter on behalf of the Respondent, was Rineer's third level supervisor. While there was not a formal agenda established for the meeting, Ledezma set forth guidelines for the conduct of the meeting at the beginning and generally followed a standard mediation format. The evidence further reflects that the meeting had a formal purpose,

specifically the mediation of the dispute which was the basis of Rineer's EEO complaint. *See Dover; Luke I.*

Therefore, based on the totality of the evidence, I find that the February 8 mediation session met the criteria for formality as set forth by the Authority.

3. The meeting was between a representative of the Agency and a bargaining unit employee

In this case, the evidence reflects that Peterson was Rineer's third level supervisor at the time of the mediation. The Respondent admits that Peterson was a supervisor and/or management official within the meaning of the Statute and that he was a representative of management. The evidence further reflects that Peterson was present at the mediation in his capacity as a supervisor and that he had the authority to reach a resolution of the EEO complaint, which was the purpose of the mediation. Under these circumstances, I find that Peterson was a representative of management under the provisions of section 7114(a)(2)(A) of the Statute.

The GC further asserts that Pedro Ledezma, the mediator, was also a representative of Respondent under the provisions of section 7114(a)(2)(A). The GC asserts that Ledezma was acting on behalf of Respondent during the mediation session, and that he served as an "agency representative". Ledezma is employed as a mediator by the Department of Defense Investigation and Resolution Division (IRD) in Sacramento, California. At the time Rineer filed his EEO complaint, the Respondent paid IRD a flat fee of $325.00 to cover services to be provided by the IRD. In addition, Ledezma received his regular DOD pay while he participated in the mediation. At the conclusion of the mediation, Ledezma wrote a report, outlining the parties, the issues, the time involved, and the outcome of the settlement efforts, which was forwarded to Dycus. Considering all these factors, the GC argues that Ledezma was a management official who was acting on behalf of the Respondent during the mediation.

The Respondent asserts that Ledezma, in his capacity as a mediator, was not a management representative, was not in Rineer's supervisory chain, had no authority to compel settlement by either party, and acted in a neutral capacity and was neither employed by nor paid by the Air Force.

Since I have found that Peterson was acting on behalf of the Respondent during the mediation session, it is unnecessary to determine the status of the mediator in this case. *See, Luke I, Luke II and Luke III.*

4. The meeting to discuss the EEO complaint concerned a grievance

The Respondent argues that the mediation session did not concern a grievance within the meaning of section 7114(a)(2)(A) of the Statute because Rineer had filed an EEO complaint, which is outside the negotiated grievance procedure. Specifically, the Respondent argues that the statutory right of a union to attend formal meetings does not apply to this fact situation since "grievances" under section 7114(a)(2)(A) does not include the discrimination complaints that were brought pursuant to EEOC procedures. Therefore, the Union had no right of representation at the settlement meeting and the Respondent did not violate section 7114(a)(2)(A) as alleged. Although this argument was accepted by the Ninth Circuit in its decision, as well as by Chairman Cabaniss in her *Dover* dissent (57 FLRA at 312-14) the Authority expressly rejected it in both its *Luke* and *Dover* decisions. *Dover,* 57 FLRA at 310; *Luke*, 54 FLRA at 732-33. There are no new facts present in this case that would distinguish it from those prior cases. Accordingly, I find that section 7114(a)(2)(A) is applicable to the mediation session between the Respondent and Rineer.

Therefore, I find that the mediation session was a meeting which concerned "any grievance or any personnel policy or practice or other general condition of employment", as required by section 7114(a)(2)(A) of the Statute. *See Dover.*

5. The employee's objection to the Union's presence at the mediation.

The final question to be determined in this matter concerns whether the Union's statutory right to prior notice and an opportunity to attend the formal meeting at issue is abrogated by the employee's request that the Union not attend. This potential conflict between the right of a Union to be present at the mediation of a formal EEO complaint and the rights of an EEO complainant has been given consideration by the Authority

In *NTEU v. FLRA,* 774 F.2d 1181 (D.C. Cir. 1985), a case involving the Union right to attend the

interview of a bargaining unit employee in preparation for an MSPB hearing, the court stated:

> [I]n the case of grievances arising out of alleged discrimination on the basis of race, religion, sex or national origin, Congress has explicitly decided that a conflict between the rights of identifiable victims of discrimination and the interests of the bargaining unit must be resolved in favor of the former. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et *seq*., provides that the right of an aggrieved employee to complete relief takes priority over the general interests of the bargaining unit. Similarly, a *direct* conflict between the rights of an exclusive representative under § 7114(a)(2)(A) and the *rights* of an employee victim of discrimination should also presumably be resolved in favor of the latter. *Id.* at 1189 n.12 (citations omitted; emphasis in original).

Later, in *Dover*, the Authority considered hypothetical problems posed by the Respondent, such as whether a Union might not agree to confidentiality, and whether the Union's presence might chill candid discussions, and concluded that there was no evidence to support such claims. The Authority also considered Respondent's claim that discussions during a mediation might implicate private information protected from disclosure, and concluded that there was no evidence to indicate that such disclosure would have occurred. *Dover*, 57 FLRA at 310.

On appeal, the D.C. Circuit, in *Dover AFB v. FLRA*, 316 F.3d 280 (D.C. Cir. 2003) upheld the Authority's decision. While finding that there was no inherent or *per se* conflict between an EEO complainant's rights and the Union's rights to attend a formal discussion, the D.C. Circuit stated, as an aside, "We do not foreclose the possibility that an employee's objection to the union presence could create a 'direct' conflict that should be resolved in favor of the employee as described *supra* note 12, NTEU, 774 F.2d at 1189 n.12." *Dover*, 316 F.3d at 287.

In his concurring opinion in *Luke II*, Member Armendariz discussed the potential effect of an employee objecting to the Union's presence at the mediation of an EEO complaint, a fact not present in the case before him.

> "[W]here a direct conflict between a union's institutional rights and an employee's right to confidentiality in mediation and settlement discussions exists, I would be inclined to agree with the D.C. Circuit that the rights of the employee should presumably prevail. I note that such a direct conflict might arise in a variety of situations, including, for example, where an employee unequivocally requests that the exclusive representative *not* be present at a mediation session of a formal EEO complaint. Of course, a determination as to whether there is a direct conflict between the rights of an employee and the rights of a union requires an assessment of the facts presented in each case." (emphasis in original) (Member Armendariz issued a similar concurring opinion in *U.S. Dep't of Veterans Affairs, North Arizona Veterans Affairs Healthcare, Prescott, Arizona,* 61 FLRA 181, 187 (2005)).

The GC asserts that, in order to determine whether there is a direct conflict in the present case, it is necessary to assess the respective rights of the Union and Rineer in connection with the Union's presence at the mediation session. According to the Union President, the Union has an interest in attending the mediation of a formal EEO complaint, in order to represent the bargaining unit as a whole and to make sure that bargaining unit employee rights are not comprised. Further the Union's presence would permit it to track the effect of resulting settlement agreements on bargaining unit employees; and would permit it to observe the process and to ensure that proper EEO procedures were followed. In addition, the Union would be able to identify whether any governing laws, rules, regulations, or contract provisions were being violated through the mediation process or by any resulting settlement agreements.

On the other hand, the GC asserts that Rineer's objection to the Union's presence had nothing to do with any concerns over his right to "confidentiality in mediation and settlement discussions." Rineer testified that he objected to the Union's presence because he was upset that the Union had refused to take a grievance to arbitration and because he believed that the Union was entitled to be present at the mediation and he was curious to see how management might react to his objection. Rineer specifically testified that his objection was not based on any concerns over confidentiality, privacy

interests, or that the Union's presence would disrupt the mediation process. Rineer's testimony rebuts any implication that through his objection he was exercising rights that might be drawn from his entitlements as an EEO complainant, such as the right to "confidentiality in mediation and settlement discussions."

The GC concludes that there is no evidence that Rineer's objection to the Union's presence demonstrates a conflict, either direct or indirect, with the Union's statutory right to be present at the mediation session.

The Respondent asserts that the complaint in this matter should be dismissed since an individual's EEO rights trump the Union's right to be present at an EEO mediation when the complainant or individual objects to their presence, as Rineer did in this case. Therefore, the Respondent was not required to have the Union present at the mediation. Rineer was adamant that the Union not be allowed to attend the EEO mediation. Dycus noted his objection and his election to not have the Union attend the mediation was granted. The management official present at the mediation, Peterson, did not know why the Union was not present. In the employment discrimination context, an aggrieved employee's rights take priority over the general interests of the bargaining unit.

It is clear that the Air Force disagrees with the Authority case law that section 7114(a)(2)(A) of the Statute affords the Union an opportunity to be present at a formal discussion, specifically mediation, relating to a formal EEO discrimination complaint. *See, Luke I, Luke II, Luke III, Dover.* In this case, for the first time, we are faced with actual facts that had been previously presented only as hypothetical situations. Here, the bargaining unit employee who filed the EEO complaint specifically requested that the Union not be present at the mediation. In answering a form sent by the Respondent, Rineer checked the box stating "I object to having the union's presence at the mediation and request they not be present." (G.C. Ex. 10).

The GC argues that the testimony of Rineer explains that his concerns regarding the Union's presence were not grounded in his concerns for confidentiality or his rights in filing a discrimination complaint, and, therefore, this objection to the Union's presence should not be considered sufficient under the Statute and the current case law. The Respondent argues that the statement is sufficient to negate the Union's rights in this matter and that the individual bargaining unit employee's rights trump the Union's rights, and, therefore, it did not violate the Statute by failing to afford the Union the opportunity to be present at the mediation.

Looking objectively at the evidence before me, we have an individual who has filed a formal EEO complaint and has agreed to mediation in an attempt to resolve the matter. The individual employee is not represented by the Union in his EEO complaint and has raised concerns with various management personnel regarding the quality of the Union's representation. According to the credited testimony of Dycus, Rineer told her that the Union's presence would be a waste of time and in response she sent this AF form regarding the presence of the Union at the mediation. The form itself explains the Union's right to be present and asks the recipient to respond regarding his/her opinion of the Union's presence.[10]

Rineer did respond, formally objecting to the Union's presence. There is no evidence that the Respondent coerced, manipulated or attempted to influence Rineer in his decision making regarding the presence of the Union. In fact, Rineer appears to have purposely objected to the Union's presence at the mediation. Further, Rineer was aware of the consequences for the Union by the action that he took. I find that Rineer's testimony regarding why he checked the form as he did does not negate the actual form itself, which is quite specific in its request that the Union not be present. There is no evidence that the Respondent was aware of Rineer's alleged motivation, and I find Rineer's subsequent testimony regarding his motivation to be of no consequence. Further, I do not find it necessary for the Respondent to seek clarification in the face of such an explicit direction that the Union not be present at the mediation. I do not find that it was necessary for the Respondent to go beyond the form itself and get some sort of explanation from Rineer for the actions that he took.[11]

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4. Apparently, this was a form created at Davis-Monthan AFB, although there was no testimony regarding its creation. Further, although Dycus testified that the Union would have been invited to the mediation if the employee had checked that he had no objection to the Union's presence, I find this highly unlikely in the face of the Air Force position in these matters. I found Dycus' testimony vague and less than convincing in this area. However, that is not the matter before me at this time.

5. Rineer testified that the Union's right to be present at the mediation session and to serve the greater good of the

Therefore, after careful consideration, I find that there was, in fact, a direct conflict between the individual employee's rights and the Union's right to have notice and an opportunity to be present at the mediation on the formal EEO complaint. In light of the D.C. Circuit's opinion in *Dover*, I resolve this conflict in favor of the employee. Although the February 8 mediation meets the criteria of section 7114(a)(2)(A) of the Statute, the Union's right to be present was superseded by the individual employee's clear and specific objection to the Union's presence. Therefore, the Respondent's failure to give notice and to afford the Union an opportunity to be present at the meeting was not a violation of the Statute.

Having found that the evidence does not support the allegation that the Respondent violated the Statute, it is therefore recommended that the Authority adopt the following Order:

ORDER

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

Issued, Washington, DC, June 13, 2008.

SUSAN E. JELEN
Administrative Law Judge

bargaining unit would outweigh his own personal interests, if there were any, in not having the Union present, (Tr. 60) I give no weight to this opinion, which was specifically solicited by the GC. This opinion is not in keeping with Rineer's testimony and behavior regarding his personal rights. There is no evidence that he understands the Statute and the meaning of individual rights over the Union's statutory rights and I find his comments in this area to not be persuasive.