**69 FLRA No. 69**

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2258, AFL-CIO
(Respondent/Union)

and

SHERIE R. MULLINS
(Charging Party/Individual)

DA-CO-14-0439

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DECISION AND ORDER

July 26, 2016

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

## I. Statement of the Case

The Federal Labor Relations Authority's (FLRA's) General Counsel (GC) issued a complaint alleging that the Union violated § 7116(b)(1) and (2) of the Federal Service Labor-Management Relations Statute (Statute)[1] when its vice president sent an email to agency management, requesting that the agency discipline the Charging Party based on the Charging Party's criticism of the vice president's performance of her representational duties.

In the attached decision, the FLRA's Chief Administrative Law Judge (the Judge) found that the Charging Party engaged in protected activity under § 7102 of the Statute[2] by criticizing the Union and that the vice president sought discipline against the Charging Party based on this protected activity. The Judge therefore concluded that the Union violated § 7116(b)(1) and (2) of the Statute, which make it illegal for a union "to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under [the Statute]" and "to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under [the Statute]," respectively.[3]

The Union has filed exceptions that challenge the Judge's factual findings and legal analysis. In these exceptions, the Union raises two new arguments that it could have raised, but did not raise, to the Judge – specifically, that it was not actually seeking discipline against the Charging Party and that the Statute obligated the vice president to take steps to address the Charging Party's alleged abusive behavior toward other bargaining-unit employees. However, under § 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, raised in the proceedings before a judge.[4] We therefore dismiss these exceptions.

As well, in a particular exception, the Union argues that the Judge's reference to the vice president as a liar during the hearing demonstrates that the Judge was biased.[5] Section 2423.31 of the Authority's Regulations sets forth the standard of conduct for an unfair-labor-practice hearing held by an administrative law judge (judge).[6] Specifically, § 2423.31(a) provides, in pertinent part, that the judge "shall conduct the hearing in a fair, impartial, and judicial manner."[7] It is well established that a party alleging that a judge was biased must explain how the judge failed to conduct the hearing in a fair, impartial, and judicial manner.[8] "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality" finding.[9] And standing alone, a judge's determination, based on the record and his or her observations of the proceeding, that a witness lied, does not establish that the judge was biased.[10] Here, the Union's only evidence that the Judge was biased was his determination that the vice president lied on the witness stand. Accordingly, we deny this exception.

Finally, as for the Union's remaining exceptions, we have considered the GC's argument that the Union failed to raise appropriate exceptions as required by §§ 2423.40(a)(1) and (a)(2) of the Authority's Regulations[11] by failing to explicitly state the portions of the Judge's opinion to which it is excepting. The exceptions sufficiently identified the portions of the Judge's decision for us to consider, and so, the exceptions are not dismissed on these grounds. However, after considering the decision and the entire record, we find that a preponderance of the record evidence supports the

[1] 5 U.S.C. § 7116(b)(1), (2).
[2] *Id.* § 7102.
[3] *Id.* § 7116(b)(1), (2).
[4] 5 C.F.R. § 2429.5.
[5] Exceptions at 2.
[6] 5 C.F.R. § 2423.31.
[7] *Id.* § 2423.31(a); *see also AFGE, Local 2192, AFL-CIO*, 68 FLRA 481, 484 (2015) (*Local 2192*).
[8] *Local 2192*, 68 FLRA at 484.
[9] *Liteky v. United States*, 510 U.S. 540, 555 (1994) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966)).
[10] *See, e.g., United States v. Lentz*, 524 F.3d 501, 530 (4th Cir. 2008).
[11] 5 C.F.R. § 2423.40(a)(1), (2); Opp'n at 4.

Judge's challenged factual findings, and that the Judge's legal analysis is consistent with applicable precedent. Therefore, we adopt the Judge's findings, conclusions, and recommendations, and we deny the Union's remaining exceptions.

## II. Order

Pursuant to § 2423.41(c) of the Authority's Regulations[12] and § 7118 of the Statute,[13] we order the Union to:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing bargaining-unit employees in the exercise of protected rights under the Statute by requesting that employees be disciplined after they engage in protected activity.

(b) Causing or attempting to cause the agency to discriminate against bargaining-unit employees by requesting that employees be disciplined after they engage in protected activity.

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

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

(a) Post at its facilities where bargaining-unit employees represented by the Union are located, copies of the attached notice on forms to be furnished by the FLRA. Upon receipt of such forms, they shall be signed by the Union President, and shall be posted and maintained for sixty consecutive days thereafter, in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(b) Disseminate a copy of the notice signed by the Union President through any email system that the Union is authorized to use if such system is customarily used to communicate with bargaining-unit employees in the Social Security Administration, San Antonio, Texas office. The notice shall be sent out on the same day that the notice is physically posted.

(c) Pursuant to § 2423.41 of the Authority's Regulations,[14] notify the Regional Director, Dallas Regional Office, FLRA, in writing, within thirty days from the date of this Order, as to what steps have been taken to comply.

[12] 5 C.F.R. § 2423.41(c).
[13] 5 U.S.C. § 7118.
[14] 5 C.F.R. § 2423.41.

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

The Federal Labor Relations Authority (FLRA) has found that the American Federation of Government Employees, Local 2258, AFL-CIO, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

**WE HEREBY NOTIFY ALL MEMBERS AND EMPLOYEES THAT:**

**WE WILL NOT**, interfere with, restrain, or coerce bargaining-unit employees in the exercise of protected rights under the Statute by requesting that employees be disciplined after they engage in protected activity.

**WE WILL NOT**, cause or attempt to cause the agency to discriminate against bargaining-unit employees by requesting that employees be disciplined after they engage in protected activity.

**WE WILL NOT**, in any like or related manner, interfere with, restrain, or coerce bargaining-unit employees in the exercise of the rights assured them by the Statute.

_____
(Union/Respondent)

Date: _____ By: _____
(Signature) (Title)

This Notice must remain posted for sixty 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, Dallas Regional Office, FLRA, whose address is: 525 S. Griffin Street, Suite 926, Dallas, TX, 75202, and whose telephone number is: (214) 767-6266.

**Office of Administrative Law Judges**

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2258, AFL-CIO
RESPONDENT

AND

SHERIE R. MULLINS
CHARGING PARTY/INDIVIDUAL

Case No. DA-CO-14-0439

Charlotte A. Dye
Elizabeth Wiseman
For the General Counsel

Stanley R. Smith
For the Respondent

Sherie R. Mullins
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

**DECISION**

**STATEMENT OF THE CASE**

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7118 and the Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), part 2423.20(a).

On February 20, 2015, the Regional Director of the Dallas Regional of the FLRA issued a Complaint and Notice of Hearing alleging that the American Federation of Government Employees, Local 2258, AFL-CIO (Respondent/ Union) violated § 7116(b)(1) and (2) of the Statute by committing an unfair labor practice (ULP) when a Union officer requested that the agency discipline a bargaining unit employee in response to the employee's criticism of Union leadership. The Respondent filed its Answer to the Complaint on March 13, 2015, denying that the disciplinary action requested was in response to the employee's union animus or failure to join the union and asserting that it was in response to misconduct exhibited by that employee toward a coworker who happened to be a Union officer.

A hearing was held in this matter on July 16, 2015, in San Antonio, Texas. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The General Counsel (GC) and Respondent filed timely post-hearing briefs, which I have fully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, I find that the Respondent committed an unfair labor practice in violation of § 7116(b)(1) and (2). In support of that determination, I make the following findings of fact, conclusion of law, and recommendations.

**FINDINGS OF FACT**

The American Federation of Government Employees (AFGE) is a labor organization under § 7103(a)(4) of the Statute and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Social Security Administration, San Antonio, Texas (SSA San Antonio), an agency within the meaning of § 7103(a)(3) of the Statute. (G.C. Ex. 1(c)). Local 2258 is an agent of AFGE for the purpose of representing bargaining unit employees at the SSA San Antonio office. *Id.*

During all times pertinent to this case, Sherie R. Mullins (Charging Party) was an employee under § 7103(a)(2) of the Statute. (G.C. Ex. 1(c)). Mullins held the position of Title 2, Technical Expert at SSA San Antonio and while her position was in the bargaining unit, Mullins was not a dues paying member of the Respondent. (Tr. 46). Bridget Peterson was employed in the same office as a Claims Representative and was an agent of the Respondent, holding the position of Vice President, AFGE, Local 2258. (Tr. 211).

On March 28, 2014, Peterson approached Mullins near Mullins' workspace and asked to speak with her in private. (Tr. 35). There had been an incident in the office a few days before in which Peterson became involved post incident and Peterson sensed that Mullins was treating her differently as a result of Peterson's involvement. (Tr. 49-53, 220-22; G.C. Ex. 5). Mullins declined to speak to her in private, and Peterson testified that because nobody was there, she elected to go ahead and engage Mullins in a conversation outside of Mullins' cubicle. (Tr. 35, 224). During this conversation, Mullins openly criticized Peterson's Union leadership and the negative impact it had upon the office. (Tr. 35). Particularly, she criticized Peterson's role in another incident in which Peterson interceded as a Union officer. (Tr. 35, 219).

Upon conclusion of the conversation, Peterson sent an email to Mullins responding to the assertions made by Mullins about Peterson's role in the office as Union Vice President. (Tr. 229). Peterson subsequently informed management of their conversation indicating that Mullins had publicly engaged her in a wide ranging disagreement during which Mullins was "yelling to the top of her lungs, she was bright red and had totally lost control . . . ." (Tr. 36, 38; G.C. Ex. 5). According to Peterson's email report to management, Mullins had verbally attacked, yelled and humiliated her in a manner that was heard by several coworkers. (Tr. 36, 38, 233; G.C. Ex. 5). In her report of the incident, Peterson requested that management take action against Mullins for her misconduct. (G.C. Ex. 5). She also demanded that an office staff meeting be conducted to reassure employees that such behavior was not acceptable. (G.C. Ex. 5). In addition, she addressed the things she felt management had been doing in the office to put the Union in a bad light and she signed the report she submitted by email in her capacity as Union Vice President. (Tr. 36; G.C. Ex. 5).

At the hearing, two witnesses testified that they were working near Mullins' cubicle on that date, and either saw or heard the conversation between Mullins and Peterson. (Tr. 85, 110). The witnesses indicated that they did not hear Mullins yell at Peterson. (Tr. 88-90, 112). Further, one of the witnesses, Maria Torres, an Operations Supervisor, testified that she happened upon Mullins and Peterson while they were conversing and did not observe anything that that made her think she needed to interrupt, intercede or terminate the discussion. (Tr. 112). Additionally, the GC provided written testimony from five other coworkers who were near Mullins' work area on March 28, 2014, when the conversation took place and all five stated that they did not witness either Mullins or Peterson raise their voices or engage in an outburst. (G.C. Ex. 7, 9-12).

The Respondent provided testimony from other coworkers who indicated that they had observed incidents where Mullins had engaged in outbursts and verbal assaults upon coworkers at other times, but none of them observed the incident on March 28, 2014. (Tr. 166-175, 177-78, 188-190, 202-08).

In response to the request made by Peterson that management take an action against Mullins, an investigation was initiated; however, no disciplinary action was proposed or imposed. (Tr. 125, 152, 161). On September 2, 2014, Mullins filed a ULP charge, asserting that Peterson's report to management and request that Mullins be disciplined was in response to the criticism Mullins expressed about the Union's involvement in office matters and the negative impact it had upon office performance and morale.

## POSITIONS OF THE PARTIES

### General Counsel

The GC contends that the Respondent violated § 7116(b)(1) and (2) of the Statute when it attempted to have management take action against Mullins because she had engaged in protected activity by openly criticizing the Union Vice President. The GC argues that the request for discipline of Mullins was motivated by the criticism she leveled at Peterson and that Peterson requested disciplinary action in her capacity as a Union officer.

### Respondent

The Respondent contends that neither Local 2258 nor Vice President Peterson engaged in any conduct that violated the Statute because as neither did anything to interfere with, restrain or coerce Mullins. The Respondent argues that the conversation and email report that was sent to management was done by Peterson solely in her capacity as a coworker and peer and not as a Union officer.

## DISCUSSION

The Respondent failed to present testimony of a single witness to confirm Peterson's assertion that Mullins verbally attacked her and was yelling and out of control during the conversation on March 28, 2014. Instead, the Respondent contends that Peterson was not acting as a Union officer when she confronted Mullins or when she reported such conduct to management and requested that Mullins be disciplined for the outrageous behavior reported. The Respondent asserts that Peterson was acting solely in her capacity of coworker and peer, and thus, the Union did not commit an unfair labor practice. Such argument is without merit.

The Respondent's contention that Local 2258 was not responsible for the behavior of Peterson is somewhat ironic, given that it was Peterson's position as a Union officer that led to her involvement in the office conflict that prompted the conversation between she and Mullins. Peterson approached Mullins because she felt Mullins was treating her differently after Peterson used her Union office to counsel an employee who was involved in a conflict with a coworker and advised him to report the incident to the local police. That the conversation resulted from Peterson's role as a Union officer became clearer when Peterson ignored the rejection of her request for a private conversation and proceed to conduct her inquiry about why Mullins was treating her differently. That was not the response of a coworker, it was the response of a Union officer who felt

entitled to involve herself in the matter, just as she had done in other office conflicts.

Aside from the fact that the conversation arose from her actions as a Union officer, it became even more apparent that it was about her role as Union Vice President when Mullins complained about her participation in office operations. Mullins was not addressing how Peterson did her job as a claims representative, it was about how she conducted business on behalf of Local 2258 in her capacity as Union Vice President. That Mullins was upset with the way Peterson acted as a Union officer is apparent from the written response Peterson sent to Mullins justifying her actions. More importantly, when Peterson decided to request that Mullins be disciplined for complaining about Peterson's actions as Union Vice President, she signed the email report sent to management as Union Vice President. While Peterson asserts this was an accident and oversight on her part, that claim is simply not credible. Were the report to management not being submitted on behalf of the Union, there would have been no reason to address how management disclosed discussions it had with the Union to other employees. (G.C. Ex. 5). In short, I conclude that when Peterson says she did not mean to submit this email in her capacity as a Union officer she is lying. Thus, her entire characterization of the event is not only unsupported, it is not credible. I find the Respondent's assertion that all of the witnesses and statements presented by the General Counsel which contradict Peterson's version of events are from a Mullins "posse" out to get Peterson to be ludicrous. Many of them are bargaining unit employees and the idea that all of them would conspire and lie is simply unbelievable when not a single bargaining unit employee reported events similar to those alleged in Peterson's email to management.

Having failed to present a single witness to support Peterson's version of events, the Respondent instead presented evidence that Mullins had behaved outrageously in the past when dealing with other coworkers. In addition to not being probative to the events of March 28, 2014, this highlights that Peterson never went to the trouble of reporting Mullins until she exercised her right to criticize the Union, and only when she did that, did Peterson decide to act. Peterson was not acting to protect her coworkers, she requested that Mullins be disciplined because Mullins spoke out about her performance as a Union officer and she did so in an attempt to chill Mullins' exercise of her right to engage in protected activity.

The rights under § 7102 of the Statute include the right to form, join or assist any labor organization, freely and without penalty or reprisal, or to refrain from any such activity and this includes the right to speak out for or against a union. 5 U.S.C. § 7102; *AFGE, Local 3475, AFL-CIO*, 45 FLRA 537, 549 (1992) (*Local 3475*); *Overseas Educ. Ass'n*, 11 FLRA 377, 387 (1983) (*OEA*). Further, it is an unfair labor practice for a union to cause or attempt to cause an agency to discriminate against any employee in the exercise of any right guaranteed under § 7102. 5 U.S.C. § 7116(b)(2). When a union violates § 7116(b)(2) of the Statute, it also violates 5 U.S.C. § 7116(b)(1). *Local 3475*, 45 FLRA at 553.

In this case, Mullins clearly spoke out again the Union, disagreeing with how the Union conducted business within the San Antonio office. In response, the Union officer to whom the objections were raised justified her prior actions in writing to the complaining employee and reported that employee to management. The report provided to management falsely described the behavior of the employee and requested that management discipline the employee for her behavior. As demonstrated in *Local 3475* and *OEA*, when a union requests that an employee be disciplined in response to that employee's exercise of protected activity, the request violates § 7116(b)(1) and (2) of the Statute, even when legitimate misconduct is reported. The essence of the violation is that protected activity was the predicate for the discipline requested. Thus, this case presents a more egregious example of a violation in that the Union sought to punish and chill protected activity by fabricating the misconduct for which it solicited discipline of the outspoken employee. While based upon the record, the employee who criticized the Union may be disagreeable and gruff when dealing with coworkers, it is also quite clear that the Union did not raise her unpleasant nature with management until she openly engaged in protected activity by criticizing the Union in the presence of other bargaining unit employees.

## CONCLUSION

Based upon the foregoing, I find that the Respondent violated § 7116 (b)(1) and (2) of the Statute when the Union Vice President, on behalf of Local 2258, requested that management take disciplinary action against a bargaining unit employee because the employee engaged in protected activity by criticizing the Union leadership. Therefore, I recommend that the Authority adopt the following order:

**ORDER**

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the American Federation of Government Employees Local 2258, AFL-CIO, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing bargaining unit employees in the exercise of protected rights under the Statute by requesting that employees be disciplined after they engage in protected activity.

(b) Causing or attempting to cause the agency to discriminate against bargaining unit employees by requesting that employees be disciplined after they engage in protected activity.

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

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

(a) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the President, American Federation of Government Employees, Local 2258, AFL-CIO, and shall be posted and maintained for sixty (60) consecutive days thereafter, in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(b) In addition to physical posting of paper notices, disseminate a copy of the Notice through any email system the Respondent is authorized to use if such system is customarily used to communicate with bargaining unit employees in the Social Security Administration, San Antonio, Texas office. This Notice will be sent out on the same day that the Notice is physically posted.

(c) Pursuant to § 2423.41 of the Rules and Regulations of the Authority, notify the Regional Director, Dallas Region, Federal Labor Relations Authority, in writing, within thirty (30) days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., March 30, 2016

_____

CHARLES R. CENTER
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 the American Federation of Government Employees, Local 2258, AFL-CIO, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

**WE HEREBY NOTIFY BARGAINING UNIT EMPLOYEES THAT:**

**WE WILL NOT**, interfere with, restrain, or coerce bargaining unit employees in the exercise of protected rights under the Statute by requesting that employees be disciplined after they engage in protected activity.

**WE WILL NOT**, cause or attempt to cause the agency to discriminate against bargaining unit employees by requesting that employees be disciplined after they engage in protected activity.

**WE WILL NOT,** in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of the rights assured them by the Statute.

_____
(Union/Respondent)

Date: _____ By: _____
(Signature) (Title)

This Notice must remain posted for sixty (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, Dallas Region, Federal Labor Relations Authority, whose address is: 525 S. Griffin Street, Suite 926, Dallas, TX, 75202, and whose telephone number is: (214) 767-6266.