63 FLRA No. 95

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
ELKTON, OHIO
(Respondent/Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 607, AFL-CIO
(Charging Party/Union)

CH-CA-05-0551

DECISION AND ORDER

April 30, 2009

Before the Authority: Carol Waller Pope, Chairman and Thomas M. Beck, Member

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). The Respondent filed an opposition to the GC's exceptions.

The complaint, as amended at the hearing, alleges that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) when it refused to allow a representative of the Charging Party to participate in meetings between a bargaining unit employee (the employee) who had been removed and three Respondent officials, during which matters resulting from the decision to remove the employee were discussed. The Judge recommended that the complaint be dismissed.

Upon consideration of the Judge's decision and the entire record, we find, for the reasons discussed below, that the Respondent did not commit the ULP alleged in the complaint. Accordingly, we dismiss the complaint.

II. Background and Judge's Decision

A. Background

The Respondent provided the employee with a notice of proposed removal. The employee notified the Respondent that the Charging Party would represent him in the proposed termination proceedings. Judge's Decision (Decision) at 2. The employee and his Charging Party representative subsequently attended a meeting with the Respondent's Warden, at which they gave an oral response to the notice of proposed removal. *Id.* at 3.

The Warden announced his decision in the case during a meeting in his office a few days later. Present at the meeting were the Warden, the Associate Warden, the Employee Services Specialist, the employee, and the Charging Party representative. The Warden read the final notice of termination aloud up to the section addressing the employee's appeal rights. *Id.* After the notice was read, the employee and his representative asked a question about overtime pay. The Warden stated that the issue of overtime could be addressed during the employee's out-processing and that the meeting was over. *Id.* The Charging Party representative requested to remain with the employee for his out-processing, but the Warden dismissed him and the Associate Warden escorted him out of the office. *Id.* at 4.

Subsequently, the employee and the Employee Services Specialist left the Warden's office and were met by the Respondent's Psychologist. *Id.* at 4. The Psychologist asked if the employee wanted to use the services of the Employee Assistance Program (EAP). *Id.* at 4. The employee declined. *Id.* Thereafter, all three moved to a conference room to wait for the employee's meeting with the Employee Services Manager. The Judge found that the purpose of the meeting with the Employee Services Manager was to "complete the administrative actions needed [for the employee's] out-process." *Id.*

The GC filed a complaint alleging that the Respondent violated § 7116(a)(1) and (5) of the Statute by refusing to allow a representative of the Charging Party to attend the meeting conducted by the Respondent's Employee Services Manager following the employee's termination. *Id.* at 2. At the hearing, the Judge granted the GC's motion to amend the complaint to add the employee's interactions with the Psychologist and the Employee Services Specialist. Hearing Transcript (Tr.) at 8.

The Judge found that the Charging Party's "right to represent a bargaining unit employee in an adverse action" did not include "post decision administrative actions undertaken to effectuate the final decision[.]" Decision at 5. The Judge based his decision on his analysis of *438th Air Base Group (MAC), McGuire Air Force Base, New Jersey*, 28 FLRA 1112 (1987)

(*McGuire*) and its holding that unions have a right under § 7114(a)(1) of the Statute to "participate[] [in] the delivery of an adverse action decision[.]" *Id.* at 11, 7-13. The Judge determined that there was no valid reason to extend *McGuire* to cover "administrative actions resulting from a final decision [i]n an adverse action." *Id.* at 7.

The Judge also found that *McGuire* could be distinguished from the instant case because the Charging Party representative was present at the time the final disciplinary decision was rendered and because the meeting ended thereafter. *Id.* at 13. According to the Judge, after the notice was read by the Warden, "there was nothing left to discuss or negotiate and no further action to be taken on behalf of the employee." *Id.* In this regard, the Judge found that the administrative matters addressed in the employee's meeting with the Employee Services Manager "flowed from the adverse action, [but] were not part of the disciplinary process for which the employee was represented." *Id.* Because the Judge found that the complaint made "no allegation regarding any interaction the employee had with other individuals after he and his [Charging Party] representative left the Warden's personal office and before he entered [the Employee Services Manager's] office by himself[,]" he did not specifically address the employee's interactions with the Employee Services Specialist or the Psychologist. *Id.* at 6.

Based on the foregoing, the Judge recommended that the complaint be dismissed.

III. Positions of the Parties

A. GC's Exceptions

The GC argues that the Judge erred in his factual and legal findings regarding the nature of the employee's termination meeting. In this regard, the CG contends that the Judge's determination that the interactions with the Warden and the other Respondent officials constituted separate meetings, rather than "a single transaction[,]" creates "artificial distinctions" and indicates a failure to "recognize the fundamental right of a union to act in a representational capacity." Exceptions at 9, 10. In support of this claim, the GC contends that, because the Union represented the employee in the disciplinary hearing preceding these meetings and in the grievance process that followed them, exclusion from the administrative out-processing ignored the Charging Party's "right to act for employees concerning disciplinary actions." *Id.* at 10. The GC also contends that Authority precedent establishes that unions may act for employees in disciplinary actions under § 7114(a)(1) of the Statute and that an agency bypasses a union when it communicates directly with bargaining unit employees in this situation. *Id.* at 10, 11. According to the GC, when applied to the facts of this case, the precedent requires a finding that the Respondent communicated directly with the employee on matters involving his discipline, including psychological counseling, "evidence that had been used against him[,]" retirement, appeal rights, and arbitration issues. *Id.* at 12. The GC argues that administrative out-processing pertains to disciplinary actions when terminated employees are involved. *Id.* at 12-13.

The GC also argues that the Judge erred by failing to address issues that were expressly raised in the amended complaint. *Id.* at 6-7. In this regard, the GC states that the Judge erred in failing to reference the employee's interaction with the Employee Services Specialist and the Psychologist. *Id.* at 7. The GC also argues that the Judge erred in failing to make adequate findings of fact about the employee's interactions with all three of the Respondent officials with whom he met after the Charging Party representative was required to leave. *Id.* at 7. Among other things, the GC alleges that the Judge failed to consider that the interactions included discussion of a "threat assessment" regarding the employee prepared by the Psychologist. *Id.* at 8.

B. Respondent's Opposition

The Respondent maintains that the Judge correctly analyzed the law and facts in finding that there was no unlawful bypass of the Charging Party. Opposition at 10. The Respondent argues that Authority precedent does not find an unlawful bypass when an agency "merely meets with bargaining unit employees" to disseminate information and does not solicit or entertain proposals concerning conditions of employment. *Id.* In this regard, according to the Respondent, the Employee Services Manager presented the employee with administrative information and forms provided to all departing employees and there was no discussion of the employee's discipline or appeal rights. *Id.* at 10-11. Likewise, the Respondent contends that the Psychologist's offer of counseling did not involve the employee's discipline or any other collective bargaining issue. *Id.* at 13. The Respondent argues that the response of the Employee Services Specialist to the employee's question about a threat assessment was not related to the employee's discipline because it was not a basis for the discipline and was not considered in the termination. *Id.*

IV. Analysis and Conclusions

A. The Judge did not err in his factual and legal findings regarding the termination meeting.

It is well-established in Authority precedent that "[a]gencies unlawfully bypass an exclusive representative when they communicate directly with bargaining unit employees concerning grievances, disciplinary actions and other matters relating to the collective bargaining relationship." *United States Dep't of Justice, Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 51 FLRA 1339, 1346 (1996) (quoting *Dep't of Health & Human Servs., Soc. Sec. Admin., Balt., Md. & Soc. Sec. Admin., Region X, Seattle, Wash.*, 39 FLRA 298, 311 (1991) (*SSA, Region X*)). Such conduct constitutes direct dealing with an employee, and is violative of § 7116(a)(1) and (5) of the Statute, because it interferes with the union's rights under § 7114(a)(1) of the Statute to act for and represent all employees in the bargaining unit. *Id.* Such conduct also constitutes an independent violation of § 7116(a)(1) of the Statute because it demeans the union and inherently interferes with the rights of employees to designate and rely on the union for representation. *Id.* at 1346-47. The Authority has held that meetings between employees and agency representatives covering administrative matters in an instructional manner do not bypass the union. *See Dep't of Health & Human Servs., Soc. Sec. Admin.*, 16 FLRA 232, 243 (1984) (*HHS*) (no bypass during employee orientation in absence of evidence that the agency attempted to "deal or negotiate directly with employees, or urged employees to put pressure on the [u]nion to take a certain course of action, or threatened or promised benefits to employees"); *Def. Logistics Agency, Def. Depot Tracy, Tracy, Cal.*, 14 FLRA 475, 478 (1984) (*DLA*) (no bypass where meeting was held solely to announce new sick-leave procedure because there was no attempt to "negotiate or to otherwise deal directly with employees concerning the change").

In this case, the Judge found, and there is no dispute, that the Charging Party representative was present when the employee's final discipline was issued by the Warden. *See* Decision at 3, 13. The GC's claim that this meeting, and the administrative events that followed, constituted a "single transaction concerning [the employee's] termination[,]" Exceptions at 9, is unsupported by any precedent or argument. In this regard, we note that the GC has not explained why these interactions, which involved different Respondent officials, different purposes, and movement to different locations, should be considered the same disciplinary meeting. *Nat'l Guard Bureau, Alexandria, Va.*, 45 FLRA 506, 520 (1992) (denying exception unsupported by "case law or any other explanation").

In addition, the record supports the Judge's finding that the employee's subsequent meeting with the Employee Services Manager constituted "administrative matters" that had "no influence or impact upon the final [disciplinary] decision already made and tendered[.]" Decision at 13. In this regard, the employee described the meeting as "administrative" and the Employee Services Manager stated that the same out-process procedure is followed whether an employee's departure is voluntary or involuntary. *Id.* at 77-78. Further, both the employee and the Employee Services Manager testified that the topics addressed at the meeting included the employee's retirement contributions, insurance, military service, leave, and final paycheck, Tr. at 39, 52, 80, and that neither the employee's termination nor his appeal rights were discussed. *Id.* at 39-40, 53, 81-82. Accordingly, the preponderance of the evidence supports the Judge's factual finding that the out-processing meeting was solely administrative and had no "influence or impact upon the final decision already made." Decision at 13. Based on these facts, the Judge's conclusion that there was no unlawful bypass is consistent with Authority precedent. *See, e.g., HHS*, 16 FLRA at 243 (no bypass where agency representative informed employees of administrative matters, including retirement and insurance, in orientation session).

In support of the claim that the Judge erred in his factual and legal findings, the GC maintains that the meeting with the Employee Services Manager (and others), subsequent to the meeting wherein the Warden read the notice, involved his termination and not "unimportant purely administrative matters." Exceptions at 12. However, on review of the record, we find that this claim is not supported by a preponderance of the evidence. In this regard, the GC's assertion that the Psychologist's offer of EAP assistance "concerned" the employee's termination is unsupported by any factual evidence or legal argument. *Id.* Likewise, the GC's claim that the employee's request for "evidence that had been used against him[,]" referring to the threat assessment prepared by the Psychologist, concerned his termination is unsupported. *Id.* We note that there is no basis in the record to conclude that the threat assessment played any role in the termination of the employee. *See*, e.g., Tr. at 60 (testimony of Employee Services Specialist), 66-67 (testimony of Warden), 81 (testimony of Employee Services Manager); GC Hearing Exhibit 9 (final termination notice).

The GC also maintains that the employee's meeting with the Employee Services Manager concerned the

termination because it involved "appeal rights and arbitration issues." Exceptions at 12. However, the testimony of the employee does not support this claim. In this regard, the employee stated that, although the Employee Services Manager gave him a packet of information that included information about Merit Systems Protection Board appeal rights, she did not discuss them with him. Tr. at 39-40. *See also Id.* at 82 (supporting testimony of Employee Services Manager). Similarly, according to the employee's testimony, the only time the issue of arbitration arose was when he stated that he would be appealing his termination using arbitration and the Employee Services Manager recommended keeping his retirement funds in place until the matter was resolved. *See id.* at 39.

The foregoing supports a conclusion that the meeting with the Employee Services Manager, following the meeting with the Warden, covered only administrative matters in an instructional manner. As a result, we conclude that the Agency did not unlawfully bypass the Charging Party. *See HHS,* 16 FLRA at 243; *DLA,* 14 FLRA at 478.

For the foregoing reasons, we deny the GC's exceptions.

B. The Judge committed non-reversible error in failing to address the issue raised by the Amended Complaint.

Under Authority precedent, a judge errs by failing to address an issue that is expressly alleged in the complaint. *Dep't of Transp., FAA, Fort Worth, Tex.*, 57 FLRA 604, 606 (2001). At the hearing, the Judge granted the GC's unopposed motion to amend the complaint to include, as alleged violations, the employee's interactions with the Psychologist and the Employee Services Specialist. Tr. at 8. Both parties questioned witnesses about these interactions. Tr. at 37-38, 49-51, 59-60, 61. However, the Judge erroneously stated that the complaint made no allegations regarding any interaction other than that between the employee and the Employee Services Manager. *See* Decision at 6. Therefore, we find that the Judge erred by failing to address an issue raised in the complaint. However, as discussed above, the record does not support the GC's claim that the employee's interactions with any of the Respondent's officials following the termination meeting were part of the disciplinary process and, thus, established a bypass. In these circumstances, we find that the error is not reversible.

Likewise, in regard to the GC's argument that the Judge failed to make adequate findings of fact, we note that, under Authority precedent, failure to cite evidence does not show that it was not considered. See *United States Small Business Admin., Wash., D.C.*, 54 FLRA 837, 850-51 (1998) (*SBA)* (citing *State of Wyoming v. Alexander*, 971 F.2d 531, 538 (10th Cir. 1992) (decisional entity need not comment on every piece of evidence presented to it); *Diaz v. Chater*, 55 F.3d 300, 308 (7th Cir. 1995) (administrative law judge need not provide evaluation of every piece of evidence)). Although the GC disagrees with the Judge's interpretation of hearing testimony, the GC has not pointed to any evidence that "militates against the Judge's factual findings[.]" *SBA*, 54 FLRA at 851. Accordingly, we deny the GC's exception.

V. Order

The complaint is dismissed.

Office of Administrative Law Judges

WASHINGTON, D.C.
U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
ELKTON, OHIO
Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 607, AFL-CIO
Charging Party

Case No. CH-CA-05-0551

Sandra J. LeBold, Esquire
Susanne S. Matlin, Esquire
For the General Counsel

Erika S. Turner, Esquire
Darrel Waugh, Esquire
Scot L. Gulick, Esquire
For the Respondent

Carl Halt, President
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, 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 (hereinafter FLRA or Authority), 5 C.F.R. Part 2423.

Based upon an unfair labor practice charge filed by the American Federation of Government Employees, Local 607 (Union or Charging Party), a complaint and notice of hearing was issued by the Regional Director of the Chicago Regional Office of the Authority. The complaint alleges that the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Elkton, Ohio (Respondent or BOP) violated section 7116(a)(1) and (5) of the Statute when it required a Union representative to return to duty and refused to allow him to participate in the administrative out-process of an employee he represented during an adverse action that resulted in the employee's removal from Federal service. (GC-l(c)) The Respondent timely filed an Answer denying the allegations of the complaint. (GC-1 (e))

A hearing was held in Youngstown, Ohio on March 29, 2006, at which time the parties were represented and afforded a full opportunity to be heard, examine witnesses, introduce evidence and make oral argument. Also, the General Counsel and the Respondent filed timely post-hearing briefs that were 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

The Respondent is an agency within the meaning of 5 U.S.C. § 7103(a)(3). (GC-1(e))

The Union 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. (GC-1(e))

On July 5, 2005 [1] , Kurt Stermer, a bargaining unit employee was given a written proposal for his removal from the position of Senior Officer Specialist, GS-007-08 in the Federal service. (GC-l(e), GC-2)

On July 7, Officer Stermer advised Respondent that the Union would be serving as his representative in the proposed adverse action. (GC-l(e), GC-3 and GC-6)

On July 25, Officer Stermer orally requested a thirty- calendar day extension for his response to the proposed removal. On July 26, the date his oral or written response was due, the employee made the same extension request in writing. On July 26, the Respondent granted Officer Stermer an additional ten calendar days for oral or written submissions. (GC-7, GC-8)

On August 10, Officer Stermer and his appointed Union representative, Todd Hayter, Chief Steward for AFGE Local 607 made a two and one-half hour oral presentation to T.R. Sniezek, Warden at the Federal Correctional Institution in Elkton, Ohio (FCI Elkton) who was the final decision authority on the proposed removal. No written response was submitted. (GC-9, R-1)

On August 17, Lois Swiderski, Employee Services Manager at FCI Elkton contacted Officer Stermer and

1. All dates occur in 2005 unless otherwise stated.

told him to report to the institution the next day for a meeting with the Warden. She also advised him to contact his Union representative and tell him about the meeting. The Respondent did not contact the Union representative directly. (Tr. 19, 35)

On August 18, Officer Stermer and his Union representative appeared before Warden Sniezek, Associate Warden Dachisen and Teresa Wilson. (Tr. 19-20, 58-59) At the beginning of the meeting, the Warden informed Officer Stermer and Steward Hayter that it was an informational meeting and that Hayter had no right to be present, however, he allowed the Union representative to remain for the meeting. (Tr. 20, 36, 74-75) The Warden then advised Officer Stermer that he had decided to terminate him effective midnight on August 18. The Warden gave Officer Stermer a copy of the termination letter and read from it verbatim up to the point where appeal rights are discussed. (Tr. 67-68)

After being advised of the decision, Officer Stermer and his representative raised an issue related to overtime pay and were told that the employee could address that during his out-processing. The Warden then indicated that the meeting was over and that Steward Hayter could return to his duties. (Tr. 69-70) Officer Stermer, Steward Hayter, Associate Warden Dachisen and Teresa Wilson then departed the Warden's office. (Tr. 48-49)

Upon leaving the Warden's office, Steward Hayter was precluded from further assisting Officer Stermer and left the area under the escort of Associate Warden Dachisen to return documents related to the case to his vehicle. (Tr. 22) After his representative departed, and while he and Teresa Wilson were standing in the secretarial area outside of the Warden's personal office, Officer Stermer was contacted by Doctor Clifford who asked if Officer Stermer wanted to use the services of the Employee Assistance Program, to which the employee replied "no". (Tr. 49)

Officer Stermer, Teresa Wilson and Doctor Clifford then moved across the hall to a conference room in human resources where they waited for Lois Swiderski to be available to conduct the out-process of Officer Stermer. (Tr. 49) When Ms. Swiderski became available shortly thereafter, she and Officer Stermer met in her office to complete the administrative actions needed to complete his out-process. (Tr. 51-53)

POSITIONS OF THE PARTIES

General Counsel

General Counsel (GC) asserts that the Respondent violated § 7116(a)(1) and (5) of the Statute when it bypassed the Union and dealt directly with an employee who was represented by the Union at a termination meeting on August 18, 2005, and that it committed an independent violation of § 7116(a)(1) in so doing because the conduct demeaned the Union and inherently interfered with an employee's right to rely upon the Union for representation.

The General Counsel argues that the administrative out- process conducted by Lois Swiderski after Warden Sniezek informed the employee of his decision on the proposed termination was in fact, a continuation of the termination meeting started by the Warden. The GC contends that as part of an ongoing termination meeting, the Union was entitled to represent Officer Stermer during that portion conducted by Lois Swiderski in her office to complete the out-process of the employee. Thus, requiring Steward Hayter to return to duty after the Warden had informed the employee of his decision on the proposed removal was an unfair labor practice.

Respondent

The Respondent asserts that once a final decision on the proposed removal was announced and the meeting with Warden Sniezek informing the employee and his representative of that decision adjourned, the Union's right to represent the employee in the adverse action did not extend to the administrative functions performed by Ms. Swiderski to effectuate the removal that resulted from the adverse action upon which the employee was represented by the Union.

ANALYSIS

Contrary to the book of Ecclesiastes, this case demonstrates that there is something new under the sun in the world of federal labor law. The question of first impression is whether a Union's right to represent a bargaining unit employee in an adverse action includes post decision administrative actions undertaken to effectuate the final decision? After thoroughly considering the facts, the legal precedent and the parties theories and arguments, I conclude that a Union's right to represent an employee in an adverse action ceases once the final decision is provided to the employee and his Union representative. Therefore, I recommend that the Complaint be dismissed.

As Respondent counsel's brief concedes and contrary to the mistaken opinion offered by Warden Sniezek at the meeting on August 18, Authority precedent makes it clear that a failure to deal with a duly appointed Union representative when an employee is being informed of the final decision on an adverse action violates the Statute. When an employee is represented by the union, dealing directly with the employee to inform him or her of the final decision on a proposed adverse action bypasses the Union and violates not only § 7116(a)(1) and (5), but also constitutes an independent violation of § 7116(a)(1) because doing so demeans the Union and inherently interferes with the right of employees to designate and rely upon the union to represent them. *438th Air Base Group (MAC), McGuire Air Force Base, NJ.*, 28 FLRA 1112, 1120-24 (1987)(*McGuire).* As discussed below, there is legitimate reason to question the holding of that case with respect to it being a statutory right, however, it is Authority precedent.

The complaint presents neither the failure to give Steward Hayter notice of the August 18 meeting, nor Warden Sniezek's comments that the Union had no right to be there as an unfair labor practice. [2] Likewise, the complaint makes no allegation regarding any interaction the employee had with other individuals after he and his Union representative left the Warden's personal office and before he entered Ms. Swiderski's office by himself as a result of his Union representative being ordered to return to duty. [3] Rather, the complaint alleges that the Respondent violated the Statute by not allowing the Union representative to attend the meeting between Officer Stermer and Lois Swiderski. (GC 1(c))

. . .

13. On August 18, 2005, Respondent, by Swerdski (sic), met with Sterner (sic) and discussed matters pertaining to Respondent's decision to remove Sterner(sic).

14. Respondent did not allow the Union to attend the meeting described in paragraph 13.

15. By the acts and conduct described in paragraphs 13 and 14, the Respondent has bypassed the Union and therefore committed an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1) and (5).

16. By the acts and conduct described in paragraphs 13 and 14, the Respondent has interfered with, restrained and coerced employees in the exercise of rights assured by the Statute and therefore committed an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1).

The Respondent, General Counsel and the Charging Party all agree that Steward Hayter was the employee's appointed Union representative and that he attended the meeting with Warden Sniezek where he and the employee were informed of the Warden's final decision on the pending adverse action. They also agree that Hayter was precluded from participating in the subsequent meeting Officer Stermer had with Ms. Swiderski to out-process in response to the Warden's decision to remove him from Federal service effective that date. Thus, there is no factual dispute and the question of whether an unfair labor practice was committed hinges upon application of the law.

In concluding that the Union's statutory right to represent an employee in an adverse action ends once the employee and his or her union representative are informed of the final decision, I give significant consideration to the questionable nature of said statutory right and, absent clear precedent from the Authority, decline to further expand it to include administrative actions resulting from a final decision on an adverse action. Although the *McGuire* case stands for the proposition that a union has a statutory right to represent an individual employee in an adverse action, the statutory provision relied upon was § 7114(a)(1). *McGuire,* 28 FLRA at 1120-22.

§ 7114(a) of the Statute provides:

> A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

Close reading of this particular provision demonstrates that it relates to acting for and negotiating collective bargaining agreements on behalf of employees in the collective sense. In fact, it is generally recognized

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2. That Steward Hayter appeared because Respondent's agent told the employee to notify him and actually attended the meeting where the employee was informed of the final decision on the adverse action are significant facts that may explain the absence of such charges in the complaint.

3. The record indicates that the employee had conversations with Teresa Wilson and Doctor Clifford.

that the right of exclusive representation is principally directed toward representation of individual employees through formal discussions and representation of groups of employees through formal discussions and collective bargaining. [4/]

How the statutory right to act and engage in collective bargaining for employees provided by § 7114(a)(1) came to include the right to represent an individual employee facing adverse action is, as Paul Harvey says, the rest of the story, and ultimately explains why I decline to extend the right to administrative actions conducted post adverse action decision.

The law school axiom that bad facts lead to bad law is demonstrated by the case that was the genesis of the statutory right proclaimed in *McGuire.* In *Department of Treasury, Internal Revenue Service, Memphis Service Center,* 17 FLRA 107 (1985), the Authority affirmed the decision and adopted with modification, the ALJ's recommended order. *(IRS)* The *IRS* case involved a situation wherein the agency was accused of bypassing the union by meeting with James Brady, the husband of a grievant who was represented by the union. It is important to note that this case actually involved a pending grievance and that the husband's involvement was at his own initiative with no knowledge that his wife had filed a grievance. In fact, his wife discovered his involvement only as he left home to attend the meeting and there is no evidence in the record that he attended the meeting as a duly designated agent or representative.

Had the agency met with the employee regarding her grievance without her union representative present, it would have clearly violated § 7114(a)(2)(A) [5]. But in this case, the agency met with a husband who knew nothing about the grievance and the grievance was not discussed at the meeting. However, the agency representative and the husband did talk about changing the wife's duty position as a means of solving the performance problems he knew about. Furthermore, a position change had been proposed to the union as a way to settle her pending grievance.

Faced with a situation involving a meeting where the grievance was not discussed, the participants did not include the employee or her union representative, and the spouse had no apparent or actual authority to act as this or any other employee's agent, the Authority affirmed the judge's conclusion that an unfair labor practice was committed because ". . . in meeting with the grievant's husband, management did by-pass the Union herein." In his decision, the judge concluded that, ". . . in dealing with James Brady re the personnel matter of Verna Brady and offering the employee a position through her husband to resolve her pending grievance, Respondent violated Section 7116(a)(1) and (5) of the Statute." *IRS,* 17 FLRA at 115-16.

The judge then recommended an Order that in essence treated the conduct as a violation of § 7114(a)(2)(A) despite the acknowledgement that such a violation was not alleged. *See fn.* 6 *supra.*

Despite the fact that the offer to change her position was not tendered as a grievance resolution and that Mr. Brady had no authority to resolve his wife's grievance, upon review, the authority affirmed the judge's decision. However, it modified the recommended Order by making it clear that it involved a single employee [6], and ordered the agency to cease and desist from:

> Attempting to resolve a unit employee's grievance filed pursuant to the grievance procedure set forth in its negotiated agreement with the National Treasury Employees Union, the exclusive representative of its bargaining unit employees, by dealing directly with the husband of the employee grievant rather than with the exclusive representative.

Although the record contained no evidence that Mr. Brady had any knowledge of the grievance nor any authority to act as a representative for his spouse and despite the fact that the agency only told him what it had already told the employee, i.e., that she could move to a different position and negotiated nothing further with respect to that previously conveyed offer, the ALJ and the Authority concluded that a violation of § 7114 occurred because the agency had bypassed its obligation to negotiate with union representatives concerning personnel matters or conditions of employment. *IRS*, 17 FLRA at 115-16.

Anyone self-admitted to the institution of marriage can appreciate the unique pressure and influence one spouse can exercise over another, and it is not beyond the realm of possibility that the agency representative understood that dynamic and may have attempted to use

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4. *A Guide to Federal Labor Relations Authority Law and Practice*, Broida at 156 (2003).

5. The decision noted that a violation of the formal discussion provision of § 7114(a)(2) was not alleged in the complaint. *IRS*, 17 FLRA at 114.

6. Pursuant to an exception filed by the General Counsel, the Authority specifically modified the Order to reflect that the violation was committed with respect to a single "employee", rather than the plural "employees" as set forth in the recommended order.

it to his advantage in trying to solve the performance problems exhibited by Mr. Brady's wife. However, it is not clear that § 7114(a)(1) was intended to deal with such situations. Although holding discussions with spouses or other relatives gives rise to serious policy questions related to privacy and there is no efficacy in negotiating with people who have no authority, it was a stretch to conclude that doing so constituted a bypass in violation of the Statute. Even if the agency had engaged in a give and take with Mr. Brady, one cannot bypass a union by negotiating with someone who is neither part of the bargaining unit nor acting as an agent for bargaining unit members. And yet, despite clear evidence that Mr. Brady was not the former and an absence of evidence that he was the latter, a bypass was found. And, two years later, that precedent, provided the bootstrap used in the *McGuire* decision to conclude that attending a meeting where the employee is informed of the final decision on a pending adverse action was a statutory right of the exclusive representative. [7/]

In *McGuire*, the Authority affirmed the decision and adopted without modification the Judge's findings, conclusions and recommended order concerning an unfair labor practice allegation related to the agency furnishing or delivering disciplinary decisions or other responses to the employee and not their designated representative. *McGuire*, 28 FLRA 1112.

The facts in *McGuire* involved not a grievance, but an adverse action. The agency was accused of committing an unfair labor practice by conducting a meeting with an employee wherein he was advised of the final decision on a proposed twenty-one day suspension without his union representative present. Just as in *IRS*, a violation of § 7114(a)(2)(A) was not alleged in the complaint, and ultimately the judge concluded that the agency violated § 7114(a)(1). In his discussion of the *IRS* case, the judge asserted:

> The IRS case, although dealing with a grievance, was not based primarily upon that fact. Rather, it was a situation wherein the union was representing an employee in dealing with management concerning personnel policies and working conditions. When a labor organization is performing its duties so representing employees, the IRS case, supra, stands for the proposition that the agency is not free to ignore the union, bypass the union, and deal directly with the employees. The FLRA's holding is a sound one recognizing, as set forth in Section 7114(a)(1) of the Statute, that the collective bargaining representative is entitled to act for and represent all employees in the unit. (7)

Footnote 7 goes on to state: "In the subject case, AFGE Local 1778 was representing Reynolds in a disciplinary proceeding, which is a personnel matter and a condition of employment."

In minimizing the fact that a grievance was involved in the *IRS* case and characterizing the adverse action as a personnel matter and condition of employment, the *McGuire* decision finds a statutory right for union representative participation at the delivery of an adverse action decision independent of the right to represent in grievances provided by § 7114(a)(2)(A), while vesting it an indicia of legitimacy drawn from that provision. However, an adverse action is the type of discrete action taken with respect to an individual employee to which the provision related to "any personnel policy or practices or other general condition of employment" in § 7114(a)(2)(A) does not apply. *U.S. Dept.* of *Justice, Immigration and Naturalization Service, New York Office of Asylum, Rosedale, NY.*, 55 FLRA 1032, 1035 (1999) (*DOJ-INS*).

Aside from the fact that § 7114(a)(1) says nothing about giving an exclusive representative the right to represent an employee in an adverse action decision meeting and makes no reference to acting for employees in anything other than a collective capacity, the best indicator that the right to represent an individual employee in an adverse action is contractual rather than statutory comes from § 7114(a)(5):

> The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from—
>
> (A) being represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance **or appeal action**; or
>
> (B) exercising grievance or appellate rights established by law, rule, or regulation;
>
> except in the case of grievance **or appeal procedures negotiated under this chapter**. (*Emphasis added*)

Thus, under the Statute, unless the exclusive representative negotiated the adverse action appeal procedures or grievance process, it is the employee who has a statutory right to choose a different representative.

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7. It should be noted that the judge in *McGuire* specifically found that attending the meeting wherein the final decision was delivered was a statutory rather than a contractual right, and did so even though there was a contractual provision.

Given that, it is illogical to conc1ude that § 7114(a)(1) gives an exclusive representative a blanket statutory right to participate in an adverse appeal action which § 7114(a)(5) gives the employee the right to take away if that representative did not negotiate the procedures. The more logical conclusion is that § 7114(a)(1) gives the exclusive representative the statutory right to negotiate the procedures to be used in adverse actions that provide it with the contractual right to attend a meeting where the decision on a proposed adverse action is announced. In fact, given that the adverse action may very well result in a grievance where the exclusive representative has the statutory right to represent individual employees pursuant to § 7114(a)(2)(A) and § 7121, there are legitimate reasons for a Union to seek such involvement. However, it is not clear from the language of the Statute that representation at an adverse action decision announcement is a right granted by § 7114(a)(1) despite the *McGuire* precedent. As a result, I decline to find that such a right extends even further to include the right to participate in administrative actions taken to effectuate the final decision in an adverse action.

In this case unlike *McGuire,* the Union representative was present at the meeting where the person authorized to make the final decision on the adverse action delivered it to the employee. After being told that the charges in the proposed removal were being sustained and that he was being removed from Federal service effective that date, the meeting in the Warden's office was adjourned. With respect to the adverse action, there was nothing left to discuss or negotiate and no further action to be taken on behalf of the employee. All that remained were the administrative matters that had to be completed in order to out-process the employee. These were performed by the Respondent's office of human relations and while resulting from the adverse action, they had no influence or impact upon the final decision already made and tendered to the employee and his Union representative by the appropriate authority.

I find that the administrative matters reflected in the checklist used by the Respondent (R-2) were ministerial in nature and that the meeting to complete the out-process of the employee was not a formal discussion covered by the provisions of § 7114(a)(2)(A), as it involved discrete actions taken with respect to an individual employee to which the provision related to any personnel policy or practices or other general condition of employment does not apply. *DOJ-INS*, 55 FLRA at 1035. Likewise, the employee's Union representative had no right to participate in the completion of such administrative matters pursuant to § 7114(a)(1). While these administrative matters flowed from the adverse action, they were not part of the disciplinary process for which the employee was represented.

Therefore, I find that the Respondent did not commit an unfair labor practice by precluding the Union representative from participating in the administrative out-process of the employee. Accordingly, I recommend that the Authority adopt the following Order.

ORDER

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

Issued, Washington, DC, August 29, 2006

CHARLES R. CENTER

Chief Administrative Law Judge