Office of Administrative Law Judges

DEPARTMENT OF THE ARMY
HUMAN RESOURCE COMMAND-ST. LOUIS
ST. LOUIS, MISSOURI
and
DEPARTMENT OF THE ARMY
INFORMATION SUPPORT
ACTIVITY-ST. LOUIS
ST. LOUIS, MISSOURI
Respondents

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
AFL-CIO
LOCAL 900
Charging Party

Case Nos. DE-CA-04-0219
DE-CA-04-0220

Michael Farley, Esquire
For the General Counsel

Loren H. Duffy, Esquire
For the Respondent

Kevin M. Grile, Esquire
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 (hereinafter FLRA/Authority), 5 C.F.R. §2411 *et seq.*

On February 26, 2004, the American Federation of Government Employees, AFL-CIO, Local 900 (Charging Party or Local 900) filed unfair labor practice charges in Case No. DE-CA-04-0219 and Case No. DE-CA-04-0220 against the Department of the Army, Human Resource Command-St. Louis, St. Louis, Missouri (Respondent HRC). (G.C. Exs. 1(a) and 1(b)) On March 29, 2004, the Charging Party amended the unfair labor practice charges to include the Department of the Army, Information Support Activity-St. Louis, St. Louis, Missouri as Respondent ISA. (G.C. Exs. 1(c) and (d)) On March 30, 2004, the Regional Director of the Denver Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing in Case No. DE-CA-04-0219, in which it was alleged that, on or about February 24, 2004, Respondent ISA issued a letter of proposed removal to bargaining unit employee Rayburn Wilkins (Wilkins), which was motivated by Wilkins' protected activity. The complaint further alleged that Respondent ISA and Respondent HRC directed that Wilkins be accompanied by an escort assigned by the Respondents at all times while he was in the Respondents' facility and limited his movements within the Respondents' facility. (G.C. Ex. 1(e)) On March 30, 2004, the Regional Director of the Denver Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing in Case No. DE-CA-04-0220, in which it was alleged that, on or about February 24, 2004, Respondent ISA issued a letter of proposed removal to bargaining unit employee James Shepherd (Shepherd), which was motivated by Shepherd's protected activity. The complaint further alleged that Respondent ISA and Respondent HRC directed that Shepherd be accompanied by an escort assigned by the Respondents at all times while he was in the Respondents' facility and limited his movements within the Respondents' facility. (G.C. Ex. 1(f)) Both complaints alleged that the Respondents violated section 7116(a)(1), (2) and (4) of the Statute by the conduct alleged therein.

On April 20, 2004, the Respondents filed their answers to both complaints, in which they admitted certain allegations while denying the substantive allegations of the complaints. (G.C. Ex. 1(g) and 1(h))

On May 18, 2004, Counsel for the General Counsel filed a Motion to Consolidate Cases for Hearing. (G.C. Ex. 1(i)) The motion was granted by the Chief Administrative Law Judge on May 19, 2004. (G.C. Ex. 1(j))

On September 23, 2004, the General Counsel filed a Motion to Amend Complaints. Specifically, the General Counsel requested that in Case No. DE-CA-04-0219, paragraphs 16-20 be deleted and replaced with the following paragraphs 16-19:

> 16. On or about February 24, 2004, and at all times since, Respondent-ISA, through Lt. Col. Payne, and Respondent-HRC, through Col. Cook, required that during the advance notice period of Rayburn Wilkins' proposed removal action that his tour of duty be fixed at 7:30 a.m. to 4:00 p.m., that he be barred from his official duty location and report daily to the Union office where he was to remain confined (except for visits to the bath-

room), and that he be accompanied by a military escort at all times while at the Respondents' facility.

17. The actions described in paragraph 16 were taken by the Respondents against Wilkins based on consideration of his pursuit of activities protected by the Federal Service Labor-Management Relations Statute, as described in paragraph 15.

18. By the conduct described in paragraphs 16 and 17, Respondents committed an independent unfair labor practice in violation of 5 U.S.C. §7116(a)(1).

19. By the conduct described in paragraphs 16 and 17, Respondents committed an unfair labor practice in violation of 5 U.S.C. §7116(a)(1), (2), and (4).

(G.C. Ex. 1(k))

The General Counsel also requested that in Case No. DE-CA-04-0220, paragraphs 16-20 be deleted and replaced with the following paragraphs 16-19:

16. On or about February 24, 2004, and at all times since, Respondent-ISA, through Lt. Col. Payne, and Respondent-HRC, through Col. Cook, required that during the advance notice period of James Shepherd's proposed removal action that his tour of duty be fixed at 7:30 a.m. to 4:00 p.m., that he be barred from his official duty location and report daily to the Union office where he was to remain confined (except for visits to the bathroom), and that he be accompanied by a military escort at all times while at the Respondents' facility.

17. The actions described in paragraph 16 were taken by the Respondents against Shepherd based on consideration of his pursuit of activities protected by the Federal Service Labor-Management Relations Statute, as described in paragraph 15.

18. By the conduct described in paragraphs 16 and 17, Respondents committed an independent unfair labor practice in violation of 5 U.S.C. §7116(a)(1).

19. By the conduct described in paragraphs 16 and 17, Respondents committed an unfair labor practice in violation of 5 U.S.C. §7116(a)(1), (2), and (4).

(G.C. Ex. 1(k))

On September 29, 2004, the Respondents filed a Response to Motion to Amend Complaints and Answer to Amended Complaints. (G.C. Ex. 1(l) Both the General Counsel's Motion and the Respondents' Response and Answer were granted by the undersigned at the beginning of the hearing in these matters.

A hearing was held in St. Louis, Missouri, on October 22, 2004, and continued on November 4, 2004, at which times 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, the Charging Party and the Respondent 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

The Department of the Army, Human Resource Command-St. Louis, St. Louis, Missouri (Respondent HRC) and the Department of the Army, Information Support Activity-St. Louis, St. Louis, Missouri (Respondent ISA) are agencies under 5 U.S.C. §7103(a)(3). Respondent ISA is a tenant organization of Respondent HRC and, as such, receives administrative support from Respondent HRC. (Tr. 76) Both Respondent HRC and Respondent ISA are physically located at the Federal Records Center Installation in St. Louis, Missouri. (Tr. 245) At all times relevant, Col. Debra Cook has been the commander of Respondent HRC and Lt. Col. Edwin Payne has been the chief of Respondent ISA. (G.C. Exs. 1(e)-1(h); Tr. 242, 412) Pat York has been the Human Resource Management Specialist at the Civilian Personnel Advisory Center. (Tr. 32)

The American Federation of Government Employees (AFGE), Local 900 (Charging Party or 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 at Respondents' facility and represents employees from both Respondent HRC and Respondent ISA. (G.C. Ex. 1(e), 1(f), paragraphs 4-5) A collective bargaining agreement (CBA) between the parties has an effective date of September 1993 and is currently in effect. (G.C. Ex. 2; Tr. 78-79)

At all relevant times, Rayburn Wilkins has been a Computer Operator at the Information Operations Branch in Respondents facility and an employee under 5 U.S.C. §7103(a)(2). Wilkins has been a member and

the Chief Steward of the Union. (G.C. Ex. 1(e), paragraphs 14-15, 1(g) paragraph 14; Tr. 82, 84) Wilkins has engaged in protected activity under the Statute, including filing and processing grievances on behalf of bargaining unit employees, and filing unfair labor practice charges. (G.C. Ex. 1(e), paragraph 15, 1(g), paragraph 15; Tr. 82, 85)

At all relevant times, James Shepherd has been a Lead Mail Clerk in the Mail Operations Section at Respondent ISA's facility and an employee under 5 U.S.C. §7103(a)(2). Shepherd has been a member and the President of the Union. (G.C. Ex. 1(f), paragraphs 14-15, 1(h), paragraph 14; Tr. 169-170) Shepherd has engaged in protected activity under the Statute, including filing and processing grievances on behalf of bargaining unit employees and filing unfair labor practice charges. (G.C. Ex. 1(f), paragraph 15, 1(h), paragraph 15; Tr. 172-187)

On February 24, 2004,[1] Lt. Col. Payne issued to Wilkins a Notice of Proposed Removal, which charged that he fraudu-lently received pay for work on eleven occasions, failed to request leave properly on eleven occasions, was AWOL on eleven occasions, falsified his union representative time sheet on eight occasions, and lied during the investigation. (G.C. Ex. 4) On February 24, Lt. Col. Payne issued to Shepherd a Notice of Proposed Removal, which charged that he fraudulently obtained entitlements on three occasions, failed to request leave properly on thirty-four occasions, was AWOL on thirty-seven occasions, falsified his union representative time sheet on twenty-five occasions, and lied during an investigation. (G.C. Ex. 7) The Notices of Proposed Removal for both Wilkins and Shepherd contained the following paragraphs:

> During the advance notice period for this proposed action, you will be in a paid duty status. However, since Management must take precautionary measures to protect government property and provide for the safety of personnel, and you have displayed volatile behavior in the past, during the advance notice period of this proposed action, your access to organizations and personnel within this facility must be restricted. Your "Access Identification Badge" will be confiscated and you will only be permitted to travel to and from the Union Office (Building 100, Room 4108a) where you will be able to conduct activities associated with the position of AFGE Local 900 Chief Steward [or President] within the confines of that location. Your access to the facility will be in an "Escort Required" status with escorts assigned to you by the Command. To facilitate the use of escorts during the advance notice period, your tour of duty is changed to a fixed tour Monday through Friday with duty hours set at 7:30 a.m. through 4:00 p.m. and a 30-minute non-duty lunch from 11:30 a.m. to 12.00 p.m. You are barred from the premises outside the above-stated hours and on holidays and weekends. In addition to allowing you access to the Union Office, with proper escort as described above, you will be permitted to utilize the bathroom facilities located at the west end of the 4th floor, Building 100. If you are found to be in noncompliance with the escort requirement, the Federal Protective Service will be contacted, and may result in issuance of U.S. District Court Violation Notice to you.

(G.C. Exs. 4 and 7)

After receiving the Notices of Proposed Removal, both Wilkins and Shepherd were escorted out of the building and had their line badges confiscated. (Tr. 107, 248) After that day, both Wilkins and Shepherd required a military escort once inside the facility. (Tr. 110-112) These escorts were taken from a duty roster administered by Headquarters and Headquarters Company (HHC). (Tr. 539) Wilkins and Shepherd were required to work 7:30 a.m. to 4:00 p.m., Monday through Friday, during the notice period. (Tr. 192) They were allowed access to the facility only on those hours and days, and not on weekends or holidays. Wilkins and Shepherd were ordered to report to the Union office each day during the proposed notice period, and both employees complied with this order. (Tr. 115) Further each employee was assigned a military escort who would accompany them while they were at the facility. Each morning, at the start of the work day, Wilkins and Shepherd would arrive at the guard's desk at the main entrance to the facility and would wait for a military escort to meet them. The military escorts, who were dressed in battle fatigues, would meet them at the guard's desk and would escort them to the Union office. Initially, and for about two weeks, the two military escorts stationed themselves inside the Union office. After two weeks, the military escorts stationed themselves immediately outside the only door to the Union office. The military escorts would accompany Wilkins and Shepherd at all times, even to the bathroom. (Tr. 109-110, 112, 115, 192-195) The military escorts were observed by bargaining unit employees throughout the notice period. Employees who wished to visit the

1. All dates are in 2004, unless otherwise specified.

Union office were obliged to pass by the military escorts stationed at the Union office door. (Tr. 226-227)

According to Lt. Col. Payne's order, Shepherd was only granted access to the Union office and nearby bathroom facilities. He did not deviate from these conditions, except for being escorted to one EEO hearing during the notice period. (Tr. 219-221) On a few occasions, Wilkins, as Union representative, was directed by management representatives to report to other locations within the facility, where he was accompanied by the military escort. (Tr. 141-142)

The Union filed unfair labor practice charges on behalf of Wilkins and Shepherd on February 26, 2004. (G.C. Exs. 1(a) and 1(b))) Wilkins and Shepherd each provided a written response to his proposed removal on April 12. (R. Exs. 1, 2, 8, and 9) Albert Blanchard, the deciding official, informed Wilkins and Shepherd on June 4 that he was removing each of them from federal service. (G.C. Exs. 5 and 8) On June 17, Wilkins and Shepherd each filed an expedited grievance (R. Exs. 8 and 9) under Article XXVIII of the parties' CBA. (G.C. Ex. 2, pp. 77-78)

On August 2, Col. Marshall Fite denied Shepherd's grievance and informed him that he would be removed from federal service. (G.C. Ex. 9) On August 5, the Union elevated the "adverse action of Union Officers" to arbitration. (R. Ex. 10) On August 31, Col. Fite denied Wilkins' grievance and informed him that he would be removed from federal service. (G.C. Ex. 6) On September 13, the Union elevated the removal of Wilkins to arbitration. (R. Ex. 11) On September 24, the Union and the Respondents stipulated that both removal actions would be heard before the same arbitrator. (R. Ex. 12)[2]

Shepherd was removed from federal service, effective September 7. Wilkins was removed from federal service, effective September 9. On the effective dates of removal, Respondents suspended the use of military escorts, although both Wilkins and Shepherd still required civilian escorts when inside Respondents' facility. (Tr. 202, 256)

Jurisdiction Issue

Whether the FLRA has jurisdiction over the issues raised in the consolidated complaints considering the filing of the two contractual grievances on June 17, 2004.

Positions of the Parties

Respondents

The Respondents assert that the FLRA does not have jurisdiction over the security measures as they were applied to Wilkins and Shepherd. The Respondents argue that if an employee chooses to grieve a disciplinary action, the FLRA will no longer have jurisdiction over actions that are inseparable from the disciplinary action. *Department of Commerce, Bureau of Census v. Federal Labor Relations Authority*, 976 F.2d 882, 888-89 (1992) (*Census*) The Respondents argue that the Union is using the same set of facts and the same legal theory to contest both the Notices of Proposed Removal and the security measures taken as a result of the proposed removals. The Union also identified the security measures as evidence of union animus during the processing of the grievances. The General Counsel concedes that the FLRA no longer has jurisdiction over the removal action or the Notices of Proposed Removal, and the Respondents assert the same is true for the security measures taken during the notice period because they are inseparable from the removal action.

The Respondents assert that the decision in *Robert W. Wildberger, Jr. v. Federal Labor Relations Authority*, 132 F.3d 784 (D.C. Cir 1998) (*Wildberger*) and *United States Small Business Administration, Washington, D.C.*, 51 FLRA 413 (*SBA*) (1995) support removing the security issue as it relates to Wilkins and Shepherd.

2. The arbitration on the removals of Wilkins and Shepherd were heard before Arbitrator George L. Fitzsimmons on December 14-17, 2004. The Arbitrator issued two decisions on March 14, 2005. The Arbitrator sustained the grievances in part and overruled in part. The Arbitrator found that the agency proved that the first grievant failed to request leave properly and was AWOL on eleven (11) occasions. The grievance was sustained in that the agency failed to prove by a preponderance of the evidence that the grievant was guilty of falsifying union time sheets, fraudulently received pay for work and lied during an investigation. The removal of the grievant was set aside and ordered expunged from the grievant's personnel file. Reinstatement was subject to a suspension without pay of thirty (30) work days. With regard to the second grievant, the Arbitrator ruled that the agency proved charges that the grievant was guilty of lying during an investigation. The grievance was sustained in that the agency failed to prove by a preponderance of the evidence that the grievant was guilty of falsifying union time sheets, fraudulently received pay for work, and failed to request leave properly and was absent without leave. The removal of the grievant was set aside and ordered expunged from the grievant's personnel file. Reinstatement was subject to a suspension of fifteen (15) work days. The Arbitrator also ordered the agency to immediately terminate the military escort and confinement policy. In the body of the decision, the Arbitrator found that the Union failed to prove by a preponderance of the evidence its affirmative defenses of harmful error, racial discrimination, and reprisal for lawful Union activities. *2005 WL 1121947 and 2005 WL 1121948.*

These cases stand for the proposition that the FLRA will decline jurisdiction when the factual predicate and legal theory in the ULP charge is the same as the matter raised in the grievance. In the case at bar, the factual predicate is the same regarding both the removal issue and the escort issue, because they both focus on the legitimacy of the removal action. The only difference in legal theory that the General Counsel notes is that the ULP charges focus on the Union's institutional interests while the grievances focus on the individual interests of Wilkins and Shepherd.

The Respondents assert that the focus in this analysis is not on whether the security measures were first charged in a ULP or grieved, but rather, on whether they are inseparable from the removal actions. In this case, the security measures taken regarding the removed employees began the day after service of the Notices of Proposed Removal and continued until removal. In charging these actions as part of the same ULP, the Union clearly believes that the whole series of events is part of an illegitimate removal action and an attempt to punish the Union. They cannot now argue that these issues are separable. There-fore, sole jurisdiction for the security measures lies with the Arbitrator.

The Respondents further cite to U.S. *Department of the Navy, Navy Resale Activity, Guam and American Federation of Government Employees, Local 1689*, 40 FLRA 30 (1991) (*Guam*) in which the Authority determined that it did not have jurisdiction to hear an appeal over security measures which were related to a removal.

The Respondents argue that the approach urged by the General Counsel and the Union in this matter would lead to the result that the FLRA has jurisdiction over the security measures but not over the appeal of the Arbitrator's decision on the same issue. This could lead to disparate results on the same issue. Further, the Respondents must defend these same security measures before both the FLRA and an arbitrator. The clear purpose of the Civil Service Reform Act is to prevent litigation of the same issue in multiple forums. Therefore, the Respondents urge that the FLRA does not have jurisdiction over the security measures as they relate to Wilkins and Shepherd.

General Counsel

The General Counsel asserts that the security measures at issue in this matter were never raised as an issue in the grievances on behalf of Wilkins and Shepherd, that the security measures can be separated from the removal actions, and that the unfair labor practices were filed before the grievances which represents an election to proceed in the unfair labor practice forum. The General Counsel asserts that the written grievances dated June 17 (filed after the ULPs in this matter) did not raise as an issue, or even mention, the restrictions that management had imposed on Wilkins and Shepherd during the notice period. Further the restrictions were not mentioned or raised as an issue in the written or verbal responses presented by the Union to the notices of proposed removal.

During the two grievance meetings held in early July, Kevin Grile, the Union representative for both grievances, verbally referred to the restrictions that had been placed on Wilkins and Shepherd during the notice period, and he described them as one of several circumstances that illustrated management's union animus in this matter. The General Counsel therefore argues that the issues raised through the grievances were limited to the removals of Wilkins and Shepherd and the security measures were separate issues from the removals. Further, even if the grievances were found to raise any issues concerning the security measures, the unfair labor practice charges were filed first and therefore the grievances, not the ULPs, would fail.

Charging Party

The Charging Party asserts that the FLRA has jurisdiction over the subject matter of the complaint, as amended. In that regard, the Charging Party points out that the first sentence of section 7116(d) by definition only applies to matters that can be raised "in an appeals procedure;" that is, the Merit Systems Protection Board (MSPB). The arbitrations in these matters are merely a substitute for the MSPB proceeding. By definition, the MSPB would have jurisdiction to pass upon the propriety of a removal taken for disciplinary reasons. *See* 5 U.S.C. 7512(l) and 5 U.S.C. 7513(a) and (d). By contrast, the MSPB does not, as a matter of law, have jurisdiction to pass upon the legal propriety of the military control and confinement policy at issue in this case. *See* 5 U.S.C. 7701(a)(1) and 5 C.F.R. 1201.1-1201.3.

Further, the legal propriety of the military control and confinement policy is simply not at issue in the scheduled arbitration on the Wilkins and Shepherd removals. The grievances only challenge the propriety of the removals, and the military control and confinement policy is only referenced as one of many examples of union animus which demonstrates that the removal decision constitutes a prohibited personnel practice and compels reversal of the removal decisions.

The Charging Party also notes that the ULPs in this matter were filed in February and amended in March, and the grievances challenging the removals were not filed until June 17. Thus, under the second sentence of section 7116(d), the FLRA has jurisdiction in this matter. Further the propriety of the military control and confinement policy is "separable" from the removal cases within the meaning of *SBA*.

And finally the Charging Party argues that the FLRA always has jurisdiction over the "institutional" interests of the Union even if the propriety of the subject matter is also being litigated in the MSPB/arbitration forum as to the appellants'/grievants' individual interests. *SBA*; *Cornelius v. Nutt*, 472 U.S. 648, 665, n20 (1985) The interests of other bargaining unit employees and of the Union as a whole are also directly at issue in the present proceeding. This is especially evident in regard to the independent section 7116(a)(1) violation because any bargaining unit employee observing the Respondents' treatment of Wilkins and Shepherd will feel chilled in the exercise of any rights guaranteed by the Statute.

Discussion and Conclusions

In *SBA,* 51 FLRA 413, the Authority reexamined previous Authority precedent interpreting the statutory bar set forth in the first sentence of section 7116(d): "Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section." The Authority stated, in part, as follows:

> In light of the *Commerce* decision,[3] we take this opportunity to clarify how the Authority will apply its *Army Finance*[4] test in cases analogous to *Bureau of Census I.*[5] Where an employee has attempted to raise related issues both in an unfair labor practice proceeding and under either an appeals procedure or a negotiated grievance procedure, we will apply the *Army Finance* test in order to determine whether to invoke the juris-dictional bars set forth in section 7116(d). We will examine the subject matter of the ULP charge to determine if the factual predicate and legal theory are the same as the matter raised in the appeals procedure or grievance.
>
> In this examination, however, we will no longer follow *Bureau of Census I* insofar as that decision held that the legal theories upon which an unfair labor practice allegation is based are different from the legal theories underlying a removal proceeding before the MSPB merely because different statutory review provisions are applicable in each instance. The *Commerce* decision held that the legislative history underlying the enactment of the CSRA discussed above--to avoid potentially inconsistent results between Authority and MSPB decisions--compels this determination. As the Fourth Circuit noted, an employee may raise an affirmative defense before the MSPB that the agency committed a "prohibited personnel practice" under 5 U.S.C. § 2302. *Commerce,* 976 F.2d at 890. We agree with the Fourth Circuit and conclude that in some circumstances the same legal theory that can be raised as a "prohibited personnel practice" under 5 U.S.C. § 2302(b)(9) can also be raised as an "unfair labor practice" under 5 U.S.C. § 7116(a). Accordingly, when the factual predicate of the ULP and the statutory appeal is the same, and the legal theory supporting the statutory appeal has been or could properly be raised to the MSPB, we will decline to assert jurisdiction over the unfair labor practice pursuant to section 7116(d).
>
> Consistent with *Commerce*, we will apply this rule only in cases when the matter raised in the ULP allegation ripens into or is inseparable from the matter appealable to the MSPB. *Commerce,* 976 F.2d at 889-90. Additionally, unlike the Authority's statutory jurisdiction to review unfair labor practice allegations of, and grant relief to, individuals and labor organizations, 5 U.S.C. §§ 7103(a)(1) & 7118(a)(1), (7), the MSPB's statutory jurisdiction is limited, under 5 U.S.C. § 7701(a) & (b)(2)(A), to reviewing appeals by, and granting relief to, employees or applicants. *Reid v. Dept. of Commerce,* 793 F.2d 277, 282 (Fed. Cir. 1986) ("[I]t would be contrary to the plain and unequivocal language of [5 U.S.C. § 7701(a)] to say that the term 'employee' . . . encompasses a labor organization[.]"). Accordingly, we will decline jurisdiction in cases where the ULP focuses on the rights of an individual employee; conversely, we will assert jurisdiction

3. *Census*, 976 F.2d 882.

4. *U.S. Department of the Army, Army Finance and Accounting Center, Indianapolis, Indiana and American Federation of Government Employees, Local 1411, 38 FLRA 1345 (1991) petition for review denied sub nom. American Federation of Government Employees, Local 1411, and Helen Owens v. Federal Labor Relations Authority,* 960 F.2d 176 (D.C. Cir. 1992).

5. *Bureau of the Census*, 41 FLRA 436 (1991) rev'd, 976 F.2d at 882.

> when the ULP focuses on the union's institutional interest in protecting the rights of other employees. *See Commerce, 976 F.2d at 889; cf. Army Finance,* 38 FLRA at 1353 (construing and applying second sentence of section 7116(d), where individual employee is actually the aggrieved party in the ULP action, employee cannot maintain separate action in the form of a grievance). (footnotes added), 51 FLRA at 421-22.

In reviewing the Authority's decision, the court stated in *Wildberger v. FLRA*, 132 F.3d 784 (D.C. Cir. 1998), in part, as follows:

> We can find no quibble with the Authority's rule, insofar as it is limited to circumstances where (1) the complaining employee has raised all of the issues that underscore his unfair labor practice charges in his appeal before the MSPB; (2) these issues are within the compass of the MSPB's jurisdiction; and (3) the MSPB has not declined jurisdiction over any of the claims raised by the employee. Consistent with the test articulated by the Authority in *Army Finance* and affirmed by this court in *Local 1411* [*Local 1411 v. FLRA*, 960 F.2d 176 (D.C. Cir. 1992)], the question of whether a complaining employee raises the "same issues" in both proceedings does not focus on whether the action was proposed or definite, but rather on whether the issues raised in the appeal arose from the same set of factual circumstances as the unfair labor practice complaint and the theory advanced in support of the unfair labor practice charge and the appeal are substantially similar. *Cf. Army Finance*, 38 F.L.R.A. at 1350-51, *affirmed sub nom. Local 1411*, 960 F.2d at 178.
>
> Our holding is limited to the facts of this case. We decline to endorse the Authority's rule more broadly, because, frankly, we are unsure just how the rule might be applied in situations not raised in this case. *Id.* at 790-91.
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> . . .
>
> Where the employee did not raise the issues underlying his unfair labor practice charges before the MSPB, the question of whether his unfair labor practice charges could be or should be subsumed into his MSPB appeal, or whether instead they are sufficiently separate to preserve the FLRA's jurisdiction over them notwithstanding the MSPB appeal, are questions that must be addressed by the FLRA in future cases. *Id.* at 795.

The court found that the Authority properly held that it lacked jurisdiction over two of the unfair labor practice charges because Wildberger had raised them, and the MSPB had considered them, in his MSPB complaint. However, the court found that the Authority did not lack jurisdiction over Wildberger's disparate treatment complaint because the MSPB did not consider and indeed declined jurisdiction over one of the legal theories raised in the unfair labor practice complaint. This matter was remanded to the Authority for consideration on the merits. See *U.S. Small Business Administration, Washington, D.C.*, 54 FLRA 837 (1998) (decision and order on remand).

In this matter, there is no doubt that once the Respondents issued the removal decisions for Wilkins and Shepherd in August that the Authority no longer had jurisdiction over the proposed removals and the General Counsel amended the complaints to reflect that position. The question remained, however, whether the security measures that were placed on Wilkins and Shepherd at the time of their proposed removals in February 2004 were separate issues that could be removed from the terminations or were so bound to the terminations as to be part of the terminations. If the security measures are found to be inseparable from the terminations, then the Authority would not have jurisdiction over those matters in accordance with the above cases.

The June 17 expedited grievances, filed on behalf of James Shepherd (R. Ex. 8) and Rayburn Wilkins, (R. Ex. 9) set forth the various defenses to the decision to remove them from federal service. Neither letter mentions the security measures imposed in February 2004. During the oral presentations on the expedited grievances, the Union representative, Kevin Grile, did refer to these security measures, in support of the Union's animus theory. It is clear that the security measures imposed on Wilkins and Shepherd were discussed during the processing of the grievances, although the grievances specifically challenged only the propriety of the removal actions. While the Arbitrator did order the Respondents to terminate the security measures, this was in the context of the remedy in the removal actions and there is no evidence that the security measures themselves were a cause of action before the Arbitrator. *2005 WL 1121947 and 2005 WL 1121948.*

However, similarly to the *Guam* case, the security measures in this matter are clearly bound up with the termination actions. While the grievances did not specifically raise these issues, the security measures were part of the factual matters raised by the parties and argued before the Arbitrator. The security measures were the direct result of the termination actions and any

discussion of those measures returns to the basis of the termination actions themselves. The security measures could have properly been raised with the termination grievances, and the attempts by the Union to separate these actions does not successfully evade the jurisdictional issues under section 7116(d).

I find that the issues raised in the grievances arose from the same set of factual circumstances as the ULP complaints, and that the legal theories advanced in support of the grievances and the portion of the ULP complaints involving the section 7116(a)(2) and (4) allegations are substantially similar. Therefore, with regard to those allegations, the consolidated complaint is barred by section 7116(d).[6] However, with regard to the independent section 7116(a)(1) allegations, the legal theories advanced in support of the complaints and the grievances are not substantially similar. The Union's institutional interests present in the section 7116(a)(1) allegations are not present in the grievances. Therefore, the Authority continues to have jurisdiction over those allegations of the consolidated complaint.

7116(a)(1) Issue

Whether the Respondents committed an independent violation of section 7116(a)(1) of the Statute by imposing the security measures on Wilkins and Shepherd during the notice period of their proposed removals.

Positions of the Parties

General Counsel

The General Counsel asserts that bargaining unit employees were well-aware of the Respondents' requirement that Wilkins and Shepherd be accompanied by military escorts at the work-site. One employee testified that she observed the military escorts and the presence of the guards caused her to hesitate before going to the Union office to discuss a work-related problem. (Tr. 227) Management actions which cause employees to "think twice" before engaging in Union activity have been found to be violations of 5 U.S.C. 7116(a)(1). *See Department of the Treasury, Internal Revenue Service, Louisville District,* 11 FLRA 290, 298 (1983).

Further, at the outset of the notice period, for approximately two weeks, the guards stationed themselves inside the Union office. The General Counsel asserts that, even if the general assignment of military escorts to Wilkins and Shepherd is not found to be a violation, the fact that Respondents had military escorts stationed inside the Union office cannot be excused and demonstrates an egregious independent violation of 5 U.S.C. 7116(a)(1). The presence of military guards within the sanctuary of the Union office would definitely create a severe chilling effect that would, and did, discourage reasonable employees in the pursuit of their protected right to seek the assistance of the Union.

Charging Party

The Charging Party asserts that the net effect of the military escort for Wilkins and Shepherd is that a reasonable unit employee will be chilled in the exercise of his or her Section 7102 right to confer with an official of the exclusive representative. The military presence around the two Union officials unduly denigrates the status and importance of the Union and thereby interferes with unit employee confidence in, and/or respect for, the exclusive representative. Similar interference with the rights of bargaining unit employees occurred when either Wilkins or Shepherd were physically located within the Union office, and the military personnel were stationed immediately outside the Union office. The Charging Party asserts that unit employees were reasonably chilled from entering the Union office and discussing a workplace matter. The testimony of unit employee Janet Cook to the effect that she experienced trepidation and embarrassment whenever she saw either Shepherd or Wilkins under escort through the halls or under guard at the Union office was a reasonable response by a unit employee observing the escorts in the halls and in front of the Union office. Ms. Cook's reactions to the implementation of this policy can be deemed typical of the reactions of a countless number of unit employees observing Shepherd and Wilkins under the control of uniformed military personnel. (Tr. 112-113)

Finally, the military control policy affected the rights of bargaining unit employees by limiting ready access of unit employees to Wilkins and Shepherd. Both Wilkins and Shepherd explained that representational duties include visiting work sites and meeting on-site with unit employees and supervisors in an attempt to solve problems. From the perspective of unit employees, the ready access that they had to Wilkins and Shepherd was lost with the Respondents's decision to confine Wilkins and Shepherd to the Union office.

Respondents

The Respondents deny that the use of the miliary escorts was an independent violation of the Statute.

6. The first sentence of section 7116(d) is not effected by whether the grievance or the ULP (in this matter the ULP) was filed first.

There was never any intention to chill Union activity, but the use of the military escorts was intended to facilitate such activity. Further, there is no evidence that any unit employee actually experienced any chilling effect, noting that Ms. Cook was able to pursue her protected activity of filing a grievance with the assistance of the Union.

The Respondents assert that the General Counsel and the Charging Party have placed undue emphasis on the subjective perceptions of employees observing military escorts. The Respondents assert that this perception would have existed even if civilian employees had been used as escorts for Wilkins an Shepherd. Finding a violation in this matter would result that Union officials could never be subject to security measures, because employees may perceive that the official was only subject to those measures because he or she engaged in protected activity.

The Respondents assert that the correct application of this standard takes into account all of the circumstances of the matter, circumstances that Cook was not aware of and that Shepherd did not inform the employees of. (Tr. 232, 207) Under all of the circumstances, a reasonable employee would not conclude that Respondents were treating the Union as a dishonest organization, but that in light of their misconduct, Wilkins and Shepherd had engaged in dishonest conduct and were being treated accordingly. Therefore, there was no evidence that a reasonable employee would be intimidated or coerced by management's use of security restrictions from engaging in protected activity, and there was no independent violation of the Statute.

More importantly, the use of soldiers would not have a chilling effect on a reasonable employee. The civilian employees at HRC work with soldiers on a daily basis and it was not remarkable that the escorts were soldiers. (Tr. 211-212, 242-243) The soldiers did not challenge visitors, did not record visitors, and performed no law enforcement functions. (Tr. 231, 542) An unarmed soldier sitting in the hallway would not, under the circumstances, have a chilling effect on employees seeking to access the Union office. And certainly, if a reasonable employee were to be informed that the soldier was only there because of the misconduct of Wilkins and Shepherd as employees, the soldier's presence would not have a chilling effect on that employee in exercising their protected rights. Therefore, there was no chilling effect and no violation of the Statute in the use of military members as escorts.

There was no evidence that the Respondents attempted to deter any employee from exercising his or her rights under the Statute by the use of the security measures. There is no evidence that a single employee was deterred from exercising his or her rights under the Statute by the use of the security measures. A reasonable employee, with knowledge of the relevant facts, would not conclude that the security restrictions were used to retaliate against Wilkins and Shepherd for their protected activity, and would not be deterred in their own exercise of rights under the Statute.

Discussion and Conclusions

Section 7116(a)(1) of the Statute provides that it shall be an unfair labor practice for an agency to interfere with, restrain, or coerce any employee in the exercise of any right provided by the Statute. Consistent with the findings and purpose of Congress as set forth in section 7101, section 7102 of the Statute sets forth certain employee rights including the right to form, join, or assist any labor organization freely and without fear of penalty or reprisal and that each employee shall be protected in the exercise of such right.

In *U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps*, *Mariba, Kentucky*, 49 FLRA 1020 at 1034 (1994), the Authority restated the objective standard for determining interference, restraint, and coercion with the pursuit of protected rights as ". . . whether, under the circumstances, the statement or conduct would tend to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement." Although the surrounding circumstances are taken into consideration, the standard is not based on the subjective perceptions of the employee or the intent of the employer.

After receiving their proposed notices of termination, the Respondents followed their standard security practices and removed the line badges that allowed Wilkins and Shepherd access to the facility as employees. Following September 11, 2001, the Respondents had increased security, which included limiting access to the facility and requiring employees and visitors to enter through a single entrance. Without their badges, Wilkins and Shepherd did not have free access throughout the building, but were required to be escorted. Generally civilian employees were used as escorts for other civilian employees, but the Respondents in this matter, designated rotating military escorts in order to maintain consistent coverage. The evidence clearly establishes that Wilkins and Shepherd were placed on a specific day shift and reported daily to the Union office, where they spent the majority of their day. Uniformed, unarmed military guards set up positions outside the Union

office, except for the first two weeks, when they were inside the Union office. When asked to stand outside, the military guards did so.

The evidence further clearly shows that bargaining unit employees located at the Respondents' facilities were aware that the Union officers, Wilkins and Shepherd, had security guards outside the Union office and accompanying them whenever they left the Union office. The question, therefore, is whether this conduct, as directed by the Respondents during the notice period of the termination actions, would tend to coerce and intimidate bargaining unit employees.

It is undisputed that once the Union officials lost their security badges they no longer had free and unfettered access to the Respondents' premises. They were directed to remain at the Union office, with an escort any time they left that office and with the guards continuously present in case they needed to leave. Both the General Counsel and the Charging Party refer to the usual practice of civilian escorts, but neither addresses the logistical problems of civilian over military escorts. Col. Cook's testimony regarding the logistical issues of furnishing guards on a daily basis is unrefuted and compelling. Further, I see no indication that the General Counsel and the Charging Party would have been satisfied with civilian escorts.

The issue of the Respondents' escort policy is clearly a security issue reserved to management under section 7106(a). Although the presence of the military escorts may have been disconcerting to unit employees, I do not find that their use in this instance interfered with Statutory right by creating a chilling effect on unit employees. Further, I find no evidence that the two week period in which the military escorts were stationed inside the Union office had any more of an egregious impact. There is no evidence that unit employees were aware of their presence in the Union office, that employees were not able to seek the assistance of the Union, or that either Wilkins or Shepherd expressed any specific concern to the Respondents (other than the initial filing of the ULPs).

Under all these circumstances, noting particularly the Respondents' security concerns in this matter, the use of the military escorts on a continuous basis during the notice period did not have a chilling effect on bargaining unit employees. Unit employees work with the military on a regular basis, and the employees continued to seek Union assistance. I do not find that the use of the military escorts for the Union officers was a substantial departure from the use of civilian escorts and subjected unit employees to interference in their pursuit of protected rights. Therefore, I find that the use of the military escorts for Wilkins and Shepherd did not directly interfere with the rights of employees in the exercise of their rights under the Statute.

It is therefore recommended that the Authority adopt the following Order:

ORDER

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

Issued, Washington, DC, November 30, 2005.

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SUSAN E. JELEN
Administrative Law Judge