

**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

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DECISION AND ORDER

April 30, 2009

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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 *438<sup>th</sup> 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.