FEDERAL LABOR RELATIONS AUTHORITY OALJ 17-21
Office of Administrative Law Judges
WASHINGTON, D.C. 20424

U.S. DEPARTMENT OF VETERANS AFFAIRS
JOHN D. DINGELL VETERANS AFFAIRS
MEDICAL CENTER, DETROIT, MICHIGAN

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 933, AFL-CIO

CHARGING PARTY

Case No. CH-CA-16-0387

Gary W. Stokes
For the General Counsel

Amy C. Slameka
For the Respondent

Charles Threatt
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

Motions for summary judgment filed under § 2423.27 of the Authority's Rules and Regulations are governed by the same principles as motions filed under Rule 56 of the Federal Rules of Civil Procedure. *Dep't of VA, VA Med. Ctr., Nashville, Tenn.*, 50 FLRA 220, 222 (1995). Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. In this case, the General Counsel and the Respondent have filed motions for summary judgment asserting that there are no genuine issues of material fact in dispute. After reviewing the motions and other pleadings, I find that summary judgment is appropriate and no hearing will be conducted.

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135, and the revised Rules and Regulations of the Federal Labor Relations Authority (Authority/FLRA), 5 C.F.R. parts 2423 and 2429.

On June 21, 2016, the American Federation of Government Employees, Local 933, AFL-CIO (Union) filed an unfair labor practice (ULP) charge against the U.S. Department of Veterans Affairs, John D. Dingell Veterans Affairs Medical Center, Detroit, Michigan, (Respondent/Agency). Following an investigation of the charge, a Complaint and Notice of Hearing was issued on March 9, 2017, by the Regional Director of the Chicago Region, alleging a bypass of the Union when the Respondent provided notice of a disciplinary decision directly to a bargaining unit employee without providing a copy to the Union who represented the employee. The Complaint alleged that the Respondent's failure to give the Union a copy of the notice violated 5 U.S.C. § 7116(a)(1) and (5) of the Statute.

On June 7, 2017, the General Counsel (GC) and Respondent filed prehearing disclosures with proposed exhibits. On June 9, 2017, the Respondent filed a Motion for Summary Judgment along with exhibits A through F and 1 through 6. (R. Ex.). On June 13, 2017, the General Counsel filed a response to the motion and a Brief in Support of a Cross-Motion for Summary Judgment with exhibits 1 through 12. (GC Ex.). A prehearing conference call was held with the parties on June 14, 2017, during which the parties agreed that there were no genuine issues of material fact in dispute and that a decision upon the motions was appropriate. The Respondent filed a response to the GC's motion for summary judgment on June 23, 2017.

Because the nationwide collective bargaining agreement (CBA) negotiated by the parties contains a provision that requires the Respondent to serve two copies of a notice of disciplinary decision upon the employee so the employee can furnish one copy to the local Union, the Respondent did not violate § 7116(a)(1) and (5) of the Statute when it failed to provide a copy of the notice of disciplinary decision to the local Union. In support of this determination, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

Based upon the admissions set forth in the Answer filed by the Respondent, I find that the Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the certified exclusive representative of a nationwide unit of agency employees which includes the Respondent. The Union is an agent of AFGE for the purpose of representing unit employees of the Respondent.

In 2011, a new national collective bargaining agreement (CBA) was effectuated between AFGE and the Respondent. R. Ex. F; GC Ex. 10. Article 14 of the CBA covers the subject of Discipline and Adverse Action. Section 8 of Article 14 addresses the processing of suspensions, adverse actions, and major adverse actions. Section 9 of Article 14 addresses Notice of Disciplinary Actions. Section 9 states:

> A. Notice of a final decision to take disciplinary action shall be in writing and shall inform the employee of appeal and grievance rights and his/her right to representation. The employee will be given two copies of the notice; one copy may be furnished to the local union by the employee. The Department will inform the local union when it takes a disciplinary action against a unit employee.
>
> B. Notices shall explain in detail the reasons for the action taken and all evidence relied upon to support the decision. The notice will also advise the employee how long the action will be maintained in his/her file. The supervisor shall discuss the notice with the employee. If the employee elects to have a Union representative present, the discussion will be delayed until the local union has an opportunity to furnish a representative.

The Respondent proposed a three day suspension of a bargaining unit employee on March 17, 2016, and complied with the requirements of Article 14, Section 8. R. Ex. 1; GC Ex. 1. The employee was represented by the Union at her oral presentation on April 15, 2016. R. Exs. 2, 3; GC Exs. 3, 4, 5, 6.

Because the employee was on extended leave at the time a decision upon the proposed suspension was issued, the Respondent sent two copies of the notice of decision dated May 2, 2017, to the residence of the employee via United Parcel Service overnight delivery. GC Ex. 6. Those documents were delivered to the employee's address on May 4, 2017, informing the employee that the proposed three day suspension was sustained. GC Ex. 6. On May 2, 2017, the Respondent also sent a one page memorandum to the local Union informing them that a disciplinary action was taken against a bargaining unit employee working in Patient Care Services. R. Ex. 5; GC Ex. 7. A copy of the notice of decision was not provided to the local Union by the Respondent. GC Exs. 3, 4.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) asserts that the Respondent was required to provide the Union with a copy of the notice of decision pursuant to statutory right established by the Authority in *438th Air Base Group (MAC), McGuire AFB, N.J.*, 28 FLRA 1112 (1987) (*McGuire*). The GC argues that because the Respondent knew the employee was represented

by the Union, the failure to send a copy of the decision letter to the Union representative violated § 7116(a)(1) and (5) of the Statute. Citing *Dep't of the Air Force, Sacramento Air Logistics Ctr., McClellan AFB, Cal.*, 35 FLRA 345 (1990) (*McClellan*), the GC contends that the contractual provision set for in Article 14 of the CBA did not waive the Union's right to receive a copy of the decision letter. The GC submits that the Respondent's failure to provide the Union with a copy of the decision letter resulted in the Union missing the deadline for filing a grievance over the decision because the memorandum informing the Union of a disciplinary action that was provided to the Union by the Respondent was "of no use to the Union."

Respondent

The Respondent contends that the Union waived the statutory right recognized by the Authority in *McGuire* when it negotiated and agreed to the language of Article 15, Section 9 of the CBA. While the *McClellan* decision refused to recognize contractual language that required provision of decision letters in duplicate "so that they may give one copy to their representative or the Union if they desire", as a waiver of the *McGuire* right, the Respondent argues that the Authority's reached that decision because the contractual language present in that case predated the McGuire decision. Thus, the Authority concluded that the language could not waive a statutory right not yet recognized.

The Respondent submits that not only did the parties agree to language in paragraph A of Section 9 that placed the onus upon the employee to provide a copy of the decision to the Union, paragraph B permits the employee to elect whether a Union representative will be present when the supervisor discusses the notice of decision with the employee, which is a clear and unmistakable waiver of the *McGuire* right, and unlike the language in *McClellan*, this provision was negotiated after that statutory right was recognized by *McGuire*.

ANALYSIS

As recognized by the DC Court of Appeals, the purpose of the Statute is to provide the parties to a bargained agreement with stability and repose with respect to matters reduced to writing in the agreement. *Dep't of the Navy v. FLRA*, 962 F.2d 48 (D.C. Cir. 1992) (*Navy*). Citing precedent from a string of earlier cases from the Authority and the courts, the Court reaffirmed that stability in the workplace is fostered by the requirement to adhere to specific conditions of employment when the conditions have already been mutually established in an agreement. *Internal Revenue Serv.*, 17 FLRA 731, 734 (1985); *Navy*, 962 F.2d at 59. It is also well established that a waiver of a statutory right must be clear and unmistakable. *U.S. Dep't of the Treasury, Customs Serv., Wash, D.C.*, 38 FLRA 770, 784 (1990). In determining whether a contract provision constitutes a clear and unmistakable waiver, the Authority examines the wording of the provision as well as other provisions of the contract, bargaining history, and past practice. *U.S. Dep't of the Navy, U.S. Marine*

Corps (MPL), Wash, D.C., 38 FLRA 632, 636 (1990) (*Marine Corps*). The Authority has also made it clear that when a provision in the contract is specific and inclusive, it can be found to have waived a statutory right without the parties expressly indicating that a waiver of the right was intended. *Missouri Nat'l Guard, Jefferson City, Mo.*, 31 FLRA 1244, 1248 (1988).

In this case, the parties agreed to the language in Article 14 of the CBA that set forth the process to be used when a bargaining unit employee was disciplined. The question is whether the agreed upon language constitutes a clear and unmistakable waiver of the union's statutory right to represent established by the *McGuire* decision in 1987. For the reasons set forth below, I find that the Union waived the statutory right established by the *McGuire* decision when it negotiated and agreed to the language set forth in Article 14 of the parties CBA.

Initially, it should be noted that the facts of *McGuire* case are not squarely on point with the case at hand. The primary question in *McGuire* was whether the agency had illegally bypassed the union when it held a meeting to notify a represented employee of a disciplinary decision without the employee's representative being present. In short, *McGuire* involved representation at the meeting where a disciplinary notice was given to a represented employee. In *McGuire*, the Authority concluded that the agency had bypassed the union when it failed to have the union representative attend a subsequent meeting where the notice of discipline was given to a represented bargaining unit employee. The *McGuire* decision recognized that the failure to have the union present at such a notice of decision meeting was an illegal bypass under the Statute. While the *McGuire* decision discusses both bypassing a representative and furnishing or delivering disciplinary decisions or other responses only to the employee, it was the right to have a union representative at the notice meeting for which the judge found no waiver. In reaching that conclusion, the judge determined that a contractual provision that required that copies of the basis for discipline be served upon the employee with no mention of the union was not sufficient to establish a waiver of the right to represent at a meeting conducted to deliver a notice of decision. However, in this case, the contractual provisions are substantially more specific and inclusive than the provision present in *McGuire*.

Furthermore, in the present case, there was no meeting subsequent to the oral presentation where the employee was not represented by the Union. Instead, the notice of decision was delivered to the employee's home address because the employee was on extended leave. Thus, the *McGuire* right to attend such a meeting subsequent to the oral presentation was not violated. Instead, the Union and the GC seek to apply the right established by *McGuire* to the provision of decisional notice documents and do so even though that notice process is fully discussed and covered by a specific and inclusive provision within the parties CBA.

Initially, it should be noted that the plain language of the CBA makes it clear that the Union waived the right to attend a discussion about the decision subsequent to the oral presentation established in *McGuire* when it agreed in Paragraph B of Article 14, Section 9,

that the decision to have the Union present at such a discussion was an election to be made by the employee.

> B. If the employee elects to have a Union representative present, the discussion will be delayed until the local union has an opportunity to furnish a representative.

GC Ex. 11 at 52.

Thus, even after the statutory right to attend such a meeting was recognized and in existence for over twenty years, the parties agreed in 2011, to a process that allowed the employee to determine if a union representative needed to be present at such a meeting. In *Marine Corps*, 38 FLRA at 637, the Authority decided that contractual language could constitute and clear and unmistakable waiver of a statutory right even before the right was established when the union had notice that the Authority was considering establishment of such a right. In this case, the right to attend a disciplinary notice meeting was well established before the CBA was negotiated and the parties' agreement to use a process that allowed the employee to elect if the union's presence was necessary at such a discussion constitutes a clear and unmistakable waiver of the right recognized in *McGuire*. Therefore, in this case, a violation of that right to represent would not have been committed even if a subsequent meeting to discuss the notice of discipline had taken place without the representative present unless the employee had requested to have the union representative there and the request was denied.

Furthermore, this language waiving the *McGuire* right is not the only language in the CBA demonstrating that the right recognized in *McGuire* should not be applied to the provision of notice documents related to a disciplinary matter in this case. In particular, the parties agreed in Paragraph A of Section 9 of the 2011 agreement, that a disciplined employee would be given two copies of the notice of discipline, one of which "may be furnished to the local union by the employee."

> A. Notice of a final decision to take disciplinary action shall be in writing and shall inform the employee of appeal and grievance rights and his/her right to representation. The employee will be given two copies of the notice; one copy may be furnished to the local union by the employee. The Department will inform the local union when it takes a disciplinary action against a unit employee.

GC Ex. 11 at 52.

The fact that the specific and inclusive language of the CBA places the onus upon the disciplined employee to provide a copy of the notice of decision to the local union is further amplified by the clear distinction within that paragraph of what documents must be provided to whom under the disciplinary process agreed to by the parties. While the language of the CBA requires that the employee be given two copies of the "notice", the Respondent is only

required to "inform" the local union when it takes disciplinary action against an employee. When fully examined in its entirety, the plain and unambiguous contractual language agreed to by the parties in 2011 makes it clear and unmistakable that the Union waived the statutory right set forth in *McGuire*. Therefore, the Respondent did not commit an illegal bypass of the Union when it complied with the specific and inclusive provision of the CBA by delivering two copies of the disciplinary notice to the employee while only providing the Union with a one page memorandum informing the Union that a bargaining unit employee was disciplined.

The GC contends that the plain and unambiguous language of these provisions does not constitute a clear and unmistakable waiver of the *McGuire* right because the Authority held in *McClellan*, 35 FLRA at 345 that a contractual provision which required that final disciplinary decisions be given to the employee in duplicate so that they could give one copy to their representative did not waive a union's right to be present when the decision was delivered. However, that argument is flawed for several reasons.

First, the *McClellan* decision does not stand for the proposition that providing two copies to the employee so that he could provide one to the union constitutes a statutory violation. Like *McGuire*, the *McClellan* decision dealt with union presence at the meeting where the notices of a decision were delivered. In this case, there was no meeting from which the Union representative was excluded. Second, part of the reason the Authority concluded that the provision related to providing written notice did not waive the right to be present at the presentation thereof, was that the statutory right had not been recognized when the parties negotiated the provision. However, in this case, the parties agreed to a process that differed from the holding of *McGuire* well after the statutory right established therein was recognized. Third, the disciplinary process provisions applicable in the *McClellan* case did not include a provision that specifically and inclusively gave the right to determine whether a union representative would be present at the time of delivery and discussion of the notice of decision to the employee. In this case, there is such a provision and the only reasonable interpretation thereof is that the Union waived the right to participate in the notice of decision meeting, unless the employee requested their attendance.

When the provisions of Article 14, Section 9 are considered in their totality, it is clear and unmistakable from the plain and unambiguous language of the CBA that the Union waived the right recognized in *McGuire* and agreed that the disciplined employee would determine if a representative would be present at the meeting where the notices of decision were given to the employee. Further, the language also makes clear that it is the employee who is responsible for providing a copy of the notice of decision to the local union after the second copy for the Union is provided by the Respondent. In short, the parties agreed that the subject employee would be the means of delivery between the Respondent and the local Union, although the Respondent would inform the Union that a disciplinary action had been completed.

The GC also submits that the bargaining history between the parties, as related in the affidavit of AFGE negotiator Oscar Williams, demonstrates that the intent of the parties was that paragraph A of Article 14, Section 9, was to establish the requirements the Agency would have to perform whether the employee was represented by the Union or not, and that

when the employee was already represented, the Agency would deliver disciplinary decisions to the Union at the same time the decision was delivered to the employee. GC Ex. 12. Suffice it to say, the opinions proffered by Williams, a Union officer are provided with the inherent bias of an interested party, but more importantly, they are difficult to square with the plain and unambiguous language of the CBA.

While Williams avers that the provision set forth in paragraph A was "rolled over" with "nearly identical language" set forth in the prior agreements reached in 1982 and 1997, that assertion is not entirely accurate. Of particular interest is that Section 9 of the 1982 agreement contained a single paragraph, whereas paragraphs A and B of Section 9, first appear in the 1997 agreement. Thus, the provisions of the 1997 and 2011 agreements which waive or modify the right to represent established in the *McGuire* decision, appear only after that decision was issued in 1987, and yet, Williams proffers no insight as to how or why that additional paragraph was added.

Equally troubling is the fact that the obligation to furnish the Union with a separate copy of the actual notice of decision if the employee was represented could have been easily incorporated into the CBA if that was the parties' intent. Instead, the parties adopted language that upon its plain and unambiguous face requires the Respondent to provide two copies of the notice to the employee and while only obligating the Respondent to inform the Union of the disciplinary action against a bargaining unit employee. In fact, one needs to look no further than a local agreement between the parties from 1977 to find an example of just how easy it is to make the obligation to provide the Union with a copy of disciplinary related correspondence. GC Ex. 11.[1] Article XII, paragraph 2 of that agreement reads:

> 2. If an employee elects to be represented by the Union in a disciplinary action, copies of all correspondence addressed to the employee will also be forwarded to the appropriate Union representative.

GC Ex. 11 at 16.

Something as simple as "The Respondent will provide one copy of the notice of the decision to the employee and a second copy to the Union representative" in place of the "The employee will be given two copies of the notice", would adequately reflect the intent averred by Williams, and yet, no such change was made in 1997 when the Section was modified by adding an additional paragraph.

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1 Although the GC sought to withdraw Exhibit 11 to its motion after filing it, the document was in the record and it has been considered given its probative value. Therefore, the motion to withdraw is denied.

Given the plain and unambiguous language within the four corners of the document, the lack of explanation for why the right to attend a notice of decision meeting was left up to the employee starting with the addition of paragraph B in Section 9 of the 1997 agreement, while no alteration was made to paragraph A, and the relative ease with which such a change could have been made, the affidavit of Union Officer Williams is given little weight.

Aside from giving little meaning to the plain language of the CBA negotiated by the parties and trivializing the Respondent's compliance therewith, the Union and the GC attempt to ratchet up the drama by asserting that the ability to file a grievance over this disciplinary action was lost as a result of the Respondent's failure to provide the Union with an actual copy of the notice of decision that was provided to the employee in duplicate. However, a close review of this assertion reveals that it is based upon inference and innuendo, rather than fact.

There is no dispute that the Respondent complied with the CBA's requirement that the Union be informed of a disciplinary action imposed upon a bargaining unit employee. R. Ex. 5; GC Ex. 3. Suffice it to say, the GC's assertion that this memorandum was "of no use to the Union" because over 300 employees work in Patient Services is just silly. While there may be 300 employees working in this department at the VA, it is a virtual certainty that not all 300 of them were the subject of a proposed adverse action. Further, the Union would know if it had appointed a representative for any bargaining unit employee working in Patient Services who was facing a proposed adverse action. Given that it had appointed a representative for the employee at question in this case, an application of the simple powers of logic and deduction should have provided the Union with an understanding of the employee to whom the information applied. While the Union president's affidavit expounds upon how many bargaining unit employees work in Patient Services, it is notably silent about how many of them were actually the subject of a proposed adverse action at the time the information about the disciplinary action was provided by the Respondent.

This sort of convenient omission was equally notable with respect to when the Union actually received a copy of the notice of decision from the employee who received two copies of the notice on May 4, 2016. GC Ex. 6. While the Union president avers that a grievance was not filed in this matter because the Union did not learn of the May 2, 2016, suspension decision until after the thirty day limit for filing a grievance had passed, neither he, nor the union representative who represented the employee definitively state when they received a copy of the notice from the employee. However, the Union president indicates that the employee contacted the Union representative in "late May or early June 2016." GC Ex. 3.

Similarly, the Union representative avers that "in late May 2016 or early June 2016", the employee contacted her by telephone to tell her that the proposed three day suspension had been imposed and that the employee brought the decision letter to the Union office in "late May or early June." GC Ex. 4. Ignoring the fact that the employee was given two copies of the notice of the decision including one for the Union on May 4, 2016, and that the Union was informed of a disciplinary action on May 2, 2106, when the Union cannot definitely state when it learned of the decision and concedes that it may have received a copy of the decision letter in May, blaming the failure to meet the thirty day grievance limit on the

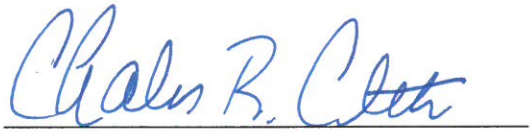
Respondent's compliance with the CBA is disingenuous. If the employee contacted the Union representative and provided a copy of the notice decision in late May, the failure to file a grievance on time was not caused by the Respondent's failure to provide the Union with an actual copy of the notice of decision. In that regard, it is telling that no affidavit was provided by the employee, the one person who probably best remembers when the Union was informed and given a copy of the notice of decision delivered by the Respondent. But one thing is certain, the timeframes set forth in the affidavits provided by the Union president and Union steward do not establish the fact that the Union missed the grievance deadline because the Respondent failed to provide them with a copy. If anything, including late May within the potential period of receipt demonstrates that the affiants were unwilling to declare that the Union did not get a copy of the notice of decision until after the grievance deadline had passed. That said, and for the reasons set forth above, the impact that the Respondent's compliance with the CBA had upon a subsequent grievance would not alter the outcome of this decision.

CONCLUSION

The Respondent did not violate § 7116(a)(1) and (5) of the Statute when it delivered two copies of the disciplinary notice to the employee while providing the Union with a one page memorandum informing the Union that a bargaining unit employee was disciplined.

Accordingly, the Respondent's Motion for Summary Judgment is **GRANTED**, and the General Counsel's Motion for Summary Judgment is **DENIED**.

Issued, Washington, D.C., August 18, 2017



CHARLES R. CENTER
Chief Administrative Law Judge