63 FLRA No. 189

UNITED STATES
DEPARTMENT OF THE AIR FORCE
62nd AIRLIFT WING
MCCHORD AIR FORCE BASE
WASHINGTON
(Respondent/Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1501
AFL-CIO
(Charging Party/Union)

SF-CA-07-0350

_____

DECISION AND ORDER

August 14, 2009

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

I. Statement of the Case

This case is before the Authority on an exception to the attached decision of the Administrative Law Judge (Judge) filed by the Respondent and a cross-exception filed by the General Counsel (GC). The Respondent filed an opposition to the cross-exception.

The complaint alleges that the Respondent violated § 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute) when it told an employee (the employee), who was represented by the Union, that the disciplinary action imposed on him might have been less severe had the employee prepared his own written response. Judge's Decision (Decision) at 2. The Judge found that the Respondent violated the Statute, as alleged.

For the reasons that follow, we conclude, in agreement with the Judge, that the Respondent violated the Statute.

II. Background and Judge's Decision

A. Factual Background

The facts are fully set out in the Judge's decision and are only summarized here. The employee's supervisor (the supervisor) served the employee with a notice of a proposed five-day suspension. Decision at 2. The employee sought the representation of a Union steward (representative), who prepared a written response and submitted it to the supervisor. *Id*. at 2-3. The supervisor refused the representative's efforts to arrange an oral response to the proposed suspension, indicating that he had read the written response and "that there was nothing more to discuss." *Id*.

At a subsequent meeting, the supervisor notified the employee and the representative of his decision to suspend the employee for three days. *Id*. The employee, supervisor, and representative provided conflicting testimony regarding the supervisor's explanation of his decision. The employee testified that the supervisor stated he had to deal with the employee "more harshly" than if the employee had written the response himself. *Id*. The supervisor testified that he explained that a lack of contrition in the written response precluded lesser discipline. *Id*. The representative testified that the supervisor explained to the employee that "things would have [been] easier on [the employee]" had he written his own response. *Id*. at 4

The employee, through the representative, filed a grievance over his three-day suspension, which set forth his grievance as follows:

> I received a 3 day suspension for alleged dereliction of duty on November 7, 2006. My supervisor refused to accept my oral reply in addition to my written response to the proposed suspense with my representative. With in his letter to suspend, he stated I omitted facts and accepted no responsibility, . . . I just believe the punishment is more harsh than required to correct my mistake.
>
> Also, the comments my supervisor made to me were coercive and anti-union.

Id. at 6. The grievance alleged that the Respondent violated Article 6, Section 3[1] of the collective bargaining agreement. *Id*.

1. Article 6, Section 3 provides that "[t]he Union and the

During a meeting held at Step 1 of the grievance procedure, the supervisor attempted to clarify the scope of the grievance and the meaning of the last quoted sentence of the grievance. *Id.* The representative explained that the sentence regarding the supervisor's allegedly "coercive and anti-union" comments would be handled as a "separate matter." *Id*. The Respondent's responses at Steps 1 and 2 of the grievance procedure made no mention of the supervisor's comments. *Id*. at 7. The Respondent's Step 3 response specifically stated that the disputed comments would not be addressed in the grievance process because they concerned an "apparent dispute between the government and the union" and would more appropriately be dealt with separately. *Id*. at 7. The Union did not invoke arbitration over the grievance. *Id*. at 8.

Subsequently, the Union filed an unfair labor practice charge alleging that the Respondent violated § 7116(a)(1) of the Statute by telling the employee that the discipline being imposed might have been less severe had he prepared his response without the involvement of the Union. *Id*. at 1-2. In response, the Respondent filed a motion to dismiss the unfair labor practice (ULP) charge, contending that it is barred by § 7116(d)[2] of the Statute because the factual predicate and legal theories for the ULP are the same as those for the grievance. *Id*. The General Counsel opposed the motion to dismiss, contending that the ULP charge is not barred by § 7116(d) because the grievance and ULP do not involve the same aggrieved party and are not based on the same legal theory. *Id*. at 9.

B. The Judge's Decision

The issues before the Judge were whether he had jurisdiction and, if so, whether the supervisor's comments violated § 7116(a) (1) of the Statute.

On the jurisdictional issue, the Judge found that the record provided a "compelling case" that the supervisor's comments constituted a factual predicate shared by the grievance and the ULP. *Id*. at 9. However, the Judge, citing the Supreme Court's decision in *Cornelius v. Nutt*, 472 U.S. 648 (1985), noted that one factual predicate can give rise to more than one aggrieved party. *Id*. The Judge concluded that the Union filed the grievance on behalf of the employee for the disciplinary action, and then filed the ULP on its own behalf to protect its institutional interest in exercising its representational responsibilities. *Id*. at 11-12. Although the Judge questioned whether Article 6, Section 3 of the collective bargaining agreement was the most appropriate provision for raising an individual grievance regarding a disciplinary action,[3] the Judge found it clear from the conduct of the parties that the grievance addressed only the employee's disciplinary action, and not the supervisor's comments. *Id*. Citing Authority precedent as well as the Respondent's response at Step 3 of the grievance process that the grievance did not involve the dispute over the supervisor's comments, the Judge concluded that the ULP was not barred by the earlier-filed grievance because the two procedures involved different aggrieved parties. *Id*. at 10-13.

Having concluded that he had jurisdiction, the Judge next addressed the question of whether the supervisor's comments violated § 7116(a)(1) of the Statute. In resolving the conflicting testimony regarding what the supervisor said, the Judge concluded that the testimony of the representative was the most reliable. *Id*. at 4. Accordingly, the Judge found that the supervisor told the employee that "things would have [been] easier on [the employee]" if he had written his own response to the proposed discipline. *Id*. The Judge concluded that these comments could reasonably be viewed as interfering with, coercing or restraining a bargaining unit member's right to representation and the union's right to represent him. *Id*. at 13-14. Therefore, the Judge found that a preponderance of the evidence established that the supervisor violated § 7116(a)(1) of the Statute.

III. Positions of the Parties

A. Respondent's Exception

The Respondent contends that the Judge erred when he found that the ULP charge is not barred by § 7116(d) of the Statute. In this regard, the Respondent contends that the rights raised in both the grievance and ULP are the employee's individual

Employer agree to recognize the principle of partnership and work within its ideology." Exhibit R-7 at 6.

2. Section 7116(d) provides, in relevant part, that:

> [I]ssues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

3. The Judge noted that Article 15 of the agreement, unlike Article 6, Section 3, specifically covers disciplinary actions, including penalties and the right to an oral reply. Decision at 11 n.2.

rights rather than the Union's institutional rights. Exceptions at 7. The Respondent also contends that the supervisor's comments were raised in both actions, which share, as the same legal predicate, an alleged violation of an employee's rights under § 7116(a)(1). *Id*. at 8-9.

B. General Counsel's Cross-Exception

The General Counsel contends that the Judge properly determined that the employee was the aggrieved party in the grievance, and that the Union is the aggrieved party in the ULP. Cross-Exception at 4. However, the General Counsel takes exception to the Judge's failure to find also that the grievance and the ULP charge raise different legal theories and that, for this additional reason, the ULP is not barred by § 7116(d). In this regard, the General Counsel contends that the grievance alleged a violation of the collective bargaining agreement while the ULP alleges a violation of the Statute. *Id*. at 6.

C. Respondent's Opposition to the General Counsel's Cross-Exception

The Respondent contends that the grievance concerned two separate matters: the suspension and the supervisor's comments. Opposition at 4. In particular, the Respondent contends that the statement in the grievance concerning the supervisor's comments "intimates a violation of 5 U.S.C. § 7116(a)(1)." *Id*. at 4. The Respondent contends, therefore, that the grievance and ULP charge share one common legal predicate: alleged interference in violation of § 7116(a)(1) of the Statute. *Id*. at 3-4. Further, the Respondent, while acknowledging that the grievance alleged a violation of Article 6, Section 3 of the agreement, contends that Article 4, section 8.d. of the agreement would have been more applicable to the allegation regarding the supervisor's comments. [4] *Id*. at 6. According to the Respondent, the representative's failure to allege a violation of that provision is further support for the Respondent's argument that the grievance raised a statutory violation. *Id*.

IV. Analysis and Conclusions

Section 7116(d) of the Statute provides that issues that may be raised under a negotiated grievance procedure or as a ULP may, in the discretion of the aggrieved party, be raised under either procedure, but not under both procedures. *See, e.g., Dep't of Transp., Fed. Aviation Admin., Fort Worth, Tex.*, 55 FLRA 951, 953 (1999) (*FAA*). In order for a ULP charge to be barred under § 7116(d) by an earlier-filed grievance: (1) the issue that is the subject of the grievance must be the same as the issue that is the subject of the ULP; (2) such issue must have been raised earlier under the grievance procedure; and (3) the aggrieved party in both actions must be the same. *See, e.g., United States Dep't of Veterans Affairs, Medical Ctr., N. Chicago, Ill.*, 52 FLRA 387, 392 (1996) (*VAMC, North Chicago*).

A. The Judge did not err in finding that the grievance and the ULP charge involve different aggrieved parties.

Contrary to the Respondent's claim, the record supports the Judge's findings that the Union, not the employee, is the aggrieved party in the ULP. In this regard, the Judge found, and the Respondent does not dispute, that the ULP charge and complaint seek no relief for the employee. *Id*. at 12. The Judge noted, in this regard, that the Respondent's brief provided no argument that the Union is not the aggrieved party in the ULP. *Id*.

As for the wording of the grievance, when the supervisor sought clarification of the reference to the supervisor's comments during the Step 1 meeting, the representative explained that the comments would be treated as a separate matter. Decision at 6. Subsequently, the Respondent's responses at Steps 1 and 2 made no reference to the comments and the Respondent's Step 3 response stated that the comments would not be addressed in the grievance procedure because they concerned a separate "dispute between the government and the union." Decision at 7. In circumstances such as these, it is appropriate to consider the actions of the parties and how those actions reflect the parties' understandings of the scope of the grievance. Here, those actions reflect that both parties understood that the issue regarding the supervisor's comments was not part of the grievance and that the dispute over those comments was to be treated separately.

The Respondent also claims that, as the ULP alleges a violation of § 7116(a)(1), it necessarily alleges a violation of the employee's individual right. Exceptions at 8. The Respondent is mistaken, however, because alleged violations of § 7116(a)(1) can pertain to interference with the rights of a union as well as of an individual. *See, e.g., United States Dep't of Def., Def. Contract Audit Agency,*

4. Article 4, Section 8(d) of the agreement provides that "[n]o employee will be subjected to intimidation, coercion, harassment, or prohibited personnel practice." Exhibit R-7 at 5.

Northeastern Region, Lexington, Mass., 47 FLRA 1314, 1321 (1993) (alleged violation of § 7116(a)(1) based on individual right); *Dep't of Health and Human Services, SSA, Balt., Md.*, 43 FLRA 318 (1991) (alleged violation of § 7116(a)(1) based on union right).

As the Judge noted, the ULP charge and complaint seek no relief for the employee. Decision at 12. As the Judge noted further, the charge is not drawn, in any part, to allege a violation of the individual's rights regarding the disciplinary action brought against him. *Id.* Instead, the sole basis for the alleged violation of § 7116(a)(1) is the supervisor's comments regarding the employee's reliance on the representative in preparing the written response. Exhibit GC-1(b), paragraphs 11 and 12.

Based on the foregoing, we deny the Respondent's exception to the Judge's determination that the aggrieved parties in the ULP and the grievance are not the same.

B. The grievance and ULP charge have different legal predicates.

The determination of whether a ULP is barred by an earlier-filed grievance requires examining whether "the ULP charge arose from the same set of factual circumstances as the grievance and the theory advanced in support of the ULP charge and the grievance are substantially similar." *United States Dep't of the Army, Army Finance & Accounting Ctr., Indianapolis, Ind.*, 38 FLRA 1345, 1351 (1991) (*Army Finance*), *petition for review denied sub nom. AFGE, AFL-CIO, Local 1411* v. FLRA, 960 F.2d 176, 177-78 (D.C. Cir. 1992). Only if both requirements are satisfied is a subsequent ULP charge barred by a former grievance. *OLAM Southwest Air Def. Sector (TAC) Point Arena Air Force Station, Point Arena, Cal.*, 51 FLRA 797, 801-02 (1996) (*OLAM*) and cases cited therein.

It is undisputed that the ULP and the earlier-filed grievance arose from the same factual circumstances. However, they rest on different legal theories. Specifically, the issue in the grievance is whether the employees' suspension violated Article 6, Section 3 of the agreement while the ULP alleges that the supervisor's statements interfered with, restrained or coerced an employee in violation of § 7102 of the Statute. Decision at 1-2, 11. As the grievance alleges a violation of the contract while the ULP alleges a violation of the Statute, the legal theories are not the same. In this regard, the Authority has held, in a variety of circumstances, that a ULP alleging a violation of the Statute raises a sufficiently distinct theory from a grievance alleging a violation of a contract even when both matters arise from the same set of facts. *See, e.g. United States Dep't of Labor, Wash., D.C.*, 59 FLRA 112, 115 (2003), and cases cited therein. For example, in *VAMC, North Chicago*, the Authority found that a ULP charge alleging that the agency implemented a policy denying cash performance awards without providing the union with notice and an opportunity to bargain was not barred by a prior grievance alleging that the agency's denial of performance awards violated the collective bargaining agreement. 52 FLRA at 392-93. Similarly, in *AFGE, National Council of EEOC Locals, No. 216*, 49 FLRA 906, 914 (1994), the Authority found no bar where the ULP charge alleged retaliation against the grievant for her union activity, and the grievance contended that there was no support for her suspension. Likewise, in *OLAM*, the Authority found no bar where the grievance sought to establish preferential treatment of employees and the ULP sought to establish the agency's statutory failure to bargain over a change in working conditions. 51 FLRA at 803.

In its opposition, the Respondent contends that § 7116(d) bars the ULP because the grievance is based on a violation of the Statute. Opposition at 3-4. In this regard, the Respondent contends that the grievance's reference to the supervisor's "coercive and anti-union" comments "intimates a violation of 5 U.S.C. § 7116(a)(1)." *Id.* at 4. The Respondent contends further that the Union's failure to cite Article 4, Section 8(d) of the agreement, which would have directly addressed the supervisor's comments, further supports the argument that the grievance raised a statutory violation instead of contractual violation. *Id.* at 6.

The Respondent's contentions are without merit. As the Judge found, the parties' conduct during the grievance procedure indicates that the grievance involved only the disciplinary action and not the disputed comments. *See* Award at 11-12. Therefore, there was no reason for the Union to have cited a contractual provision addressing the comments. Moreover, even if the Union did not base the grievance on the contract provision most relevant to disciplinary actions, the fact remains that the grievance was expressly based on the contract. *See Dep't of Def., United States Army Reserve Personnel Command, St. Louis, Mo.*, 55 FLRA 1309, 1313, n.5 (ULP based on the Statute not barred by earlier-filed grievance based on a contract provision even if the contract provision is not a "plausible basis" for the grievance). As such, the grievance was based on a

different legal theory from the ULP.[5]

Based on the foregoing, we conclude that, even if the grievance and the ULP charge involve the same aggrieved party, they involve different legal theories.

V. Order

Pursuant to § 2423.41(c) of the Authority's Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the United States Department of the Air Force, 62nd Airlift Wing, McChord Air Force Base, Washington, shall:

1. Cease and desist from:

(a) Making statements to employees in the bargaining unit represented by the American Federation of Government Employees, Local 1501, AFL-CIO (Union) that interfere with, restrain or coerce employees in the exercise of their rights under § 7102 of the Statute, which includes the right to be represented by the union without fear of penalty or reprisal.

(b) Interfering with, restraining or coercing employees in the exercise of their rights assured by the Statute.

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

(a) Post at all facilities at McChord Air Force Base, Washington, copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the Commander of the 62nd Airlift Wing, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by any other material.

(b) Pursuant to § 2423.41(e) of the Authority's Regulations, notify the Regional Director of the San Francisco Region, Federal Labor Relations Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply.

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

The Federal Labor Relations Authority has found that the United States Department of the Air Force, 62nd Airlift Wing, McChord Air Force Base, Washington, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

We hereby notify employees that:

WE WILL NOT make statements to employees in the bargaining unit represented by the American Federation of Government Employees, Local 1501, AFL- CIO (Union) that interfere with, restrain, or coerce employees in the exercise of their rights under § 7102 of the Federal Service Labor-Management Relations Statute, which includes the right to be represented by the union without fear of penalty or reprisal.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

_____

Department of the Air Force
62nd Airlift Wing
McChord Air Force Base, Washington

Dated:_____By:_____
(Signature)
Commander, 62nd Airlift Wing

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, San Francisco Regional Office, whose address is: Federal Labor Relations Authority, 901 Market Street, Suite 220, San Francisco, California 94103-1791, and whose telephone number is: 415-356- 5000.

5. For the same reason, the Authority rejects the Respondent's contention that after filing the grievance, the representative attempted to withdraw the statutory issue from the grievance. *See* Exceptions at 9-10. As discussed above, the Authority concludes that the grievance raised no statutory issue.

Office of Administrative Law Judges

DEPARTMENT OF THE AIR FORCE
62 AIRLIFT WING
MCCHORD AIR FORCE BASE, WASHINGTON
Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1501, AFL-CIO
Charging Party

Case No. SF-CA-07-0350

Stefanie Arthur
For the General Counsel

Steven E. Sherwood
Amy Bryan, Captain
For the Respondent

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute (Statute), and the Rules and Regulations of the Federal Labor Relations Authority (Authority).

On August 14, 2007, the Regional Director for the San Francisco region of the Authority issued a Complaint and Notice of Hearing, based upon an unfair labor practice (ULP) charge filed on March 26, 2007 by the American Federation of Government Employees, Local 1501 (Union), against the Department of the Air Force, 62nd Airlift Wing, McChord AFB, WA (Respondent). The Complaint alleged that the Respondent interfered with, restrained or coerced an employee in violation of §7102 of the Statute by telling an employee, who was represented in the matter by the Union, that the discipline being imposed might have been less severe had the employee prepared his own response, and that the Respondent thereby violated §7116(a)(1) of the Statute.

On August 30, 2007, the Respondent filed a Motion to Dismiss the Complaint, asserting that the charge upon which the Complaint was based was raised previously as an issue in a grievance. On September 4, 2007, the General Counsel filed an Opposition to the Motion to Dismiss to which the Respondent filed a Reply on September 5, 2007. On September 6, 2007, the General Counsel filed a Motion to Strike the Respondent's Reply and an Order denying the Motion to Strike was issued by the undersigned on September 7, 2007. The Order gave the General Counsel leave to file a response and advised the parties that action upon the Motion to Dismiss would be reserved until post hearing when the incomplete record on the matter was fully developed. On September 7, 2007, the General Counsel filed a Response to the Order indicating that further evidence and argument on the Motion to Dismiss would be presented at the hearing.

A hearing was held in Tacoma, Washington on September 27, 2007, where all parties were represented and afforded a full opportunity to be heard, produce relevant evidence, and examine and cross-examine witnesses. Counsel for the Respondent and the General Counsel also filed timely post-hearing briefs. Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency under §7103(a)(3) of the Statute. GC-1(b), (d). The Union is a labor organization within the meaning of §7103(a)(4) of the Statute. GC-1(b), (d). The Union is the exclusive representative of a unit of employees appropriate for collective bargaining at Respondent's facility. GC-1(b), (d).

On November 7, 2006, the Respondent, through supervisor George Graham, served bargaining unit member Will Thompson with a notice of a proposed five day suspension. JT-1. As a result, Thompson sought the representation of union steward Dave Duncan, who, after getting a seven day extension for a response that was initially due on November 14, 2006, prepared a written response that was submitted to Graham on November 21, 2006. R-2, 3, 4, 5. The written response was actually from Duncan, who prepared and signed the document and submitted it with the countersignature of Will Thompson. T-109. Although Duncan tried to arrange an oral reply to the proposed suspension on two or three occasions, those efforts were rebuffed by Graham, who indicated that he had read the written response and that there was nothing more to discuss. JT-1, 3; TR-175.

On December 6, 2006, Graham held a meeting with Thompson and Duncan. GC-1(a). The purpose

of the meeting was to give the employee notice of the decision to suspend for three calendar days, two of which were not duty days for the employee. JT-2. At the hearing, the three participants provided conflicting testimony regarding Graham's comments. While all three generally agreed that comments concerning the written response were made, two of the participants recalled them being made with starkly different clarity. T-145, 202. Thompson recalled that Graham clearly indicated that he was getting harsher punishment because he used the Union for representation in the matter. His testimony was that Graham stated:

> [Y]ou know, "Will, if you had wrote your -- this letter yourself", . . . "things would have went better for you. But since you used the Union's help, I'm going to deal with you more harshly than if you would have went alone." T-145

Graham recalled a much different version of the conversation, one in which he explained that a lack of contrition in the written response precluded lesser discipline:

> Well, maybe if Mr. Thompson had continued -- had written the response and continued on the path that he originally had taken on October 25th, of being contrite, that perhaps this whole outcome may have been different. T-202

Between these polar extremes is the recollection of Duncan, who recalls the comments of Graham being made with more ambiguity:

> You know, Will, if you would have written your own response, things would have went easier on you. T-104

and:

> You know, Will, had you written your own response, things would have went easier on you. T-160

In resolving this conflicting testimony to determine the facts of this meeting, I conclude that the testimony of Duncan is the most reliable for the following reasons.

One, it is consistent with the allegations of the Charge, which was filed closer in time to the incident when recall of the event was subject to neither diminished nor enhanced recollection. Two, while the recollections of Thompson and Graham provide greater clarity, they do so with self-serving facets recalled only by them. While it can be argued that Duncan may have some motive to not recall the additional detail asserted by Graham, the same cannot said of Thompson's version and the fact that Duncan does not recall the self-serving facets reported by either of the other witnesses leads me to conclude that they are a function of enhanced recollection rather than fact. Third, all three recalled Graham being asked to repeat or explain what he meant by his comments and further inquiry about his comments would not have been necessary had the initial comment been as explicit as the version alleged by either Thompson or Graham.

In addition, although Graham asserted at the hearing that the context of his comments was related to the lack of contrition expressed in the written response, his actions in the matter at the time reflected little concern or interest in how his employee felt about the error he made. Even though more than two weeks elapsed from the time the written response was submitted on November 21, 2006, until the notice of decision was handed down on December 6, 2006, Graham refused to hear any oral reply from Thompson in the interim. JT-1, 2. Had Graham truly been interested in whether Thompson was contrite and learned a lesson despite the combative tone of the written response prepared by his union representative, such an oral reply could have been arranged in response to Duncan's multiple requests. Instead, Graham told Duncan that he had read the statement and that there was nothing more to discuss. Furthermore, on January 10, 2007, when Graham and Duncan discussed the comments he was accused of making, Graham did not deny making the comments or explain their context with the clarity offered at the hearing. When told in January 2007, that posting a letter of apology for making the comments would resolve the matter, rather than explaining that the context of his comments made an apology inappropriate, he simply indicated that he needed more time to think about what he was going to do. TR-60, 109, 110. Then, when pressed to explain why an apology was not appropriate, he again failed to offer any context or to assert that such context had been provided on December 6, 2006. TR-60.

Finally, Graham described the comments to which Duncan was seeking an apology in this manner:

> Well, he had asked me to write an apology letter to AFGE 1501 for the statement that I

> had made to Mr. Thompson about being – if he had written his own response, that it would have been much more advantageous to his cause. TR-59, 60.

While only one factor in my determination, I find Graham's failure to characterize the comments as "alleged" or to explain their context when using his own words to describe them revealing. For the reasons outlined above, I find it most likely that Graham, disappointed, annoyed and angered by the challenging tone and combative tenor of the written response prepared by what management considered to be a confrontational and demanding union representative, decided he would teach Duncan and Thompson a lesson by refusing to consider any oral reply and disciplining Thompson to a degree that not only corrected the dereliction, but also punished Thompson for the tone and tenor of the written response prepared by his union representative. TR-52.

Thus, I conclude that the ambiguous comments recalled by Duncan represent the most accurate factual scenario for the meeting on December 6, 2006, and that Graham, as recalled by Thompson and Duncan, made comments which intentionally linked the discipline being imposed to Duncan's written response by indicating that Thompson would have been better off preparing his own written response, and did so without further context or explanation.

On January 3, 2007, Will Thompson filed a grievance over his three day suspension which set forth his grievance as follows:

> I received a 3 day suspension for alleged dereliction of duty on November 7, 2006. My supervisor refused to accept my oral reply in addition to my written response to the proposed suspense with my representative. With in his letter to suspend, he stated I omitted facts and accepted no responsibility. In contrary, my signed written responses prove I accepted responsibility, I just believe the punishment is more harsh than required to correct my mistake.
>
> Also, the comments my supervisor made to me were coercive and anti-union. JT-1

For his grievance, Thompson was again represented by union steward Duncan and the grievance indicated that the actions alleged in the grievance violated Article 6, Section 3 of the collective bargaining agreement, which is a general partnership provision. JT-1, R-7. In essence, Duncan explained that he felt the refusal to give Thompson the opportunity to make an oral replay was inconsistent with the principle of partnership. T-105.

Graham, Thompson and Duncan met to discuss the Step one grievance on January 10, 2007. During that meeting, Graham attempted to clarify what the grievance was about and when he inquired about what was meant by the last sentence of the grievance, Duncan responded by indicating that those comments were a separate matter. T-59, 103, 116, 128. In fact, Duncan and Graham waited until Thompson was no longer in attendance before they discussed the comments Graham made at the December 6 meeting and Duncan explained that he and Thompson perceived them as coercive and anti-union, but that it would be handled as a separate matter. T-59, 116, 128. In his Step one reply, Graham described the grievance as being about his not permitting Mr. Thompson an oral interview which in turn precluded him from seeing how remorseful Mr. Thompson was. JT-2. While Graham's Step one grievance reply denied the grievance, it contained no discussion of the comments. JT-2.

The grievance filed by Thompson was elevated to Step two on January 17, 2007, where it was emphasized that the grievance was about Graham's failure to consider an oral response from Thompson and that the punishment was too severe. JT-3, 5. At Step two, the grievance was again denied with no discussion related to the comments in the Step two grievance reply issued on January 30, 2007. JT-5. Thompson's grievance was elevated to Step three on February 5, 2007. JT-6. The third step grievance decision was issued on February 22, 2007. JT-8. Despite the fact that the prior grievance decisions dealt only with the failure to allow an oral presentation and the severity of the punishment, the third step decision identified the grievance as having three points:

> (1) Mr. George Graham (Mr. Thompson's supervisor) refused to accept Mr. Thompson's oral reply to a proposed suspension for failing to correctly perform a Dropped Object Panel (DOP) inspection; (2) the punishment (3-day suspension) was too harsh; and (3) certain comments by Mr. Graham were coercive and anti-union. JT-8.

With respect to the third point, the decision stated:

> This memorandum does not address Mr. Thompson's third point of complaint. However, I do consider this point very serious and am prepared to discuss it with the union in a more appropriate forum. I have already recommended mediation as a means of resolving this ***apparent dispute between the government and the union***, and I look forward to such an opportunity. JT-8 (Emphasis added).

Having declared that the third point related to Graham's alleged comments would not be addressed, the deciding official then went on to state in paragraph (3)(d) of his decision that:

> . . . my review of the documentation and the interview uncovered nothing that I interpret as being coercive or anti union. I therefore concluded Mr. Graham did not attempt to coerce or be anti union toward Mr. Thompson. In any event, ***this issue is more appropriately dealt with separate of this grievance process***. Accordingly, I have recommended the parties attempt to resolve their differences through mediation as to any, supposed, anti-union activities my management. JT-8 (Emphasis added).

Ultimately, the deciding official indicated that he was ". . . denying Mr. Thompson's requested remedies in full.", and the union was informed of its right to invoke arbitration. JT-8. Subsequently, the union decided to not invoke arbitration over Will Thompson's individual grievance. T-131.

Although the union elected not to invoke arbitration upon Thompson's individual grievance, on March 26, 2007, it filed an unfair labor practice charge over the comments made by George Graham during the December 6, 2006 meeting in which he indicated that things might have gone better for Thompson had he written his own response to the notice of proposed suspension. GC-1(a).

I. The Motion to Dismiss

POSITION OF THE PARTIES

A. Respondent

The Respondent contends that the Authority lacks jurisdiction over the ULP charge set forth in the complaint because it is barred by the dual prosecution prohibition set forth in 5 U.S.C. §7116(d).[1/] Respondent argues that the factual predicate and legal theories for the ULP charge filed on March 26, 2007 are the same as those for the grievance filed by Will Thompson on January 3, 2007. Thus, Respondent asserts that the proper process for the resolution of this matter is the parties' negotiated grievance procedure because the individual's grievance was the first prosecution of the matter initiated by the Union.

B. General Counsel

The General Counsel concedes that the individual grievance of Will Thompson filed by the Union in response to his suspension was initiated prior to the ULP charge filed by the Union in response to comments made by a management official when that suspension was imposed. However, the General Counsel contends that the complaint is not prohibited by the dual prosecution provision of 5 U.S.C. §7116(d) because the grievance and the ULP complaint do not raise the same issues or involve the same aggrieved party, and that the legal theories supporting the grievance and charge are not substantially similar.

DISCUSSION AND ANALYSIS

Respondent's factual evidence, arguments at the hearing and post hearing brief provide a compelling case for the proposition that the factual predicate underlying this ULP complaint was part of the grievance filed on behalf of Will Thompson because included as part of the individual grievance, was an allegation that comments made by a supervisor when the discipline was imposed were coercive and anti-union. However, the Respondent's Brief fails to discuss and resolve the question of whether the aggrieved party under the individual grievance and this ULP complaint were one and the same, and that failure is tantamount to surrender given the legal precedent on this issue.

The purpose and effect of the prohibition upon dual prosecution set forth in 5 U.S.C. §7116(d) is quite simple. An aggrieved party who, under the Statute has the right to choose the forum in which a

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[1/] 5 U.S.C. §7116(d) states in part:

> . . . issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

dispute is aired, is not permitted two chances to litigate the same dispute by virtue of the Statute providing two forums. However, as recognized by the Supreme Court in the *Cornelius* case, it is an aggrieved party who is limited to single forum and, as the court recognized, a single factual situation can give rise to more than one aggrieved party. *Cornelius v. Nutt*, 472 U.S. 648; 105 S.Ct. 2882; 86 L.Ed.2d 515 (1985) (*Cornelius*).

In *Cornelius*, the court held that an employee who filed a grievance asserting a violation of his individual rights and the Union, who had independent rights in its institutional capacity, were separate aggrieved parties. After reaching that conclusion, the Supreme Court rejected a union's argument that §7116(d) barred it from filing a ULP charge in its institutional capacity merely because an employee had initiated an appeal or grievance procedure based on the same facts to enforce his individual rights. *Cornelius*, 472 U.S. at 665 fn.20. While the Supreme Court's ruling recognized that a single factual scenario could create more than one aggrieved party who had an independent right to choose differing forums under the Statute, that conclusion was not novel. In fact, a prior Authority decision interpreting the dual prosecution prohibition of §7116(d) issued shortly after the Statute was enacted, held that an individual grievance not filed by a union in its institutional capacity as an aggrieved party, precluded consideration of the individual's grievance as a basis for barring the union's ULP complaint. *U.S. Air Force, Air Force Logistics Command, Aerospace Guidance and Metrology Center, Newark, OH. and Local 2221, AFGE*, 4 FLRA 512, fn.1, 527 (1980) (*Newark*).

The distinction between an individual's rights and a union's rights was also recognized within the context of §7116(d) in the Authority's decision in *Internal Revenue Service, Western Region, San Francisco, CA.*, 9 FLRA 480, 481 fn.2 (1982). In that case, the Authority held that a union's unfair labor practice complaint over an information request was not barred by an appeal previously filed by an employee seeking the same information in a Merit Systems Protection Board proceeding. The Authority, in agreement with the ALJ, found that the ". . . Union's right to the information could not have been raised or decided in the proceeding before MSPB and therefore was not barred by section 7116(d) from being raised herein as an unfair labor practice." In *IRS, Chicago*, a union's independent right to request information was not part of a precluded ULP charge because the request over which the charge was filed only repeated prior employee requests and was made solely for the purpose of representing those employees in their previously filed grievances. Thus, under those limited circumstances, the Authority upheld an ALJ determination that the bar upon dual prosecution should be applied while recognizing that rights independent of those related to the grievances could lead to a different result. *Internal Revenue Service, Chicago, IL.*, 3 FLRA 479, 483 fn.1 (1980). (*IRS, Chicago*). See also, *Department of Defense Dependents Schools, Europe, London Central High School, High Wycombe, England*, 1 FLRA 143, 145 fn.4 (1979), which recognizes the distinction between union rights and employee rights.

As the case at bar is most similar to the facts in *Newark*, the authority of that precedent is dispositive and the Respondent's Motion to Dismiss on the basis of §7116(d) is denied. In the *Newark* case, the Authority held that a Union was not barred from filing an unfair labor practice charge over a refusal to bargain over reorganization by virtue of an individual employee's grievance over a detail that resulted from that same reorganization. In reaching that conclusion, the Authority pointedly observed that the union had the right to file an institutional grievance and thus, the Union's filing of an individual grievance on behalf of an aggrieved employee did not constitute an election of remedies by the union within the meaning of §7116(d) when it came to the union protecting its own rights.

In this case, the same can be said of the Union's right to protect its interest by filing an unfair labor practice charge rather than an institutional grievance to protect its right to represent and the bargaining unit members' right to be represented by the Union. Pursuant to Article 35 Section 2(b) of the Memorandum of Agreement (MOA), the Union had the option of filing its own institutional grievance over Graham's comments and could have presented them as a breach of Articles 4, 5 or 15 of the MOA. R-7. However, the Union did not file an institution grievance for the harm done to it and the bargaining unit to which Thompson belonged, by Graham's comments. Instead, the Union filed an individual grievance on behalf of employee Will Thompson, asserting that Article 6, Section 3 of the MOA was violated because the Employer did not act in a way consistent with the principle of partnership.
R-7.

While there is certainly considerable reason to question whether this article and section of the MOA was the strongest and best provision upon which to base an individual employee's claim related to a

disciplinary action[2/], it is clear from the conduct of the parties throughout the grievance process that only the employee's individual grievance was being addressed. In fact, the Step one and Step two answers contained no discussion of Graham's comments and the Step three grievance answer went so far as to declare that the comments would not be "addressed", because they involved a "dispute between the government and the union" and that they would be "more appropriately dealt with separate of this grievance process." JT-8.

Although the Respondent's Brief acknowledges that a ULP is barred by §7116 only ". . . when it occurs after the employee has already filed a grievance **and** when the basis of that filing focuses on an individual's rights rather than institutional interests", the brief makes no argument regarding why the ULP charge in this case was not protecting a Union's institutional interest in exercising its representational duty and the bargaining unit's right to be represented. RB-10. In that regard, it is important to note that the ULP charge and complaint in this case sought no relief for the individual employee. GC-1(a); GCB-22. Furthermore, this case involves neither a situation where the ULP was based solely upon an action being taken against a union official who's subsequent grievance was barred, *Dep't of Defense Dependents Schools, Pacific Region and Overseas Education Ctr.*, 17 FLRA 1001 (1985); nor one wherein a charge was drawn, in part, to allege a specific violation of a grievant's rights and for which relief was sought for that particular individual. *U.S. Dep't of Justice, Immigration and Naturalization Service*, 20 FLRA 743 (1985); *U.S. Dep't of the Army, Army Finance and Accounting Center, Indianapolis, IN.*, 38 FLRA 1345, 1350-51 (1991), review denied, 960 F2d 176, 178-179 (D.C. Cir. 1992). Each of these cases represent situations wherein the Authority applied the dual prosecution prohibition of §7116(d) to preclude a subsequent individual grievance over an individual right previously raised by a ULP charge, and not a situation where an individual grievance barred a subsequent ULP charge related to a union's institutional rights.

Given Authority precedent and the Respondent's own conclusion that the individual grievance did not involve the dispute between the government and the Union over the comments along with recognizing that such a dispute should be dealt with using a process separate from the individual's grievance, I conclude the Union retained the right to file either an institutional grievance or an unfair labor practice to address its own independent aggrieved status resulting from the impact such comments had upon the Union's right to represent and the bargaining unit members' right to be represented. The Union elected the latter, and having done so, was precluded from pursuing a subsequent institutional grievance over the comments by virtue of §7116(d). Therefore, the Respondent's Motion to Dismiss is denied and the question of whether the comments made by Mr. Graham in the December 6, 2006, meeting constituted an unfair labor practice must be addressed.

II. The Unfair Labor Practice Charge

POSITION OF THE PARTIES

A. General Counsel

General Counsel contends that the comments made by George Graham on December 6, 2006, violated section 7116(a)(1) of the Statute. The General Counsel asserts that in telling Will Thompson that he would have gone easier on him if he had prepared his own response to the proposed suspension, Graham interfered with, restrained or coerced the employee in the exercise of his rights under the Statute and committed an unfair labor practice.

B. Respondent

The Respondent argues that a reasonable person would not interpret the comments made by Graham on December 6, 2006, as interfering with, coercing, or restraining an employee from exercising his rights under the Statute. Respondent asserts that Graham's statements focused upon the tone and effect of the written response to the proposed disciplinary action prepared by Thompson's union representative and not the fact that a union representative was involved in the process.

[2/] Article 15 of the MOA specifically covers disciplinary actions and Section 3 provides guidance related to penalties while Section 8 discusses the written notice that established the right to an oral reply in this case. While not as pointed, Article 4 Section 8 provided another potential source for breach and that would have been the most appropriate MOA article for raising an individual grievance related to the language used by Graham, whereas, an institutional grievance related to such language would have been better covered by Article 5.

DISCUSSION AND ANALYSIS

For the reasons set forth in my findings of fact, I conclude that while ambiguous, the comments made by Graham during the December 6, 2006, meeting were made to indicate that the discipline imposed upon Thompson was in part a response to the confrontational, challenging and combative tone of the written response prepared and submitted by his union representative. Thus, the question to be resolved is whether those ambiguous comments could reasonably be viewed as interfering with, coercing or restraining a bargaining unit member's right to representation and the union's right to represent him. For the reasons set forth in this decision, I conclude that such an interpretation is not only reasonable but was the intent of the speaker in this case.

Based upon the testimony provided at the hearing, it is clear that the union representative involved in this matter performs his representative function with combative zeal and places less emphasis upon engendering goodwill with management. One management witness described his behavior with regard to this particular matter as showing up unannounced and making threats. TR-38. The witness also referred to him as a bull in the china shop who tended to barge into meetings, catch supervisors off guard and make demands and threats to try and coerce them to commit to things without giving thought to his demands. TR-52. Another management witness described his behavior in this case as "pressing", "agitated" and "threatening". TR-68, 69. Clearly, Duncan is not a potted plant when it comes to performing his representational duties. A combative, challenging style may not be what management would prefer from an elected representative and it may not be the most effective means of representing the unit. However, an agency violates §7116(a)(1) of the Statute when it interferes with an employee's rights under §7102 to form, join or assist any labor organization freely and without fear of penalty or reprisal. *U.S. Dep't of Agriculture, U.S. Forest Serv., Frenchburg Job Corps, Mariba, KY.*, 46 FLRA 1375 (1993).

In this case, Graham's telling Thompson that things would have gone easier for him had he written his own response created a scenario wherein the employee could conclude that he was being punished, at least in part, not for his offense but for the fact that he sought union representation and allowed that representative to prepare his written response. Furthermore, it is clear from their testimony that Thompson and Duncan interpreted Graham's comments in exactly that manner. T-127, 128. However, the standard for determining whether a management statement violates §7116(a)(1) is an objective one. The test is whether, under the circumstances, the statement could reasonably tend to coerce or intimidate the employee or whether the employee could reasonably have drawn a coercive inference from the statement and not whether they actually did so. *Fed. Mediation and Conciliation Serv.*, 9 FLRA 199 (1982); *Dep't of the Air Force, Scott Air Force Base, IL.*, 34 FLRA 956, 962 (1990); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Safford, AZ.*, 59 FLRA 318, 322 (2003). Neither the subjective perception of the employee nor the employer's intent is determinative because an objective standard which considers the circumstances surrounding the comments must be used. *Bureau of Engraving and Printing*, 28 FLRA 796 (1987); *Ogden Air Logistics Ctr., Hill Air Force Base, UT.*, 51 FLRA 1459 (1996) (*Ogden*).

While such circumstances could include an explanation that clarified ambiguous comments, like it was a lack of contrition in a written response, for the reasons set forth in my earlier discussion, I conclude that such an explanation was not proffered by Graham at the time the comments were made. I have no doubt that Graham was concerned by the lack of contrition in the response written by Thompson's union representative and that he discussed those concerns with other members of management. However, I am equally convinced that the combative tone of Duncan's written response not only disappointed, but angered Graham because it questioned the quality of his investigation and challenged the basis for the proposed action. When Graham responded to Duncan's request for an oral reply by stating that he had read the written response and there was nothing more to hear, he behaved like a supervisor angry that his authority had been challenged, rather than one who was interested in determining if his subordinate had learned a valuable lesson before he determined the appropriate punishment. TR-175. Therefore, I conclude that Graham told Thompson and Duncan that Thompson's discipline would have been less severe had he written his own response, not to demonstrate his concern for lack of contrition, but to teach Thompson a lesson about using his union representative and to make that representative acutely aware of the fact that his hardball tactics had resulted in harm. In his testimony, Graham admitted that during the December 6, 2006, meeting, he asking the two "who had written the response" and I find that the only reason he posed that question was to emphasize the culpability of Duncan because his

Notice to Suspend specifically stated: "In reviewing your representative's response . . . ". TR-201, JT-1. Thus, there was no doubt in Graham's mind about who wrote the response, as it was clearly indicated in his own document, and his inquiry and comments were the equivalent of sending Thompson the message that he had hung himself by going to the union. *Dep't of the Navy, Portsmouth Naval Shipyard*, 7 FLRA 766 (1982).

Under *Ogden*, there is no need to determine if Graham made the comments with the intent to interfere with, restrain or coerce an employee in the exercise of his rights under the Statute, it is sufficient to conclude that the comments could reasonably tend to do so. However, considering all of the circumstances in this case, I find that Graham wanted Thompson and Duncan to know that Duncan's zealous representation did not come without a price and that Graham's doing so could reasonably tend to interfere with, restrain or coerce an employee in the excise of his rights under the Statute. Seeking union representation is among the rights guaranteed by §7102 and under these circumstances, Graham's indication that Thompson would have been better served to write his own response rather than relying upon a union representative violates §7116(a)(1). *IRS, North Atlantic Region, Brookhaven Serv. Ctr., Holtsville, NY.*, 53 FLRA 732 (1997).

Based upon the foregoing, I find that a preponderance of the evidence establishes that the Respondent violated §7116(a)(1) of the Statute on or about December 6, 2006, when, during a meeting with employee Will Thompson and union representative David Duncan, George Graham said to the employee, words to the effect of, that if you had prepared your own response, things might have gone better for you and that if the employee had written his own response he might have gone easier on him. Accordingly, it is recommended that the Authority adopt the following:

ORDER

Pursuant to §2423.41(c) of the Rules and Regulations of the Authority and §7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the Department of the Air Force, 62 Airlift Wing, McChord Air Force Base, Washington, shall:

1. Cease and desist from:

(a) Making statements to employees in the bargaining unit represented by the American Federation of Government Employees, Local 1501, AFL-CIO that interfere with, restrain or coerce employees in the exercise of their rights under §7102 of the Federal Service Labor-Management Relations Statute, which includes the right to be represented by the union without fear of penalty or reprisal.

(b) Interfering with, restraining or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action:

(a) Post at all facilities at McChord Air Force Base, Washington, copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the Commander, 62 Airlift Wing, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced or covered by any other material.

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

Issued, Washington, DC, March 12, 2008

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CHARLES R. CENTER
Chief Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF

THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of the Air Force, 62 Airlift Wing, McChord Air Force Base, Washington, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT, make statements to employees in the bargaining unit represented by the American Federation of Government Employees, Local 1501, AFL-CIO that interfere with, restrain, or coerce employees in exercise of their rights under §7102 of the Federal Service Labor-Management Relations Statute, which includes the right to be represented by the union without fear of penalty or reprisal.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

_____

Department of the Air Force
62 Airlift Wing
McChord Air Force Base, Washington

Dated:_____By:_____
(Signature)
Commander, 62 Airlift Wing

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, San Francisco Regional Office, whose address is: Federal Labor Relations Authority, 901 Market Street, Suite 220, San Francisco, California 94103-1791, and whose telephone number is: 415-356-5000.