

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-000

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| U.S. DEPARTMENT OF VETERANS AFFAIRS Respondent | |
| and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, SEIU, LOCAL R5-136, AFL-CIO Charging Party | Case No. AT-CA-90578 |

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before JULY 31, 2000, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: June 29, 2000
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: June 29, 2000

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF VETERANS
AFFAIRS

Respondent

and

Case No. AT-CA-90578

NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES, SEIU,
LOCAL R5-136, AFL-CIO

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

OALJ 00-42

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| U.S. DEPARTMENT OF VETERANS AFFAIRS Respondent | |
| and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, SEIU, LOCAL R5-136, AFL-CIO Charging Party | Case No. AT-CA-90578 |

Mr. George B. DeMarse
For the Respondent

Susanne S. Matlin, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. 7101, et seq., and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether, when the parties' collective bargaining agreement specifically, and at length, addresses representation at the first and second steps of the negotiated grievance procedure, Respondent violated §§ 16(a) (1) and (5) by refusing to permit attorney representation at a step two grievance meeting. For reasons fully set forth hereinafter, I find that Respondent did not violate § 16(a) (1) or (5).

This case was initiated by a charge filed on May 25, 1999, in the Atlanta Region (G.C. Exh. 1(a)); on June 29,

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For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial, "71", of the statutory reference, i.e., Section 7116(a) (5) will be referred to, simply, as, "\$ 16(a) (5)".

1999, this, and other cases, were, pursuant to § 2429.2 of the Rules and Regulations, 5 C.F.R. § 2429.2, transferred to the Chicago Regional Office (G.C. Exh. 1(b)); the Complaint and Notice of Hearing issued on November 15, 1999 (G.C. Exh. 1(d)); the Notice of Hearing set the hearing for January 19, 2000, at a place to be determined in Charleston, South Carolina; and by Notice dated January 10, 2000, the place of hearing was fixed for Moncks Corner, South Carolina, not Charleston as originally designated, pursuant to which a hearing was duly held on January 19, 2000, in Moncks Corner, South Carolina, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which each party waived. At the conclusion of the hearing, February 22, 2000, was fixed as the date for mailing post-hearing briefs and each party timely mailed a helpful brief, received on, or before, February 29, 2000, which have been carefully considered. Upon the basis of the entire record, I make the following findings and conclusions:

FINDINGS

1. The National Association of Government Employees, SEIU, AFL-CIO (hereinafter, "NAGE") is the exclusive representative of a nationwide consolidated unit of non-professional employees of the United States Department of Veterans Affairs (hereinafter, "VA"), including the employees at VA's Ralph H. Johnson Veterans Affairs Medical Center in Charleston, South Carolina (hereinafter, "VAMC Charleston"). National Association of Government Employees, SEIU, Local R5-136, AFL-CIO (hereinafter, "Union") is the agent of NAGE for the representation of bargaining unit employees at VAMC Charleston.

2. VA and NAGE are parties to a master collective bargaining agreement. The current Master Agreement is dated May 28, 1992 (G.C. Exh. 2), which replaced the Master Agreement dated October 2, 1984 (G.C. Exh. 3).

3. The provisions of the 1984 Master Agreement with respect to the Grievance Procedure (G.C. Exh. 3, Article 13) were carried over, largely without change through Article 13, Section 9 (G.C. Exh. 3, Art. 13, Section 9), in the 1992 Master Agreement except that the Grievance Procedure now is Article 47 rather than Article 13 (G.C. Exh. 2, Article 47); that Section 1 of Article 47 is a new provision (G.C. Exh. 2, Article 47, Section 1); and minor changes were made in Article 13, Section 5, Section 6,

Step 2 and Step 3 (G.C. Exh. 3) as noted hereinafter.
Pertinent provisions of the current Grievance Procedure are:

"GRIEVANCE PROCEDURE

"Section 1 - Grievance means any complaint:

"A. by any unit employee concerning any matter relating to the employment of the employee;

"B. by the Union concerning any matter relating to employment of unit employees;

"C. by any unit employee, the Union or the Employer concerning;

"(1) the effect or interpretation, or a claim of breach of this agreement; or

"(2) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

"Section 2 - This negotiated grievance procedure shall be the sole procedure available to the Union, the Employer and the unit employees for resolving grievances over the interpretation or application of this Master Agreement, its amendments, or its supplements, or, for unit employees over any dissatisfaction with their working conditions."

. . .

"Section 4 - Most grievances arise from misunderstandings or disputes which can be settled promptly and satisfactorily on an informal basis at the immediate supervisory level. The Employer and the Union agree that every effort will be made by Management and the aggrieved party(ies) to settle grievances at the lowest possible level.

"Section 5 - Reasonable time during working hours will be allowed for employees and Union representative to prepare and/or present grievances.

"Section 6 - An employee and/or his/her representative are encouraged to discuss issues of concern to them, informally, with his/her

supervisor at any time. Likewise, an employee and/or his/her representative may request to talk with other appropriate officials about items of concern without filing a grievance if they choose. The following steps will be followed when an employee grievance is initiated. Grievances should be initiated at the lowest step of this procedure where the management official has the authority to take corrective action to resolve the grievance. However, the time limits to initiate a grievance will be as set forth in Step 1, regardless of the step at which the grievance is initiated.

"Step 1 - The grievance must be submitted by the aggrieved employee, or his/her designee, orally or in writing, within 14 calendar days from the date of the act or occurrence, or the employee's awareness thereof, to the employee's immediate supervisor (or designee). The employee's immediate supervisor (or designee) will meet with the aggrieved employee to discuss the grievance. The employee may be accompanied by the Local steward who will ordinarily be the one designated to represent the employee's Service. The immediate supervisor (or designee) will provide the employee with a decision on the issue within 10 calendar days after receipt of the grievance. If the grievance is submitted in writing, the grievance should contain the specific nature of the complaint, the date of the incident, the desired remedy, and the article(s), if applicable, of the Agreement (either the Master or the Supplemental) which is (are) at issue. A written grievance requires a written response. If the grievance is presented orally, the grievant and/or the grievant's representative must advise the supervisor in advance that the meeting is for the purpose of presenting a grievance.

"Step 2 - If no mutually satisfactory settlement is reached as a result of the first step consideration, the aggrieved may submit the grievance under the second step. Such notification will be in writing and state the specific nature of the complaint, the date of the incident, the desired remedy, and the articles(s), if applicable, of the Agreement (either Master or Supplemental) at issue. Such grievance must be presented within 10 calendar days of receipt of the Step 1 decision. The grievance at Step 2 will

be submitted to the Service Chief (or designee). If the Service Chief is the immediate supervisor, the grievance will be submitted to the next higher Management Official below the Director. The Management official receiving the grievance at Step 2 will meet with the aggrieved employee. The employee may be accompanied by the Chief steward, or his/her designee. The Management Official will provide the employee with a written decision on the issue within 10 calendar days after receipt of the grievance.

"Step 3 - If no mutually satisfactory settlement is reached as a result of the second step, the aggrieved may submit the grievance to the Director (or the Director's designee) within 10 calendar days of receipt of the decision at Step 2. The Director, (or designee) will meet with the aggrieved employee to discuss the grievance. The employee may request the assistance of a Local Union representative and/or a National Office representative at this step. The Director (or designee) will render a decision, in writing, within 14 calendar days after receipt of the grievance.

"Step 4 - If no mutually satisfactory settlement is reached, only the union or management may refer the matter to arbitration within 30 calendar days of the date of receipt of the Step 3 decision. All time limits in this Article may be extended by mutual consent of the parties of this Agreement.

". . . . (G.C. Exh. 2, Article 47, Section 1, 2, 4, 5, 6 [1992 Agreement]; G.C. Exh. 3, Article 13, Sections 1, 4, 5, 6 [1984 Agreement] [NOTE: Section 1 of Article 47 is a new provision (G.C. Exh. 2, Section 1); the phrase, ". . . consistent with procedures in Article 6, Section 14" of Article 13, Section 5 of G.C. Exh. 3 was deleted and the words, "and/or" were inserted in the language of Article 13, Section 5; the time in Article 13, Section 6, Step 2 to present a grievance and in Step 3 to appeal from Step 2, was changed from 14 days to 10 days (G.C. Exh. 3, Section 6, Step 2, Step 3)]. (Emphasis supplied)

4. "Arbitration" is Article 48 of the current Agreement (G.C. Exh. 2, Article 48) and had been Article 14 of the 1984 Agreement (G.C. Exh. 3, Article 14).

5. Until 1996, VAMC Charleston usually had only one representative at Step 2 grievance meetings, - the Service Chief, or designee - but in 1996, it began sending two representatives - the Service Chief, or designee, and a person from Human Resources (Personnel) (Tr. 26, 49, 129). When VAMC Charleston began having two representative at Step 2 grievance meetings the Union, pursuant to Article 7, Section 3 (G.C. Exh. 2, Article 7, Section 3), which grants the Union the same number of representatives as management at any formal discussion², insisted on having two representatives and has done so. (Tr. 24, 42-43, 52-53).

At no time, however, has any person represented the Union in any Step 2 grievance meeting who was not a designated officer or steward (Tr. 24, 43, 73, 131-132, 138); i.e., specifically the Union has never had a National Representative or an attorney at a Step 2 grievance meeting (id.).

6. In May, 1999, Steward Corrin Marinko represented bargaining unit employee Victoria Henslee in a grievance and she, Marinko, was notified of the Step 2 meeting (Tr. 53-54). As the Union expected Mr. Donald Wilson, a labor relations specialist at VAMC Charleston (Tr. 135), together with the Service Chief, Dr. Allen Robbins (Tr. 55), to be present for VAMC Charleston at the May 25, 1999, grievance meeting, Mr. Fletcher P. Truesdell, President of the Union, designated Ms. Michele Snyder, a private attorney, whose firm represents the Eastern Region of NAGE, to attend the Step 2 grievance meeting as the Union's second representative (Tr. 29, 32, 46, 50, 54-55, 63, 70-71, 75).

While Ms. Henslee, Ms. Marinko and Ms. Snyder were waiting for the Step 2 grievance meeting to begin, Mr. Wilson appeared and told Ms. Snyder that he would not allow her to attend the grievance meeting (Tr. 29, 55-56, 64, 71-72, 138). After some discussion with Mr. Wilson, Ms. Snyder returned to the Union office and told Mr. Truesdell that Mr. Wilson would not let her attend the meeting and Mr. Truesdell went to the Step 2 grievance meeting which then proceeded with the grievant, Ms. Henslee, and Ms. Marinko and Mr. Truesdell present for the Union and

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"Section 3 - The Union shall be given the opportunity to be present at any formal discussion . . .

"In such cases, the Union will be entitled to the same number of representatives as management, regardless of official time status." (G.C. Exh. 2, Article 7, Section 3).

Dr. Robbins and Mr. Wilson present for VAMC Charleston (Tr. 30, 57, 138).

7. Article 9 of the current Agreement (G.C. Exh. 2, Article 9) is entitled, "UNION REPRESENTATION", and Section 1 provides as follows:

"Section 1 - The Employer shall recognize the officers and stewards of the Union. The Union will keep the local facility advised in writing of the names of its officers and stewards. Any changes will be reported to management in writing. A complete revised listing will be provided by the Union at least annually. Management officials of the Employer will officially recognize only those Union representatives who have been appointed and reported in keeping with this article." (G.C. Exh. 2, Article 9, Section 1).

I specifically do not credit the inference of Mr. Truesdell's testimony (Tr. 150) that Article 9, Section 1, applies only to official time for various reasons. First, any such inference is contrary to the plain language of this Article and of Section 1. As noted, this Article 9 is entitled, "Union Representation" and, clearly, Section 1 delineates those persons who may speak for the Union, commit the Union and act for the Union. Thus, Section 1, provides, in part, that,

". . . Management officials of the Employer will officially recognize only those Union representatives who have been appointed and reported in keeping with this article." (G.C. Exh. 2, Article 9, Section 1).

While it may be true that only those officers and stewards provided for in Section 1 may receive official time, nevertheless, Section 1 does not deal in any manner with official time. Official time is addressed directly in Sections 2, 7 and 11 and indirectly by Section 3 (G.C. Exh. 2, Article 9, Sections 2, 3, 7, 11). Second, Mr. George Reaves, a national representative for NAGE and Chief Negotiator for NAGE for the 1992 Agreement, conceded on cross-examination that Article 9, Section 1, ". . . provides a procedure for designating local representatives" (Tr. 117); Section 1, ". . . didn't speak to official time. . . ." (Tr. 119); and, ". . . management officials of the employer will recognize only those union representatives who have been appointed and reported in keeping with this article." (Tr. 119). Moreover, the genesis of Article 9 makes this apparent beyond cavil.

Thus, Section 1, of NAGE's initial proposal was identical to Section 1 as agreed upon except for the sentence, "Any changes will be reported to management in writing" (G.C. Exh. 9, Attachment, Section 1, p. 14; G.C. Exh. 2, Article 9, Section 1), which was added later. Section 1 of the NAGE proposal dealt only with the designation, recognition and authority of the officers and stewards so designated to act for the union and did not make any reference whatever to, "official time" which was addressed by Section 2 and in the NAGE proposal each officer and representative was to be granted the stated number of hours of official time specified for each, e.g., "President - 40 hours per week"; "Stewards - 20 hours per week not to exceed 4 hours per each day" (G.C. Exh. 9, Attachment, Section 2, p. 14). VA did not agree with NAGE's proposed Section 2 and insisted that official time be negotiated at the local level and, eventually, Section 2 was agreed upon as written (G.C. Exh. 2, Article 9, Section 2, p. 6). The change from NAGE's initial proposed language of Section 2 did not alter in any manner the purpose and function of Section 1 both as proposed and adopted which, as noted above, was to provide for the recognition, designation and authority of its designated officers and stewards. It did not make any reference whatever to, "official time" which was, and is, dealt with by other Sections of Article 9. Third, I reject the testimony of both Mr. Truesdell and Mr. Reaves concerning the purpose of Section 1, namely to refer to official time, as self-serving and contrary to the unambiguous language of Section 1 (G.C. Exh. 2, Article 9, Section 1, p. 6).

CONCLUSIONS

It is true, as General Counsel asserts, that there is no provision of the Agreement that specifically prohibits an attorney from representing a grievant at a Step 2 grievance meeting; but the converse is also true, namely, that there is no provision of the Agreement that specifically authorizes an attorney to represent a grievant at a Step 2 grievance meeting. Nevertheless, I conclude that the Agreement of the parties precludes representation from outside the bargaining unit at a Step 2 grievance meeting.

Like Internal Revenue Service, Washington, D.C., 47 FLRA 1091 (1993)³ (hereinafter, "IRS"), this case involves an alleged breach of a union's statutory right to designate its representatives. There is no dispute that it is within the discretion of both agency management and labor organizations holding exclusive recognition to designate their respective representatives, American Federation of Government Employees, AFL-CIO, 4 FLRA 272, 273 (1980); American Federation of Government Employees, Local 1738, AFL-CIO, 29 FLRA 178, 188 (1987). Nor is there any doubt that in exercising that discretion, the parties may impose limitations by orchestrating the representation permitted at specified levels.

In IRS, supra, the Authority stated, in part, as follows:

" . . . On reexamination, . . . We now hold that when a respondent claims as a defense to an alleged unfair labor practice that a specific provision of the parties' collective bargaining agreement permitted its actions alleged to constitute an unfair labor practice, the Authority, including its administrative law judges, will determine the meaning of the parties' collective bargaining agreement and will resolve the unfair labor practice complaint accordingly." (id. at 1103)

. . .

"To assure the intent of Congress in providing for a meaningful choice of forums under Section 7116(d), we hold that the Authority in resolving these cases will apply the same standards and principles in interpreting collective bargaining agreements as applied by arbitrators in both the Federal and private sectors and in the Federal courts under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. As part of these standards, we note, for example, that 'collective bargaining agreements must be read in light of the realities

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The Authority's initial decision in this case was: 39 FLRA 1568 (1991), where it espoused a, "clear and unmistakable waiver", test rather than a, "differing and arguable interpretation", analysis. In Internal Revenue Service v. FLRA, 963 F.2^d 429 (D.C. Cir. 1992), the Court vacated the Authority's decision in 39 FLRA 1568 and remanded the case for further proceedings.

of labor relations and considerations of federal labor policy, which make up the background against which such agreements are entered.' Local Union 1395, IBEW, 797 F.2d at 1033 (citations omitted). The focus will be on the interpretation of the express terms of the collective bargaining agreement. HHS v. FLRA, 976 F.2d at 235. Nevertheless, the meaning of the agreement must '[u]ltimately . . . depend [] on the intent of the contracting parties.' Local Union 1395, IBEW, 797 F.2d at 1034 (quoting Gateway Coal Co. v. UMW, 414 U.S. 368, 382 (1974)). The parties' intent must be given controlling weight, 'whether that intent is established by the language of the clause itself, by inferences drawn from the contract as a whole, or by extrinsic evidence.' Id. [797 F.2d] at 1036. . . .

" . . . Furthermore, in determining the meaning of the collective bargaining agreement, the administrative law judge should consider, as necessary, any alleged past practices relevant to the interpretation of the agreement. . . ." (id. at 1110-1111).

A. GRIEVANCES THROUGH STEP TWO TO BE HANDLED LOCALLY

That the parties here intended that through the Second Step of the grievance procedure, grievances were to be handled "in house", i.e., that representative of both grievant and management be "local" is shown by the language of their Agreement. Thus, Article 47 - GRIEVANCE PROCEDURE, provides, in part as follows:

"**Section 4** - Most grievances . . . can be settled promptly and satisfactorily on an informal basis at the immediate supervisory level. The Employer and the Union agree that every effort will be made by Management and the aggrieved party(ies) to settle grievances at the lowest possible level." (Emphasis supplied)

"**Section 5** - Reasonable time during working hours will be allowed for employees and Union representative to prepare and/or present grievances." (Emphasis supplied)

"**Section 6** - An employee and/or his/her representative are encouraged to discuss issues of concern to them, informally, with his/her supervisor . . . Grievances should be initiated

at the lowest step of this procedure where the management official has the authority to . . . resolve the grievance. . . ." (Emphasis supplied)

"Step 1 - The grievance must be submitted . . . to the employee's immediate supervisor (or designee). The employee's immediate supervisor (or designee) will meet with the aggrieved employee to discuss the grievance. The employee may be accompanied by the Local steward who will ordinarily be the one designated to represent the employee's Service. The immediate supervisor (or designee) will provide the employee with a decision . . . A written grievance requires a written response. . . ." (Emphasis supplied)

"Step 2 - If no mutually satisfactory settlement is reached as a result of the first step consideration, the aggrieved may submit the grievance under the second step. . . . The grievance at Step 2 will be submitted to the Service Chief (or designee). If the Service Chief is the immediate supervisor, the grievance will be submitted to the next higher Management Official below the Director. The Management official receiving the grievance . . . will meet with the aggrieved employee. The employee may be accompanied by the Chief steward, or his/her designee. The Management Official will provide the employee with a written decision. . . ." (Emphasis supplied)

It is true that, beginning in 1996, VAMC Charleston has had a person from Personnel (Human Resources) accompany the Management Official at Step 2 grievance meetings and, pursuant to Article 7, Section 3 of the Agreement, the Union insisted upon having two representatives and has done so. Article 7, Section 3 provides, ". . . the Union will be entitled to the same number of representatives as management" (emphasis supplied) and union representation, i.e., those persons authorized to represent the Union, is set forth in Article 9, Section 1, to wit: ". . . officers and stewards . . . who have been appointed and reported in keeping with this article." (Article 9, Section 1). Similarly, "representative" in Article 47, Section 5 and Section 6, is governed in each instance by the provisions of Article 9, Section 1.

Article 47, Section 9, provides, in part, that:

"Section 9 - Unit employees . . . may present a grievance which may be adjusted with or without Union representation . . . However, the Union shall have the right to have its representative present at the adjustment. . . ."

Again, "Union representation" and "representative" are controlled by the provisions of Article 9, Section 1 of the Agreement.

Article 47, Section 14, provides, in part, as follows:

"Section 14 - Upon the filing of a grievance, an employee, and/or his/her representative, shall be allowed to review any documentation . . . At their request, employees or their representatives will be provided with a copy of any of the material reviewed"

As noted above, grievances are "filed", or initiated, at Step 1 which specifically states,

"The employee may be accompanied by the Local steward"

"Representative" in Section 14, necessarily, is a steward, both as stated in Step 1 upon initiation of a grievance and as provided in Article 9, Section 1 of the Agreement.

B. Outside Union Representation Not Permitted Until Step 3

The parties were at pains to make certain that both the Union and Management make every effort to settle grievances at the lowest level; that employees and/or their representatives discuss issues informally; that grievances be initiated at the lowest level; that a grievance is initiated at Step 1 by submission to the employee's immediate supervisor, or designee, who will meet with the employee who may be accompanied by the Local Steward; and at Step 2 the Management Official (ordinarily, the Service Chief or designee) will meet with the employee who may be accompanied by the Chief steward, or designee (Management added a person from Personnel and the Union added a second Article 9, Section 1, representative); but no outside representation for either Management or the Union was contemplated or provided until Step 3, at the Director's level, when the Union was permitted to have a National Office representative. Thus, the Agreement provides in relevant part:

"Step 3 - If no mutually satisfactory settlement is reached as a result of the second step, the aggrieved may submit the grievance to the Director (or the Director's designee) . . . The Director, (or designee) will meet with the aggrieved employee to discuss the grievance. The employee may request the assistance of a Local Union representative and/or a National Office representative at this step. . . ."

At the outset, the parties here carefully modified the word "representative" to delineate a Local Union representative, controlled by Article 9, Section 1, from a National Office representative, who is not. But of greater significance, the parties made it plain that when "outside" representation was permitted in the grievance procedure they made provisions for it. The corollary is that when they did not make provision for "outside" representation through the Second Step of the grievance procedure, they intended the preclusion of "outside" representation. Moreover, through the Third Step, "outside" representation of management is not authorized.

C. UNION AND EMPLOYER GRIEVANCES AND GRIEVANCES AFFECTING MORE THAN ONE FACILITY ARE SUI GENERIS AND WITHOUT REPRESENTATION LIMITATION

Article 47, Section 10 governs Union grievances and provides as follows:

"Section 10 - Union grievances shall be filed with the Director . . . The parties will meet within 10 days to discuss the grievance. The Director will provide a written decision. . . ."

Article 47, Section 11 governs Employer grievances and provides as follows:

"Section 11 - Employer grievances shall be filed with the Union President by the Director or designee . . . The Union President will provide a written decision. . . ."

Article 47, Section 12 governs grievances affecting more than one facility and provides as follows:

"Section 12 - A grievance affecting more than one facility may be brought by the NAGE National office or VA Headquarters . . . The grievance will be filed with the respective designated

representa-tive. . . . Written decisions will be issued. . . ."

Sections 10, 11 and 12 place no limitation whatever on representation at a Union grievance, before the Director, at an Employer grievance, before the Union President, or a grievance affecting more than one facility, another type of Union or Employer grievance, brought by the NAGE National Office or by VA Headquarters. Consequently, National Representative Reaves' participation in a grievance at VAMC Charleston in about May, 1998 (Tr. 115) was entirely consistent with Section 10 because it was a Union grievance (Tr. 122).

D. NO REPRESENTATION LIMITATION AT ARBITRATION

Arbitration is governed by Article 48 (G.C. Exh. 2, Article 48) which imposes no limitation on representation of the parties. Accordingly, it was entirely consistent with Article 48 that attorney Snyder represent the Union at arbitration (Tr. 61, 69).

E. CONSISTENT PRACTICE SINCE 1984 SHOWS THAT "OUTSIDE" REPRESENTATION HAS BEEN PRECLUDED THROUGH STEP 2

The provisions of Step 1 and Step 2 of the 1984 Agreement (G.C. Exh. 3, Article 13, Section 6, Step 1 and Step 2) were identical to the provisions of Step 1 and Step 2 of the 1992 Agreement, except: (a) Article 13 of the 1984 Agreement became Article 47 of the 1992 Agreement; and (b) both the time for presenting a grievance, after receipt of the Step 1 decision, and the time to issue a written decision was changed from 14 calendar days in the 1984 Agreement to 10 calendar days (G.C. Exh. 2, Article 47, Section 6, Step 1 and Step 2). The record shows that from 1984 no person from outside the activity has represented any employee or management through the Second Step of the grievance procedure. Step 2 specifically provides that, "The employee may be accompanied by the Chief steward, or his/her designee" and, while "designee" does not, standing alone, preclude "outside" representation, the provisions of Article 47 as a whole make it clear that "designee" does not encompass "outside" representation whether by National Union representatives or by attorneys. As previously noted, it is not until the Third Step that the Agreement permits any outside representative and at Step 3, "The employee may request the assistance of a Local Union representative and/or a National Office representative at this step." (Emphasis added)

Further, the record shows that since 1984 no employee has been represented through Step 2 of the grievance procedure by any person other than an officer or steward. Indeed, the record shows that even through Step 3 this has been true, even though at Step 3 the employee could have requested a National Office representative (Mr. Reaves' participation in a grievance at the Director's level was not pursuant to Section 6, Step 3; but, rather, was pursuant to Section 10, because this was a Union grievance).

For all of the foregoing reasons, I find that the provisions of Article 47 of the current Agreement (G.C. Exh. 2), as did the substantially like provisions of Article 13 of the 1984 Agreement (G.C. Exh. 3), precluded "outside" representation through Step 2 and, therefore, when the Union attorney was refused permission to represent the employee, Ms. Henslee, at the Step 2 grievance meeting, Respondent, VAMC Charleston, acted in accordance with Article 47 which precludes the representation of employees through the Second Step by any outside representative, including attorneys. In so acting, Respondent, VAMC Charleston, followed the consistent and unvaried practice of the parties since 1984. Accordingly, Respondent, VAMC Charleston, did not violate § 16(a)(1) and (5) of the Statute.

F. NAGE WAIVED THE RIGHT TO RESOLVE INTERPRETATION OF ARTICLE 47 THROUGH UNFAIR LABOR PRACTICE PROCEDURES

Although I have found that Article 47 of the parties' Agreement precluded representation of an aggrieved employee by an attorney at Step 2 of the grievance procedure, I would, alternatively, find that NAGE, and its agent, the Union, waived its discretion to raise the interpretation of Article 47 through the unfair labor practice procedures.

§ 16(d) of the Statute, as pertinent, provides:

"(d) . . . 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." (5 U.S.C. § 7116(d)). (Emphasis added)

In their 1992 Agreement, the parties added a new provision, as Section 1, which reads as follows:

"Section 1 - Grievance means any complaint;

. . .

"C. by any unit employee, the Union or the Employer concerning:

"(1) the effect or interpretation, or a claim of breach of this agreement; or

. . . ." (G.C. Exh. 2, Article 47, Section 1). (Emphasis added)

Section 2 of the 1992 Agreement, which is identical to Section 1 of the 1984 Agreement (G.C. Exh. 3, Article 13, Section 1), provides as follows:

"Section 2 - This negotiated grievance procedure shall be the sole procedure available to the Union, the Employer and the unit employees for resolving grievances over the interpretation or application of this Master Agreement, its amendments, or its supplements, or, for unit employees over any dissatisfaction with their working conditions."

. . . ." (G.C. Exh. 2, Article 47, Section 2). (Emphasis added)

Because Section 1 of Article 47 defines, "grievance" as any complaint by any unit employee, the Union or the Employer concerning the effect or interpretation of the agreement and Section 2 of Article 47 specifically states that, "This negotiated grievance procedure shall be the sole procedure available to the Union, the Employer and the unit employees for resolving grievances [i.e. complaints] over the interpretation or application of this Master Agreement. . . .", clearly, NAGE waived its discretion to resolve the interpretation or application of Article 47 through the unfair labor practice procedures and because NAGE has waived its right to resolve the meaning or applications of the Agreement under the unfair labor procedures, the Complaint must, for this reason alone, be dismissed.

Having found that Respondent, VAMC Charleston, did not violate either § 16(a) (1) or (5) of the Statute, as alleged, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. AT-CA-90578 be, and the same is hereby, dismissed.

WILLIAM B. DEVANEY
Administrative Law Judge

Issued: June 29, 2000
Washington, DC

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. AT-CA-90578, were sent to the following parties in the manner indicated:

**CERTIFIED MAIL & RETURN RECEIPT
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