67 FLRA No. 135

UNITED STATES
DEPARTMENT OF THE AIR FORCE
SPACE AND MISSILE SYSTEMS CENTER
LOS ANGELES AIR FORCE BASE
EL SEGUNDO, CALIFORNIA
(Respondent)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2429
AFL-CIO
(Charging Party)

SF-CA-11-0402

DECISION AND ORDER

August 18, 2014

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

In the attached decision, a Federal Labor Relations Authority (FLRA) administrative law judge (the Judge) found that the Charging Party (the Union) represented an employee (the employee) in connection with the employee's Equal Employment Opportunity (EEO) complaint. The Judge also found that the Respondent and the employee had discussions regarding the EEO complaint, and that those discussions resulted in an agreement to settle that complaint. The Judge concluded that the Respondent violated the Federal Service Labor-Management Relations Statute (the Statute) by bypassing the Union, but did *not* violate the Statute by holding formal discussions with the employee because, according to the Judge, the discussions were not "formal."[1]

As the Respondent does not except to the Judge's finding that it committed a bypass violation, we adopt that portion of the Judge's decision without precedential significance. The Respondent does except to the formal-discussion portion of the Judge's decision. But the Respondent does not except to the Judge's finding that the disputed discussions were not formal; the Respondent excepts only to another (non-dispositive) finding by the Judge in connection with the formal-discussion allegation. As such, the main question before us is whether resolving that exception would result in issuing an advisory opinion. Because resolving the exception would not affect the Judge's disposition of the formal-discussion issue, the answer is yes. Thus, as § 2429.10 of the Authority's Regulations provides that the Authority will not issue advisory opinions,[2] we dismiss the Respondent's exception, and we modify the Judge's order only to direct the electronic posting of a notice (electronic-notice posting).

II. Background and Judge's Decision

The employee filed an EEO complaint and notified the Respondent that the Union was his representative in connection with that complaint. The Respondent and the employee subsequently had discussions, and they negotiated and reached agreement to settle the EEO complaint. The Union was not notified of these discussions.

The General Counsel (GC) issued a complaint (as amended) alleging that the Respondent violated the Statute by: (1) conducting formal discussions with the employee without giving the Union an opportunity to be represented, as § 7114(a)(2)(A) of the Statute requires; and (2) bypassing the Union by meeting directly with the employee and negotiating a settlement of his EEO complaint.

Section 7114(a)(2)(A) of the Statute provides that exclusive representatives "shall be given the opportunity to be represented at . . . any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment."[3] To prove a formal-discussion violation, the GC is required to show that the Respondent denied the Union an opportunity to attend: (1) a discussion; (2) that was formal; (3) between one or more representatives of the Respondent and one or more unit employees or their representatives; (4) concerning any grievance or any personnel policy or practice or other general condition of employment.[4]

The Judge found that discussions between the Respondent's representative and the employee occurred and that, under Authority precedent, formal EEO complaints are "grievances" within the meaning of

[1] Judge's Decision at 15.

[2] 5 C.F.R. § 2429.10.

[3] 5 U.S.C. § 7114(a)(2)(A).

[4] Judge's Decision at 12 (citation omitted).

§ 7114(a)(2)(A).[5] The Judge acknowledged that the U.S. Court of Appeals for the Ninth Circuit (the Ninth Circuit) "holds a different view" on the latter point, but she stated that the Authority applies its own precedent "even in cases that arise within the Ninth Circuit."[6] However, the Judge found that the Respondent did not violate the Statute because the discussions were not formal, within the meaning of § 7114(a)(2)(A).[7] Accordingly, she recommended dismissing the formal-discussion allegation.[8]

In addressing the bypass allegation, the Judge stated that an agency engages in an unlawful bypass when it "communicates directly" with unit employees concerning "grievances, disciplinary actions[,] and other matters" relating to the collective-bargaining relationship.[9] She also stated that this "conduct constitutes direct dealing with an employee" and violates § 7116(a)(1) and (5) of the Statute because it "interferes with the union's rights under [§] 7114(a)(1) to act for and represent" employees in the unit.[10] Section 7116(a)(1) of the Statute provides that it is an unfair labor practice (ULP) for an agency "to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under" the Statute.[11] Section 7116(a)(5) provides that it is a ULP "to refuse to consult or negotiate in good faith with a labor organization as required by" the Statute.[12] And § 7114(a)(1) provides that an exclusive representative "is entitled to act for, and negotiate collective[-]bargaining agreements covering, all employees in the unit."[13]

The Judge found that the employee designated the Union President "in her [U]nion capacity" as his representative in his EEO complaint,[14] and that, as a result, "the [Respondent] was no longer free to deal directly with [the employee] with respect to settlement of his complaint."[15] The Judge concluded, relying on several Authority decisions,[16] that by dealing directly with the employee in settling his EEO complaint, "the Respondent bypassed the Union and violated [§] 7116(a)(1) and (5) of the Statute."[17]

The Respondent filed an exception to the Judge's decision, and the GC filed an opposition to the Respondent's exception.

III. Analysis and Conclusions

The Respondent argues that the Judge erred in finding that the discussions at issue "concerned a grievance within the meaning of [§] 7114(a)(2)(A)" of the Statute.[18] In particular, the Respondent contends[19] that the Judge improperly disregarded the Ninth Circuit's decision in *Luke Air Force Base, Arizona v. FLRA*,[20] which held that an EEO complaint is not a grievance within the meaning of § 7114(a)(2)(A).[21] According to the Respondent, the instant case arose within the jurisdiction of the Ninth Circuit,[22] and the Authority's and the Judge's "disregard of controlling Ninth Circuit law subjected the Respondent to undue bias" on the part of the Judge.[23] The Respondent cites a court decision regarding "intra-circuit non-acquiescence," claiming that "a full reading" of the decision supports its assertion that the current complaint "wholly lacks legal standing and must be dismissed."[24] In addition, the Respondent states that because, in its view, the Judge "failed to properly follow clear and existing controlling federal case law, the [d]ecision here must be reversed[,] and all allegations must be dismissed in their entirety."[25]

In its opposition, the GC states that the Respondent's exception to the Judge's interpretation of "grievance" in § 7114(a)(2)(A) addresses the formal-discussion allegation of the complaint "despite no formal[-]discussion violation having been found by" the Judge.[26] And the GC disputes the Respondent's claim of bias.[27] In addition, the GC contends that the Respondent has not excepted to the Judge's finding of bypass and, therefore, that the Authority must affirm that finding.[28] For support, the GC cites[29] the Authority's statement in

[5] *Id.* at 13.
[6] *Id.*
[7] *Id.*
[8] *Id.* at 19.
[9] *Id.* at 15 (citation omitted).
[10] *Id.* at 16 (citation omitted).
[11] 5 U.S.C. § 7116(a)(1).
[12] *Id.* § 7116(a)(5).
[13] *Id.* § 7114(a)(1).
[14] Judge's Decision at 17.
[15] *Id.*
[16] *Id.* at 16-17 (citing *U.S. DOJ, INS, N. Region, Twin Cities, Minn.*, 52 FLRA 1323 (1997); *U.S. Dep't of the Treasury, Office of the Chief Counsel, IRS Nat'l Office*, 41 FLRA 402 (1991); *McGuire Air Force Base, N.J.*, 28 FLRA 1112 (1987); *U.S. GPO*, 23 FLRA 35 (1986)).
[17] *Id.* at 17.
[18] Exception at 6.
[19] *Id.* at 6-7.
[20] 208 F.3d 221 (9th Cir. 1999) (table decision without published opinion), *cert. denied*, 531 U.S. 819 (2000).
[21] 1999 U.S. App. LEXIS 34569, at *4-5 (9th Cir. 1999) (unpublished opinion).
[22] Exception at 3.
[23] *Id.* at 9.
[24] *Id.* at 8 (citing *Stieberger v. Heckler*, 615 F. Supp. 1315, 1352 (S.D.N.Y. 1985), *vacated sub nom.*, *Stieberger v. Bowen*, 801 F.2d 29 (2d Cir. 1986)).
[25] *Id.* at 9.
[26] Opp'n at 1.
[27] *Id.* at 3.
[28] *Id.* at 2.
[29] *Id.* at 2 n.2.

U.S. Patent & Trademark Office (*PTO*)[30] that "a party must both raise an exception and argue in support of that exception" to satisfy the Authority's regulatory requirements for excepting to an administrative law judge's decision.[31]

Under § 2423.41 of the Authority's Regulations, the Authority adopts, "without precedential significance," unexcepted-to findings of administrative law judges.[32] And under § 2429.10 of the Authority's Regulations, the Authority will not issue advisory opinions.[33] Consistent with § 2429.10, the Authority will not resolve an issue if doing so would not affect the results in a case.[34]

No exceptions have been filed to the Judge's finding that the discussions were not formal. So, consistent with § 2423.41, we adopt that finding without precedential significance. As a result – and because a finding of formality is necessary to establish a formal-discussion violation – the Judge's recommended dismissal of the formal-discussion allegation would stand, even if the Authority resolved the Respondent's argument concerning the meaning of "grievance." Thus, the exception requests an advisory opinion, and – consistent with § 2429.10 and Authority precedent – we dismiss it.[35]

And there is no basis for finding that the Respondent is excepting to the Judge's finding of a bypass violation. All of the Respondent's arguments address the Judge's finding that the EEO complaint was a grievance. To support its exception, the Respondent cites only one page of the Judge's decision – page 13, which is part of the formal-discussion analysis[36] – and does not cite anything from pages 15-17, where the Judge discusses bypass.[37]

Further, the Judge did not base her bypass finding on her determination that the EEO complaint is a grievance within the meaning of § 7114(a)(2)(A). Indeed, the Judge mentioned grievances only once in her bypass discussion – specifically, when she set out the general standard for finding bypass, which involves management communicating directly with bargaining-unit employees regarding various matters, including not only "grievances," but also "disciplinary actions and other matters relating to the collective-bargaining relationship."[38] Moreover, none of the Authority decisions that the Judge discussed involved Authority findings that unions were representing employees in grievances. In this regard, in *U.S. GPO*,[39] which the Judge distinguished from this case,[40] the Authority found no bypass violation where the employee had not designated the union as her representative in her EEO complaint.[41] And *438th Air Base Group (MAC), McGuire Air Force Base, New Jersey*[42] involved a respondent that dealt directly with an employee regarding a disciplinary matter.[43] Further, *U.S. DOJ, INS, Northern Region, Twin Cities, Minnesota*[44] involved an information request in connection with a proposed removal of an employee, where the union was the employee's designated representative in connection with the removal.[45] Finally, *U.S. Department of the Treasury, Office of the Chief Counsel, IRS National Office*[46] held that, by prohibiting an employee from representing another employee in his EEO complaint, the respondent violated the first employee's right to act for an employee on behalf of a union under § 7102 – and thus violated § 7116(a)(1) – of the Statute.[47]

The Respondent makes general statements that "the current [c]omplaint wholly lacks legal standing and must be dismissed,"[48] and that "the [d]ecision here must be reversed[,] and all allegations must be dismissed in their entirety."[49] But the Respondent makes both of these statements in the context of the Judge's failure to apply Ninth Circuit precedent involving formal discussions.[50] Further, § 2423.40(a)(1) of the Authority's Regulations requires that exceptions to administrative law judges' decisions include "the specific findings, conclusions, determinations, or recommendations being challenged[, and] the grounds relied upon."[51] And § 2423.40(a)(2) requires exceptions to include "[s]upporting arguments, which shall set forth, in order: all relevant facts with specific citations to the record; the issues to be addressed; and a separate argument for each issue, which shall include a discussion of applicable law."[52] To the extent

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[30] 57 FLRA 185 (2001).
[31] Opp'n at 2 n.2 (quoting *PTO*, 57 FLRA at 186).
[32] 5 C.F.R. § 2423.41(a); *see also U.S. Dep't of VA, Veterans Canteen Serv.*, 66 FLRA 944, 945 n.2 (2012) (adopting unexcepted-to findings without precedential significance).
[33] 5 C.F.R. § 2429.10.
[34] *USDA, Rural Hous. Serv., Centralized Servicing Ctr.*, 67 FLRA 207, 208 (2014).
[35] *See, e.g.*, *NASA, Goddard Space Flight Ctr., Greenbelt, Md.*, 62 FLRA 348, 349 (2008) (dismissing exception that sought advisory opinion).
[36] *See* Exception at 5.
[37] Judge's Decision at 15-17.
[38] *Id.* at 15.
[39] 23 FLRA 35 (1986).
[40] Judge's Decision at 16.
[41] 23 FLRA at 35, 38-41.
[42] 28 FLRA 1112 (1987).
[43] *Id.* at 1112-13.
[44] 52 FLRA 1323 (1997).
[45] *Id.* at 1333.
[46] 41 FLRA 402 (1991).
[47] *Id.* at 412-18.
[48] Exception at 8.
[49] *Id.* at 9.
[50] *Id.* at 8-9.
[51] 5 C.F.R. § 2423.40(a)(1).
[52] *Id.* § 2423.40(a)(2).

that the Respondent *intends* to except to the bypass finding, it fails to satisfy these regulatory requirements. Accordingly, we adopt the Judge's finding of bypass without precedential significance under § 2423.41 of the Authority's Regulations. And as the foregoing demonstrates that the dissent's premise (that the Respondent's arguments regarding Ninth Circuit precedent concerning the term "grievance" are before us based on an exception to the bypass portion of the Judge's decision) is wrong, we find the dissent's conclusion – that the ULP complaint against the Agency should be dismissed – unfounded.

But we have a more fundamental disagreement with the dissent, which suggests that the bypass complaint against the Agency should be dismissed because, among other things, the grievant settled "*his own EEO complaint*"[53] with the Agency and because the Union's charges focus entirely on Union interests.[54] The dissent concludes, in this regard, that the Union's and the GC's actions in pursuing the ULP "seem to undermine the Authority's mandate to 'facilitate . . . the amicable settlement[] of disputes.'"[55]

In taking this position, the dissent misreads the Statute. In particular, the dissent ignores the Statute's express link between unions' role as exclusive representative and "the amicable settlement[] of disputes [that] contributes to the effective conduct of public business[.]"[56] First, Congress determined that employee "participat[ion] *through* labor organizations" was a proven way to achieve these objectives.[57] Second, Congress gave labor organizations the responsibility "to act for, and negotiate . . . agreements covering . . . *all employees in the unit*," and be "responsible for *representing the interests of all employees* in the unit."[58] The dissent promotes its preferred outcome: the settlement between the grievant and the Agency. But these "ends" cannot justify bypassing the "means" – the Union's participation in the process as exclusive representative – that Congress chose to promote the amicable settlement of disputes and ultimately achieve a more effective and efficient government. Indeed, the irony of the dissent is that it relies on Congress' intent to foster the amicable settlement of disputes as justification for eliminating one of the principal mechanisms Congress selected to achieve that very objective – exclusive union representation of bargaining unit employees.

Finally, we note that the Judge denied the GC's request for electronic-notice posting, based on Authority precedent as it existed when she issued her decision.[59] After the Judge issued her decision, the Authority held, in *U.S. DOJ, Federal BOP, Federal Transfer Center, Oklahoma City, Oklahoma* (*Fed. Transfer Ctr.*),[60] that electronic-notice posting "is a traditional remedy" that the Authority would order "in future decisions where ULPs are found."[61] Although no exceptions have been filed to the Judge's failure to order an electronic-notice posting in this case, the National Labor Relations Board (the Board) – whose practice the Authority has decided to follow[62] – routinely modifies administrative law judges' orders to provide for electronic-notice posting, even where the Board's GC has not excepted to the judges' failures to do so.[63] Consistent with the Board's practice, we modify the Judge's order to direct an electronic-notice posting.

IV. Order

Pursuant to § 2423.41(c) of the Authority's Regulations and § 7118 of the Statute, the Respondent shall:

1. Cease and desist from:

(a) Bypassing the Union in cases where the Union is designated as the representative for a bargaining-unit employee in an EEO complaint and dealing directly with that employee to discuss settlement of the complaint.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

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

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[53] Dissent at 12.
[54] *Id.* at 11-12.
[55] *Id.* at 12 (citing 5 U.S.C. § 7101(a)(1)(C)).
[56] 5 U.S.C. § 7101(a)(1)(B), (C).
[57] *Id.* § 7101(a)(1) (emphasis added).
[58] *Id.* § 7114(a)(1) (emphasis added); *see generally* Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1979: Hearings on S. 2640, S. 2727, and S. 2830 Before the Committee on Governmental Affairs, U.S. Senate, 95th Cong. 216 (1978) (letter of Alan K. Campbell, Chairman, U.S. Civil Service Commission on Civil Service Reform and Reorganization to Senator Abraham Ribicoff, Chairman, Committee on Governmental Affairs).

[59] Judge's Decision at 18.
[60] 67 FLRA 221 (2014).
[61] *Id.* at 221.
[62] *See id.* at 225 (finding Board's reasoning "persuasive and relevant").
[63] *See, e.g.*, *Kaleida Health, Inc.*, 356 NLRB No. 171, slip op. at 1 n.4 (2011) (modifying order when Board GC did not file exceptions); *Times Union, Capital Newspapers Div. of The Hearst Corp.*, 356 NLRB No. 169, slip op. at 1 n.4 (2011) (same).

(a) Post at its facilities where bargaining-unit employees represented by the Union are located, copies of the attached notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander of the Space and Missile Systems Center, Los Angeles Air Force Base, El Segundo, California, and shall be posted and maintained for sixty consecutive days thereafter in 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with employees by such means.

(b) Pursuant to § 2423.41(e) of the Authority's Regulations, notify the Regional Director, San Francisco Regional Office, Federal Labor Relations Authority, in writing, within thirty days from 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 U.S. Department of the Air Force, Space and Missile Systems Center, Los Angeles Air Force Base, El Segundo, California, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT bypass the American Federation of Government Employees, Local 2429, AFL-CIO, the exclusive representative of bargaining-unit employees, in cases where it is designated as the representative of a bargaining-unit employee in an EEO complaint and dealing directly with that employee to discuss settlement of the employee's EEO complaint.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce bargaining-unit employees in the exercise of their rights assured by the Statute.

____
(Agency/Activity)

Dated: _______ By: ____________________________
(Signature) (Title)

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

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

Member Pizzella, dissenting:

I disagree with my colleagues insofar as they dismiss the Respondent's argument that the decision of the Federal Labor Relations Authority's Administrative Law Judge (ALJ), and the prior rulings upon which she relies, show a "blatant disregard of the Ninth Circuit [Court of Appeals] . . . case law"[1] and conclude that the Respondent did not except to the bypass violation that was found by the ALJ.

For fifteen years, the Ninth Circuit has clearly held that equal employment opportunity (EEO) complaints *do not* constitute "'grievances' within the meaning of [§] 7114(a)(2)(A)" of the Federal Service Labor-Management Relations Statute (our Statute).[2] For a shorter period of time, the U.S. Court of Appeals for the District of Columbia Circuit has held that EEO complaints *do* constitute "grievances" within the meaning of § 7114(a)(2)(A).[3]

This case arose out of an EEO complaint that was filed by Gordon Hancock, an employee at the Air Force's Space & Missile Systems Center Agency, and a subsequent unfair labor practice (ULP) charge that was filed by the Union president at the Agency, which is based on the Los Angeles Air Force Base in El Segundo, California.[4] California falls under the jurisdiction of the Ninth Circuit.

Hancock filed his EEO complaint after the Agency placed him in an absent without leave (AWOL) status, rather than on sick leave, for several days.[5] When he filed his complaint, Hancock named Jennifer Grigsby (Union president for AFGE Local 2429) as his "representative."[6] Hancock's complaint proceeded through the normal steps, including an unsuccessful mediation in September 2010, but Grigsby was unable to facilitate a resolution of Hancock's complaint. Thereafter, an "impartial" EEO specialist in the Agency's EEO office,[7] Frank Gonzalez, "undertook efforts to facilitate a resolution" of the complaint. Several months before Hancock retired in December 2011,[8] the Agency indicated to Gonzalez that it was willing to change Hancock's AWOL to sick leave if Hancock provided documentation to support the leave.[9] Gonzalez contacted Hancock about these new developments and asked if Grigsby was available. Hancock indicated "that he didn't need her there"[10] and made no further "attempt to contact [Grigsby]."[11] Thereafter, Gonzalez and Hancock had several discussions, over the course of several days (some by telephone and some in the EEO office),[12] that resulted in a successful settlement agreement that resolved all of the issues in the EEO complaint.[13]

Sometime after Hancock had already settled *his* EEO complaint, Grigsby took offense that she was left out of the loop and filed a ULP charge that argued that the Agency violated *the Union's rights* when it discussed resolution of Hancock's own EEO complaint with Hancock "*without giving the Union* an opportunity to be" present,[14] even though Gonzalez asked Hancock if he needed Grigsby there and Hancock indicated that he did not.[15] The Union made no argument that the settlement agreement was not fair or that Hancock was harmed or coerced in any respect.

Therefore, the disposition of this case is quite simple for me. All of the parties to this case – the Agency, the Union, and Hancock – all work on the Los Angeles Air Force Base and they are subject to the jurisdiction of the Ninth Circuit; the Ninth Circuit has determined that an EEO complaint is not a "grievance" within the meaning of § 7114(a)(2)(A) of our Statute;[16] and Hancock's EEO complaint, and how he chose to ultimately resolve *his* complaint, was "an exercise of *his rights* [not the Union's] under Title VII."[17] Therefore, since the Ninth Circuit has determined that Hancock's EEO complaint is not a "grievance," the Agency could not have violated the Statute. Case closed.

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[1] Exceptions at 5.
[2] *Luke Air Force Base, Ariz. v. FLRA*, 208 F.3d 221, 221 (9th Cir. 1999) (*Luke AFB*), cert. denied, 531 U.S. 819 (2000), *rev'g Luke Air Force Base, Ariz.,* 54 FLRA 716 (1998).
[3] *Dep't of the Air Force, 436th Air Lift Wing, Dover Air Force Base v. FLRA*, 316 F.3d 280 (D.C. Cir. 2003) (*Dover*), *aff'g U.S. Dep't of the Air Force, 436th Airlift Wing, Dover Air Force Base, Dover, Del.*, 57 FLRA 304 (2001) (Chairman Cabaniss dissenting).
[4] Judge's Decision at 1-2.
[5] *Id*. at 3.
[6] *Id*.
[7] *Id*. at 14.
[8] *Id*. at 2.
[9] *Id*. at 3.
[10] *Id*. at 8.
[11] *Id*.
[12] *Id*. at 3, 8-10.
[13] *Id*. at 10.
[14] Majority at 2 (emphasis added).
[15] Judge's Decision at 8.
[16] *Luke AFB*, 208 F.3d at 221.
[17] *U.S. Dep't of the Air Force, Davis-Monthan Air Force Base, Tucson, Ariz*., 64 FLRA 845, 852 (2010) (Dissenting Opinion of Member Beck) (*Davis-Monthan)*; *see also Pension Benefit Guaranty Corp., Wash., D.C*., 62 FLRA 219, 229 (2007) (Dissenting Opinion of Chairman Cabaniss) ("an employee's choice whether to have the union present is a relevant factor to balance in determining whether a 'conflict' exists between the rights of the union and the employee").

I not only agree with the Ninth Circuit on this point, I do not agree that the Authority may simply ignore the law of that Circuit in a case that originates within its jurisdiction.[18] In this case, my colleagues do not even bother to address the Agency's arguments that the ALJ acted in "blatant disregard" of the Ninth Circuit[19] and that the complaint "wholly lacks legal standing and must be dismissed."[20] In prior cases that originated in the Ninth Circuit, my colleagues have "*repeatedly rejected* this approach and held that a formal EEO complaint is a grievance within the meaning of § 7114(a)(2)(A),"[21] as if the more times they ignore the precedent, it will simply go away.

My colleagues seem to doubt that Hancock had sufficient ability to settle his own complaint and should have asked the Union for permission to do so.[22] But, from my perspective, the Agency and Hancock should be applauded (not criticized) for the manner in which they worked together to reach a settlement of the EEO complaint rather than fighting it out through hours of protracted discovery and witness preparation, litigation before the Equal Employment Opportunity Commission, and a possible appeal to federal court. Those efforts – in contrast to the Union's filing of the ULP charge – "contribute[d] to the effective conduct of [the government's] business."[23]

Somewhere in this process, Grigsby apparently forgot that she was supposed to be on Hancock's side. I agree with my colleagues that Grigsby, as a union representative, has a statutory obligation to "act for"[24] employees (especially when she was asked by Hancock to serve as *his representative* in *his* EEO complaint). I also agree that Grigsby is "responsible for *representing the interests of all employees in the unit*"[25] but that statutory obligation does not supercede the employee's prerogative to choose when, how, and to what extent he will use his representative (whether that representative is from the union or a privately-retained attorney) *in his own EEO complaint*. Hancock chose Grigsby to serve as *his representative*, but it was entirely *his prerogative* whether, or not, Grigsby would participate in the final stages of his settlement negotiations. Gonzalez asked Hancock if he wanted Grigsby present at those negotiations, and Hancock *decided* that he "didn't need her there."[26] Gonzalez and Hancock were able to come to agreement and everyone was happy . . . everyone that is, except Grigsby.

It is, therefore, inexplicable to me that the Grigsby and the General Counsel would try to keep this dead case on life support even after Hancock retired.[27] Their efforts seem to undermine the Authority's mandate to "facilitate . . . the amicable settlement[] of disputes."[28]

As noted above, the majority does not even address the Agency's argument that the ALJ showed a "blatant disregard of the Ninth Circuit . . . case law."[29] Instead, my colleagues conclude that because the ALJ ultimately found that the Agency's discussions with Hancock were not "formal," a determination on the "grievance" matter will "not affect the results in [this] case."[30] That conclusion would be correct, however, *only if* the Agency had not excepted to the ALJ's finding of bypass. Unlike the majority, I would conclude that the Agency specifically challenged, and excepted to, the Judge's finding of a bypass violation.

The Agency argues, quite clearly, that "a *full reading* of this decision"[31] demonstrates "that the current [c]omplaint *wholly* lacks legal standing and must be dismissed."[32] The Agency also asserts that "[i]nasmuch as the [Judge] has failed to properly follow clear and existing controlling federal case law, *the [d]ecision here* must be reversed and *all allegations* must be dismissed *in their entirety*."[33] There is no dispute that the "allegations" in this case included a charge of bypass.

[18] *U.S. Dep't of Energy v. FLRA*, 106 F.3d 1158, 1165 (4th Cir. 1997) ("every federal agency, including the FLRA, is required to abide by the law of this [c]ircuit in matters arising within the jurisdiction of this [c]ourt, until and unless it is changed by this [c]ourt or reversed by the Supreme Court of the United States"); *see also Singh v. Ilchert*, 63 F.3d 1501, 1508 (9th Cir. 1995) ("A federal agency is obligated to follow circuit precedent in cases originating within that circuit.") (superseded on other grounds as stated in *Parussimova v. Mukasey*, 555 F.3d 734 (9th Cir. 2009)); *St. Margaret Memorial Hosp. v. NLRB*, 991 F.2d 1146, 1154 (3d Cir. 1993) ("as an administrative tribunal whose findings, conclusions[,] and orders are subject to direct judicial review by courts of appeals, the [NLRB] is, of course, bound to follow the precedent of this [c]ourt"); *Reich v. Contractors Welding*, 996 F.2d 1409, 1413 (2d Cir. 1993) ("the fact that the [Occupational Safety and Health Review] Commission has nationwide jurisdiction does not free it from the confines of Second Circuit precedent"); *Beverly Enterprises v. NLRB*, 727 F.2d 591, 592-93 (6th Cir. 1984) ("the basic doctrine that, until reversed, the dictates of a Court of Appeals must be adhered to by those subject to the appellate court's jurisdiction . . . *administrative agencies are no more free to ignore this doctrine than are district courts*") (emphasis added).
[19] Exceptions at 5.
[20] *Id.*
[21] *Davis-Monthan*, 64 FLRA at 849 (emphasis added).
[22] Majority at 6.
[23] 5 U.S.C. § 7101(a)(1)(B).
[24] Majority at 7 (quoting 5 U.S.C. § 7114(a)(1)).
[25] *Id.* (emphasis in Majority).
[26] Judge's Decision at 8.
[27] *Id.* at 2.
[28] 5 U.S.C. § 7101(a)(1)(C).
[29] Exceptions at 5.
[30] Majority at 5.
[31] Exceptions at 8 (emphasis added).
[32] *Id.* (emphasis added).
[33] *Id.* at 9 (emphases added).

Therefore, I would conclude that the Agency's encompassing reference to a "full reading of this decision"[34] and its petition to dismiss "all allegations . . . in their entirety"[35] unmistakably challenges the one and only allegation that the Judge sustained – bypass.

As I noted in in *AFGE, Local 2198,*[36] I am concerned with the majority's willingness to dismiss meritorious arguments on mere technicalities.[37] Just two months ago, the U.S. Circuit Court of Appeals for the District of Columbia Circuit criticized the Authority for concluding that a union waived an argument before that Court simply because it failed to use a specific combination of words in exceptions it had previously filed with the Authority.[38] The Court noted that "a party is not required to invoke 'magic words' in order to adequately raise an argument before the Authority. Instead, an argument is preserved if the party has *fairly brought* the argument '*to the Authority's attention*.'"[39] Without any doubt, it is clear to me that the Agency *fairly brought* its concerns regarding the finding of a bypass violation *to the Authority's attention*.

For the reasons discussed above, I would conclude that the ALJ erred and would dismiss the complaint in its entirety.

Thank you.

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[34] *Id.* at 8
[35] *Id.*
[36] 67 FLRA 498, 500 (2014) (Concurring Opinion of Member Pizzella).
[37] *See AFGE, Local 1897*, 67 FLRA 239, 240 (2014) (Member Pizzella concurring) (*Local 1897*) (Authority finding that union's exception that asserts "using the '*Douglas* [f]actors as guidance . . . the agency's five[-]day suspension of [the grievant] is excessive'" does not state a contrary-to-law claim; *AFGE, Local 1738*, 65 FLRA 975, 977 (2011) (Member Beck concurring) (Authority finding that union's exception that asserts an award is "contrary to the plain language of the negotiated agreement" does not establish an essence exception); *AFGE, Local 3955*, 65 FLRA 887, 889 (2011) (Member Beck concurring) (Authority finding that union's exception that asserts arbitrator erred by "relying on Article 32 of the parties' agreement" and "citing [*AFGE, Federal Prison*] *Council 33*, 51 FLRA 1112 [(1996], in support of his award" does not establish an essence or contrary to law exception).
[38] *NTEU v. FLRA*, 754 F.3d 1031, No. 12-1199, 2014 U.S. App. LEXIS 11208, at *20 (June 17, 2014).
[39] *Id*. (emphases added) (quoting *U.S. Dep't of Commerce v. FLRA*, 7 F.3d 243, 245 (D.C. Cir. 1993)).

Office of Administrative Law Judges

UNITED STATES
DEPARTMENT OF THE AIR FORCE
SPACE AND MISSILE SYSTEMS CENTER
LOS ANGELES AIR FORCE BASE
EL SEGUNDO, CALIFORNIA
Respondent

AND

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2429, AFL-CIO
Charging Party

John Pannozzo, Jr., Esq.
For the General Counsel

Michael Wells, Esq.
For the Respondent

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §§ 7101-7135 (the Statute), and the revised Rules and Regulations of the Federal Labor Relations Authority (Authority), 5 C.F.R. Chapter XIV, Part 2423.

On May 26, 2011, the American Federation of Government Employees, Local 2429, AFL-CIO (Charging Party/Union) filed an unfair labor practice (ULP) charge against the Department of the Air Force, Space and Missile Systems Center, Los Angeles Air Force Base, El Segundo, California (Respondent/Agency). On January 30, 2012, the Acting Regional Director of the San Francisco Region issued a Complaint and Notice of Hearing in the case. An amended complaint was issued on February 8, 2012. As amended, the complaint alleged that: (1) the Respondent failed to comply with section 7114(a)(2)(A) of the Statute when its representatives conducted formal discussions with a bargaining unit employee without affording the Union an opportunity to be represented; and (2) it discussed the resolution of the bargaining unit employee's pending Equal Employment Opportunity (EEO) complaint without affording the Union an opportunity to be represented. The complaint alleged that by these actions, the Respondent violated section 7116(a)(1) and (8) and section 7116(a)(1) and (5) of the Statute.

On or about March 5, 2012, the Respondent filed its Answer to the amended complaint in which it admitted certain allegations, but denied the substantive allegations of the complaint.

A hearing in this matter was held on March 20, 2012, at which time all parties were represented and afforded an opportunity to be heard, produce relevant evidence, and examine and cross-examine witnesses. The General Counsel and the Respondent filed timely post-hearing briefs.

Based on 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

Background

The Respondent is an agency or a subordinate activity within an agency under section 7103(a)(3) of the Statute. (G.C. Exs. 1c & 1e). The Union is a labor organization under section 7103(a)(4) of the Statute and is the exclusive representative of multiple bargaining units consisting of employees located at the Respondent. (G.C. Ex. 1c; Tr. 116).

Gordon Hancock was employed at the Respondent during a period extending from November 1999 until his retirement in December 2011. (Tr. 16, 79, 116). Hancock was included in one of the bargaining units represented by the Union. (Tr. 116). On or about May 17, 2010, Hancock contacted the Respondent's Equal Employment Opportunity (EEO) office and initiated the EEO complaint process. (G.C. Ex. 2; Tr. 200). The EEO counselor who handled Hancock's complaint was Deborah Butler. (Tr. 200, 206). The "intake" form that recorded information about Hancock's complaint was signed by him on May 17, 2010, and identified Jennifer Grigsby as his representative. (G.C. Ex. 2). Jennifer Grigsby was at all times material the President of the Union. (Tr. 116). During the course of the EEO counseling conducted in Hancock's case, an e-mail exchange dated July 14, 2010, occurred in which Butler sought clarification from Hancock about his choice of representative and Hancock responded identifying "our local Union" as his representative. (G.C. Ex. 4). By memorandum dated August 19, 2010, Butler provided Hancock with a

"Notice of Right to File a Discrimination Complaint." (G.C. Ex. 5). This notice, among other things, advised Hancock that he had 15 calendar days from the date he received the notice to file a discrimination complaint. (Id.).

Hancock submitted a discrimination complaint form dated September 1, 2010, in which he took issue with various actions of his first-line supervisor. (G.C. Ex. 6). Among the issues raised in his EEO complaint was the supervisor's action charging Hancock with AWOL for some absences that he had requested be charged to sick leave. (Id.). His complaint identified "Jennifer Grigsby, President, AFGE/Local 2429" as his representative. (id.). A memorandum dated September 1, 2010, was sent by Debra Block, EEO Specialist, to Grigsby with a cc to Hancock, that acknowledged receipt of Hancock's "Formal Discrimination Complaint." (G.C. Ex. 7). The memorandum from Block advised that the complaint would be reviewed; a determination would be made whether to accept it for processing; and that information would be provided concerning procedures and appeal rights. (Id.).

On September 23, 2010, a mediation was conducted. (G.C. Ex. 11; Tr. 28). At the mediation, EEO Specialist Tommy McInnis III served as mediator and Grigsby represented Hancock. (*Id.*). Mr. John Randolph, Director of the 61st Force Support Squadron, who was "probably" Hancock's third-level supervisor served as the management representative at the mediation. (G.C. Ex. 11; Tr. 29, 173). Randolph was assisted by two advisors. (G.C. Ex. 11). Although no witness specifically testified about the outcome of the mediation, it is reasonable to infer from the fact that processing of Hancock's EEO complaint continued, the mediation did not produce a settlement. Moreover, at hearing, Counsel for the General Counsel stated that the mediation was not successful. (Tr. 15).

The Meetings and Communications

At some point after the formal complaint was filed, Frank Gonzalez, EEO Specialist, undertook efforts to facilitate a resolution of Hancock's complaint. (Tr. 243). Gonzalez testified that Hancock had communicated an interest in settling his complaint to Butler. (Tr. 243, 255-56). According to Gonzalez, he was informed that Hancock wanted his AWOL changed to sick leave. (Tr. 243). After learning from "management" that they were willing to change the AWOL to sick leave if Hancock could produce documentation establishing that he had doctor's appointments on the relevant days, Gonzalez contacted Grigsby and relayed this information to her. (Tr. 243-44). Gonzalez' testimony varied as to whether Grigsby told him to contact Hancock directly to obtain documentation supporting Hancock's sick leave use (Tr. 244) or that she would have Hancock contact him. (Tr. 256, 296-97). Although Grigsby denied telling Gonzalez that she would have Hancock call him about providing the documentation, she was not specifically asked and did not state whether she told Gonzalez to contact Hancock directly to obtain the documentation. (Tr. 307-08). Also, Grigsby did not clearly deny that Gonzalez approached her about the need for the documentation. Thus, I find Gonzalez' testimony that he communicated with Grigsby about management's willingness to settle Hancock's EEO complaint and the need to obtain documentation from Hancock prior to having any contact with Hancock is unrebutted and I credit it to the extent it established that Gonzalez approached Grigsby and communicated his need for documentation relating to Hancock's absences prior to any contacts he had with Hancock.

Gonzalez' testimony also varied on the matter of whether, after his conversation with Grigsby, he called Hancock or Hancock called him about providing the documentation. (Tr. 244, 246-47, 256, 296-97). In any event, Gonzalez' need for the documentation was somehow conveyed to Hancock and, in response, Hancock provided documentation to Gonzalez. (Tr. 258, 284-85, 296-97, 303-04). Although there is some difference in the testimony about the date and method by which Hancock conveyed the documentation to Gonzalez, the evidence supports a conclusion that Hancock e-mailed it to Gonzalez on April 11, 2011. (Tr. 284-85, 303-06). In particular, the General Counsel questioned Gonzalez about an e-mail sent to him by Hancock at 12:05 PM that day forwarding the documentation and Gonzalez acknowledged receiving such an e-mail on that day.[1] (Tr. 284-85).

Hancock's testimony showed a flawed recollection about when and how he provided the documentation to Gonzalez. At one point, Hancock testified he summarized the information regarding the medical appointments that corresponded to the AWOL charges when he returned to his office from a meeting with Gonzalez on April 11, during which Gonzalez had requested and received the information. (Tr. 38-39). At another point, Hancock testified that he sent the information to Gonzalez by e-mail on April 12. (303-04). At yet another point, Hancock testified that he didn't recall whether he had actually listed the dates in an e-mail or sent the documentation as an attachment but then stated that he provided the documentation to

[1] This e-mail was among material given to the General Counsel by the Respondent in response to a *subpoena duces tecum*. (Tr. 7-8, 284). Although the General Counsel questioned Gonzalez about the e-mail and Gonzalez acknowledged its existence, the General Counsel made no attempt to enter the e-mail into the record.

Gonzalez at the "second meeting of the 12th of April, I believe." (Tr. 305-06). Although the April 11 e-mail is not in the record, its existence is undisputed and there is no reliable testimony or evidence that the documentation was delivered by some other method at some other time. I find the documentation was sent by Hancock to Gonzales by e-mail about noon on April 11.

During the period spanning April 11 through April 13, 2011, a series of meetings and telephone conversations occurred involving Hancock and Gonzalez and they are the focus of the complaint in this case. The descriptions of what occurred at these meetings and telephone conversations offered by Gonzalez and Hancock differ in many respects.

It is undisputed that on April 11, 2011, Gonzalez called Hancock and asked him to come to the EEO office. It is undisputed that Gonzalez is not in Hancock's chain of command and has no authority over Hancock. (Tr. 258). Gonzalez testified that the purpose of his request was to go over the documentation Hancock had provided by e-mail in an effort to match the dates of the medical appointments with those of the AWOL charges. (Tr. 247, 258, 283-87). Gonzalez didn't recall what time he and Hancock met but did recall it was after he received Hancock's April 11 e-mail. (Tr. 284-85). Gonzalez stated that he asked if Grigsby was available to come and Hancock responded that he didn't need her. (Tr. 258.) According to Gonzalez, he and Hancock went into a conference room in the EEO area and went over the documentation matching up dates with the AWOL charges. (Tr. 247, 283-87). Gonzalez asserted there was no negotiation at the meeting. (Tr. 287). Gonzalez' account of events places his drafting of a settlement agreement as occurring after the April 11 meeting and he denied reading a draft of the settlement agreement to Hancock at the April 11 meeting. (Tr. 258, 287). Gonzalez did not testify about the length of the meeting or whether anyone else was present.

Gonzalez denied the EEO office was under any pressure from "command" to settle Hancock's complaint or do so immediately or that he called Hancock in so they could settle the case right away. (Tr. 257-59, 265-66). Gonzalez did acknowledge that he has heard management say they "don't like having things hanging out there[]" and like to get them settled as soon as possible, but denied he had said this to Hancock. (Tr. 259, 282). Gonzalez' statement that there was no pressure from "command" to settle Hancock's complaint was corroborated by the testimony of Randolph who as the Director of the 61st Support Squadron to which Hancock was assigned had responsibility for settling EEO complaints that arose within his squadron. (Tr. 16, 173-74,183-84). In particular, Randolph, who had settlement authority for Hancock's complaint, stated that he was under no pressure from any of his superiors to settle Hancock's complaint or settle it quickly.[2] (Tr. 183-84; G.C. Ex. 9). Randolph did, however, testify that he was interested in settling several EEO complaints, including Hancock's, that were pending when Randolph became Director of the 61st Support Squadron. (Tr. 174, 180-81).

According to Gonzalez, Hancock lacked medical documentation for three of the medical appointments. (Tr. 261-62). Gonzalez testified that later in the day on April 11 after their meeting, he called Hancock to inquire whether Hancock would be willing to accept having the AWOL for the dates of those three appointments converted to LWOP (leave without pay). (Tr. 262). Gonzalez described his inquiry as a matter of exploring all possible settlement options so that he would be in a position to convey to management what Hancock was willing to accept. (*Id.*). Gonzalez stated that Hancock rejected this idea.

Gonzalez stated that on April 12 he was waiting for management to get back to him about the three days for which Hancock lacked documentation and had no communications with Hancock on that day. (Tr. 261, 288-89). Gonzalez testified that once he heard from management that they were willing to convert all the AWOL to sick leave, he prepared a draft settlement agreement and either called or e-mailed Hancock requesting that he come over to the EEO office and look at the draft to make sure it was what he wanted. (Tr. 258, 289).

Gonzalez stated that Hancock came to the EEO office on April 13, 2012, and they stood at the front counter where Gonzalez presented Hancock with the draft settlement agreement for him to review. (Tr. 260). According to Gonzalez, Hancock stood at the "main counter" of the EEO office, spent 5 to 10 minutes reading the draft over, and pronounced it what he wanted. (*Id.*). Gonzalez testified that he then told Hancock that he would do a final copy of the settlement agreement and send it to Grigsby for her review and signature. (*id.*). Gonzalez stated Hancock responded he would sign the agreement and did not need Grigsby to sign it but did request that once "it's all taken care of[]" Grigsby be given a copy for her records. (Tr. 264-66). According to Gonzalez, he then removed Grigsby's signature block from the agreement. (Tr. 264-65).

Both Gonzalez and Butler testified that when Hancock came in, Butler was present in the immediate

[2] In his brief, the General Counsel asserts Gonzalez and James Daley, Deputy Director of EEO, had settlement authority for Hancock's EEO complaint. There is no evidence to support this assertion. Rather, the record supports a finding that it was, in fact, Randolph who had settlement authority.

area. (Tr. 211, 262-63). Butler testified that she overheard parts of their conversation and when Gonzalez raised the matter of having Grigsby involved, Hancock responded that he didn't need Grigsby but just wanted to "get this out of the way." (Tr. 211-12).

Hancock provided a different version of these events. Hancock's description is as follows. On April 11, he received a call from Gonzalez at about 10 or 11 a.m. requesting that he come to the EEO office to settle the complaint. (Tr. 33-34). During the call, Gonzalez told him that the EEO office was being pressured by "command" to resolve the complaint and it had to be done "today." (Tr. 34). Hancock requested that his union representative be present but was told Grigsby was on leave. (Tr. 34). Hancock felt he had to meet with Gonzalez because of the commander's involvement and in the interest of not jeopardizing his complaint and so he immediately went to the EEO office.[3] (Tr. 34-35). When Hancock arrived at the EEO office, Gonzalez reiterated that the commander wanted the matter resolved "today" and when Hancock asked again about Grigsby being present, he was told again that she was on leave. (Tr. 35-36). Hancock and Gonzalez proceeded to a conference room in the EEO area where Gonzalez read a settlement agreement to him in its entirety. (Tr. 36). Daley, Deputy Director of EEO, was also present but said nothing during the meeting and "seemed" to be taking notes. (Tr. 36). Hancock objected to the settlement agreement read by Gonzalez because it didn't convert his AWOL to leave. (Tr. 37). Gonzalez responded that although he doubted Randolph would agree to that, he would check with Randolph and would get back to Hancock. (Tr. 37-38). At the end of the meeting, Gonzalez requested that Hancock provide "doctor's appointments" that corresponded with each occurrence of AWOL. (Tr. 38). Hancock estimated this meeting lasted 20 to 25 minutes. (*Id.*).

During his direct testimony, Hancock stated that when he returned to his office, he "summarized" the information pertaining to the doctor's appointments and gave it to Gonzalez. (Tr. 39). When Hancock was recalled to testify later in the hearing, as discussed earlier, he showed uncertainty and confusion on the point of when and by what means he gave the documentation pertaining to the medical appointments to Gonzalez, at one point saying he thought he e-mailed the documentation to Gonzalez and at another saying he believed he gave it to Gonzalez at the "second meeting of the 12th of April[.]" (Tr. 303-06).

Hancock stated that after the meeting on April 11, he may have called and left a message for Grigsby to call him but was not sure whether he did so.[4] (Tr. 95-96; 113-14).

Hancock asserted that he had a telephone conversation with Gonzalez on April 12. By Hancock's account, he was sitting in his office on the morning of April 12 when Gonzalez called and reiterated that a settlement had to be taken care of and asked Hancock to come to his office. (Tr. 39-40). According to Hancock, he didn't go to the EEO office but he and Gonzalez had a 5 to 10 minute telephone conversation in which Gonzalez reported to Hancock that although management was willing to convert most of the AWOL to leave, there were three periods of AWOL they were not willing to convert to leave. (Tr. 39-40). Hancock stated that he rejected the offer. (Tr. 39). Hancock testified that during this telephone conversation he heard Daley's voice in the background. (Tr. 39, 89-91).

Hancock testified that the next day, April 13, he was in his office when he received a telephone call from Gonzalez who told him that management was agreeing to everything he wanted and asked him to come to the EEO office and sign the settlement agreement. (Tr. 40). Hancock stated that he immediately went to the EEO office and met in the EEO conference room with Gonzalez and Daley. According to Hancock, he told Gonzalez and Daley he was uncomfortable about the situation because things were being rushed and that he would rather have Grigsby there. (Tr. 41-42). Hancock asserted they responded that command wanted it done and it had been around too long. (*Id.*). Hancock testified that he went along and signed the agreement. (*id.*). Hancock estimated the meeting lasted about 10 to 15 minutes. (Tr. 42). Hancock stated that at this meeting Daley was writing on paper and Hancock assumed he was taking notes. (Tr. 43). Hancock was provided a copy of the settlement agreement at the end of the meeting.

The settlement agreement was signed by Hancock on April 13, 2012, and by the Agency's Settlement Authority and Agency coordinating officials on April 14. (G.C. Ex. 9). Neither Gonzalez nor Daley were among the signatories. After the settlement agreement was signed by Hancock and the management signatories, Gonzalez sent a copy to Grigsby by e-mail dated April 15, 2011. (Tr. 266; G.C. Ex. 16).

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[3] Hancock explained that he had formerly been in the military and from that experience believed that "if the commander wants something you do it." (Tr. 38).

[4] Grigsby testified she received no message from Hancock on April 11. (Tr. 131).

Grigsby testified that she never received any notice of the meetings and telephone conversations involving Gonzalez and Hancock that occurred during the period of April 11 through 13, and the Respondent's witnesses do not contend that they notified her. (Tr. 131). Thus, it is undisputed that the Respondent did not notify Grigsby of the meetings and telephone conversations that occurred during that period. According to Grigsby, she first became aware of the settlement agreement on April 21, when she opened the e-mail dated April 15 from Gonzalez in which he forwarded a copy of the signed agreement. (Tr. 132-33; G.C. Ex. 16). Grigsby stated that she contacted Hancock and asked him why he had settled and he responded that he was forced to because the "agency" was pressuring EEO. (Tr. 133).

Both Hancock and Grigsby testified that Hancock wanted money in addition to having his AWOL converted to leave. (Tr. 107-08, 160). Neither explained what monetary payment Hancock had in mind in addition to the payment he received as a consequence of having his AWOL converted to sick leave.

There are a number of discrepancies between the descriptions of the events that occurred during the period April 11 through 13 that were offered by the various witnesses. In sorting out the various accounts, I find as follows:

It is undisputed that on April 11 Gonzalez called Hancock and asked him to come to the EEO office and that Hancock went there immediately after he got the request. I credit Gonzalez' account that he raised the matter of whether Grigsby was available to come and that Hancock responded that he didn't need her there. In this regard, I find Hancock's account that Gonzalez twice rebuffed his expressed desire that Grigsby be present at the April 11 meeting by telling him she was on leave inconsistent with Hancock's failure to make any attempt to contact her himself after the meeting occurred to report to her what had occurred. Also, I am dubious about Hancock's claim as it does not appear likely that Gonzalez was in the position to know the details of Grigsby's time and attendance status.

I find that upon Hancock's arrival, Hancock was taken to a conference room in the EEO office, and it is undisputed that both Gonzalez and Daley were there. I do not find Hancock's contention that he was told command wanted his EEO complaint settled that day convincing. I find it likely that Randolph's willingness to settle the case as well as a desire to get the matter resolved soon was communicated to Hancock, but I do not find credible that it was expressed in terms of the "commander" wanting it done "today." Although evidence shows that Randolph was actively involved in efforts to resolve the complaint, there is nothing to show that the matter had been elevated beyond Randolph or, more specifically, to the commander's level. Additionally, I note that Grigsby testified she received a copy of the investigative report in Hancock's complaint although she did not remember the date she received it. (Tr. 146, 162-63). It is highly unlikely that the investigation would have continued after settlement was reached and the fact Grigsby was provided a copy of the investigative report suggests that the investigation was completed prior to the settlement and thus close to or even within the time frames specified in EEOC's regulations for completion of investigations. *See* 29 C.F.R. § 1614.108. Thus, the record does not indicate the Agency may have been motivated to press for immediate settlement of Hancock's complaint because of the complaint processing deadlines specified by EEOC. I find it more likely that the impetus for his call to Hancock was that Randolph was interested in resolving pending EEO complaints and, more immediately, Gonzalez had received material from the former documenting the medical appointments that corresponded with the AWOL charges that were at issue in his EEO complaint. Specifically, Gonzalez wanted to review the material with Hancock in an effort to craft a settlement that both management and Hancock would accept. As discussed earlier, I find Gonzalez' called and the meeting occurred sometime in the afternoon of April 11.

Based on my acceptance of the account offered by Gonzalez that the purpose of the meeting was to review with Hancock the documents he had received at most a few hours prior to the meeting and determine what could be worked out that would be acceptable to both parties in a settlement agreement, I reject Hancock's account that Gonzalez had a draft settlement agreement prepared that he read at the April 11 meeting. I am also skeptical of Hancock's claim because he did not provide any information on what terms were offered in the settlement agreement Gonzalez allegedly read to him. Also, in view of the amount of boilerplate in the settlement agreement eventually reached, which strikes me as typical of settlement agreements, I am highly doubtful that Gonzalez would have read it to Hancock as contrasted with giving him a copy to read. Gonzalez acknowledges going through Hancock's documents and matching the dates covered by them with the dates on which Hancock was charged with AWOL. Gonzalez never stated exactly what he was matching the documents provided by Hancock against and I think it's very possible that he may have been using something that amounted to a working draft of a settlement agreement that set forth the AWOL dates and that gave Hancock the impression that a draft of the settlement agreement had been prepared. The short period between the points at which Gonzalez had received Hancock's supporting documents and when the meeting occurred supports a

finding that Gonzalez wanted to go over the documentation with Hancock and that preparation of a presentable draft of a settlement agreement prior to the April 11 meeting would have been unlikely. Also, both Hancock and Gonzalez testified that at some point either during the April 11 meeting itself and/or a subsequent telephone call on either April 11 or 12, the issue of three dates for which there were AWOL charges but no documentation of medical appointments was discussed also indicates that the principle focus of the meeting was to review the documentation and compare it to the AWOL dates rather than to present a draft of a settlement agreement to Hancock.

In the versions of events offered by both Gonzalez and Hancock, a telephone conversation between the two occurred sometime after the meeting - - either later in the day on April 11 (Gonzalez' version) or on the morning of April 12 (Hancock's version). According to both, this conversation concerned at least in part the three dates for which documentation of medical appointments was lacking. The two offer differing accounts of other specifics of the conversation. Having accepted Gonzalez's account of the purpose and focus of the meeting, I also find that he was aware by the end of the meeting that documentation pertaining to three of the AWOL dates was lacking. I find his testimony convincing that he called Hancock for the purpose of ascertaining what alternatives might exist with respect to resolving this problem so that available options could be conveyed to the management representatives involved in making the decision on what settlement terms they would agree to. I find it possible that this telephone call could have occurred either sometime on April 11 after the meeting had concluded or on the morning of April 12. In any event, establishing the precise time and date of this telephone call is not critical to the resolution of this case.

There is no dispute that a meeting occurred on April 13 after Gonzalez contacted Hancock to inform him that management had agreed to convert all of his AWOL to sick leave and asked him to come to the EEO office to sign the settlement agreement. There is no dispute that Hancock went immediately to the EEO office after being contacted by Gonzalez or that he was presented with a settlement agreement to sign and he did so. Gonzalez' testimony that this transaction occurred at the front counter of the EEO office is corroborated by Butler. Butler also corroborated Gonzalez' testimony that Hancock stated he did not need Grigsby to sign the settlement. I find Hancock's testimony that he informed Gonzalez he would rather have Grigsby there is inconsistent with his statement that despite feeling the process was rushed he "went along with it." (Tr. 41). Also, I find Hancock's failure to contact or attempt to contact Grigsby about the settlement efforts that were going on revealing. Despite the fact that her office was next to the EEO office and despite his reservations about the process, Hancock made no effort to inform her about what was going on and left it for her to find out about the settlement when Gonzalez served a copy of the executed agreement on her. Such action is more consistent with the description offered by Butler and Gonzalez that Hancock stated he did not need Grigsby present than with the description offered by Hancock that he expressed a desire for Grigsby's presence. Neither Gonzalez nor Butler refuted Hancock's testimony that Daley was present at the signing of the settlement agreement, and I find it is undisputed that he was. Although Hancock also asserted he "assumed" Daley was taking notes, it is not clear given the short length of this meeting and its limited purpose why he would have done so. This suggests it is more likely that if Daley was writing on a piece of paper, it was the behavior of a habitual note-taker or perhaps a doodler. There is no evidence any "minutes" or records relating to the meetings on April 11 or 13, were prepared.

DISCUSSION AND ANALYSIS

Position of the Parties

General Counsel

The General Counsel alleges the Respondent violated section 7116(a)(1) and (8) of the Statute when representatives of the Agency conducted formal discussions within the meaning of section 7114(a)(2)(A) of the Statute with a bargaining unit employee concerning his EEO complaint without affording the Union an opportunity to be represented and also, violated section 7116(a)(1) and (5) by bypassing the Union when its representatives met with a bargaining unit employee and negotiated a settlement of his EEO complaint. In his post-hearing brief, counsel for the General Counsel asserted that the alleged bypass also constituted an independent violation of section 7116(a)(1) of the Statute.

With respect to the formal discussion allegation, the General Counsel alleges that although the two face-to-face meetings and one telephone conversation conducted during the period April 11 through 13 met the elements set forth in section 7114(a)(2)(A) for a formal discussion that required the Union be given an opportunity to be present, the Respondent failed to notify Grigsby of these meetings. The General Counsel contends that the two face-to-face meetings and the telephone conversations constituted "discussions" under the Statute. Hancock was a bargaining unit employee and Daley and Gonzalez were representatives of the agency under section 7114 (a)(2)(A). In support of this latter contention, the General Counsel asserts Daley and Gonzalez conducted negotiations with Hancock for the settlement of his EEO complaint, possessed settlement

authority for the Respondent, and presented offers on behalf of the Respondent.

In arguing that the meetings were "formal," the General Counsel asserts the purpose of the meeting, i.e., the settlement of Hancock's formal EEO complaint, established formality. Additionally, the General Counsel contends application of the factors that Authority decisions have identified as indicators of formality also shows the meetings and telephone conversation were formal. Specifically, the General Counsel claims Daley and Gonzalez were negotiating on behalf of the "highest level" of the Respondent's organization and possessed full authority to settle the formal complaint. (G.C.'s Br. at 13). Also, the General Counsel points to the following factors as supporting his contention that the meetings and telephone conversation were formal: Daley was the second ranking official in the EEO office; the meetings were conducted in a conference room in a location away from Hancock's work area; the meetings had a "formal agenda," i.e., resolution of Hancock's EEO complaint; Hancock's attendance was mandatory; Daley's note-taking constituted a formal recordation or transcription of attendance and comments; and the meetings and telephone conversation lasted for periods ranging from about 5 to 25 minutes.

The General Counsel contends that in accordance with Authority decisions Hancock's EEO complaint was a grievance within the meaning of section 7114(a)(2)(A). The General Counsel urges that Authority decisions be followed rather than the decision of the U.S. Court of Appeals for the Ninth Circuit in *Luke Air Force Base v. FLRA*, 208 F.3d 221 (9th Cir. 1999)(*Luke v. FLRA*), which reversed the Authority on the point of whether an EEO complaint constitutes a grievance within the meaning of section 7114(a)(2)(A).

Turning to the bypass allegation, the General Counsel contends Hancock had designated Grigsby in her capacity as a Union representative to serve as his representative in his EEO complaint and the record establishes the EEO office personnel were aware of this fact. Citing *U.S. Dep't of Justice, BOP, FCI, Bastrop, Tex.*, 51 FLRA 1339 (1996)(*FCI, Bastrop*), the General Counsel asserts that a bypass occurs if an agency knows a unit employee is represented by the exclusive representative but deals directly with that employee concerning a grievance or other matter relating to the collective bargaining relationship. The General Counsel argues that by dealing directly with Hancock, the Respondent bypassed the Union in violation of the Statute.

The General Counsel contends that while Hancock and Grigsby provided credible accounts of events, Gonzalez and Butler did not and their testimony should not be credited.

As remedy, the General Counsel requests that Respondent be ordered to cease and desist, post a notice to employees signed by the Commanding Officer of the Los Angeles Air Force Base, and also distribute the notice electronically to employees "using Respondent's customary method." (G.C.'s Br. at 24).

Respondent

The Respondent argues that because this case arose within the jurisdiction of the Ninth Circuit, it is controlled by that court's decision in *Luke v. FLRA*. Respondent characterizes *Luke v. FLRA* as holding that a meeting to discuss settlement of a formal EEO complaint did not concern a grievance within the meaning of section 7114(a)(2)(A) of the Statute and, consequently, there was no obligation to provide the exclusive representative an opportunity to be present at the meeting. The Respondent maintains that *Luke v. FLRA* should be followed in this case and the Authority's practice of non-acquiescence with that decision should be discontinued. The Respondent asserts that consistent with *Luke v. FLRA*, the complaint in this case should be dismissed.

DISCUSSION

The Two Meetings and the Telephone Conversation Were Not Formal Discussions Within the Meaning of Section 7114(a)(2)(A) of the Statute

To establish that a violation of section 7114(a)(2)(A) occurred, the General Counsel must show by a preponderance of the evidence that the exclusive representative was denied the opportunity to attend: (1) a discussion; (2) that was formal; (3) between one or more representatives of the agency and one or more unit employees or their representatives; and (4) concerning any grievance or any personnel policy or practice or other general condition of employment. *See, e.g., U.S. Dep't of Veterans Affairs, Northern Arizona Veterans Affairs Healthcare, Prescott, Ariz.*, 61 FLRA 181, 183 (2005)(*VA Prescott*).

I find that both the meetings and the telephone conversation constituted a "discussion" within the meaning of section 7114(a)(2)(A) of the Statute. The Authority has long held that the term discussion is synonymous with meeting and does not even require that actual discussion or dialogue occur to constitute a discussion within the meaning of that section of the Statute. *See, e.g. FCI, Bastrop,* 51 FLRA at 1343. Additionally, discussions are not removed from the scope

of section 7114(a)(2)(A) simply because they are conducted over the telephone instead of in person. *See, e.g., Veterans Admin. Med. Ctr., Long Beach, Cali.*, 41 FLRA 1370, 1379 (1991), *aff'd* 16 F.3d 1526, 1531-32 (9th Cir. 1994).

I will defer discussion of the second factor identified above, i.e, formality, which I find is the dispositive one in this case, until later and for now turn to the third factor. It is undisputed that Hancock was a bargaining unit employee. I find based on Authority precedent, both Gonzalez and Daley were representatives of the Agency for purposes of section 7114(a)(2)(A). Both were employees of the EEO office and had some role in or responsibility for the processing of Hancock's EEO compliant. Although the record shows they were engaging in an effort to settle Hancock's EEO complaint in the capacity of impartial facilitators or go-betweens relaying information and offers between Hancock on the one hand and the Agency's settlement authority and management representatives on the other, it does not establish that they, themselves, were functioning as advocates for the Agency. Their role was analogous to that of the EEO investigators discussed in *Pension Benefit Guaranty Corp., Wash., D.C.*, 62 FLRA 219 (2007)(*PBGC*), in that they were carrying out EEO functions for which the Agency had responsibility. Consistent with the Authority's decision in *PBGC*, Gonzalez and Daley were representatives of the Agency for purposes of section 7114(a)(2)(A) regardless of whether their specific role was an impartial one in the processing of the complaint as compared to the EEO complainant and the Agency decision makers and advisors who would determine whether to settle the case on what terms.

As for the fourth factor identified above, the Authority has repeatedly held that formal EEO complaints are grievances within the meaning of section 7114(a)(2)(A). *See, e.g., U.S. Dep't of the Air Force, Davis-Monthan AFB, Tucson, Ariz.*, 64 FLRA 854 (2010). As the Respondent recognizes, the Authority applies this holding even in cases that arise within the Ninth Circuit, which holds a different view on whether EEO complaints constitute grievances within the meaning of section 7114(a)(2)(A). *See, e.g., id.* For the reasons amply set forth in *U.S. Dep't of the Air Force, Luke AFB, Ariz.,* 58 FLRA 528, 533-34 (2003), and the cases cited therein, I find the meetings and telephone conversations that are the subject of this case concerned a grievance within the meaning of section 7114(a)(2)(A).

I find, however, the meetings and telephone conversation were not formal. In determining whether a meeting is formal, the Authority considers the totality of the facts and circumstances presented. *See., e.g., VA Prescott*, 61 FLRA at 185. The Authority has identified a number of illustrative factors that it considers in determining formality: (1) the status of the individual who held the discussions; (2) whether any other management representatives attended; (3) the site of the discussions; (4) how the meetings for the discussions were called; (5) how long the discussions lasted; (6) whether a formal agenda was established for the discussions; (7) the manner in which the discussions were conducted; and (8) whether attendance by the bargaining unit employee was mandatory.

First, I reject the General Counsel's argument that the purpose of the meetings, i.e., the settlement of Hancock's EEO complaint, established formality. Consistent with the Authority's decisions in *VA Prescott* and *U.S. Dep't of Energy, Rocky Flats Field Office, Golden, Colo.*, 57 FLRA 754 (2002)(*Rocky Flats*), I find that particular purpose is not sufficient in itself to establish formality. Both decisions involved allegations that meetings that were for the purpose of resolving an employee's EEO complaint constituted formal discussions under section 7114(a)(2)(A). In both cases the Authority found the meetings were not "formal." In both *VA Prescott* and *Rocky Flats,* unlike the circumstances here, a significant factor in the Authority's determination that the meetings were not formal was the fact that the meetings involved were employee-initiated. It would, however, seem that if the fact that the purpose of an agency-initiated meeting was to resolve an employee's EEO complaint were sufficient by itself to render it formal, the same would be true for an employee-initiated meeting with the same purpose. Although the purpose of settling Hancock's EEO complaint shows the meeting had a formal purpose, that is only one factor suggesting formality and it must be weighed along with other factors in determining formality. *See VA Prescott*, 61 FLRA at 186.

All three discussions were conducted by Gonzalez, who was an EEO Specialist assigned to the EEO office. As discussed above, Gonzalez' status was that of an impartial go-between who was attempting to facilitate a settlement of Hancock's EEO complaint and who neither had any authority over Hancock nor was in Hancock's chain of command. I find the evidence does not support a finding that anyone other than Gonzalez and Hancock were involved in the telephone conversation. Hancock's claim that he heard Daley's voice in the background is too tenuous to base a finding that Daley was "attending" the telephone conversation meeting. Although Daley was present at the two face-to-face meetings, his status was the same as Gonzalez in that he had no authority over Hancock and was not in his chain of command. No Agency official who had settlement authority, was a signatory to the settlement agreement, or was an advocate for the Agency

was present. These factors suggest the meetings were not formal. *Id.* at 185.

The site of the two face-to-face meetings was the EEO office, which was away from Hancock's immediate work area. This suggests formality. *See, Id.* at 186. The telephone conversation occurred while Hancock was in his immediate work area. This suggests that the telephone conversation was not formal. *See Soc. Sec. Admin., OHA, Boston Regional Office, Boston, Mass.*, 59 FLRA 875, 878 (2004).

The two face-to-face meetings were called when Gonzalez contacted Hancock and asked him to come over to the EEO office and Hancock went immediately to the office. Thus, the manner in which the meetings were called was closer to the spontaneous or impromptu end of the spectrum rather than the end of the spectrum that is characterized by advance planning and notice. The telephone conversation came about when Gonzalez spontaneously called Hancock and inquired about his willingness to accept having some of the time for which he was charged AWOL converted to LWOP rather than sick leave for some of the dates. The manner in which all of the discussions were called suggests they were not formal. *See VA Prescott*, 61 FLRA at 186.

The April 11 face-to-face meeting was estimated to last approximately 20 to 25 minutes; the telephone conversation was estimated to last approximately 5 to 10 minutes; and the April 13 face-to-face meeting was estimated to last approximately 10 to 15 minutes. All of these duration estimates can fairly be characterized as relatively short, which suggests the meetings were not formal. *Id.*

All of the meetings had a purpose - - exploration and accomplishment of a settlement in Hancock's EEO complaint, but there is no evidence a formal agenda was established for any of them. As stated in *VA Prescott*, the Authority recognizes "the existence of an agenda and the established purpose of a meeting are separate and distinct factors for assessing formality, and the existence of one does not establish the existence of the other." I*d.* at 185. The absence of a formal agenda weighs on the side of informality.

The April 11 meeting consisted primarily of Gonzalez going through the documentation provided by Hancock and attempting to match the dates on which AWOL was charged against the medical appointments evidenced by that documentation. The telephone conversation centered on an inquiry by Gonzalez seeking to determine what options might be acceptable to Hancock for settlement terms relating to the three AWOL dates for which there was no documentation of medical appointments. The April 13 meeting involved Gonzales presenting a copy of a draft settlement agreement for Hancock's review and approval and then a final for his signature. The record does not show any of these meetings were conducted by following a planned structure or established agenda. Although Hancock testified that at the two face-to-face meetings he "assumed" Daley, whom he observed writing on a piece of paper, was taking notes, there is no real evidence that was indeed what Daley was doing or what the nature and purpose of any notes he may have been taking might be. Moreover, there is no evidence that a record or minutes of the two meetings were created. I find that the manner in which the meetings and telephone conversation was conducted do not suggest they were formal.

The record does not establish Hancock's participation in the meetings was mandatory. Although Hancock felt he had to attend, it appears this belief was based on a misperception on his part that the attempt to settle his EEO complaint was emanating from the "Commander" and his personal desire to cooperate with the wishes of the commander and efforts to settle his EEO complaint rather than any directive he was given by Gonzalez, Daley, or anyone in his chain of command. The non-mandatory nature of the meeting suggests it was not formal.

While a few of the factors normally relied on to determine formality suggest the meetings were formal, many of the other factors suggest otherwise. The Authority has held discussions are not necessarily formal simply because they have some of the indicia of formality. *See, e.g., VA Prescott*, 61 FLRA at 186. In this case, considering the totality of the circumstances, I find the factors suggesting formality do not outweigh those suggesting the meetings were not formal. Therefore, the record fails to establish that the three meetings were formal within the meaning of section 7114(a)(2)(A).

A Bypass Occurred

An agency unlawfully bypasses an exclusive representative when it communicates directly with bargaining unit employees concerning grievances, disciplinary actions and other matters relating to the collective bargaining relationship. *E.g., U.S. Dep't of Justice, FBOP, FCI, Elkton, Ohio,* 63 FLRA 280, 282 (2009). Such conduct constitutes direct dealing with an employee and is violative of section 7114(a)(1) and (5) of the Statute, because it interferes with the union's rights under section 7114(a)(1) to act for and represent all employees in the bargaining unit. *E.g., id.* The Authority has also found such conduct constitutes an independent violation of section 7116(a)(1) of the Statute because it demeans the union and inherently interferes with the

rights of employees to designate and rely on the union for representation.

In *U.S. Gov't Printing Office*, 23 FLRA 35 (1986)(*GPO*), the Authority addressed the question of whether a bypass occurred when an agency dealt directly with a bargaining unit employee to informally adjust an EEO complaint the employee had filed under the complaint process administered by EEOC. In *GPO*, the employee involved had not chosen the exclusive representative as her representative in the EEO complaint. *Id.* at 35. The Authority found no violation occurred as a consequence of the agency's direct dealings with the employee because "[t]he bargaining unit employee had elected to pursue her complaint of discrimination as an appeal under the regulatory process of the EEOC, and the exclusive representative had no statutory rights or obligations to represent her in that process."
Id. at 40.

There are, however, decisions that indicate another outcome may be called for in circumstances where an employee has designated an exclusive representative to serve as his/her representative. In *438th Air Base Group (MAC), McGuire AFB, N.J.*, 28 FLRA 1112 (1987)(*McGuire AFB*), the Authority addressed an allegation that the agency bypassed the exclusive representative by delivering a decision in a disciplinary action directly to a bargaining unit employee in circumstances in which the union was serving as the employee's designated representative in the disciplinary proceeding. In *McGuire AFB*, the Administrative Law Judge found that a bypass occurred. In reaching his conclusions in the case, the Judge interpreted section 7114(a)(1) of the Statute as entitling the exclusive representative to act for and represent all employees in its bargaining unit in dealings with management concerning personnel matters and conditions of employment. *Id.* at 1122. The Judge found that when an exclusive representative represents an employee in the unit, an agency must deal with the exclusive representative and bypassing the exclusive representative and dealing directly with the employee violates the Statute. In adopting the Judge's findings, conclusions and recommended order, the Authority noted particularly that the agency knew the unit employee was being represented by the union in the disciplinary matter and found in the circumstances of the case the agency violated the Statute by bypassing the union and dealing directly with the employee.

In another decision that involved an allegation that an agency had failed to provide information that an exclusive representative requested under 7114(b)(4) of the Statute, the Authority followed a course analogous to and consistent with that taken in *McGuire AFB*. Specifically, the Authority found that although an exclusive representative is not obligated to represent an employee in a proceeding related to a proposed adverse action, if it "undertakes such representation, it acts as an exclusive representative and, as such, is entitled to avail itself of its rights under the Statute." *U.S. Dep't of Justice, INS, Northern Region, Twin Cities, Minn.*, 52 FLRA 1323, 1333 (1997)(*Twin Cities*). *Cf. U.S. Dep't of the Treasury, Office of the Chief Counsel, IRS, Nat'l Office*, 41 FLRA 402, 418 (1991)(Authority stated that the exclusive representative has a right to act for and on behalf of employees in an EEO matter; employees have a right under section 7102 of the Statute to represent other employees on behalf of the exclusive representative in EEO proceedings where the exclusive representative has chosen to represent those employees.).

In this case, in contrast to the circumstances in *GPO*, Hancock had designated Grigsby in her union capacity as his representative in his EEO complaint. Consistent with *McGuire* and *Twin Cities*, I find that having undertaken representation of Hancock in his EEO complaint, the Union was entitled to its rights as exclusive representative. Once the Union became Hancock's representative in his EEO complaint, the Agency was no longer free to deal directly with Hancock with respect to settlement of the complaint. Although Gonzalez claims Hancock told him that he did not need Grigsby at the April 11 and 13 meetings relating to settlement of his EEO complaint, there is neither assertion nor evidence that Hancock rescinded his designation of Grigsby as his representative. In fact, Gonzalez acknowledged that Hancock requested a copy of the executed settlement agreement be sent to Grigsby and Gonzalez complied. Thus, the evidence supports a finding that at the time of the discussions that are at issue in this case, Grigsby continued to be Hancock's designated representative.

I further find that although Grigsby may have authorized Gonzalez to deal with Hancock in terms of obtaining documentation to demonstrate Hancock had medical appointments that coincided with the dates of the AWOL charges, there is no evidence, and for that matter Gonzalez does not even claim, Grigsby agreed Gonzalez could deal directly with Hancock in efforts to reach terms for, and agreement on, settlement of his EEO complaint. Although Gonzalez' initial contact with Hancock may have been limited to obtaining documentation of medical appointments that were relevant to the AWOL charges, the dealings between the two evolved into the development of an actual settlement agreement that Hancock signed. In view of the Union's status as exclusive representative combined with its continuing status as Hancock's designated representative in his EEO complaint, it was for the Union rather than Hancock to determine whether it was to be excluded from the efforts

to reach a settlement of Hancock's EEO complaint. I find that by dealing directly with Hancock in settling his EEO Complaint, the Respondent bypassed the Union and violated section 7116(a)(1) and (5) of the Statute.

Although there are Authority decisions that find dealing directly with employees and bypassing the exclusive representative constitutes an independent violation of section 7116(a)(1) of the Statute, the complaint in this case did not allege an independent violation. Moreover, the General Counsel did not assert an independent violation of section 7116(a)(1) in either his pre-hearing disclosure or opening statement at the hearing in this case. Rather, the allegation of an independent 7116(a)(1) violation first appears in the General Counsel's post-hearing brief. The Authority does not judge a complaint based on rigid pleading requirements. *OLAM Southwest Air Defense Sector (TAC), Point Arena Air Force Station, Point Arena, Cal.*, 51 FLRA 797, 807 (1996). Thus, the Authority will consider matters that are fully and fairly litigated between the parties even though such matters are not specified in the complaint or where the complaint is ambiguous. *Bureau of Prisons, Office of Internal Affairs, Wash., D.C. & Phoenix, Ariz.,* 52 FLRA 421, 429 (1996). The test of full and fair litigation is whether the respondent knew what conduct was at issue and had a fair opportunity to present a defense. *Id.* In view of the fact that the first notice the Respondent had that it was being charged with an independent violation of section 7116(a)(1) was in the General Counsel's post-hearing brief, it cannot be said the matter of an independent violation of 7116(a)(1) was fully and fairly litigated and I do not find an independent violation.[5]

Remedy

As a remedy, the General Counsel seeks an order requiring that the Respondent cease and desist and post a notice to employees. In addition to being posted on bulletin boards, the General Counsel seeks to have the notice to employees electronically distributed to all bargaining unit employees. Under current Authority case law, posting of a notice to employees on bulletin boards and other places where notices to employees are customarily posted is considered a traditional remedy in virtually all cases where a violation is found. *See F.E. Warren AFB, Cheyenne, Wyo.*, 52 FLRA 149, 161 (1996)(*F.E. Warren*). Requiring that the notice be distributed electronically is, however, a nontraditional remedy. *See U.S. Dep't of Justice, FBOP, FCI, Florence, Colo.*, 59 FLRA 165, 173-74 (2003)(*FCI, Florence*). The standard that the Authority applies in determining whether to order a nontraditional remedy is as follows:

> [A]ssuming that there exist no legal or public policy objections to a proposed, nontraditional remedy, the questions are whether the remedy is reasonably necessary and would be effective to recreate the conditions and relationships with which the unfair labor practice interfered, as well as to effectuate the policies of the Statute, including the deterrence of future violative conduct.

Id. at 174 *quoting F.E. Warren*, 52 FLRA at 161.

In this case the General Counsel presented nothing and the record does not establish that requiring the Respondent to distribute the notice electronically "is reasonably necessary and would be effective to recreate the conditions and relationships with which the unfair labor practice interfered, as well as to effectuate the policies of the Statute." *FCI, Florence*, 59 FLRA at 174. I find ordering electronic distribution of the notice would not be appropriate in this case.

CONCLUSION

Based on the foregoing, I find that the evidence fails to establish that the Respondent violated section 7116(a)(1) and (8) of the Statute by conducting formal discussions with a bargaining unit employee without affording the Union an opportunity to be represented. I recommend that this portion of the complaint be dismissed. Further, I find that the Respondent violated section 7116(a)(1) and (5) of the Statute by bypassing the Union, as alleged. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the U.S. Department of the Air Force, Space and Missile Systems Center, Los Angeles Air Force Base, El Segundo, California, shall:

[5] With respect to the matter of finding an independent violation of section 7116(a)(1) in conjunction with direct dealing allegations, I note that the Authority in one decision raised the question of whether the test it applied in finding such violations should be modified. *See U.S. Dep't of Housing & Urban Dev.*, 54 FLRA 1267, 1283 n.20 (1998). The fact that the Authority itself has suggested that its test may warrant modification is all the more reason that Respondent should have been afforded notice that an opportunity existed to raise that issue if it so chose.

1. Cease and desist from:

(a) Bypassing the American Federation of Government Employees, Local 2429, AFL-CIO (the Union), in cases where the Union is designated as the representative for a bargaining unit employee in an EEO complaint and dealing directly with that employee to discuss settlement of the employee's EEO complaint.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

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

(a) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander of the Space and Missile Systems Center, Los Angeles AFB, El Segundo, California, 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 section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, San Francisco Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., August 27, 2012

____

SUSAN E. JELEN
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 U.S. Department of the Air Force, Space and Missile Systems Center, Los Angeles Air Force Base, El Segundo, California, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT bypass the American Federation of Government Employees, Local 2429, AFL-CIO, the exclusive representative of our employees, in cases where it is designated as the representative for a bargaining unit employee in an EEO complaint and dealing directly with that employee to discuss settlement of the employee's EEO complaint.

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 Statute.

____
(Agency/Activity)

Dated:__________ By:____________________________
(Signature) (Title)

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 any of its provisions, they may communicate directly with the Regional Director, San Francisco Regional Office, Federal Labor Relations Authority, and whose address is: 901 Market Street, Suite 220, San Francisco, CA 94103, and whose telephone number is: 415-356-5000.