68 FLRA No. 143

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VETERANS AFFAIRS MEDICAL CENTER
RICHMOND, VIRGINIA
(Respondent)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2145, AFL-CIO
(Charging Party)

WA-CA-11-0390

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DECISION AND ORDER

September 2, 2015

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

I. Statement of the Case

This unfair labor practice (ULP) case comes before the Authority on exceptions to the attached decision by Administrative Law Judge Richard A. Pearson (Judge) filed by the Respondent. In his decision, the Judge determined that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute)[1] when the Respondent dealt directly with a bargaining-unit employee (the employee) and bypassed the Union by asking the employee if he would move floors as a means of resolving complaints filed against him. The Respondent now challenges two findings that support the Judge's conclusion that the Respondent bypassed the Union.

First, the Respondent alleges that the Judge erred in finding that the Respondent dealt directly with the employee and bypassed the Union when a supervisor sought to arrange directly with the employee a "consensual settlement of complaints made against" him (grievance-bypass finding).[2] Because the Respondent fails to demonstrate that the Judge erred in his determination, we deny this exception.

Second, the Respondent alleges that the Judge erred in finding that the Respondent attempted to arrange a change in working conditions directly with the employee (working-conditions-bypass finding). Because the Respondent has failed to demonstrate that the Judge erred in his working-conditions-bypass finding, we also deny this exception.

II. Background and Judge's Decision

A. Background

As the facts are set forth in detail in the Judge's decision, we will only briefly summarize them here. This matter involves complaints two coworkers made against the employee and the actions the employee's supervisor took in response to the complaints. Two coworkers of the employee separately filed "Behavioral Code of Conduct Report" forms alleging misconduct by the employee. After receiving the complaints, the employee's supervisor sent an email to the employee stating that he "[n]eed[ed] to discuss something with [him]."[3] The two met and discussed the complaints against the employee. At a certain point during the fifteen-minute conversation, the supervisor indicated to the employee that the complaints might be settled if the employee voluntarily moved to a different floor. The employee refused. However, one of the complaining coworkers moved instead.

In response to the supervisor's actions, the Union filed a ULP charge against the Respondent (the charge), and later filed an amended charge (the amended charge). After investigating the charge, the Regional Director (RD) of the Federal Labor Relations Authority (FLRA) Washington Regional Office at the time dismissed both charges, but the General Counsel (GC) granted the Union's appeal of the dismissal. After further investigation, the RD issued a complaint (the complaint). The complaint alleged that the Respondent had violated §§ 7114(a)(2)(A) as well as 7116(a)(1) and (8) of the Statute when the Respondent failed to give the Union notice and opportunity to be represented at a formal discussion between a management official and a bargaining-unit employee. Additionally, the complaint alleged that the Respondent violated § 7116(a)(1) and (5) of the Statute by bypassing the Union at that meeting.

[1] 5 U.S.C. §§ 7101-7135.
[2] Judge's Decision at 20.
[3] *Id.* at 3.

B. Judge's Decision

Before the Judge, the GC conceded that the Union had not timely filed the amended charge, but argued that it issued the complaint based solely on the original charge. Specifically, the GC argued that the original complaint was broad enough to encompass the allegation of bypass.

As to the merits, the GC argued that the meeting between the employee and the supervisor was a formal discussion. As such, the GC argued, the Respondent failed to notify the Union in advance of the meeting or give the Union an opportunity to attend, as required under § 7114(a)(2)(A) of the Statute and in violation of § 7116(a)(1) and (5) of the Statute. Additionally, the GC argued that the Respondent bypassed the Union in violation of § 7116(a)(1) and (5) of the Statute when the Respondent tried to persuade the employee to move floors without the Union's involvement.

The Respondent denied the allegations, arguing that the brief meeting between the supervisor and the employee was informal and did not concern a grievance. Additionally, the Respondent argued that the supervisor did not negotiate with the employee regarding any conditions of employment. Therefore, according to the Respondent, the conversation did not implicate any of the Union's rights and the Respondent did not bypass the Union. The Respondent also argued that the meeting was an investigatory interview permitted under § 7114(a)(2)(B) of the Statute.

As an initial matter, the Judge determined that the original charge encompassed the Union's charge of bypass. The Judge noted that, although the original charge did not specifically mention the term "bypass," "[t]he charge directs the Respondent's attention to the meeting . . . and it further accuses the Respondent of discussing [the employee]'s conditions of employment and threatening to reassign him during the meeting."[4] The Judge thus determined that "the charge alleged the critical facts underlying a bypass allegation, and the Respondent had adequate notice of what it was being accused."[5]

As to the merits, the Judge first determined, as pertinent here, that the meeting was not a formal discussion within the meaning of § 7114(a)(2)(A) of the Statute, and, therefore, the Respondent did not violate §§ 7114(a)(2)(A) and 7116(a)(1) and (8) of the Statute by failing to give the Union notice and the opportunity to be represented at that meeting. As a result, the Judge dismissed this portion of the GC's complaint.

As to the second allegation in the GC's complaint, the Judge determined that the Respondent bypassed the Union when it dealt directly with the employee concerning a change in the employee's conditions of employment – that is, the employee's move from one floor to another. Considering the differences in patients on the different floors, the Judge also determined that the effects of such a change would have been more than de minimis. The Judge rejected the Respondent's contention that the supervisor was merely gathering information or an opinion from the employee. The Judge stated that the supervisor was "specifically trying to obtain [the employee]'s consent to a change in his conditions of employment, in a way that would avoid involving the Union."[6] In addition, the Judge found that the Respondent had bypassed the Union when the supervisor "sought to directly arrange with [the employee] a consensual settlement of the complaints made against him."[7]

In conclusion, the Judge found that "the Respondent violated § 7116(a)(1) and (5) of the Statute by directly dealing with a bargaining[-]unit employee and bypassing the Union when [the supervisor] asked [the employee] if he would move to the second floor as a means of resolving the complaints filed against him."[8]

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

III. Analysis and Conclusions

The Respondent alleges that the Judge erred in finding that a "single, brief question was an attempt to arrange a change in working conditions directly with [the employee] and an attempt to resolve a grievance directly with [the employee]."[9] Agencies unlawfully bypass an exclusive representative when they communicate directly with bargaining-unit employees concerning grievances, disciplinary actions, and other matters relating to the collective-bargaining relationship.[10] Such conduct constitutes direct dealing with an employee and violates § 7116(1)(a) and (5) of the Statute because that conduct interferes with the Union's rights under § 7114(a)(1) of the Statute to act for and represent all employees in the bargaining unit.[11]

[4] *Id.* at 9.
[5] *Id.*
[6] *Id.* at 20.
[7] *Id.*
[8] *Id.* at 21.
[9] Exceptions at 4.
[10] *Dep't of the Treasury, IRS, Kan. City Serv. Ctr., Kan. City, Mo.*, 57 FLRA 126, 129 (2001) (*IRS*) (quoting *U.S. DOJ, BOP, Fed. Corr. Inst., Bastrop, Tex.*, 51 FLRA 1339, 1346 (1996)).
[11] *Dep't of HHS, SSA, Balt., Md.*, 39 FLRA 298, 311 (1991) (*DHS*); *see also* 5 U.S.C. § 7116(a)(1) & (5); *id.* § 7114(a)(1).

The Respondent alleges that the Judge "erred in finding that [the supervisor] attempted to 'directly arrange with [the employee] a consensual settlement of the complaints made against him' and thereby bypassed the Union."[12] The Respondent raises three contentions to support this exception.

First, the Respondent argues that the Judge erred in his grievance-bypass finding because "[t]he 'grievances' at issue were, in fact, not grievances as contemplated by the Statute."[13] The Respondent argues that "they were brief and informal written statements complaining only about [the employee]'s conduct in the workplace."[14] There is no dispute concerning the application of the statutory definition of "grievance" here. Considering the broad definition the Statute assigns to the term grievance,[15] a complaint by employees concerning the conduct of another employee in the workplace meets the statutory definition – "any complaint . . . by any employee concerning any matter relating to the employment of that employee."[16] Furthermore, the Authority has found that § 7103(a)(9) of the Statute does not limit the definition of grievance to formal grievances.[17] Consequently, the Respondent has not demonstrated that the Judge erred in concluding that the conversation concerned grievances as defined under the Statute.

Second, the Respondent argues that "the meeting was a 'rather haphazard, unorganized, [and] brief discussion'" which could not be construed as an attempt to settle the complaints against the employee.[18] However, the Respondent does not challenge the Judge's factual finding that the supervisor "indicated to [the employee] that the complaints might be settled if [the employee] moved to the second floor."[19] As such, regardless of the brevity of the conversation, the supervisor "communicate[d] directly with [a] bargaining[-]unit[-]employee[] concerning [a] grievance[]."[20] This argument fails to demonstrate that the Judge erred in his determination.

Third, the Respondent argues that there could be no settlement of the grievances because the employee "had no real ability to achieve a settlement of [the] allegations made against him by his co[]workers and, therefore, [the supervisor] could not have bypassed the Union in this context."[21] However, by attempting to reach a resolution of the grievance, regardless of the viability of the solution, the supervisor communicated directly with a bargaining-unit employee concerning a grievance, and, by doing so, bypassed the Union.[22] Consequently, the Respondent's argument fails to demonstrate that the Judge erred in his determination.

Because the Respondent has failed to demonstrate that the Judge erred in his grievance-bypass finding, we deny this exception.

Additionally, the Respondent alleges that the Judge erred in his working-conditions-bypass finding.[23] This finding was in addition to the Judge's grievance-bypass finding, a finding sufficient to support the Judge's conclusion that "the Respondent violated § 7116(a)(1) and (5) of the Statute"[24] by dealing directly with the bargaining-unit employee by asking him to move to a different floor. However, we find that the working-conditions-bypass determination provides an additional basis for the Judge's conclusions, and we find it appropriate to address the Respondent's exceptions to the working-conditions-bypass determination.

First, the Respondent argues that a "single, solitary question from [the Agency] . . . cannot be a negotiation, as contemplated by the Statute, requiring the Union's involvement."[25] Although the Respondent reads the extent of negotiations as a limiting factor of the statutory definition of negotiations, the Statute does not support such an interpretation. Whether the negotiations concern a single issue addressed in a single question or an entire bargaining agreement addressed over months of negotiations, the Agency has a duty to negotiate with the Union on those matters outlined in the Statute. Consequently, the length of the negotiations is immaterial, and this argument fails to demonstrate that the Judge erred.

Second, the Respondent argues that relocation of an employee "is a management right not subject to collective bargaining," and that the supervisor "could have involved the Union in any required negotiations on the impact and implementation of such a reassignment" – but that "there is no evidence that [the supervisor] even seriously considered moving" the employee.[26] However, the Judge found that the supervisor "asked [the employee whether] he would move" to a different floor, and that, "[b]y doing this, [the supervisor] sought to deal directly with [the employee] to change his conditions

[12] Exceptions at 7.
[13] *Id.*
[14] *Id.* (emphasis removed).
[15] *NTEU v. FLRA*, 774 F.2d 1181, 1185-89 (D.C. Cir. 1985).
[16] 5 U.S.C. § 7103(a)(9)(A).
[17] *U.S. DOJ, INS, N.Y. Office of Asylum, Rosedale, N.Y.*, 55 FLRA 1032, 1035 (1999) (Member Cabaniss dissenting).
[18] Exceptions at 7 (quoting Judge's Decision at 18).
[19] Judge's Decision at 20.
[20] *IRS*, 57 FLRA at 129.
[21] Exceptions at 7-8.
[22] *IRS*, 57 FLRA at 129.
[23] Exceptions at 4.
[24] Judge's Decision at 20-21; *see also IRS*, 57 FLRA at 129.
[25] Exceptions at 5.
[26] *Id.*

of employment, without involving the Union."[27] The Respondent provides no basis for finding that the Judge erred in this regard, or for concluding that the supervisor did not "even seriously consider[] moving" the employee.[28] Further, to the extent that the Respondent is arguing that it had no obligation to bargain because relocation allegedly involves a management right, that is irrelevant. Even if relocation would involve the exercise of a management right in the circumstances of this case – an issue that we need not (and do not) decide – the Respondent still had an obligation to bargain over procedures and appropriate arrangements related to the relocation, if the relocation would have more than a de minimis effect on conditions of employment (which, as discussed below, it would).[29] Thus, the Respondent's argument provides no basis for reversing the Judge.

The Respondent also argues that the change was de minimis and not subject to collective bargaining.[30] As noted above, an agency exercising a management right is not required to negotiate the impact and implementation of that decision if the change has no more than a de minimis effect on conditions of employment.[31] The Respondent contends that there was "little evidence that . . . any change in working conditions would have been more than de minimis."[32] The Judge determined that the change was more than de minimis based on his evaluation of witness testimony and his credibility findings regarding that testimony.[33] We will not overrule a Judge's determination regarding credibility of witnesses unless a clear preponderance of all the relevant evidence demonstrates that the determination was incorrect. We have examined the record carefully, and find no basis for reversing the Judge's credibility findings.[34] Consequently, the Respondent has not demonstrated that the Judge erred in finding a more than de minimis change.

Further, the Respondent – arguing that "the facts and conclusions in [*U.S. Department of the Treasury, IRS* (*IRS*) [35]] are inapposite to the present matter" – claims that the Judge erred in his application of *IRS*.[36] Under *IRS*, an agency may question employees directly, provided that it does not do so in a way that amounts to negotiating directly with them concerning matters that are properly bargainable with their exclusive representative.[37] Management has the latitude to gather information, including opinions, from bargaining-unit employees to ensure the efficiency and effectiveness of its operations.[38] However, the Judge found that the Respondent was

> not merely "gathering information" or "opinions" from his employee . . . . This was not a survey or poll, and [the Respondent] was not seeking general information or opinions; he was specifically trying to obtain [the employee]'s consent to a change in his conditions of employment.[39]

These unexcepted-to factual findings support the Judge's application of *IRS*. Therefore we reject this argument, and the Respondent has failed to demonstrate that the Judge's working-conditions-bypass finding was deficient.

Consequently, the Respondent has failed to demonstrate that the Judge erred in his working-conditions-bypass finding, and we reject this exception.

Therefore, the Judge properly ruled that the Respondent committed a ULP, violating § 7116(a)(1) and (5) of the Statute by bypassing the Union and directly dealing with a bargaining-unit employee.

As a final matter, we note the concurrence's statements that (despite the Respondent's failure to raise these issues): we "overlook[]"[40] the issue of whether the Union's original charge alleged a bypass; the Authority's ULP Regulations require that ULP charges contain certain information;[41] and we have "required *absolute and total acquiescence* to the filing requirements that are set forth in the Authority's Regulations."[42]

[27] Judge's Decision at 19.
[28] Exceptions at 5.
[29] *Pension Benefit Guar. Corp.*, 59 FLRA 48, 50 (2003) (*PBGC*).
[30] Exceptions at 5-6.
[31] *PBGC*, 59 FLRA at 50.
[32] Exceptions at 5-6.
[33] Judge's Decision at 19-20, Exceptions at 6 n.4 ("In finding that the – purely hypothetical – change in [the employee's] working conditions would have been more than de minimis, the Judge cited to [the employee's] testimony.").
[34] *Veterans Admin., Wash., D.C.*, 30 FLRA 961, 995 (1988).
[35] 64 FLRA 972 (2010).
[36] Exceptions at 6.
[37] *IRS*, 64 FLRA at 977.
[38] *Id.*
[39] Judge's Decision at 20 (quoting *IRS*, 64 FLRA 972, 977-78).
[40] Concurrence at 13.
[41] *Id.* at 14.
[42] *Id.*

But it is the *concurrence* that overlooks something: well-established legal principles regarding the resolution of ULP cases. As the U.S. Supreme Court has stated in connection with ULP charges filed with the National Labor Relations Board (Board),

> A charge filed with the . . . Board is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry . . . . The responsibility of making that inquiry, and of framing the issues in the case[,] is one that Congress has imposed upon the Board, not the charging party. To confine the Board in its inquiry and in framing the complaint to the specific matters alleged in the charge would reduce the statutory machinery to a vehicle for the vindication of private rights. This would be alien to the basic purpose of the [National Labor Relations] Act [(Act)] . . . .
>
> Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it. There can be no justification for confining such an inquiry to the precise particularizations of a charge.[43]

The Authority, citing this Supreme Court precedent, has stated that,

> in analogous situations arising under the . . . Act, . . . courts have found that it is the function not of the charge but of the complaint to give notice to a respondent of specific claims made against it; that the purpose of a charge is merely to set in motion the machinery of an inquiry; and that the investigation may deal with [ULPs] that are related to those alleged in the charge and grow out of those allegations while the processing is pending.[44]

Accordingly, the Authority has held that: "(1) the [ULP] charge serves merely to initiate an investigation and to determine whether a complaint in a matter should be issued; (2) a charge is sufficient in [an] administrative proceeding [] if it informs the alleged violator of the general nature of the violation charged against him; and (3) where a procedural defect exists concerning the charge, a respondent must be prejudiced by the alleged defect" in order for the Authority to decline to resolve the allegedly defective claim.[45]

Moreover, even after an FLRA regional office has investigated a ULP charge and a complaint has issued, the Authority "does not [even] judge [the] *complaint* based on rigid pleading requirements."[46] Instead, "the Authority will consider matters that are fully and fairly litigated between the parties, even where such matter is not specified in a complaint."[47] As the Authority previously has noted, this is consistent with private-sector precedent.[48]

[43] *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307-08 (1959).
[44] *U.S. DOJ, BOP, Allenwood Fed. Prison Camp, Montgomery, Pa.*, 40 FLRA 449, 455 (1991) (*Allenwood*).
[45] *Id.* (citing *DOD Dependents Schs., Mediterranean Region, Naples Am. High Sch., (Naples, It.)*, 21 FLRA 849, 861 (1986)).
[46] *Olam Sw. Air Def. Sector (TAC), Point Arena Air Force Station, Point Arena, Cal.*, 51 FLRA 797, 807 (1996) (emphasis added) (citation omitted).
[47] *Id.* at 807-08; *accord U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Forrest City, Ark.*, 57 FLRA 787, 788 (2002); *Air Force Flight Test Ctr., Edwards Air Force Base, Cal.*, 55 FLRA 116, 121 (1999).
[48] *U.S. DOL, Wash. D.C.*, 51 FLRA 462, 467 (1995) (discussing private-sector precedent).

To support its position, the concurrence cites decisions that addressed the burdens that parties have when they file, with the Authority, exceptions to arbitration awards[49] or submissions that the Authority's Regulations do not expressly allow.[50] Those types of filings are wholly different from filing a ULP charge with a regional office of the FLRA, which – as stated above – is merely the starting point for the ULP process.[51]

The concurrence also cites the Office of the GC's (OGC's) 2008 revisions to the FLRA's ULP regulations, and implies that the "strict requirements" set forth in those revisions rendered the above-stated ULP principles inapplicable.[52] But in the proposed regulatory revisions, the OGC stated that the pertinent regulation was "substantially unchanged,"[53] and in the final rules, the OGC stated that the pertinent requirement was "not a new requirement."[54] Thus, there is no basis for finding that the 2008 regulatory revisions were intended to change the above-stated, well-established ULP principles.

IV. Order

Pursuant to § 2423.4l(c) of the Authority's Regulations and § 7118 of the
the Statute, the Respondent, shall:

1. Cease and desist from:

(a) Bypassing the Charging Party, the exclusive representative of a bargaining unit of its employees, by dealing directly with bargaining-unit employees concerning conditions of employment.

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

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

(a) Post at its facilities where bargaining-unit employees represented by the Charging Party are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority (FLRA). Upon receipt of such forms, they shall be signed by the Medical Center Director, and shall be posted and maintained for sixty 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. In addition to physical posting of paper notices, the Notice shall be distributed to bargaining-unit employees 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 § 2423.4l(e) of the Authority's Regulations, notify the Regional Director of the Washington Regional Office, FLRA, in writing, within thirty days from the date of this Order, as to what steps have been taken to comply.

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[49] *U.S. Dep't of the Army, U.S. Army Aviation & Missile Research Div., Redstone Arsenal, Ala.*, 68 FLRA 123, 125-26 (2014) (Member Pizzella dissenting) (noting that party that argues that an arbitration award is contrary to a management right must allege not only that the award affects a management right under § 7106(a) of the Statute, but also that the contract provision that the arbitrator enforced was not negotiated under § 7106(b) of the Statute); *NAIL, Local 17*, 68 FLRA 97, 98-99 (2014) (excepting party did not raise recognized ground for review of arbitration award when it argued that "the [a]rbitrator erred when he found 'that [a certain remedy] . . . is contrary to the [n]egotiated [a]greement,'" and that the arbitrator 'fail[ed] to acknowledge the limits on management's rights agreed to in' the parties' agreement."); *AFGE, Local 1815*, 68 FLRA 26, 26-27 (2014) (excepting party did not raise recognized ground for review of arbitration award when it argued, among other things, that the arbitrator "failed to consider all evidence relating to the case."); *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 602 (2014) (Member Pizzella dissenting) (noting that party that argues that an arbitration award is contrary to a management right must allege not only that the award affects a management right under § 7106(a) of the Statute, but also that the contract provision that the arbitrator enforced was not negotiated under § 7106(b) of the Statute); *AFGE, Local 2198*, 67 FLRA 498, 499 (2014) (Member Pizzella concurring) (excepting party failed to raise recognized ground for review of arbitration award when it claimed that award was "contrary to" and "ignore[d] the language of" the parties' collective-bargaining agreement).

[50] *SSA, Region VI*, 67 FLRA 493, 496 (2014) (relying on well-established Authority precedent and § 2429.26(a) of the Authority's Regulations – which, as pertinent here, provides that the Authority "may in [its] discretion grant leave" to parties to file supplemental submissions as the Authority "deems appropriate" – Authority declined to consider supplemental submission where filing party had not "requested leave" to file it); *U.S. DOL*, 67 FLRA 287, 288 (2014) (same).

[51] *Allenwood*, 40 FLRA at 455.

[52] Concurrence at 14.

[53] 72 Fed. Reg. 72,632,72,632 (Dec. 21, 2007).

[54] 73 Fed. Reg. 8995, 8996 (Feb. 19, 2008).

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

The Federal Labor Relations Authority has found that the Department of Veterans Affairs, Veterans Affairs Medical Center, Richmond, Virginia, 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 2145, AFL-CIO, the exclusive representative of a bargaining unit of our employees, by dealing directly with bargaining unit employees concerning conditions of employment.

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.

_____

Respondent

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for sixty 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, Washington Regional Office, Federal Labor Relations Authority, whose address is: 1400 K Street, NW., 2nd Floor, Washington, DC 20424, and whose telephone number is: (202) 357-6029.

Member Pizzella, concurring:

I agree with my colleagues that the Respondent dealt directly with a bargaining-unit employee (the employee) and bypassed the Union when the employee's supervisor sought to arrange directly with him a "consensual settlement of the complaints made against" him (grievance-bypass finding).[1] However, I write separately to address the Respondent's challenge to the finding by Administrative Law Judge Richard A. Pearson (Judge) that the Respondent attempted to arrange a change in working conditions directly with the employee (working-conditions-bypass finding) and because this case involves a matter not addressed by the majority that deserves attention.

I disagree with my colleagues concerning the Judge's working-conditions-bypass finding. Prior to implementing a change in conditions of employment, an agency is required to provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain.[2] However, the substance of the decision to exercise a reserved management right is not itself subject to negotiation, only the impact and implementation of that decision.[3]

In the case before us, the Respondent discussed with the employee only the move itself – a management right[4] – not any of the details – including the impact or implementation of that move.[5] Consequently, the Respondent had no duty to negotiate with the Union concerning the matter discussed with the employee. Although the Respondent would have a duty to negotiate with the Union concerning the impact and implementation of the move prior to the move itself, the Respondent did not discuss the impact or implementation of this decision with the employee.

The majority is correct that the Respondent "still had an obligation to bargain over procedures and appropriate arrangements related to the relocation."[6] However, the majority errs when it posits that, because the Respondent has a duty to bargain over procedures and

[1] Judge's Decision at 20.
[2] *U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Systems Ctr. Detachment 12, Kirtland Air Force Base, N.M.*, 64 FLRA 166, 173 (2009).
[3] *Pension Benefit Guar. Corp.*, 59 FLRA 48, 50 (2003).
[4] 5 U.S.C. § 7106(a)(2)(A) ("nothing in this chapter shall affect the authority of any management official of any agency . . . to . . . assign . . . employees in the agency"); *id.* (a)(2)(B) ("nothing in this chapter shall affect the authority of any management official of any agency . . . to assign work").
[5] Judge's Decision at 19 ("the meeting was . . . an attempt . . . to transfer [the employee] to a different work location.")
[6] Majority at 6.

appropriate arrangements, "the Respondent's argument provides no basis for reversing the Judge."[7] Merely having this obligation does not mean that the Respondent violated it. As the Respondent never discussed those procedures or appropriate arrangements with the employee, the Respondent never breached this obligation by bypassing the Union. Therefore, I agree with the Respondent that the Judge erred in his working-conditions-bypass finding.

However, I agree with the majority that the Judge's other finding – the grievance-bypass finding – is sufficient to sustain the Judge's ultimate determination that the Respondent bypassed the Union.

I also write separately to address one matter overlooked by the majority. When the Union filed its original charge, it only alleged that the Agency violated § 7116(a)(1), (2), and (8) of the Federal Service Labor-Management Relations Statute (the Statute).[8] The original charge did not allege, or express any concern whatsoever, that the Agency "bypassed" the Union. [9] Sometime later, though, the Union tried to amend its charge to include the allegation that the Agency had *also* bypassed the Union. That was a different charge altogether than the charge the Union originally filed with the General Counsel (GC).[10]

Initially, the GC determined that the later-filed charge that included the bypass allegation was untimely and advised the Union that it was filed too late.[11] The Union asked the GC to reconsider, and, upon further review, the GC filed a complaint including the bypass allegation.[12]

The Judge decided that there was no violation of § 7116(a)(2) or (8) – the allegations in the original and timely charge. But the Judge found that, even though "the original charge did not explicitly [include the charge of] 'bypass,'"[13] the Agency bypassed the Union, in violation of § 7116(a)(5), when the supervisor asked the employee to move floors.[14]

Our Regulations require that a ULP charge must include: (1) "[a] clear and concise statement of the facts alleged to constitute a[ULP]"; (2) "a statement of how those facts allegedly violate specific section(s) . . . of the [Statute]"; and, (3) "the date and place of occurrence of the particular acts."[15] The original charge did not include any reference to § 7116(a)(5) of the Statute.[16] In fact, when the Union attempted to amend its charge, it added that section. The Union never explained in its original charge how the Agency's actions constituted a violation of § 7116(a)(5).

That the Union's original charge did not include an allegation of bypass and that the charge was the sole basis upon which the Judge found a violation of § 7116(a)(5) of the Statute is not a matter that can simply be ignored.

The majority has required *absolute and total acquiescence* to the filing requirements that are set forth in the Authority's Regulations – exceptions are summarily dismissed when a party fails to use the precise word or phrase (or dares to use an alternative word) that is required by the majority to describe an exception;[17] supplemental submissions are rejected if the party requesting permission does not invoke the proper Authority Regulation;[18] and the majority *always* denies a

[7] *Id.*
[8] 5 U.S.C. §§ 7101-7135.
[9] GC Ex. 1(a) at 1-3.
[10] Joint Ex. 4 at 3-4.
[11] *Id.* ("The Union filed its initial charge on May 27, 2011. The Union did not raise the bypass allegation in the charge. Because the Union did not raise the allegation until January 18, 2012, more than six months after it learned of the alleged bypass, the amendment is untimely.").
[12] GC Ex. 1(c).
[13] Judge's Decision at 7.
[14] *Id.* at 21.
[15] 5 C.F.R § 2423.4(a)(5).
[16] *Dep't of HHS, SSA Balt., Md.*, 39 FLRA 298, 311 (1991) ("We find that the [r]espondents . . .violated § 7116(a)(1) and (5) of the Statute by bypassing the Union and dealing directly with a bargaining[-]unit employee concerning a grievance filed under the negotiated grievance procedure.").
[17] *E.g. NAIL, Local 17*, 68 FLRA 97, 98-99 (2014) (dismissing exception alleging that the award was contrary to the parties' agreement); *AFGE, Local 1815*, 68 FLRA 26, 26-27 (2014) (dismissing exception alleging that the award "failed to consider all evidence relating to the case"); *AFGE, Local 2198*, 67 FLRA 498, 498-99 (2014) (dismissing exception alleging that the award is contrary to and ignores the language of the parties' agreement).
[18] *E.g. SSA, Region VI*, 67 FLRA 493, 496 (2014) (denying consideration of supplemental submission because party did not request leave under § 2429.26(a) of the Regulations); *U.S. DOL*, 67 FLRA 287, 288 (2014) (same).

party's contrary-to-law exception if it does not add the words that the provision at issue "was not negotiated [pursuant to] § 7116(b)."[19] In other words, time and time again, the majority has dismissed arguments and submissions simply because the party has not used an exact word or phrase. Following the Authority's implementation of its revised regulations in 2008,[20] § 2423.4(a)(5) of the Authority's Regulations now plainly requires a charge to contain "[a] clear and concise statement of the facts alleged to constitute a[ULP], a statement of how those facts allegedly violate specific section(s) and paragraph(s) of the Statute, and the date and place of occurrence of the particular acts." Here the Union did not simply fail to use specific language, it failed to use any language whatsoever which alleged a bypass.

The majority relies on *U.S. Department of Justice, Bureau of Prisons, Allenwood Federal Prison Camp, Montgomery, Pennsylvania* (*Allenwood*)[21] to support why it would not enforce the requirements of § 2423.4 of the Authority's Regulations. However, *Allenwood* is inapposite here because it predates the strict requirements that the Authority adopted with the implementation of the Authority's Regulations in 2008. As noted above, since then, § 2423.4(a)(5) has required "a statement of how those facts allegedly violate specific section(s) and paragraph(s) of the [Statute]."[22]

Because the Union's charge did not include an allegation of bypass no complaint should have been issued on that allegation based on our Regulations. Without a timely charge of bypass, the Judge had no basis on which to find a violation of § 7116(a)(5) of the Statute.

Inexplicably, however, the Agency never addresses the fact that the second charge was "untimel[y],"[55] or whether the first charge included allegations that could be construed as raising a charge of bypass. Because the Agency never addressed this issue, I agree that this exception should be denied.

I also disagree with the majority, to the extent the terms "conditions of employment" and "working conditions" are used interchangeably throughout the decision. For the reasons that the United States Court of Appeals for the District of Columbia Circuit held in *NTEU v. FLRA*[56] and that I explained *in General Services Administration, Eastern Distribution Center, Burlington, N.J.*, those terms "[do] not mean the same thing."[25]

Thank you.

[19] *E.g. U.S. Dep't of the Army, U.S. Army Aviation & Missile Research Div., Redstone Arsenal, Ala.*, 68 FLRA 123, 125 (2014) ("An award enforcing a contract provision will not be found deficient absent a claim that the provision was not negotiated under § 7106(b) of the Statute or a claim that the arbitrator applied a provision negotiated under § 7106(b) in a way that is not reasonably related to that provision and the harm being remedied.") (citations omitted); *SSA, Office of Disability Adjudication & Review, Region IV, New Orleans, La.*, 67 FLRA 597, 602 (2014) ("[T]he party arguing that the award is contrary to management rights to allege not only that the award affects a right under § 7106(a), but also that the agreement provision that the arbitrator has enforced is not the type of contract provision that falls within § 7106(b) of the Statute.).

[20] *Compare* 72 Fed. Reg. 72,632, 72,634 (Dec. 21, 2007) (notice of proposed rulemaking)(§ 2423.4(a)(5) containing "a statement of how those facts allegedly violate specific section(s) . . ."); 73 Fed. Reg. 8995, 8996 (Feb. 19, 2008) (notice of final rule), with 62 Fed. Reg. 40,911, 40,916 (July 31, 1997) (notice of final rule for § 2423.4(a)(3) (containing "a statement of the section(s) and paragraph(s) [of the Statute] alleged to have been violated").

[21] 40 FLRA 449 (1991).

[22] 75 Fed. Reg. 13,429-01, 13,431 (2010).

[55] Judge's Decision at 7.

[56] 745 F.3d 1219, 1224 (D.C. Cir. 2014).

[25] 68 FLRA 70, 81 (2014) (Concurring Opinion of Member Pizzella).

Office of Administrative Law Judges

DEPARTMENT OF VETERANS AFFAIRS
VETERANS AFFAIRS MEDICAL CENTER
RICHMOND, VIRGINIA
Respondent

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2145, AFL-CIO
Charging Party

Case No. WA-CA-11-0390

June M. Marshall
For the General Counsel

Timothy M. O'Boyle
James M. Kielhack, Jr.
For the Respondent

Jennifer D. Marshall
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

Two of Wayne Church's co-workers filed written statements to an agency manager in which they objected to comments Church made to them. Church's third-level supervisor decided to meet with Church to obtain his account of the incidents. When confronted with the complaints, Church angrily denied the accusations; the supervisor asked few, if any, questions to flesh out further details of the incidents. Before Church left the supervisor's office, the supervisor asked him if he'd be willing to move from the fourth floor to a clinic on the second floor in order to resolve the complaints. Church refused to relocate. Subsequently, one of the complaining employees moved to the second floor instead.

The issues in this case are, first, whether this meeting constituted a "formal discussion" that required advance notice to the Union, and second, whether the supervisor improperly bypassed the Union when he tried to reassign Church without involving the Union. I conclude that while some aspects of the meeting were formal, it was predominantly informal in structure and content. Therefore, if the supervisor had simply discussed the complaints registered against Church, the Union would have had no right to participate in the meeting. But once the supervisor began to discuss reassigning Church to a different work area, he sought to change the conditions of his employment. By dealing directly with Church on a matter that should have been negotiated with the Union, he unlawfully bypassed the Union and sought to undermine it.

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101 *et seq.* (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. part 2423.

On May 27, 2011, the American Federation of Government Employees, Local 2145, AFL-CIO (the Union) filed an unfair labor practice charge against the Department of Veterans Affairs, Veterans Affairs Medical Center, Richmond, Virginia (the Agency or Respondent). GC Ex. 1(a). The Union filed an amended charge on January 18, 2012.[1] GC Ex. 1(b). After investigating the charges, the Regional Director of the FLRA's Washington Region issued a Complaint and Notice of Hearing on May 24, 2012, alleging that the Respondent violated §§ 7114(a)(2)(A)[2] and 7116(a)(1) and (8) of the Statute by failing to give the Union notice and an opportunity to be represented at a formal discussion between a management official and a bargaining unit employee, and that the Respondent violated § 7116(a)(1) and (5) of the Statute by bypassing the Union at that same meeting. GC Ex. 1(c). The Respondent filed its Answer to the Complaint on June 6, 2012, denying that it had violated the Statute.

A hearing was held in this matter on August 2, 2012, in Richmond, Virginia. All parties were represented and afforded an opportunity to be heard, to

[1] It appears that the amended charge was never served on the Respondent. Tr. 6-8. This will be discussed further below.

[2] Paragraphs 12 and 14 of the Complaint are inconsistent, in that paragraph 12 refers to a violation of § 7114(a)(2)(B), and paragraph 14 refers to a violation of § 7114(a)(2)(A). GC Ex. 1(c). At the hearing, Counsel for the General Counsel eliminated the confusion by stating that it is alleging a violation of § 7114(a)(2)(A), not (B). Tr. 14.

introduce evidence, and to examine witnesses. The General Counsel (GC) and Respondent filed post-hearing briefs which I have fully considered.

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

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. *See* GC Exs. 1(c) & 1(d). The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization under § 7103(a)(4) of the Statute and is the exclusive representative of a unit of employees that includes the Respondent's facility in Richmond, Virginia. *Id.* The Union is an agent of AFGE for the purpose of representing employees at that facility. *Id.* The Respondent and AFGE are parties to a collective bargaining agreement (CBA). Jt. Ex. 1.

On April 7 and 14, 2011,[3] two kinesiotherapists (bargaining unit employees) filed separate "Behavioral Code of Conduct Report" forms (Reports of Contact) with their supervisors, each objecting to statements made to them by physical therapist Wayne Church. Jt. Exs. 2 & 3. Since kinesiotherapists and physical therapists work under different supervisors, the complaints were subsequently referred to the Chief of the Physical Therapy and Rehabilitation Service, Dr. Shane McNamee. Tr. 113-14. One employee objected to a comment Church made about joining the Union (Jt. Ex. 3), while the other employee objected to Church referring to her age and describing her as "jail bait" (Jt. Ex. 2). Dr. McNamee had only become service chief the previous August, and he had never handled such a complaint before, so he discussed the cases first with someone in Human Resources (HR), who suggested that he discuss the complaints with Church. Tr. 88, 90-91.

On the afternoon of May 13, McNamee sent an email to Church: "Need to discuss something with you. Can you please page me when you get a chance []." R. Ex. 1 at 2; Tr. 91. Within minutes, Church called McNamee, learned that McNamee was available, and went from his office on the fourth floor to McNamee's office on the first floor. Tr. 26. As McNamee explained at the hearing, "I just wanted Mr. Church to have some knowledge of what these things said and get his take on it just to see from his perspective if there was any truth in these things or what they were really about." Tr. 90-91. When Church arrived, McNamee advised him that he had the right to have a Union representative present if he wished, and Church declined the offer. Tr. 26, 91. Church looked first at the report concerning the union-related conversation and asked McNamee "what was the complaint." Tr. 26. McNamee responded that "it looks like you guys are just blowing smoke[,]" but that the other complaint was "more serious . . . ." Tr. 26-27. When Church read the complaint about him allegedly describing an employee as "jail bait," he got upset. Tr. 27. According to Church, he immediately said he wanted to discontinue the meeting and get a Union representative. Tr. 27, 28. He also told McNamee he thought it was "very unfair to me that they were having these young therapists to make these false allegations." Tr. 27. He said that McNamee told him to take the weekend to consider it, "but if you were to transfer down to the second floor and work, this here I'll take it and put it right in my drawer . . . and you'll never hear about it again." Tr. 29. Church refused to be reassigned to the second floor, told McNamee he wanted "to take this to the highest of authorities[,]" and left the office. *Id.*

According to McNamee, Church became "very irate" and "upset" as soon as he read the two complaints, and he began waving his hands and accusing the hospital administration of "creating these things to assassinate his character." Tr. 94. Church didn't ask for a Union representative at any point in the meeting, nor did he seek to terminate the meeting; rather, he "seemed to continue to talk [ ]" about the accusations against him. Tr. 97, 103. Church "eventually calmed down and we went through that a couple of times and I asked him is there any truth in these? Is there any veracity to these, basically? He denied both of those." Tr. 94. McNamee also explained that "because of the allegations of the one from the young lady . . . [Jt. Ex. 2] I thought it was best while we were looking into this, because of the nature of it, to see if Mr. Church would voluntarily work in a different area of the hospital . . . ." Tr. 94; *see also* Tr. 103-05. After Church refused to be reassigned, he and McNamee discussed that the woman's complaint would be handled formally through the EEO process. Tr. 95; *see also* Tr. 125-26. At the hearing, McNamee testified he that didn't remember telling Church that the complaint would "go away" if he agreed to work on the second floor. Tr. 96, 125. Both Church and McNamee estimated that the entire meeting lasted ten or fifteen minutes. Tr. 29-30, 96. The Union did not receive any advance notice of the May 13 meeting. Tr. 78.

Within minutes after this meeting, Church sent McNamee an email confirming their discussion. Among other things, Church reiterated his desire "to take this formal as discussed with you." R. Ex. 1 at 1. He further stated, "This is such a serious accusation and you want to fix it by sending me to the second floor to work." *Id.* McNamee, in turn, forwarded Church's email along with his own comments to various management officials at the

[3] All dates refer to 2011, unless otherwise noted.

hospital, confirming that he had asked Church "to voluntarily move treatment locations." *Id*. Since Church would not move voluntarily, McNamee recommended that Church be involuntarily "moved to another clinical location as he apparently knows the name of the accuser . . . to prevent any particular backlash against this young lady." *Id*. This became unnecessary, as the female kinesiotherapist subsequently agreed to move to the second floor to be away from Church. Tr. 120. Her "Behavioral Code of Conduct Report" was investigated by the Respondent's EEO director, who found insufficient evidence of an EEO violation to pursue the matter further. Tr. 122-23.

Church also spoke to the Union president the day after the meeting and asked her to represent him. Tr. 30, 56-57. Church was concerned about being forced to move to the second floor. Tr. 57. Church followed up his conversation by sending an email to the Union president on May 26, in which Church reiterated that McNamee had offered him "an opportunity to resolve this by going to the second floor to continue performing my job." GC Ex. 2. On May 27, the Union president filed its unfair labor practice charge regarding the May 13 meeting. Tr. 58; GC Ex. 1(a).

The ULP charge, filed by the Union president on May 27, consisted of three pages, all of which focused on the McNamee-Church meeting of May 13. The first page related to their discussion of the union-related Report of Contact and alleged that McNamee had spoken to Church in a coercive manner to intimidate him from discussing Union membership, in violation of § 7116(a)(1) and (2) of the Statute. GC Ex. 1(a) at 1. The second page related to McNamee's discussion of both Reports of Contact, alleging that it was a formal discussion and an investigation of complaints, that McNamee had threatened to reassign Church from the fourth floor to the second floor, and that McNamee had failed to notify the Union in advance, in violation of § 7116(a)(1) and (8). *Id*. at 2. The third page alleged that McNamee had violated Church's "Weingarten" rights by refusing his request to stop the meeting until he obtained a Union representative; it also cited McNamee's alleged threat to move Church to a different floor. *Id.* at 3.

What appears to be an amended ULP charge was prepared by Union president Jennifer Marshall. GC Ex. 1(b). It is a two-page document, the typed portions of which are copies of the third and first pages of the original ULP charge, but each of the two pages has a handwritten addition labeled "Bypass Amendment"; the first page of the new charge is signed by Ms. Marshall and dated January 18, 2012. *Id*. at 1, 2. Each page contains virtually the identical addition, alleging that McNamee attempted to negotiate conditions of employment with Church at the May 13 meeting. Unlike the original charge, which contains an entry in the "For FLRA Use Only" box at the top of the first page that it was given a case number on May 27, the amended charge has no entry or date in the box at the top.

After an investigation by the Washington Region of the FLRA, the Regional Director dismissed each of the allegations of the original charge on its merits and dismissed the amended charge as untimely. Jt. Ex. 4. The General Counsel, however, granted the Union's appeal of the dismissal and directed the Regional Director to reconsider the bypass, formal discussion, and Weingarten allegations. Jt. Ex. 5. After further investigation, the Regional Director found merit in the bypass and formal discussion allegations and issued the Complaint, as noted above. GC Ex. 1(c).

POSITIONS OF THE PARTIES

The General Counsel asserts that the Respondent, through Dr. McNamee's actions on May 13, committed two separate but related violations of the Statute. It argues that the May 13 meeting was a "formal discussion," as that term is defined by § 7114(a)(2)(A), and that the Respondent violated § 7116(a)(1) and (8) by failing to notify the Union in advance of the meeting or to give the Union an opportunity to attend. The GC further argues that the Respondent bypassed the Union in violation of § 7116(a)(1) and (5) by trying to persuade Church to move to the second floor voluntarily.

On the first point, the GC asserts that the May 13 meeting satisfied the statutory criteria of a formal discussion. It is undisputed that the meeting was a discussion, and that it was between a bargaining unit employee and a representative of the Agency. The subject of the meeting was the two Reports of Contact objecting to statements Church made to other employees. Since the Reports of Contact were complaints about Church's conduct, the GC says the McNamee-Church discussion of the complaints concerned a grievance. The Authority has frequently held that the term "grievance" in 7114(a)(2)(A) is broader than the scope of the parties' contractual grievance procedure. *See U.S. Dep't of Def., U.S. Air Force, 325th Fighter Wing, Tyndall AFB, Fla*., 66 FLRA 256, 260 (2011) (*Tyndall AFB*); *Luke Air Force Base, Ariz*., 54 FLRA 716, 730 (1998) (*Luke AFB*). GC Br. at 6-7. Finally, the evidence shows that many of the indicia of formality commonly cited by the Authority were present at the May 13 meeting. *Id*. at 8. Dr. McNamee is a high-level manager for the Respondent, the meeting took place not in Church's work area but in McNamee's office, and it lasted ten to fifteen minutes. Additionally, while Church may not have been told that the meeting was mandatory, the circumstances surrounding it suggest that Church had little choice but to attend. Since the Agency admits that the Union was not

notified of the meeting, the Agency committed an unfair labor practice.

Regarding the bypass allegation, the GC contends that McNamee attempted to convince Church to transfer to a different work location, and that to induce Church to accept a transfer, McNamee offered to resolve the charges against him or to make the complaints disappear. *Id*. at 9-10. Reassigning an employee to a different work location is a change in a condition of employment, and the Agency was obligated to negotiate with the Union, not Church, on this matter. *U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirtland AFB, N.M.*, 64 FLRA 166 (2009) (*Kirtland AFB*). By dealing directly with Church on this issue, the Agency violated § 7116(a)(1) and (5) of the Statute.[4] *Iowa Nat'l Guard & Nat'l Guard Bureau*, 8 FLRA 500, 513 (1982).

The Respondent denies both allegations on their merits. It argues first that the May 13 meeting was "brief, informal, and did not concern a grievance" as defined by the Statute and case law. R. Br. at 4. In the context of § 7114(a)(2)(A), the Respondent disputes that the meeting concerned a grievance, or that it met the formality criteria of Authority case law. The Agency disputes the GC's reliance on *Tyndall AFB* as a basis for finding the May 13 meeting to be a grievance, as the Authority did not (as the GC contends) uphold the ALJ's finding that an employee's call to security police constituted a grievance. R. Br. at 7-8, *citing* 66 FLRA at 260. Rather, the Authority simply assumed the ALJ's finding on that point, without actually deciding it, because the agency had not filed exceptions on that issue. In our case, the Agency submits that the May 13 discussion was, at most, something that could have given rise to a future grievance. R. Br. at 8. If a supervisor's initial investigation of a co-worker's complaint about a fellow employee is considered a grievance, the distinctions between subparagraphs (A) and (B) of § 7114(a)(2) would be rendered redundant and meaningless. R. Br. at 8-9. In the Respondent's view, the May 13 meeting was an investigatory interview within the meaning of § 7114(a)(2)(B); Church was advised of his right to a Union representative and he declined; and this was all the Statute requires.

Moreover, the Agency insists that the circumstances of the meeting reflect its informality. It was brief – ten minutes, not more than fifteen – and the Agency cites decisions in which this length, or longer, weighed against a finding of formality. *See, e.g., U.S. Dep't of Veterans Affairs, N. Ariz. VA Healthcare, Prescott, Ariz.*, 61 FLRA 181, 185 (2005) (*Arizona VA*); *Dep't of Health & Human Serv., Soc. Sec. Admin.*, 29 FLRA 1205, 1208 (1987) (*SSA I*). McNamee was the only management representative at the meeting, and it was arranged in almost a spontaneous manner. The meeting had no agenda, Church was not told that his attendance was mandatory, and McNamee did not have any script or take notes. R. Br. at 7.

The Respondent denies that McNamee negotiated with Church regarding any conditions of employment or otherwise dealt with Church in a manner that bypassed the Union. First, it asserts that the Agency had no obligation to negotiate with the Union about Church moving voluntarily to the second floor. Church's working conditions were virtually identical on the second floor as they were on the fourth floor, except that the patient population is slightly different and he found the fourth floor more convenient for him. Tr. 36-37. Church testified that he had changed floors in other circumstances in prior years, and he is not aware that there were any negotiations with the Union about those moves. Tr. 42-43. Thus the Respondent submits that no bargaining rights were implicated by McNamee's request that Church agree to move to the second floor. R. Br. at 10-11. All McNamee did was solicit Church's opinion whether he would voluntarily move to another floor, something an agency is entitled to do pursuant to *Nat'l Treasury Employees Union v. FLRA*, 826 F.2d 114, 123 (D.C. Cir. 1987). This was a brief conversation, not a negotiation, and Church refused to even entertain the idea of moving to the second floor, so the Union was not bypassed. R. Br. at 11.

In its Answer to the Complaint (GC Ex. 1(d) at 3), the Respondent objected to the timeliness of the amended ULP charge (GC Ex. 1(b), which was filed more than six months after the May 13 meeting. At the outset of the hearing, Respondent renewed this objection, but the objection focused more on the failure to serve the amended charge on the Respondent than on its untimeliness. Tr. 6, 10-11. The GC conceded that the amended charge was not served on the Agency (Tr. 8) but asserted that the language of the original charge was broad enough to encompass the allegation that the Agency bypassed the Union (Tr. 8-9). The GC further indicated that it issued the Complaint based solely on the original charge. Tr. 10-13. The Respondent did not pursue the issue of untimeliness further at the hearing, and it did not raise the issue in its post-hearing brief.

Nevertheless, the GC did address the procedural issue in its brief and argues that the original ULP charge did allege that the Agency bypassed the Union. GC Br. at 9. Although the original charge did not explicitly use the phrase "bypass," it alleged (near the end of the last paragraph of page 3) that "McNamee threatened bargaining unit employee, Wayne Church with

[4] The GC has not alleged that this constituted an independent violation of § 7116(a)(1).

moving him from his regular assignment of the 4th Floor to that of the 2nd floor as resolution to the alleged 'complaints'." GC Ex. 1(a) at 3, ¶4. In the GC's view, the Complaint's allegation that the Agency bypassed the Union is "directly related to and encompassed within the factual allegations" of that language in the original charge. GC Br. at 9. Therefore, it was timely filed, and the Respondent was properly put on notice of the nature of the violation it was accused of committing. *See U.S. Penitentiary, Leavenworth, Kan.*, 55 FLRA 704, 732 (1999).

DISCUSSION AND CONCLUSIONS

A. The Bypass Complaint Was Based on a Timely and Sufficient Charge

Section 2423.4(a)(5) of the Authority's Rules and Regulations requires that an unfair labor practice charge contain "[a] clear and concise statement of the facts alleged to constitute an unfair labor practice, a statement of the section(s) and paragraph(s) of the [Statute] alleged to have been violated, and the date and place of occurrence of the particular acts[.]"

Section 2423.20(a) (3), (4) of the Rules and Regulations requires a complaint issued by a regional director to set forth, among other things, "[t]he facts alleged to constitute an unfair labor practice[ ]" and "[t]he particular sections of 5 U.S.C., chapter 71 and the rules and regulations involved[.]"

The procedural question that arises here is whether the original ULP charge – which cites various actions and statements by Dr. McNamee on May 13, but which doesn't explicitly allege that he bypassed the Union – is sufficient to support the bypass violation alleged in the Complaint. The Union sought to correct this problem by amending its charge on January 18, 2012, but the amended charge was not served on the Respondent, and the GC is relying only on the original charge to support the Complaint. [5]

The Authority has repeatedly held that a complaint complies with these requirements "if the allegations in the complaint bear a relationship to the charge and are closely related to the events complained of in the charge." *U.S. Dep't of Justice, Bureau of Prisons, Allenwood Fed. Prison Camp, Montgomery, Pa.*, 40 FLRA 449, 455 (1991). It further stated in the *Allenwood* case that "a charge is sufficient in an administrative proceeding if it informs the alleged violator of the general nature of the violation charged against him[.]" *Id.* Both the Authority and the federal courts have explained that a charge merely sets in motion the machinery of an inquiry, which may then deal with unfair labor practices that are related to, or grow out of, the allegations of the charge. *Id.*, and cases cited therein.

In the current case, the original charge, filed on May 27, was three pages long, with each page focusing on a different aspect of the May 13 meeting between McNamee and Church. The second page explicitly alleged that the meeting was a formal discussion, and it further alleged: "In addition, the meeting involved a discussion regarding bargaining unit employee, Wayne Church [sic] conditions of employment in that management threatened to move him from his regular assignment of the 4th Floor to the 2nd Floor." GC Ex. 1(a) at 2, ¶4. The third page (alleging a Weingarten violation) reiterated McNamee's alleged threat to move Church to the second floor "as resolution to the alleged 'complaints'." *Id.* at 3, ¶4. Nowhere in the charge is McNamee accused explicitly of "bypassing" the Union.

Despite the absence of the word "bypass," the charge does state the essential facts on which the bypass allegation in the Complaint is based. The charge directs the Respondent's attention to the meeting of May 13, and it further accuses the Respondent of discussing Church's conditions of employment and threatening to reassign him during the meeting, as a means of resolving the employees' complaints against Church. Discussing the possible change in an employee's conditions of employment directly with the employee, rather than his Union, or seeking to resolve a complaint directly with the employee, represent conduct that undercuts the Union's role as the exclusive representative of employees. So, while the original charge did not use the word "bypass," it did direct the Respondent's attention to conduct that might constitute an unlawful bypass. The Complaint made explicit what had previously been implicit, but it remained focused on the events of the May 13 meeting and the statements McNamee made to Church. Thus, the complaint bears a close relationship to the charge and to the events complained of in the charge, as required by *Allenwood* and other decisions.

The facts of the *Allenwood* case are instructive regarding our own case. There, the union filed a charge alleging that the agency unlawfully refused to furnish it with crediting plans pursuant to a June FOIA request. After investigating the charge, the General Counsel issued a complaint alleging that the agency had unlawfully refused to furnish the union with the same crediting plans pursuant to a September request made under both FOIA and § 7114(b)(4) of the Statute.

[5] The GC insisted that it was basing its complaint solely on the contents of the original charge, and I emphasized at the hearing that I would not look to the amended charge to support the complaint. Tr. 12. It is therefore unnecessary to examine whether the failure to serve the amended charge on the Respondent undermines the complaint.

40 FLRA at 450. Despite the absence of any reference to the September information request or to § 7114(b)(4) in the ULP charge, the charge "put the Respondent on general notice of the allegation that it had violated the Statute by refusing to furnish the requested crediting plan" and the complaint was closely related to the events cited in the charge. *Id*. at 455. In contrast, in *U.S. Dep't of Agric., FSIS, Wash., D.C.*, 59 FLRA 68 (2003), the Authority held that a charge alleging bad faith bargaining and unlawful domination of a local union could not serve as the basis for a complaint alleging that the agency had bypassed a different entity of the union, which was the exclusive representative of the employees. Not only did the charge fail to allege an unlawful bypass, but it also cited management communications with local union officials as violative, whereas the essential violation alleged in the complaint was communicating directly with members of the bargaining unit. 59 FLRA at 73 (majority opinion).[6] By failing to mention "a critical factual element of a bypass allegation[,]" the charge failed to inform the agency of the general nature of a bypass charge. *Id*. The pleadings in our case are comparable to those in *Allenwood*: the charge specifically cites statements by McNamee that discussed conditions of employment, threatened reassignment, and attempted to resolve the complaints against Church without the involvement of the Union. Thus, the charge alleged the critical facts underlying a bypass allegation, and the Agency had adequate notice of what it was being accused of. *See also U.S. Penitentiary, Florence, Colo.*, 53 FLRA 1393, 1401-03 (1998).

B. The May 13 Meeting Was Not a Formal Discussion

Section 7114(a)(2)(A) of the Statute provides:

> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at –
>
> (A) 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[.]

In order for a union to have a right to be represented under § 7114(a)(2)(A), there must be: (1) a discussion (2) which is formal (3) between a representative of the agency and a bargaining unit employee or the employee's representative (4) concerning any grievance or any personnel policy or practice or other general condition of employment. *Tyndall AFB*, 66 FLRA at 259.

In examining these criteria, the Authority is guided by the intent and purpose of § 7114(a)(2)(A), which is to provide a union with an opportunity to safeguard its interests and the interests of bargaining unit employees as viewed in the context of the union's full range of responsibilities under the Statute. *Gen. Serv. Admin.*, 50 FLRA 401, 404 (1995). The intent and purpose of § 7114(a)(2)(A) does not constitute a separate element in the analytical framework; rather, it is only a guiding principle that informs the Authority's judgments in applying the statutory criteria. *Id*. at 404 n.3. When a meeting satisfies these criteria, management must give the union notice of, and an opportunity to be present at, the meeting, or else it violates § 7116(a)(1) and (8) of the Statute. *Tyndall AFB*, 66 FLRA at 260.

The parties seem to agree, and the evidence confirms, that the meeting between McNamee and Church on May 13 was a discussion, that it involved a bargaining unit employee and a management representative, and that the Union was not notified in advance. What remains in dispute is whether the May 13 meeting was formal and whether it "concerned a grievance."[7]

The May 13 meeting concerned a grievance

Section 7103(a)(9) of the Statute states:

> "grievance" means any complaint –
>
> (A) by any employee concerning any matter relating to the employment of the employee;
>
> (B) by any labor organization concerning any matter relating to the employment of any employee; or
>
> (C) by any employee, labor organization, or agency concerning –
>
> (i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment[.]

[6] *But see* the dissenting opinion, 59 FLRA at 75-76, which argues that the complaint was sufficiently related to the charge, as they both object to actions taken by the same agency official on the same date.

[7] The GC does not contend that the meeting concerned a personnel policy or practice or general condition of employment. *See* GC Ex. 1(c) at ¶12; GC Br. at 6-7.

McNamee asked to talk to Church, and get his views, about two Reports of Contact, both of which alleged that Church had made objectionable comments to them while they were working. The one in particular that seems to have attracted everyone's attention and concern was the comment attributed to Church about a young female employee being "jail bait," because everyone understood that this could be construed as sexual harassment, which could result in disciplinary action against Church. *See, e.g.*, GC Ex. 2; R. Ex. 1 at 1; Tr. 103. Both of the Reports of Contact were "complaints" by bargaining unit employees against Church,[8] and both concerned matters relating to their employment. Therefore, the Reports of Contact satisfy the plain statutory definition of a grievance, and the May 13 meeting "concerned" a grievance.

In finding that the meeting was a grievance, I acknowledge that most decisions interpreting § 7114(a)(2)(A) have involved discussions occurring in the context of a negotiated grievance procedure or some form of statutory appeal. Thus, management discussions with employees regarding MSPB[9] appeals and EEO complaints[10] have been found to be grievances, as have discussions in preparation for arbitration hearings,[11] and even discussions at the informal stages of a negotiated grievance procedure.[12] In *INS Rosedale*, the Authority left unresolved the question of whether "the definition of 'grievance' [extends] beyond the filing of either a statutory appeal or an informal or formal grievance[,]" but Member Wasserman stated his view that it does. 55 FLRA at 1035 n.7. In *U.S. Dep't of the Air Force, 436th Airlift Wing, Dover AFB, Dover, Del.*, 57 FLRA 304, 308 (2001) (*Dover AFB*), the Authority analyzed the statutory language of § 7103(a)(9) and interpreted the repeated use of the word "any" as an indication of Congress's intent to define the term "grievance" as inclusively as possible.[13] In *Luke AFB*, the Authority stated that the meaning of "grievance" is not dependent on the scope of the parties' negotiated grievance procedure. 54 FLRA at 730.

All of these considerations suggest that the complaints made by the two employees objecting to statements Church allegedly made to them were grievances within the meaning of § 7103(a)(9), and that the meeting called by McNamee to discuss with Church the allegations against Church should be viewed as a discussion concerning a grievance, within the meaning of § 7114(a)(2)(A). The purpose of giving a union the right to participate in formal discussions, after all, is to provide the union with an opportunity to safeguard its own interests and the interests of all bargaining unit employees, in the context of the union's full range of statutory responsibilities. *U.S. Dep't of Justice, Bureau of Prisons, Fed. Corr. Inst. (Ray Brook, N.Y.)*, 29 FLRA 584, 589 (1987). Here, two bargaining unit employees objected to statements made by another bargaining unit employee; one of those statements might be construed as sexual harassment. In light of this, the Union may well have institutional interests in (1) being informed of allegations of sexual harassment of bargaining unit members; (2) representing a bargaining unit member who is accused of such harassment; and (3) seeing to it that cases of sexual harassment are handled in a fair and consistent manner.

On the other hand, this case poses an interesting question regarding the relationship, and potential overlap, between subparagraphs (A) and (B) of § 7114(a)(2). Specifically, if a management representative conducts an "examination of an employee . . . in connection with an investigation" that may reasonably result in disciplinary action against the employee, can that meeting also constitute a "formal discussion" under § 7114(a)(2)(A)?

[8] Using the common meaning of the word, the Authority has stated that a complaint includes "something that is the cause or subject of protest or grieved outcry." *U.S. Dep't of Justice, INS, N.Y. Office of Asylum, Rosedale, N.Y.*, 55 FLRA 1032, 1038 n.13 (1999) (*INS Rosedale*).

[9] *Veterans Admin. Med. Ctr., Long Beach, Cal.*, 41 FLRA 1370, 1379-80 (1991) (*VA Long Beach*).

[10] *Luke AFB*, 54 FLRA at 730.

[11] *Dep't of the Air Force, Sacramento Air Logistics Ctr., McClellan AFB, Cal.*, 29 FLRA 594, 598-602 (1987) (*McClellan I*).

[12] *INS Rosedale*, 55 FLRA at 1035; *U.S. Dep't of Justice, Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 51 FLRA 1339, 1344 (1996) (*FCI Bastrop*). As in those two cases, the grievance procedure negotiated by AFGE and the VA in our case encourages employees and Union representatives to "informally discuss issues of concern to them with their supervisors . . . [and] to talk with other appropriate officials about items of concern without filing a formal grievance if they choose." Article 43, Section 7.B of the CBA (Jt. Ex. 1 at 230).

[13] I agree with Respondent that *Tyndall AFB* cannot be interpreted as holding that an employee's emergency call to security police was a grievance. The Authority assumed the ALJ's finding that the emergency call was a grievance, but it did not actually rule on the issue. 66 FLRA at 260.

The evidence regarding the May 13 meeting indicates that McNamee understood the meeting triggered Church's right to a Union representative under § 7114(a)(2)(B); he advised Church of this, but Church (at least initially) declined a Union representative.[14] In these circumstances, can the meeting separately trigger the Union's right to prior notice and an opportunity to attend under subparagraph (A)?

Initially, the Authority seems to have answered this question in the negative, as it interpreted the legislative history of the two subparagraphs of § 7114(a)(2) as creating a distinct dichotomy of rights: if a manager is "conducting an investigation by examining . . . employees for the purpose of gathering facts[,]" the case "must perforce be decided under section 7114(a)(2)(B) and consideration under section 7114(a)(2)(A) is inapposite." *Dep't of Health & Human Serv., Soc. Sec. Admin.*, 18 FLRA 42, 43, 46 (1985) (*SSA II*). In this decision, the Authority determined that "the employees were examined in connection with an investigation. This being so, there occurred no 'formal discussion' within the meaning of section 7114(a)(2)(A)." *Id.* at 46.[15]

Two years later, however, the Authority significantly restricted the applicability of *SSA II* in *McClellan I*.[16] When a management lawyer sought to interview, in preparation for an arbitration hearing, a bargaining unit employee who had been named as a union witness, it did so without notifying the union or allowing it to attend, and it cited *SSA II* in defense of its conduct. While the Authority reaffirmed the analysis in *SSA II* that § 7114(a)(2)(A) and (B) establish "separate rights to representation[ ]" and "serve distinct purposes[,]" it rejected the concept that "a union's right to representation at fact-gathering interviews conducted in preparation for third-party hearings depends solely on meeting the requirements of § 7114(a)(2)(B) and cannot be considered under the provisions of section 7114(a)(2)(A)[.]" 29 FLRA at 600. Rather, it said, "the particular facts of each individual case will determine the provisions of the Statute which are pertinent." *Id.* In contrast to the employee interviews in *SSA II*, which did not occur in the context of an upcoming third-party hearing, the Authority in *McClellan I* considered the union's interest in representing employees at hearings and in assuring the noncoerciveness of management interviews of union witnesses entitled the union to be present at such interviews. *Id.* at 600-02. It reiterated this analysis in *Dep't of the Air Force, F.E. Warren AFB, Cheyenne, Wyo.*, 31 FLRA 541, 552 (1988), stating, "[w]e reject the Judge's conclusion that agency management may treat interviews as one kind of meeting or another at its option . . . Whether section 7114(a)(2)(A) or (B) applies is determined by the facts of each case."

A case that involves facts somewhat analogous to ours is *Nat'l Labor Relations Bd.*, 46 FLRA 107 (1992) (*NLRB*). There, an employee wrote an anonymous letter to agency management complaining of widespread racial discrimination in one department, prompting management to assign its EEO Director to investigate the allegations and to interview employees in the department. The director did so, interviewing the employees who were accused of bias and many other employees who were not accused. She advised the union of what she was doing and offered the Union an opportunity to participate in some of the interviews. Nonetheless, the agency was charged with violating § 7114(a)(2)(A), and the agency argued that the interviews were fact-gathering meetings, not formal discussions, and that the allegations made in the anonymous letter did not constitute a "complaint" under § 7114(a)(2)(A). *Id.* at 125. Citing *McClellan I* and distinguishing *SSA II*, the judge rejected the agency's argument and found that the fact-gathering interviews were formal discussions. *Id.* at 128-37. While the judge considered it "an interesting question" whether the anonymous letter constituted a "grievance" under § 7114(a)(2)(A), he declined to decide that question, as the interviews triggered by the letter concerned "general conditions of employment." *Id.* at 132-33. The Authority upheld the judge's conclusions, except as to one question of waiver that is not relevant to our case. *Id.* at 111-12.

[14] In its original ULP charge, the Union alleged, among other things, that McNamee rejected Church's request for a Union representative, but the General Counsel did not pursue this allegation in the Complaint. *See* GC Ex. 1(a) at 3, GC Ex. 1(c), Jt. Ex. 4 at 2. In his testimony at the hearing, Church stated that while he initially declined to have a Union representative, he changed his mind and asked for one when he read the Reports of Contact, but McNamee did not stop the meeting. Since the Complaint does not accuse the Respondent of violating § 7114(a)(2)(B), I do not need to address this factual discrepancy.

[15] Interestingly, the management interviews of employees in *SSA I* occurred after a written grievance had been filed by the union and discussed with management. *Id.* at 43. Thus, it is clear that the interviews "concerned a grievance."

[16] Since its *McClellan I* decision, the Authority has not cited *SSA II* as a basis for a decision, except in *Am. Fed'n of Gov't Employees, Local 3428*, 66 FLRA 156, 158 (2011). There, an arbitrator cited
SSA II, but the arbitrator's rationale was not explained in the Authority's decision, and the Authority said it was not ruling on the merits of that rationale. *Id.* at 158 n.6.

The Respondent argues that if the complaints made against Church are considered grievances under § 7114(a)(2)(A), then an employee's right to request union representation under § 7114(a)(2)(B) could be rendered "meaningless" and "redundant".[17] R. Br. at 9. But the Authority has made clear that the two subparagraphs of 7114(a)(2) protect separate and distinct rights and have different purposes, and that allegations of formal discussion violations will be evaluated within the criteria specified in (A). In the *NLRB* case, the agency protected itself, the union, and the various employees being interviewed by advising each employee of his right to union representation and by also advising the union of its right to attend the interviews. A similar practice could have been followed here. In our case, the Union had a distinct interest in participating in McNamee's meeting with Church – even if Church didn't think he needed a representative – and the Agency has not shown that notifying the Union in advance of the meeting would have destroyed the purpose of interviewing him.

Considering all these factors, I conclude that the May 13 meeting concerned a grievance.

1. The May 13 Meeting Was Not Formal

In order to determine whether meetings are "formal," the totality of the circumstances presented in each case must be examined. The Authority has identified a variety of factors that are relevant for this purpose, but it has also stated that these factors are merely illustrative. *F.E. Warren AFB, Cheyenne, Wyo*., 52 FLRA 149, 157 (1996) (*Warren AFB*). The relevant factors include: (1) the status of the individual who held the discussion; (2) whether any other management representatives attended; (3) the site of the discussions (i.e., in the supervisor's office, at the employee's desk, or elsewhere); (4) how the meeting for the discussion was called (i.e., with formal advance written notice or more spontaneously and informally); (5) the length of the discussion; (6) whether a formal agenda was established; and (7) the manner in which the discussions were conducted (i.e., whether the employee's identity and comments were noted or transcribed). *Pension Benefit Guar. Corp., Wash., D.C.*, 62 FLRA 219, 222 (2007); U*.S. Dep't of Labor, Office of the Assistant Sec'y for Admin. & Mgmt., Chi., Ill*., 32 FLRA 465, 470 (1988). Also relevant at times are whether attendees signed a confidentiality agreement (*Dover AFB*, 57 FLRA at 307), and whether attendance at the meeting was mandatory (*Am. Fed'n of Gov't Employees, Local 2054*, 63 FLRA 169, 172 (2009)). The Authority also considers the purpose of the meeting, and in some cases the purpose of the discussion may be sufficient, by itself, to establish its formality. *Warren AFB*, 52 FLRA at 156.

In this case, the indicia of formality do not fall uniformly on one side of the scale or the other. Instead, some indicia point toward formality and some point toward informality. On the whole, however, considering the totality of the circumstances, I conclude that the May 13 meeting was not formal.[18]

The GC correctly cites two aspects of the meeting suggesting formality: the status of the management representative conducting the meeting, and the location of the meeting. Dr. McNamee was Church's third-level supervisor, and the meeting was held in McNamee's office on the first floor; Church worked on the fourth floor. The fact that McNamee was not only above Church in the chain of command, but was three levels above him, is a significant factor that signifies the meeting was of importance, and not simply a spontaneous discussion of something that just happened on the work floor. A similar impression is conveyed by Church having to go to McNamee's office for the meeting: the discussion took place on McNamee's "territory," so to speak, conveying an unspoken message as to who was in charge.

Two other factors, which point – but less strongly – toward formality, are the way the meeting was initiated and whether the meeting was mandatory. McNamee sent Church an email on the afternoon of May 13: "Need to discuss something with you. Can you please page me when you get a chance []." R. Ex. 1 at 2. Within minutes, Church had paged McNamee and walked down to McNamee's office. Church was not explicitly told that he was required to meet with McNamee, but in light of McNamee's position, declining the request would have been difficult. A specific time was not set for the meeting; the fact that Church was merely asked to contact McNamee when he "got a chance" detracts somewhat from the formality of the arrangement and from the mandatory nature of his attendance, but overall I would still consider these facts as evidence of formality.

Weighing against formality are the facts that there was no agenda for the meeting, no notes were taken by McNamee or anyone else, Church was not asked or required to keep the meeting confidential, no other management representative attended, and the meeting was brief. Indeed, the overall impression conveyed by the testimony of both Church and McNamee is one of an unscripted encounter in which McNamee was hoping to

[17] A better question may be whether an expansive definition of "formal discussion" renders the employee's right under 7114(a)(2)(B) to **decline** union representation meaningless.

[18] *See, e.g., Arizona VA*, 61 FLRA at 186, where the Authority explains that the presence of some indicia of formality does not necessarily make the discussion formal under the Statute.

short-circuit what might otherwise become a formal investigation, and to avoid the contentious arguments that would be made in a formal investigation, by talking personally to the various protagonists. Although McNamee had discussed the Reports of Contact with someone in HR, it is clear that he went into the May 13 meeting with no notes, pre-drafted questions, or anything of the sort – rather, he just wanted to get Church's "take" on the allegations and see "what they were really about." Tr. 90-91. And while McNamee did not admit that he offered to drop the employees' complaints if Church agreed to move his workstation to the second floor, I believe that McNamee was looking for a way to satisfy everyone without the complaints being addressed through a formal administrative process.[19] Once Church made it clear that he was not going to settle the matter quietly, McNamee had no desire to pursue his questioning further, and he turned the complaints over to the EEO office for a determination. Tr. 95, 99.

Supporting my belief on this latter point, first, is the utter lack of specificity to McNamee's questions of Church. In Church's account of the meeting, McNamee didn't really ask him anything about the Reports of Contact; rather, McNamee simply handed the reports to him, which caused Church to become upset and accuse management of conspiring to induce employees to falsely accuse him. Tr. 27-28. In McNamee's account of the meeting, he simply asked Church whether there was "any truth" in the allegations, and Church denied them. Tr. 93. Neither Church nor McNamee described any follow-up questions on McNamee's part; no questions tracking the language of the employees' complaints, in an effort to pinpoint areas of dispute or agreement between Church and the complainants. In well-planned, well-thought-out (i.e., formal) investigatory examinations, the interviewer has either a script or a detailed plan of how to pursue the questioning of the witness; denials are followed up with more specific probing. None of that was evident in this case. This indicates to me that while the meeting was not "spontaneous," it was not the result of any real planning. As McNamee testified (and essentially corroborated by Church), he simply wanted to make Church aware of the allegations and to hear Church's version.

The short length of the meeting further supports the idea of informality.[20] Although the GC argues that the Authority has found meetings of ten to fifteen minutes to be of sufficient duration to connote formality, the case it cites for this point demonstrates the contrary. The meeting in *Dep't of the Air Force, Sacramento Air Logistics Ctr., McClellan AFB, Cal.*, 35 FLRA 594, 604 (1990) (*McClellan II*), was found to have taken between fifteen and twenty-five minutes; thus it was significantly longer than the meeting in our case. More importantly, the questioning that occurred in *McClellan II* offers a good contrast to McNamee's questioning of Church here. An agency lawyer contacted an employee who had been identified as a possible union witness at an upcoming arbitration hearing, and he asked a series of questions to elicit what the employee knew about the incident in dispute. *Id.* at 596, 604, 613-14. Even though the lawyer's questions were not written down in advance, it is evident that he asked a considerable number of factual questions and follow-up questions to ascertain whether the employee's account would support or conflict with the agency's knowledge of the facts. McNamee did nothing of the sort in his meeting with Church, however. His questions were not systematic or detailed, and all we can discern from the two witnesses' accounts of the conversation is that McNamee asked him whether the complaints against him were valid. Therefore, *McClellan II* does not help the GC's case.

The Authority discussed the time issue in more depth in a case involving the same parties as our case, in *U.S. Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Richmond, Va.*, 63 FLRA 440, 443 (2009). It cited three cases in which discussions lasting between fifteen and twenty minutes were considered too short to connote formality. *See Arizona VA*, 61 FLRA at 185; *Def. Logistics Agency, Def. Distrib. Region W., Tracy, Cal.*, 48 FLRA 744, 745 n.2 (1993); *SSA II*, 29 FLRA at 1208. In its 2009 *Richmond VA* decision, the Authority affirmed an ALJ's finding that a meeting lasting between fifteen and thirty minutes did not support formality.

I would also add that it is not the mere quantity of time a meeting lasts that is important, but the detail, specificity, and focus of the discussion in that time which connotes formality or informality. McNamee was seeking to ascertain the validity of the two Reports of Contact and to hear Church's side of the story. If he had engaged Church in a detailed series of analytical questions about the two incidents, trying to pinpoint exactly what was said by each person, and following up Church's answers with more specific questions, I might be more inclined to find that this discussion was formal. But as I have already explained, that was not the tenor of the discussion at all. Most of the ten or fifteen minutes were occupied by Church's angry denunciations of management's efforts to assassinate his character, not discussing the details of the allegations in the Reports of Contact.

[19] I will address this matter separately, below, with regard to whether McNamee bypassed the Union.

[20] While I use ten to fifteen minutes as the possible range of time the meeting lasted, the evidence suggests it was closer to ten. *Compare* Tr. 29-30 *and* 96.

As for the purpose of the meeting, I do not think the facts of the meeting clearly point in either direction, but they point moderately toward informality. This factor overlaps considerably with my earlier discussion regarding whether the meeting "concerned a grievance," and I think it is more relevant to consider those facts in regard to the meeting's "formality." Cases such as *McClellan I*, *Luke AFB*, and *VA Long Beach* looked at the procedural context of the meetings in those cases and determined that preparations for an arbitration hearing, a formal EEO complaint investigation, and an MSPB hearing, respectively, are "grievances" within the meaning of § 7114(a)(2)(A). In *FCI Bastrop*, the Authority held that even a meeting to discuss a "potential grievance" met the statutory definition of grievance. 51 FLRA at 1345. Although the May 13 meeting in our case did not even occur at the informal stage of the parties' grievance procedure, I found that it met the statutory definition of a grievance. Nevertheless, I also consider the preliminary stage at which the May 13 meeting occurred as a factor weighing against its formality. When a formal administrative or statutory process such as an MSPB or unfair labor practice hearing takes place, investigatory or fact-finding interviews of employees must be viewed in the context of that administrative or statutory procedure. In contrast, McNamee's questioning of Church occurred before anyone had filed a grievance – either in writing or at an informal stage – under the parties' negotiated grievance procedure. Two employees had filed Reports of Contact objecting to things Church said to them, but no supervisor had made any decision that Church should be disciplined. McNamee and HR were just beginning to investigate what exactly had happened and whether Church had done anything wrong. While I still view the Reports of Contact as grievances, it is also clear that the investigatory process had barely begun.

Even at such a preliminary stage of an agency's fact-finding, it is possible that a manager's investigatory interview of the subject of a report of contact might constitute a "formal discussion" under § 7114(a)(2)(A), but only if the interviewer conducted his questioning in a much more formal, thorough manner. For instance, if the Reports of Contact against Church had been assigned to the Agency's Inspector General, and if an IG representative had required Church to sign an affidavit as to exactly what happened, and if the questioning that led up to the affidavit was highly detailed, then I would consider the discussion formal. But those hypothetical facts are not present here. Instead, we have a rather haphazard, unorganized, brief discussion that quickly digressed from the facts of Church's conversations with the two complainants to accusations of management assassinating Church's character.

In sum, the indicia of informality outweigh the indicia of formality. Accordingly, I find that the May 13 meeting was not formal within the meaning of § 7114(a)(2)(A) of the Statute. Since one of the essential criteria of a formal discussion is not present, this portion of the Complaint is dismissed.

C. The Respondent Unlawfully Bypassed the Union

Section 7114(a)(1)[21] of the Statute affirms the principle of a union's exclusive representation of employees in a bargaining unit, and this principle requires an agency to "deal only with" that representative "on matters that are within the sole authority of that exclusive representative." *Am. Fed'n of Gov't Employees, Nat'l Council of HUD Locals 222*, 54 FLRA 1267, 1276-77 (1998) (*HUD*). As the Authority stated in *Dep't of Health & Human Serv., Soc. Sec. Admin, Balt., Md.*, 39 FLRA 298, 311 (1991), "Agencies unlawfully bypass an exclusive representative when they communicate directly with bargaining unit employees concerning grievances, disciplinary actions and other matters relating to the collective bargaining relationship."

While the case law provides no straightforward definition of the phrase "direct dealing," it offers examples of conduct that constitutes direct dealing. For instance, an agency unlawfully bypasses a union when it communicates with one or more employees "concerning grievances, disciplinary actions and other matters relating to the collective bargaining relationship." *Id.* Similarly, it violates the Statute when it solicits employee assistance in establishing a condition of employment (*Air Force Accounting & Fin. Ctr., Lowry AFB, Denver, Colo.*, 42 FLRA 1226, 1239 (1991)) or when it threatens or promises benefits to employees (*HUD*, 54 FLRA at 1279).

But an agency is not prevented from seeking information or opinions directly from its employees, so long as it does not (1) attempt to deal or negotiate directly with employees concerning conditions of employment; or (2) use the information gained from employees to undermine the status of the union. *U.S. Dep't of the Treasury, Internal Revenue Serv.*, 64 FLRA 972, 978 (2010) (*IRS*). Pursuant to these principles, agencies have been allowed to conduct surveys of employees' views and suggestions about working conditions (*id.*), to instruct employees about conditions of employment at orientation sessions (*Dep't of Health & Human Serv.,*

[21] This provision states, in part: "A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit."

Soc. Sec. Admin., 16 FLRA 232, 243 (1984), and to handle purely administrative matters relating to the out-processing of a terminated employee (*U.S. Dep't of Justice, Fed. Bureau of Prisons, FCI Elkton, Ohio*, 63 FLRA 280, 282 (2009)).

I have already explained that the Agency did not need to notify the Union and give it an opportunity to participate when McNamee questioned Church about the two Reports of Contact that had been filed regarding him. It was not a formal discussion. But at a certain point in the meeting, McNamee pivoted the conversation and asked Church if he would move from the fourth floor to the second floor. At that point, the meeting was no longer a fact-finding investigation but an attempt to effectuate a voluntary resolution of the informal grievances and to transfer Church to a different work location. By doing this, McNamee sought to deal directly with Church to change his conditions of employment, without involving the Union.

Changing an employee's work area is a change in the employee's conditions of employment. As noted by the GC, the Authority found in *Kirtland AFB*, 64 FLRA at 173-74, 175-76, that the relocation of a single employee to a different work area effected a change in conditions of employment that required notice to the union and bargaining; *see also Veterans Admin., W. L.A. Med. Ctr., L.A., Cal.*, 24 FLRA 714, 717-18 (1986). In a negotiability dispute, the D.C. Circuit Court of Appeals, enforcing the Authority's bargaining order, noted that issues relating to office environment "involve matters at the very heart of the traditional meaning of 'conditions of employment'". *Library of Cong. v. FLRA*, 699 F.2d 1280, 1286 (D.C. Cir. 1983), *enf'g AFSCME Local 2477*, 7 FLRA 578 (1982). While the Respondent sought to minimize the impact of Church moving to the second floor as merely a matter of convenience and a different patient population (R. Br. at 10), I consider those effects to be more than *de minimis* here. When Church testified that he would be dealing with a different patient population on the second floor, he explained that the patients there had surgery, whereas the patients on the fourth floor have more medical problems. Tr. 37. It is evident from this that the manner in which a physical therapist will treat his patients is likely to be different, depending on the type of medical or surgical issues they face, and that an employee may have distinct preferences as to which type of patients he would prefer working with. I also reject the attempt to minimize the matter of convenience in working on one floor rather than another. McNamee may have had legitimate reasons for seeking to separate Church from the employees who had filed complaints against him, but Church's preferences for wanting to continue working on the fourth floor are also legitimate. If McNamee was going to discuss such a reassignment with Church, he should have negotiated the impact and implementation of such a change with the Union. By seeking to arrange it directly with Church, he was improperly bypassing the Union and undermining its position as the exclusive representative of the employees.

Furthermore, I reject the Agency's argument that it had no obligation to negotiate such a reassignment, since Church testified that in previous years he had been moved to different work locations without any apparent negotiations. Tr. 42-43; R. Br. at 10-11. Church was in no position to adequately testify concerning any negotiations that occurred (or didn't occur) in those earlier situations, and there is no other evidence as to whether the Union had waived its right to negotiate this issue, in 2011 or in earlier years. Additionally, any failure to negotiate in previous years would not preclude the Union from negotiating the same issue in subsequent years.

In addition to dealing directly with Church to move him from the fourth floor to the second floor, I find that McNamee sought to directly arrange with Church a consensual settlement of the complaints made against him. Although the Reports of Contact had not been filed under the negotiated grievance procedure, and Church had not yet named the Union as his representative in that matter, I am convinced that McNamee tried to convince Church that it would be in his interest to voluntarily move to the second floor as a means of resolving the complaints. The exact language that McNamee used in this regard is not critical: whether he assured Church that he would take the Reports of Contact and "put [them] right in my drawer . . . you'll never hear about it again[,]" or whether he used some more ambiguous language, I am persuaded that McNamee indicated to Church that the complaints might be settled if he moved to the second floor. Tr. 29. McNamee could not recall whether he had used the language attributed to him by Church (Tr. 96), but Church's recollection was more specific and detailed. I give weight to the summary of their meeting that Church wrote immediately after it ended, in which he said (referring to the sexual harassment complaint): "This is such a serious accusation and you want to fix it by sending me to the second floor to work." R. Ex. 1 at 1. Coming fresh after the meeting, Church's email is convincing evidence that McNamee was trying to work out a voluntary resolution of the complaint, and that moving Church to the second floor was part of that resolution.

In these circumstances, McNamee should have involved the Union in reassigning Church to a different floor, and in working out a resolution of the complaints that the two employees had filed against Church. Contrary to the Respondent's argument, McNamee was not merely "gathering information" or "opinions" from his employee when he asked Church if he would be willing to relocate to the second floor. *See IRS*, 64 FLRA at 977-78. This was not a survey or poll, and McNamee was not seeking general information or opinions; he was specifically trying to obtain Church's consent to a change in his conditions of employment, in a way that would avoid involving the Union. In this respect, it is similar to the situation in *Dep't of the Treasury, IRS, Kan. City Serv. Ctr., Kan. City, Mo.*, 57 FLRA 126, 129 (2001).

Therefore, I find that the Respondent violated § 7116(a)(1) and (5) of the Statute by directly dealing with a bargaining unit employee and bypassing the Union when McNamee asked Church if he would move to the second floor as a means of resolving the complaints filed against him.

Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Department of Veterans Affairs, Veterans Affairs Medical Center, Richmond, Virginia, shall:

1. Cease and desist from:

(a) Bypassing the American Federation of Government Employees, Local 2145, AFL-CIO, the exclusive representative of a bargaining unit of its employees, by dealing directly with bargaining unit employees concerning conditions of employment.

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

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

(a) Post at 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 Medical Center Director, 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. In addition to physical posting of paper notices, the Notice shall be distributed to bargaining unit employees 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 Rules and Regulations, notify the Regional Director of the Atlanta 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.

Issued, Washington, D.C., January 30, 2015

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RICHARD A. PEARSON
Administrative Law Judge

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

The Federal Labor Relations Authority has found that the Department of Veterans Affairs, Veterans Affairs Medical Center, Richmond, Virginia, 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 2145, AFL-CIO, the exclusive representative of a bargaining unit of our employees, by dealing directly with bargaining unit employees concerning conditions of employment.

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)

Date: _____ 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 communicated directly with the Regional Director, Washington Regional Office, Federal Labor Relations Authority, whose address is: 1400 K Street, NW., 2nd Flr., Washington, DC 20424, and whose telephone number is: (202) 357-6029.