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

OALJ 14-20

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 525

CHARGING PARTY

Case No. AT-CA-11-0216

Brian R. Locke
For the General Counsel

Angie Wiesman
For the Respondent

William Turner
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

Tyrone Lipscomb, a correctional officer at a federal prison, sent a memorandum to the president of his union, accusing his second-level supervisor, Captain Eric Rayburn, of criticizing his work in a profane and demeaning manner, in front of inmates. The memo also accused Rayburn of violating the Bureau of Prisons' Standards of Employee Conduct, the collective bargaining agreement (CBA) between the Agency and its union, and retaliating against Lipscomb for having previously filed an Equal Employment Opportunity (EEO) complaint. While the memo was addressed to the union president, Lipscomb also sent it to the prison's Warden and the Bureau's Office of Internal Affairs (OIA), among others, and he requested that Rayburn's retaliation stop.

Subsequently, an OIA special agent came to the prison to interview Lipscomb, submit a report to Agency officials, and to determine whether Rayburn had violated the Standards of Employee Conduct. The issue before me is whether that interview "concerned a grievance" and whether it was a "formal discussion" that the union was entitled to attend, pursuant to 5 U.S.C. § 7114(a)(2)(A). Under the Statute and Authority precedent, "grievances" include complaints relating to the employment of any employee, complaints of CBA violations, and EEO complaints. Because the interview concerned Lipscomb's earlier memorandum, and because the memorandum complained about matters directly related to Lipscomb's employment, the interview concerned a grievance within the meaning of § 7114(a)(2)(A).

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), 5 C.F.R. part 2423.

On March 2, 2011, the American Federation of Government Employees, AFL-CIO, Local 525 (the Union) filed an unfair labor practice charge against FCI Williamsburg, an activity of the Department of Justice, Federal Bureau of Prisons (the Agency or Respondent). GC Ex. 1(a), 1(c). The Union filed an amended charge on August 1, 2011. After investigating the charge, the Acting Regional Director of the Atlanta Region of the Authority issued a Complaint and Notice of Hearing on August 31, 2011, alleging that the Agency violated 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 concerning a complaint submitted by the employee. The Respondent filed its Answer to the Complaint on September 26, 2011, denying that it had violated the Statute. The Respondent filed a Motion for Summary Judgment, and the General Counsel (GC) filed a Cross-Motion for Summary Judgment, both of which were denied.

A hearing was held in this matter on November 29, 2011, in Salters, South Carolina. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The 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 Ex. 1(c). 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, Federal Correctional Institution

(FCI) Williamsburg, in Salters, South Carolina. GC Ex. 1(c). 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 CBA. Tr. 23.

Tyrone Lipscomb is a senior correctional officer at FCI Williamsburg, a medium security prison. Tr. 18, 54. On October 18, 2010, Lipscomb filed an EEO complaint alleging that his second-level supervisor, Captain Eric Rayburn, discriminated against him based on his race, color, and Union activity. Tr. 19; R. Ex. 3 at 1-2. Sometime in late October or early November, a contract investigator interviewed Lipscomb about his EEO complaint. Tr. 60.

According to Lipscomb, Rayburn was inspecting Lipscomb's work on December 2, 2010. Rayburn entered the housing unit where Lipscomb worked and told Lipscomb to follow him to a cell. Tr. 47; R. Ex. 2 at 1; GC Ex. 2 at 1. At the cell, in front of inmates, Rayburn asked Lipscomb, "do you see all this shit?" referring to rags or clothes on the floor, "It has to be in the damn locker." R. Ex. 2 at 1; GC Ex. 2 at 1. Rayburn kicked the items towards Lipscomb. R. Ex. 2 at 2; GC Ex. 2 at 1. At another cell, Rayburn took a T-shirt off of a coat rack and asked, "what is this?" in what Lipscomb believed was a "belittling manner". GC Ex. 2 at 1. Rayburn walked through other cells "insulting" Lipscomb and making "derogatory comment[s]" about him "in front of the entire unit . . . [of] about sixty inmates." *Id.* Rayburn told Lipscomb, "I don't give a fuck how you feel about me, all I care about is you not doing your job." *Id.* Rayburn left the housing unit shortly thereafter.

Later that day, Lipscomb wrote a memorandum (the December 2 memorandum) to Union President Thomas Peavy. GC Ex. 2. In this document, Lipscomb set forth Rayburn's actions as stated above, and he asserted that those actions violated the Agency's Program Statement 3420.09, and Article 6(b) and (l) of the CBA.[1] *Id.* at 2. Lipscomb claimed that Rayburn's actions were "adding extra stress" to his family and were making him "uncomfortable working around" Rayburn. *Id.* at 1-2. Further, Lipscomb claimed that Rayburn had not spoken to him in such an "unprofessional manner prior to me filing a EEO complaint against him for discriminating against me . . . ." *Id.* at 1. Lipscomb also asserted that the Agency's Program Statement 1210.24 required him to report Rayburn's "unprofessional conduct[.]" *Id.*[2] Although the memorandum was addressed to Union President Peavy, Lipscomb also emailed it to the Warden, the Agency's regional director, the OIA, and the

[1] Program Statement 3420.09, called the Standards of Employee Conduct, is set forth in its entirety at Jt. Ex. 1. It states that employees may not use "profane, obscene, or otherwise abusive language when communicating with . . . fellow employees," and shall not act in a manner "demeaning to . . . fellow employees[.]" *Id.* at 9. Article 6(b) of the CBA states that there will be "no restraint, harassment, intimidation, reprisal, or any coercion against any employee in the exercise of any employee rights" including the right to be treated "fairly and equitably" and the right to be "free from discrimination based on . . . race, color, . . . or Union activity[.]" GC Ex. 4 at 1. Article 6(l) of the CBA states that "reprimands . . . will be handled in a private setting whenever possible." *Id.* at 2.

[2] Program Statement 1210.24 provides that "staff who become aware of any violation . . . of the Standards of Employee Conduct must report them to management . . . or to the OIG." R. Ex. 4 at 7.

Office of Inspector General (OIG). Tr. 58. At the hearing, Lipscomb stated that he sent the December 2 memorandum to the Warden and others because Rayburn was "acting very unstable, and I didn't want him to retaliate against me for that." Tr. 21. Lipscomb also reiterated at the hearing that he was alleging in the December 2 memorandum that Rayburn's actions on December 2 were retaliation for his EEO complaint. *Id.*

Lipscomb testified that after the incident, he felt "threaten[ed] and intimidated" and, on December 6, 2010, he requested that the Warden conduct a "threat assessment" to determine whether he and Rayburn should be separated. Tr. 22, 41-42; GC Ex. 3. When asked at the hearing why he was uncomfortable working with Rayburn, Lipscomb explained: "Because of his actions. The captain is the head of security of the institution . . . and he also has the ability to hire and fire, and this could greatly affect my livelihood." Tr. 21. A committee later determined that there was no need to separate Lipscomb and Rayburn. Tr. 40-41.

On December 7, 2010, Lipscomb sent a copy of his December 2 memorandum to the Agency's EEO office and asked to amend his complaint to allege that Rayburn's actions on December 2 were retaliation for Lipscomb's EEO complaint. R. Ex. 1; Tr. 21, 33, 38. About one month later, the EEO office confirmed that Lipscomb's complaint had been amended. Tr. 22. At the time of the hearing, Lipscomb was still waiting to receive the final Agency decision on his EEO complaint. Tr. 39.

Allegations of misconduct by prison staff can be filed in a variety of ways, but ultimately all such allegations go to the Justice Department's Office of Inspector General, which decides whether to investigate the matter itself or to refer it to Agency management. Tr. 129. Lipscomb's December 2 memorandum was, in this manner, referred by OIG to OIA, which is a division of the Federal Bureau of Prisons that conducts and monitors investigations at correctional institutions and other facilities throughout the Agency. Tr. 29-30, 130-32. The Chief of OIA in Washington, D.C., assigned Lipscomb's case to OIA Special Agent Brian Barrick (Tr. 132), who works out of a field office at the Federal Medical Center in Butner, North Carolina.[3] Tr. 144-45. In addition to personally investigating matters at a variety of Agency facilities, Barrick monitors other investigations conducted by local investigators at these facilities. *See* Tr. 128, 139. He also provides the Agency with guidance regarding a union's role in misconduct investigations involving bargaining unit employees. Tr. 129.

After he was assigned the incident involving Lipscomb and Rayburn, Special Agent Barrick informed Lieutenant James Patterson, a special investigative supervisor at FCI Williamsburg, that he would be coming in from Butner, four hours away by car, to interview

[3] The Federal Medical Center in Butner, North Carolina, is part of the Federal Correctional Complex there. Tr. 144.

Lipscomb on March 1, 2011.[4] Tr. 107-08. On February 24, Patterson had an administrative lieutenant switch Lipscomb's March 1 shift from the night shift to the day shift, so that Barrick could interview Lipscomb. Tr. 108-09.

Lipscomb reported for duty at 8:00 a.m. on March 1, and was told that he would be meeting with Patterson at some point that day. He was also told to patrol the recreation area (as opposed to the housing unit, where he regularly worked) in the meantime. Tr. 25-26, 53-54. At around 12:30 p.m., Patterson had a supervisor radio Lipscomb to come to Patterson's office. Tr. 24, 26, 57, 110. Although Lipscomb did not know why Patterson wanted to speak to him, Lipscomb knew that Patterson was an investigator, so he went to the Union office and told Peavy that he wanted a Union representative. Tr. 26, 57.

The Agency had not notified the Union that Lipscomb would be meeting with an investigator. Tr. 82. Patterson explained at the hearing that he did not provide notice to the Union because he was "not required to do so," since Lipscomb was "not receiving any discipline as part of this interview."[5] Tr. 109-10. Further, Patterson testified that he had never previously notified the Union under similar circumstances. Tr. 110. Similarly, Barrick testified that he did not provide notice to the Union, stating that it had "never been a practice to do so." Tr. 137. When asked at the hearing whether all bargaining unit employees have the right to a union representative during an interview, Barrick stated that "subjects of the investigations" have that right. Tr. 131.

Without knowing why Lipscomb was going to Patterson's office, Peavy assigned Rasheem Holland to be Lipscomb's Union representative, and the two went to Patterson's office. Tr. 26. There, Patterson told Holland, "you're not needed at this time; where will you be?" Tr. 43. Holland said he'd be at the Union office, and Patterson replied, "if [Lipscomb] needs you, he'll call you." Tr. 43; *see also* Tr. 27. It was clear to Lipscomb that Patterson was thereby preventing Holland from attending the interview. Tr. 43.

Patterson told Lipscomb he would not be interviewing him, but was "just the escort[,]" without explaining why Lipscomb needed an escort. Tr. 27-28. Patterson led Lipscomb to an office in the Human Resources Division that the Warden and human resources had previously selected. Tr. 25, 27, 114, 138. The office's windows faced the hallway and were covered with brown paper – something Lipscomb had never seen before (Tr. 29, 44-45), but which was Barrick's standard practice. Tr. 139. Patterson stated at the hearing that he had covered the windows earlier that day, with Barrick's help, for "privacy concerns[.]" Tr. 114. Barrick stated that covering the windows "brought less distraction [ ]"

---

[4] At the hearing, Barrick explained that while Patterson could investigate misconduct at FCI Williamsburg, he could not investigate this matter, because Rayburn was also Patterson's supervisor. Tr. 146, 149-50.

[5] Similarly, Patterson did not give Lipscomb advance notice of the interview. Tr. 110-11.

and "makes for a smooth interview." Tr. 139-40. Upon arriving at the interview room, Patterson knocked on the door and Barrick came out and introduced himself. Tr. 28. Patterson told Barrick that Lipscomb "had his union rep, but I told him he didn't need him." Tr. 28. Barrick responded, "Okay[,]" and Patterson then left. Tr. 28, 111-12.

Barrick and Lipscomb entered the office, with Barrick sitting on one side of a desk and Lipscomb sitting on the other side; no one else was in the office. Tr. 45, 140. Barrick began by reading Lipscomb a statement. He explained that he was an OIA investigator and that Lipscomb was being called as a complainant of an allegation of staff misconduct, but that he was not the subject of the investigation. Tr. 29, 138. Barrick told Lipscomb that he had a duty to participate in the investigation, meaning that Lipscomb could not have refused to attend the meeting. Tr. 29, 31. He also informed Lipscomb that he could be terminated or otherwise disciplined for providing information that was not truthful. Tr. 29. Barrick stated at the hearing that informing the interviewee of this penalty was a "standard practice" that helped protect the integrity of the investigation. Tr. 140-41.

Barrick then read aloud from a draft affidavit on his laptop that was based on Lipscomb's December 2 memorandum, and he asked Lipscomb questions about the memorandum as he read. Tr. 45-47, 141, 148. Barrick asked Lipscomb to elaborate on and clarify things he had written in the December 2 memorandum. Tr. 30-31, 43, 46. Among the questions Barrick asked was whether Lipscomb could specify the cell where Rayburn kicked the rags or clothes. Tr. 46-47. He also asked Lipscomb whether there were any details that he hadn't mentioned in the December 2 memorandum that he'd like to add. Tr. 148-49. Barrick incorporated Lipscomb's answers during the interview into the affidavit. Tr. 30-31, 43. He then printed out the affidavit, showed Lipscomb the changes from the December 2 memorandum, and asked Lipscomb to read it over and make sure it was exactly what he wanted to say. Tr. 45-46, 48-49. Lipscomb determined that the changes were satisfactory, and then he initialed each page of the affidavit and signed and dated the last page. Tr. 30, 45-46, 49; R. Ex. 2 at 3. In the affidavit, Lipscomb reaffirmed his prior description of Rayburn's actions. R. Ex. 2 at 1-2. He also reiterated his belief that, before he filed his EEO complaint, Rayburn had not treated him so poorly, and that Rayburn's conduct on December 2 was "in retaliation of my filing the EEO Complaint against him." *Id.* at 2.

At the hearing, Barrick acknowledged that he knew Lipscomb had filed an EEO complaint, but he did not know the details of that complaint or that Lipscomb had amended it. Tr. 133-34. He explained that the EEO complaint process is separate from the investigation of alleged staff misconduct that he was conducting. Tr. 134. He said that he did not conduct his investigation based on Lipscomb having filed an EEO complaint, and that he does not have the authority to dispose of an EEO complaint. Tr. 133-35.

Barrick instructed Lipscomb not to discuss their meeting with anyone. Tr. 140. As with his warning against dishonesty, Barrick did this as a "standard practice" to "keep the integrity of the investigation." Tr. 140. Lipscomb estimated that the interview lasted about 20 minutes (Tr. 47), while Barrick estimated it lasted 30 to 45 minutes. Tr. 141.

At the end of the interview, Lipscomb asked Barrick how the investigation would proceed from there. Tr. 59. Barrick said that he would complete his investigation and forward a report to his supervisor; if his supervisor determined that there had been wrongdoing, that determination would be sent to the Warden, who would decide whether to take any further action. Tr. 31, 59, 147-48. Barrick told Lipscomb that he would not be notified about the result of the investigation, and indeed Lipscomb heard nothing further from the Agency, OIA, or OIG after the interview on March 1. Tr. 31, 59.

DISCUSSION AND CONCLUSIONS

Positions of the Parties

General Counsel

The GC argues that the Respondent violated § 7116(a)(1) and (8) of the Statute because it failed to fulfill its statutory obligation to provide the Union with notice of, and an opportunity to attend, the March 1, 2011, meeting. The GC argues that the Agency was obligated under § 7114(a)(2)(A) to notify the Union of, and give it an opportunity to attend the Barrick-Lipscomb interview, because the meeting met the statutory criteria: it was (1) a discussion; (2) between a bargaining unit employee and a representative of the Agency; (3) concerning a grievance; and (4) it was formal. GC Br. at 6. Asserting that there is no dispute that the meeting satisfies the first two of these criteria, the GC focuses its argument on whether the meeting was formal and whether it concerned a grievance.[6]

The GC contends that the Barrick-Lipscomb interview was formal because it: (1) involved planning and review by high-level officials; (2) took place in the Human Resources Division offices, away from Lipscomb's regular work area; (3) was neither casual nor impromptu, but instead was planned in advance by the Agency; (4) followed an agenda, as Barrick asked questions based on the December 2 memorandum; (5) involved Barrick modifying the draft affidavit to incorporate Lipscomb's answers to Barrick's questions; (6) required Lipscomb to sign the affidavit; (7) served as a basis for Barrick's investigative report; (8) involved Patterson escorting Lipscomb to the meeting; (9) took place in an office whose windows were covered with brown paper, so as to ensure privacy and avoid distractions; (10) pertained to allegations of misconduct that could result in a supervisor being disciplined; (11) required that Lipscomb answer truthfully, or else he might face discipline himself; (12) required that Lipscomb not discuss the investigation with others; (13) involved changing Lipscomb's shift; and (14) was mandatory. GC Br. at 13-16. Moreover, the GC argues that the meeting was formal, even though it lasted only between 20 and 45 minutes and did not involve a "detailed exchange[] of information." *Id.* at 15.

---

[6] The GC does not claim that the meeting concerned "any personnel policy or practices or other general condition of employment[.]" *See* 5 U.S.C. § 7114(a)(2)(A).

In arguing that the March 1 meeting "concerned a grievance," the GC notes all parties' agreement that the meeting related to Lipscomb's December 2 memorandum. The GC asserts that the December 2 memorandum was: (1) a complaint by an employee concerning a matter relating to his employment and, thus, a grievance under § 7103(a)(9)(A) of the Statute; and (2) a complaint that an Agency supervisor had violated the CBA and, thus, a grievance under § 7103(a)(9)(C)(i). GC Br. at 7-9. In addition, the GC asserts that the meeting concerned the same events covered by Lipscomb's amended EEO complaint, and therefore concerned a grievance, under Authority precedent regarding EEO complaints and investigations. *Id.* at 8-9. The GC maintains that the Union had an interest in attending the March 1 meeting so that it could ensure that the Agency properly investigated and remedied allegations of misconduct, and so that it had information necessary to enforce the CBA. *Id.* at 10-12.

With regard to a remedy, the GC requests that the chief of OIA should sign a notice to employees, because notices should be signed by the highest-level official of the activity responsible for the violation.[7] GC Br. at 26 (citing *U.S. Dep't of HUD, Ky. State Office, Louisville, Ky.*, 58 FLRA 73, 73 (2002)). Further, the GC urges that notice be sent to Barrick and other agentss at the OIA office in Butner, North Carolina. GC Br. at 26. In this regard, the GC argues that such a notice would deter Barrick from violating the Statute in the future, and that sending notices outside the bargaining unit is appropriate in these circumstances. GC Br. at 24 (citing *U.S. Penitentiary, Florence, Colo.*, 53 FLRA 1393, 1394 (1998) (*U.S. Penitentiary*)). In the alternative, the GC requests a nationwide posting. GC Br. at 26 (citing *U.S. DOJ, Fed. BOP, OIA, Wash., D.C.*, 55 FLRA 388, 395 (1999) (*BOP*)). The GC argues that a nationwide posting would be appropriate, because employees at FCI Williamsburg are part of a nationwide bargaining unit, Barrick is "responsible for conducting investigations in facilities nationwide" and provides guidance to "local facilities" on the Union's role in interviews, and Barrick's "failure to comply with the Statute will affect employees of the bargaining unit outside of FCI Williamsburg." GC Br. at 24-25.

Respondent

The Respondent acknowledges that "neither Mr. Lipscomb nor the . . . Union were . . . provided notification" of the March 1 meeting. R. Br. at 11. Further, the Respondent acknowledges that Patterson "instructed the Union Representative to return to his post," where "he would be called if his presence was required." *Id.* However, the Respondent argues that it did not violate § 7114(a)(2)(A), because the meeting was not a formal discussion and did not concern a grievance. *Id.* at 1, 16.

[7] The parties dispute whether distributing notices electronically would be warranted as a nontraditional remedy. Because the Authority now incorporates electronic distribution as part of a traditional notice posting remedy, this dispute has been resolved, and I do not address it further. *See U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014).

The Respondent points to a variety of facts regarding the March 1 meeting to show that it was not a formal discussion: (1) Barrick was the only management official at the meeting; (2) Barrick and Lipscomb were the only people at the meeting; (3) the meeting was not at Lipscomb's regular work area, but only because "it cannot be expected that an interview of this nature" would be held in front of "inmates and other staff" (*id.* at 10-11); (4) although OIA called the meeting, the meeting "would not have been called were it not for the employee's report of misconduct" (*id.* at 10); (5) the meeting lasted 30 to 45 minutes and therefore was "not lengthy" (*id.* at 13); (6) "other than to make the changes to the affidavit . . . no formal agenda was involved [ ]" (*id.*); (7) Barrick did not have a list of questions for Lipscomb; (8) Barrick "did not take notes or write anything down, but utilized his laptop [ ]" (*id.* at 12); (9) the changes Barrick made to the draft affidavit were merely "clarifications" (*id.*); (10) Barrick is "commonly assigned" to investigations outside of his duty station at Butner, and thus it was therefore "not unusual the interview . . . took place at FCI Williamsburg [ ]" (*id.* at 10); and (11) the "only interchange between . . . Barrick and . . . Mr. Lipscomb concerned the changes being made on an affidavit" prepared for Lipscomb (*id.* at 12). Moreover, the Respondent argues that it was "standard practice" to tell the interviewee not to discuss the interview and to warn him of penalties for dishonesty. *Id.*

To support its contention that the March 1 meeting did not concern a grievance, the Respondent argues that while the Authority defines the term "grievance" broadly, Congress did not intend § 7114(a)(2)(A) to apply to discussions such as the one on March 1, 2011. Respondent argues that Lipscomb did not make "a complaint relating to his employment," but rather he was "reporting potential violations of policy." *Id.* at 6. It cites *U.S. Dep't of the Air Force, Davis-Monthan AFB, Tucson, Ariz.*, 64 FLRA 845, 848-49 (2010) (*Davis-Monthan AFB*), in support of this point.

The Respondent distinguishes Lipscomb's "report of staff misconduct" from his EEO complaint and emphasizes that Special Agent Barrick was not investigating the alleged EEO violation, but only the allegation that Rayburn violated the Standards of Employee Conduct. In this regard, the Respondent argues that: (1) Lipscomb's affidavit (R. Ex. 2) does not refer to the allegations that Lipscomb made in his EEO complaint; (2) Lipscomb's affidavit "only concerns his December 2, 2010, memorandum [ ]" (R. Br. at 8); (3) Barrick "did not conduct his investigation . . . due [to] an EEO complaint or amended EEO Complaint [ ]" (*id.* at 7); (4) Barrick was "aware Mr. Lipscomb had filed an EEO complaint[,]" but did not know the details of either the original or the amended EEO complaint (*id.* at 8); (5) OIA cannot take any action on, or dispose of, EEO complaints (*id.* at 14); and (6) OIA misconduct investigations and EEO investigations complaints involve "separate processes [ ]" that are overseen by "separate entities," that conduct "separate investigations." (*Id.* at 8).

The Respondent asserts that "it would be in contravention of the legislative history of the . . . Statute to construe every complaint made by an employee, who also has filed an EEO Complaint, as a grievance." *Id.* at 2; *see also id.* at 8-9, 13. Quoting *U.S. DOJ, BOP, FCI (Ray Brook, N.Y.)*, 29 FLRA 584, 589 (1987) (*FCI Ray Brook*), the Respondent asserts that § 7114(a)(2)(A)'s purpose is "to provide the union with an opportunity to safeguard its interests and the interests of employees in the bargaining unit – viewed in the context of a

union's full range of responsibilities under the Statute." R. Br. at 13; *see also* R. Br. at 14 (citing *IRS v. FLRA*, 706 F.2d 1019, 1023 (9th Cir. 1983)). While § 7114(a)(2)(A) is intended "to protect the bargaining unit as a whole[,]" the March 1 meeting between Lipscomb and Barrick "had no implications to the bargaining unit as a whole, but only on the reporting employee if he failed to be truthful, and on the employee who allegedly violated policy." *Id.* at 2.

Analysis

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. *U.S. DOD, U.S. Air Force, 325th Fighter Wing, Tyndall AFB, Fla.*, 66 FLRA 256, 259 (2011) (*Tyndall AFB*).

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. *GSA*, 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, § 7114(a)(2)(A) "requires management to give the employees' exclusive representative notice of, and an opportunity to be present at" the meeting. *Tyndall AFB*, 66 FLRA at 260. An agency that fails to do so violates § 7116(a)(1) and (8) of the Statute. *Id.*

1. The March 1 meeting was a discussion between a representative of the Agency and a bargaining unit employee

The Respondent acknowledges that the Barrick-Lipscomb interview involved a representative of the Agency and a bargaining unit employee. R. Br. at 1-2, 7, 10, 13, 16. Moreover, while the Respondent asserts that the "only interchange between OIA Agent Barrick and Mr. Lipscomb concerned the changes being made on an affidavit" (*id.* at 12), it seems to understand that such an "interchange" nonetheless constitutes a "discussion." *See id.* at 1-2, 16. It is well settled that the term "discussion" in § 7114(a)(2)(A) is synonymous with the term "meeting," and no actual discussion or debate need occur for the meeting to constitute a discussion within the meaning of the Statute. *Pension Benefit Guar. Corp., Wash., D.C.*, 62 FLRA 219, 221 (2007) (*PBGC*). Accordingly, I find that the March 1 meeting was a discussion between a representative of the Agency and a bargaining unit employee. This leaves us with two disputed issues: whether the meeting was formal and whether it concerned a grievance.

2. The March 1 meeting was formal

In order to determine whether meetings are "formal," within the meaning of 7114(a)(2)(A), the totality of the circumstances presented in each case must be examined. Some illustrative factors that are considered 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). *PBGC*, 62 FLRA at 222; *U.S. DOL, Office of the Assistant Sec'y for Admin. & Mgmt., Chi., Ill.*, 32 FLRA 465, 470 (1988). Other factors the Authority has considered include the purpose of the meeting, *U.S. Dep't of VA, VA Med. Ctr., Richmond, Va.*, 63 FLRA 440, 443 (2009); whether attendees signed a confidentiality agreement, *U.S. Dep't of the Air Force, 436th Airlift Wing, Dover AFB, Dover, Del.*, 57 FLRA 304, 307 (2001) (*Dover AFB*); and whether attendance by the bargaining unit employee was mandatory, *AFGE, Local 2054*, 63 FLRA 169, 172 (2009).

There are numerous indications that the March 1 meeting was formal. First, the meeting was called by Barrick, a high-status individual who, as an OIA special agent, investigates misconduct, supervises local investigators, and writes reports for OIA and prison wardens. While Barrick may not be in Lipscomb's chain of command, his investigative findings will carry significant weight, and he thus has real status. Second, the meeting took place away from Lipscomb's regular work area. The Respondent argues that "an interview of this nature" could not be held in front of "inmates and other staff" (R. Br. at 10-11), but this simply underscores that the meeting involved sensitive matters – an indication of formality. Third, the Agency made preparations for the meeting several days in advance. On February 24, Patterson changed Lipscomb's schedule so that Lipscomb would be able to meet

with Barrick during the day on March 1. Moreover, the Warden and human resources selected the meeting room ahead of time, and Barrick and Patterson readied the room the morning before the meeting. Further, the meeting was called in a deliberate manner. In contrast to what would generally occur in an employee-initiated, impromptu meeting, Patterson had another supervisor radio Lipscomb and direct him to Patterson's office, and Patterson escorted him from there to the meeting room. While the Respondent argues that Barrick's investigation and the Barrick-Lipscomb meeting were the direct result of Lipscomb's December 2 memorandum, it acknowledges that it was OIA, through Barrick, that called the March 1 meeting. Furthermore, it is clear from the above facts that Barrick planned every detail of the meeting in advance, down to the paper covering the windows of the interview room.

Fourth, Barrick used the December 2 memorandum as the basis for his questions, and thus ran the meeting using the functional equivalent of an agenda. *See F.E. Warren AFB, Cheyenne, Wyo.*, 52 FLRA 149, 158-59 (1996), where a message from upper management was used as an agenda by the manager holding the meeting. Although the Respondent points to the absence of any note-taking or a list of prepared questions for Lipscomb as a sign of the meeting's informality, this obscures the reality that Lipscomb's December 2 memorandum served as Barrick's script, and that Barrick put into writing (in the form of an affidavit) Lipscomb's answers to his questions, which sought to elaborate on, and clarify, the details of Lipscomb's earlier memo. Fifth, the meeting was mandatory: Lipscomb was required to participate in the interview. Sixth, the purpose of the meeting was to enable Barrick to produce an affidavit, signed and approved by Lipscomb, which ultimately would form the basis of Barrick's investigative report, to be reviewed by Barrick's supervisors and by the Warden of FCI Williamsburg. Finally, the meeting was conducted in a highly formalistic manner. The meeting began not with small talk but with Barrick reading Lipscomb a statement informing Lipscomb that he was being "called in" as the complainant of an allegation of staff misconduct. Tr. 138. Barrick asked Lipscomb questions, and Lipscomb was required to answer truthfully or risk discipline, up to termination – a penalty purportedly needed to ensure the integrity of the investigation. Lipscomb reviewed the affidavit Barrick prepared and affirmed, under oath, that it was accurate. Barrick initialed each page of the affidavit and signed and dated the last page. Although Lipscomb was not required to sign a confidentiality agreement, he was instructed by Barrick not to discuss the meeting with anyone, and this instruction was reiterated in the affidavit itself. R. Ex. 2.

The procedures used in the meeting follow a ritual-like pattern, carried out by an investigator who had officiated at many such interviews, and they embody a deep level of formality. The fact that these procedures were part of Barrick's "standard practice" and intended to protect the "integrity" of the process is an indication of the meeting's formality and seriousness, not its informality. Barrick was charged with investigating and reporting whether Rayburn, a captain at FCI Williamsburg, had violated the Agency's Standards of Employee Conduct. A finding that Rayburn had violated the rules of conduct could ultimately have serious adverse consequences to Rayburn, and a finding that Lipscomb was lying could similarly result in disciplinary action against Lipscomb. Indeed, the investigation

was important enough to warrant Barrick traveling more than two hundred miles to conduct the interview, rather than having someone at FCI Williamsburg conduct the investigation. This indicates formality, even if it was "common[]" for Barrick to conduct investigations away from Butner. R. Br. at 10. OIA, as well as Barrick, went to great lengths to ensure the integrity of the investigation, and the least-apt descriptions that can be attached to the March 1 meeting are "informal," "impromptu," or "casual."

Further, while the meeting lasted only 20 to 45 minutes, that factor alone does not indicate that the meeting was informal. Shorter meetings have been found to be formal. *See Dep't of VA v. FLRA*, 3 F.3d 1386, 1390 (10th Cir. 1993) (*VA v. FLRA*) (10 to 20 minutes), *aff'g* 44 FLRA 768 (1992) and 44 FLRA 408 (1992); *U.S. DOJ, BOP, FCI, Bastrop, Tex.*, 51 FLRA 1339, 1343, 1356 (1996) (*FCI Bastrop*) (25-30 minutes); *Dep't of the Air Force, Sacramento Air Logistics Ctr., McClellan AFB, Cal.*, 35 FLRA 594, 604 (1990) (15-25 minutes). And as the facts cited in the preceding two paragraphs show, a great deal of formality can be condensed into a short meeting. While it is true that there was only one management representative, and two people total, at the meeting, this fact is outweighed by the numerous indications of formality listed above.

In sum, the indicia of formality greatly outweigh the indicia of informality. Accordingly, I find that the March 1, 2011, meeting was formal within the meaning of § 7114(a)(2)(A) of the Statute.

3. The March 1 meeting concerned a grievance

(a) Lipscomb's complaints about his working conditions and the Agency's alleged contract violations are a grievance

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

"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[.]

Barrick testified that he traveled to FCI Williamsburg to interview Lipscomb "regarding a complaint that he had of an allegation of staff misconduct." Tr. 132. Barrick became aware of Lipscomb's "complaint" when he received Lipscomb's December 2 memorandum. Tr. 133. It is therefore clear that the March 1 meeting "concerned" the allegations Lipscomb had made in the December 2 memorandum.

Was the December 2 memorandum a grievance? Since it was sent by an employee (Lipscomb), clauses (A) and (C)(i) are the portions of § 7103(a)(9) that are potentially applicable to our case. The Authority has long held that the term "grievance," in the context of § 7114(a)(2)(A) formal discussions, should be interpreted in light of its broad definition in § 7103(a)(9) of the Statute. *Tyndall AFB*, 66 FLRA at 259. Consistent with this approach, the Authority has found that EEO complaints and other statutory appeal procedures are grievances within the meaning of the Statute, even though they may were not filed or processed under the parties' negotiated grievance procedure. *PBGC*, 62 FLRA at 224; *Dover AFB*, 57 FLRA at 308-10.

I begin by asking whether the December 2 memorandum is a "complaint" under § 7103(a)(9) of the Statute. In interpreting wording in the Statute, the Authority has used a word's common dictionary meaning. *Tyndall AFB.*, 66 FLRA at 259-60. Consistent with this approach, the Authority has indicated that a complaint includes "something that is the cause or subject of protest or grieved outcry." *U.S. DOJ, INS, N.Y. Office of Asylum, Rosedale, N.Y.*, 55 FLRA 1032, 1038 n.13 (1999) (*INS Rosedale*) (Member Wasserman, quoting Webster's Third New International Dictionary (unabridged) (1986)). I find this meaning useful and applicable to the facts of this case, especially since Barrick himself used the word "complaint" to describe the document that initiated Barrick's investigation and his meeting with Lipscomb. Tr. 132-33.

Rayburn's actions on December 2, 2010, were indeed the cause and the subject of protest and grieved outcry on Lipscomb's part, as evidenced by the memorandum he wrote that same day. Specifically, he alleged that his second-level supervisor, who had the power to control many aspects of his employment, had criticized his work in what he perceived as a humiliating, derogatory, and (given that it was in front of inmates) potentially dangerous manner. GC Ex. 2. Further, Lipscomb alleged that Rayburn's actions violated the Agency's own Standards of Employee Conduct, and that they were done in retaliation for Lipscomb's prior EEO complaint. Lipscomb sent his memo not only to the Union, but also to the Warden, the Agency's regional director, OIG, and OIA. It is clear, from this manner of distribution, that Lipscomb wanted as many officials within the Agency and the Union to know about what had happened. By stating, in regard to Rayburn's alleged "retaliations," "I request them to stop immediately[,]" it is also apparent that Lipscomb wanted the Agency to act on his complaint. *Id.* For these reasons, I find that the December 2 memorandum was a complaint and that it directly concerned matters relating to Lipscomb's employment; thus, it was a grievance under § 7103(a)(9)(A) of the Statute. Moreover, because Lipscomb alleged in the memorandum that Rayburn's actions violated the CBA, I find that it is a grievance under § 7103(a)(9)(C)(i) as well.

In making these findings, I acknowledge that cases interpreting § 7114(a)(2)(A) have mostly involved grievances under a negotiated grievance procedure or a statutory appeal procedure. *See INS Rosedale,* 55 FLRA at 1035-37. But § 7103(a)(9)'s broad wording does not limit a grievance to complaints filed within those procedures; rather, it refers to "any complaint . . . relating to the employment of any employee[.]" In its *Dover AFB* decision, the Authority interpreted Congress' repeated use of the word "any" as an indication of its intent to make the definition as inclusive as possible. 57 FLRA at 308. In *FCI Bastrop*, 51 FLRA at 1344-45, and in *INS Rosedale*, 55 FLRA at 1035, the Authority held that a meeting relating to an informal grievance "concerned a grievance" and constituted a formal discussion. Consistent with this precedent, an administrative law judge determined that an employee's 911 call to security police in response to perceived harassment from representatives of the agency was a grievance under § 7103(a)(9)(A). *Tyndall AFB*, 66 FLRA at 276 (ALJ decision).[8] Another administrate law judge found that an employee's letter to the base commander, asking him to overturn a suspension imposed by a lower-ranking officer, was a grievance within the meaning of § 7103(a)(9), regardless of whether the letter constituted a grievance under the negotiated grievance procedure. *U.S. Dep't of the Air Force, Griffiss AFB, Rome, N.Y.*, Case No. 1-CA-80289 (1989), ALJDR No. 86, slip op. at 8-10 (Dec. 6, 1989). Finally, there is little doubt but that the allegations in the December 2 memorandum – including alleged contract violations – would constitute a grievance if filed under the CBA's negotiated grievance procedure. As such, and as Lipscomb sent the memorandum to protect against retaliation – an end often sought when filing within a negotiated grievance procedure – I find no reason to treat the December 2 memorandum differently, for purposes of § 7114(a)(2)(A), from a grievance filed within a negotiated grievance procedure.

The Respondent raises several arguments asserting that the March 1, 2011, meeting did not concern a grievance, but none are convincing. First, the Respondent argues that Lipscomb's December 2 memorandum was a "report of staff misconduct," not a grievance, and cites § 7103(a)(9) and *Davis-Monthan AFB* for support. R. Br. at 6. But the Respondent identifies nothing in the statutory language that suggests any meaningful distinction between a report of staff misconduct and a grievance. On the contrary, the pertinent language in § 7103(a)(9) – "any complaint . . . by any employee concerning any matter relating to the employment of the employee" – applies just as well to a "report of staff misconduct" as it does to a "grievance." The Respondent's reliance on *Davis-Monthan AFB* is puzzling, because the Authority held there that an EEO complaint was a grievance within the meaning of § 7114(a)(2)(A), and that a union was entitled to attend a mediation concerning the EEO complaint, even though the employee did not want the union to be present. 64 FLRA at 849-50. *Davis-Monthan AFB* supports the General Counsel's case, not the Respondent's.

Second, the Respondent asserts that it would be "in contravention of the legislative history of the Labor Statute to construe every complaint made by an employee, who also has filed an EEO Complaint, as a grievance." R. Br. at 2. In addition to the Authority's decision in *FCI Ray Brook, supra*, the Respondent cites the Ninth Circuit's decision in *IRS v. FLRA*,

[8] The Authority did not review the merits of the judge's finding on this point. *See* 66 FLRA at 260.

706 F.2d at 1019 to show that unions are not entitled to attend all types of meetings pursuant to § 7114(a)(2)(A). While the Authority has expressly refused to acquiesce in the *IRS Fresno* decision,[9] and its rationale has been essentially rejected by the Tenth and D.C. Circuits,[10] the Authority's decision in *FCI Ray Brook* is still followed. However, *FCI Ray Brook* has generally been cited in support of an expansive reading of a union's role, rather than a narrow one.[11]

The Respondent argues that entitling the Union to attend Agency investigative interviews regarding staff misconduct allegations would be contrary to the legislative intent, because § 7114(a)(2)(A) exists to "protect the bargaining unit as [a] whole," and the Barrick-Lipscomb meeting "had no implications to the bargaining unit as a whole[.]" R. Br. at 2. Respondent insists that the interview could only affect Rayburn (if he were ultimately found to have committed misconduct) or Lipscomb (if he failed to be truthful). *Id.* at 2, 14. However, the Authority has found that meetings concerned a grievance, even though the meeting concerned only a discrete action with respect to an individual employee. *See, e.g., Tyndall AFB*, 66 FLRA at 259-60; *FCI Bastrop*, 51 FLRA at 1344-45. Indeed, many of the disputes in which unions represent or assist an individual employee do not involve the larger bargaining unit, but the Authority and courts recognize that even the most narrow, individualized disputes may be appropriate opportunities for a union to carry out its statutory responsibilities. Thus, in *NTEU*, 774 F.2d at 1188, the court stated that employee complaints of discrimination or improper discipline "can potentially affect all bargaining unit employees in important ways. Remedies for improper employer conduct . . . also may affect other bargaining unit employees, since a benefit or opportunity granted to one employee can mean the loss of the same benefit or opportunity for another employee." Citing that same language, the Authority in *Dover AFB* stated that "unions have an established interest in how allegations of discrimination are dealt with and resolved, regardless of the forum in which the employee chooses to lodge the complaint." 57 FLRA at 309; *see also Davis-Monthan AFB*, 64 FLRA at 849. Certainly, the March 1 meeting involved matters – a captain's alleged verbal abuse of an employee in front of inmates, a CBA violation, and retaliation for the filing of an EEO complaint – that would be of concern to the rest of the bargaining unit. Moreover, the Union could potentially provide valuable assistance and perspective to Lipscomb during his meeting with Barrick. The Union would be more likely than any individual employee to know how similar incidents have been handled, and it could advise Lipscomb on facts and issues that might be relevant to Barrick's investigation. It could also, by its presence, neutralize the potential for intimidation that may occur when an OIA special agent interviews an employee. *See FCI Ray Brook*, 29 FLRA at 591, and *NTEU*, 774 F.2d at 1192-93. Based on the foregoing, the Respondent's claim that it would be contrary to the Congressional intent of § 7114(a)(2)(A) to find that the March 1 meeting concerned a grievance is unfounded.

---

[9] *Dover AFB*, 57 FLRA at 308.

[10] *VA v. FLRA*, 3 F.3d at 1390-91 (10th Cir. 1993); *NTEU v. FLRA*, 774 F.2d 1181, 1185-88 (D.C. Cir. 1985) (*NTEU*).

[11] *See, e.g. INS Rosedale*, 55 FLRA at 1035.

The Respondent also argues that the March 1 meeting did not concern personnel policies and practices or other general conditions of employment. R. Br. at 6. The GC concedes this. But if a discussion concerns a grievance, the meeting need not also concern personnel policies and practices or other general conditions of employment in order for there to be a violation. *See NTEU*, 774 F.2d at 1186 n.7 (§ 7114(a)(2)(A) is written in the disjunctive – the subject of the formal discussion must concern a grievance *or* any personnel policy, etc.). Because the March 1 meeting concerned a grievance, it is irrelevant that the meeting did not also concern personnel policies and practices or other general conditions of employment.

In sum, because Barrick's March 1, 2011, interview of Lipscomb concerned the December 2 memorandum, and the December 2 memorandum was a grievance under § 7103(a)(9)(A) and 7103(a)(9)(C)(i) of the Statute, I find that the interview concerned a grievance under § 7114(a)(2)(A) of the Statute.

(b) Lipscomb's EEO complaint is a grievance

The Authority has long recognized that an EEO complaint is a grievance under § 7114(a)(2)(A). *Davis-Monthan AFB*, 64 FLRA at 849; *U.S. Dep't of the Air Force, Luke AFB, Ariz.*, 58 FLRA 528, 533-34 (2003). Thus, Lipscomb's EEO complaint, which he filed in October 2010 and amended on December 7, 2010, based on Rayburn's actions on December 2, was a grievance. The question posed in this case is whether Barrick's interview of Lipscomb on March 1, 2011, "concerned" that grievance, for purposes of § 7114(a)(2)(A).

The Authority has stated that the term "concerned" means "to relate or refer to." *Tyndall AFB*, 66 FLRA at 259-60 (quoting Webster's Third New International Dictionary 471 (2002)). As discussed earlier, the March 1 meeting was triggered by, and focused on, Lipscomb's December 2 memorandum. Barrick admitted as much at the hearing. Tr. 132-33. In that memorandum, Lipscomb alleged (among other things) that Rayburn's actions on December 2 were done in retaliation for Lipscomb's EEO complaint. Specifically, Lipscomb alleged that Rayburn had not acted in such an "unprofessional manner prior to me filing a EEO complaint against him for discriminating against me because of my race, Color, National Origin, sex and Non Sexual Harassment." GC Ex. 2 at 1. While Barrick may not have known the substance of Lipscomb's EEO complaint, other than the bare allegation just quoted, he was aware that the complaint was pending. Barrick and Lipscomb spent most of the March 1 meeting drafting an affidavit, signed by Lipscomb, in which Lipscomb detailed precisely what happened on December 2. In that affidavit Lipscomb reiterated his December 2 allegation that Rayburn's conduct on December 2, 2010, was "in retaliation of my filing the EEO Complaint against him." R. Ex. 2 at 2.

With this in mind, it is impossible to factually or legally separate the allegations in the December 2 memorandum from Lipscomb's EEO complaint. In Lipscomb's view, Rayburn's actions on December 2 were motivated by the EEO complaint. Barrick was investigating the events described in the December 2 memo, and the affidavit he drafted for

Lipscomb incorporated an explicit reference to the EEO allegations and to Rayburn's alleged retaliation. Thus, I conclude that the March 1 meeting "concerned" Lipscomb's EEO complaint, among other allegations of misconduct. This is an independent basis to find that the March 1 meeting concerned a grievance under § 7114(a)(2)(A).

In so finding, I recognize that in interviewing Lipscomb on March 1, Barrick was not primarily concerned with Lipscomb's EEO complaint (either in its original or amended form). Barrick was not conducting an EEO investigation, just as he was not investigating whether Rayburn had violated the CBA; rather, he was investigating whether Rayburn had violated the Agency's Standards of Employee Conduct. The Respondent emphasizes in its brief that these are all separate processes, handled by entirely different components of the Agency. R. Br. at 8. This is true. But when the facts and allegations of the underlying "grievance" are so closely intertwined, as they are here, it makes no difference, for purposes of 7114(a)(2)(A). In the course of a single incident that unfolded in a matter of minutes on December 2, Rayburn allegedly violated the Agency's rules of conduct, the collective bargaining agreement, and EEO law. OIA and Barrick may not have cared whether Rayburn had violated the CBA or EEO law, but Barricks's discussion with Lipscomb unavoidably "concerned" the other allegations as well.[12] For purposes of § 7114(a)(2)(A), it is enough that the March 1 meeting related to Lipscomb's EEO complaint, a standard satisfied here. *See Tyndall AFB*, 66 FLRA at 259-60.

4. The Respondent failed to provide the Union notice of and an opportunity to attend the March 1 meeting

The Respondent acknowledges that neither Lipscomb nor the Union was notified in advance of the March 1 meeting (R. Br. at 11), and this acknowledgement is consistent with the record. Tr. 82, 109, 137. Further, the Respondent acknowledges that Lt. Patterson instructed Holland, Lipscomb's Union representative, to "return to his post," rather than come with Lipscomb to the meeting with Barrick. R. Br. at 11. This too is consistent with the record. Tr. 43. The Respondent adds that Lipscomb could have called Holland after the meeting began (R. Br. at 11), but this just shows that Respondent misses the underlying point of § 7114(a)(2)(A), which is to enable the Union to attend the *entire* meeting.[13]

---

[12] It should also be noted that while the OIA investigation was a different "process" from the EEO investigation or a CBA grievance, any statement that Lipscomb provided during the OIA investigation may ultimately be used for or against him in another forum. For instance, if Lipscomb had told Barrick something that materially conflicted with his December 2 memorandum, it could potentially be used against him in his EEO case. Thus, the "processes" are not as "separate" as Respondent suggests.

[13] While it doesn't really matter (for purposes of finding an unfair labor practice) why the Agency officials failed to notify the Union or allow Holland to attend the interview, it appears that Patterson and Barrick confused a union's formal discussion rights under § 7114(a)(2)(A) with an employee's "Weingarten" rights under § 7114(a)(2)(B). When they were questioned at the hearing, they both indicated that "subjects" of an investigation – in this case, Rayburn – are entitled to a union representative, but not "witnesses" in the investigation, because only the "subject" is in danger of receiving any discipline. Tr. 109-10, 136-37. But a union's right to notice of, and participation at, a formal discussion is not dependent on the interviewee's likelihood of discipline or on the interviewee's request. The Respondent's confusion on this point is relevant to the appropriate remedy for the unfair

Based on the foregoing, I find that the Respondent failed to provide the Union with notice of, and an opportunity to attend, a formal discussion concerning a grievance and, thus, failed to comply with § 7114(a)(2)(A) of the Statute. Accordingly, I find that the Respondent violated § 7116(a)(1) and (8) of the Statute.

5. The Notice should be signed by the highest management official at FCI Williamsburg

In order to remedy the Respondent's unfair labor practice, the GC argues that the chief of OIA should sign the Notice to Employees, arguing that OIA is the activity responsible for the violation here. GC Br. at 26-27.

The Authority typically directs the posting of a notice signed by the highest official of the activity responsible for the violation. *U.S. Dep't of VA*, 56 FLRA 696, 699 (2000). While I concede that Barrick and OIA were involved in the violation of the Union's rights, the evidence in this case indicates that FCI Williamsburg was the activity that was primarily responsible for the violation. The meeting took place at FCI Williamsburg and was coordinated by FCI Williamsburg employees – specifically, Patterson, the Warden, and employees of the Human Resources Division. It was those employees, rather than Barrick (based more than two hundred miles away) who were in the best position to notify the Union of the meeting. Further, while Barrick acquiesced when Patterson told him, just before the meeting, that he had sent Lipscomb's Union representative away, it was Patterson who prevented the Union representative from attending the meeting. As such, and as there is no direct evidence that OIA policy caused the violation, I find that FCI Williamsburg is the activity that is responsible for the violation, and that FCI Williamsburg management is in the best position to prevent future violations. *See id.* (absent an allegation that a violation occurred as a result of nationwide policy, the appropriate individual to sign the notice was the highest management official at the location where the violations occurred). Although OIA agents often will be conducting interviews at this and other facilities, and thus their cooperation in complying with the Statute will be essential, I believe this purpose can best be accomplished by sending copies of the Notice to OIA agents, as discussed below.

Accordingly, I find that the Warden, the highest management official at FCI Williamsburg should sign the Notice.

6. The Notice should be distributed to the OIA offices at Butner, North Carolina, as well as at FCI Williamsburg

The GC also requests that the Notice to Employees be distributed to Barrick and the OIA office at Butner, North Carolina, as well as to bargaining unit employees at FCI Williamsburg. In the alternative, the GC requests a nationwide posting distributed to all bargaining unit employees. GC Br. at 24-26.

(footnote 13 continued)

labor practice, as I will discuss below.

Sending notices to supervisors and management officials such as Barrick is a nontraditional remedy. *See U.S. Penitentiary,* 53 FLRA at 1394. Nontraditional remedies are warranted when reasonably necessary and effective to recreate the conditions and relationships with which the unfair labor practice interfered, as well as to effectuate the policies of the Statute, including the deterrence of future violative conduct. *Id.* Here, the record indicates that Barrick trains other investigators on the rights of Union representatives under the Statute, but nevertheless appears to be unaware that Union representatives are entitled to attend formal discussions under § 7114(a)(2)(A) of the Statute. Tr. 129, 137. Barrick further testified that he had never previously notified the Union when conducting such interviews. Tr. 137-38; *see also* Tr. 109-10. While such testimony is not sufficient to prove that he, or the Agency, has committed multiple violations of § 7114(a)(2)(A), it does demonstrate that both Barrick and Patterson need to be advised of the Union's rights on this matter. Furthermore, since Barrick does not work at FCI Williamsburg, the posting and dissemination of a Notice only at the Williamsburg facility would be inadequate to effectuate the purposes of such a Notice. Accordingly, I find that sending the Notice to the OIA office at Butner, North Carolina, is reasonably necessary and would be effective to recreate the conditions and relationships with which the ULP interfered, and that it would effectuate the policies of the Statute, including the deterrence of future violative conduct.

While I grant the GC's request to send the notice to the OIA office at Butner, North Carolina, I deny the GC's alternative request to order a nationwide posting. Typically, notices are posted at the location or organizational level where the violation occurred. *AFGE, Local 3937*, 64 FLRA 17, 23 (2009); *see also U.S. Dep't of Commerce, NOAA, Nat'l Ocean Serv., Coast & Geodetic Survey Aeronautical Charting Div., Wash., D.C.*, 54 FLRA 987, 1022-23 (1998) (limiting posting to activity where violations took place, based in part on the fact that violations did not reflect policy at a higher organizational level). The scope of a posting can go beyond where the violation occurred, in certain circumstances, however. *BOP*, 55 FLRA at 395. In determining the scope of a posting requirement, the Authority considers the two purposes served by the posting of a notice. *U.S. Dep't of VA*, 56 FLRA 696, 699 (2000) (quoting *BOP*, 55 FLRA at 394). First, the notice provides evidence to unit employees that the rights guaranteed under the Statute will be vigorously enforced. Second, in many cases the posting is the only visible indication to those employees that a respondent recognizes and intends to fulfill its obligations under the Statute. *Id.*

Here, the violation involved only two locations, FCI Williamsburg and the OIA office at Butner. Although Barrick is responsible for providing guidance to local investigators, there is no indication that Barrick committed a ULP beyond Butner or FCI Williamsburg; that he influenced others to commit ULPs; or that he was influencing others across the nation. In addition, there is no indication that Barrick was acting pursuant to a nationwide OIA policy. Further, while Barrick and Patterson's beliefs as to unions' and employees' rights under § 7114(a)(2)(A) have been shown to be incorrect, there is no indication that Barrick or Patterson were acting in bad faith. And while the GC alleges that there is "widespread confusion" regarding the Respondent's policies under § 7114(a)(2)(A), the GC cites only one person outside of FCI Williamsburg – Barrick – who is confused. GC Br. at 25. These factors support a posting limited to FCI Williamsburg and the OIA office at Butner.

The GC relies on *BOP* to support its request for a nationwide posting. In *BOP*, a nationwide posting was based in part on "multiple violations involving improper responses to several requests for representation" under § 7114(a)(2)(B) of the Statute, committed by several traveling investigators in a "blatant disregard for a bargaining unit member's right." 55 FLRA at 395 (internal quotation marks omitted). Here, there is no indication that the Respondent's failure to comply with the Statute is pervasive or based on blatant disregard for bargaining unit members' rights. *See id.* Accordingly, I deny the GC's alternative request for nationwide posting, and 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 Justice, Federal Bureau of Prisons (the Respondent), shall:

1. Cease and desist from:

(a) Conducting formal discussions with bargaining unit employees concerning any employment-related complaint, including interviews conducted by agents of the Office of Internal Affairs concerning complaints filed by employees alleging staff misconduct, without notifying the American Federation of Government Employees, AFL-CIO, Local 525 (the Union), and affording it an opportunity to be represented at the discussions;

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

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

(a) Notify the Union and afford it an opportunity to be represented at formal discussions, including interviews conducted by agents of the Office of Internal Affairs concerning complaints filed by employees alleging staff misconduct.

(b) 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 Warden of FCI Williamsburg 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 these 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. The Notice shall also be distributed to all agents of the Federal Bureau of Prisons, Office of Internal Affairs, at FCI Williamsburg and at the Federal Medical Center, Butner, North Carolina.

(c) 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., August 14, 2014

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 Justice, Federal Bureau of Prisons, 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 conduct formal discussions with bargaining unit employees concerning any employment-related complaint, including interviews conducted by agents of the Office of Internal Affairs concerning complaints filed by employees alleging staff misconduct, without notifying the American Federation of Government Employees, AFL-CIO, Local 525 (the Union), and affording it an opportunity to be represented at the discussions.

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

WE WILL notify the Union and afford it an opportunity to be represented at formal discussions, including interviews conducted by agents of the Office of Internal Affairs concerning complaints filed by employees alleging staff misconduct.

_____
(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, Atlanta Regional Office, Federal Labor Relations Authority, whose address is: 225 Peachtree Street, N.E., Suite 1950, Atlanta, GA 30303, and whose telephone number is: (404) 331-5300.