FEDERAL LABOR RELATIONS AUTHORITY OALJ 16-02
Office of Administrative Law Judges
WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS U.S. PENITENTIARY ATWATER ATWATER, CALIFORNIA RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1242, AFL-CIO CHARGING PARTY	Case No. SF-CA-15-0089

Robert M. Bodnar
For the General Counsel

Steven R. Simon
For the Respondent

Heidi Burakiewicz
Taryn Wilgus Null
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135, and the revised Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), part 2423.

On October 29, 2014, the American Federation of Government Employees, Local 1242, AFL-CIO (Union) filed an unfair labor practice (ULP) charge against the U.S. Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary Atwater, Atwater, California (Respondent). In the charge, the Union wrote that on October 17, 2014, the Respondent's Human Resource

(HR) Manager, Dee Graham, sent a memorandum directly to bargaining unit members notifying them that they would receive a direct deposit payment of back pay and interest pursuant to an Arbitration Award. (R. Ex. 4 at 1-2). The Union alleged, in relevant part, that the Respondent's "direct communication with bargaining unit members about the resolution of a grievance constitutes an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1), (5), and (8)." (*Id.* at 2).

On May 29, 2015, the Acting Regional Director of the San Francisco Region of the FLRA issued a Complaint and Notice of Hearing alleging that the Respondent violated § 7116(a)(1) and (5) of the Statute when Graham sent the October 17, 2014, notification to employees. It also alleged that the Respondent violated the Statute when, on or about November 2014, Graham dealt directly with employees about the amount of back pay they should receive and submitted changes to payout amounts for certain employees. The General Counsel alleges that this conduct bypassed the Union and interfered with, restrained, and coerced bargaining unit employees in the exercise of their rights guaranteed by the Statute. The Respondent timely filed an Answer to the Complaint in which it admitted certain allegations, but denied that it violated the Statute.

On July 21, 2015, the Respondent filed a Motion for Summary Judgment (MSJ). On July 31, 2015, the General Counsel filed a Response to the Respondent's MSJ, a Cross-Motion for Summary Judgment, and Motion to Postpone Hearing Indefinitely. The General Counsel agreed that there was no dispute as to any material facts, but argued that it was entitled to summary judgment as a matter of law. Thereafter, the Respondent filed a Response to the General Counsel's MSJ, and continued to argue that it was entitled to summary judgment in its favor. On August 10, 2015, I issued an Order Indefinitely Postponing the Hearing.[1]

Having carefully reviewed the pleadings, exhibits, and arguments of the parties, I have determined that this matter can be decided on the motions for summary judgment, and therefore, a hearing is not necessary pursuant to 5 C.F.R. § 2423.27.

The Authority has held that motions for summary judgment filed under the Authority's Regulations serve the same purpose and are governed by the same principles as motions filed in the United States District Courts under Rule 56 of the Federal Rules of Civil Procedure. *Dep't of VA, VA Med. Ctr., Nashville, Tenn.*, 50 FLRA 220, 222 (1995). Summary judgment is appropriate when there is no "genuine dispute as to any material fact" and the moving party is entitled to judgment as a matter of law.

[1] On August 17, 2015, the Respondent filed a Motion to Quash the General Counsel's subpoena and on August 21, 2015, the General Counsel filed a Response and asserted that if this matter is decided on cross MSJ, the subpoena is moot. Because I am issuing a decision based on the MSJ, I find that the subpoena is moot, and therefore I will not address the Respondent's Motion to Quash.

Based on the record, I find that the General Counsel did not establish that the Respondent bypassed the Union in violation of § 7116(a)(1) and (5) of the Statute, and I will therefore grant the Respondent's Motion for Summary Judgment.

I make the following findings of fact, conclusions and recommendations in support of that determination.

FINDINGS OF FACT

The Respondent is an agency under § 7103(a)(3) of the Statute. 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 nationwide unit of employees of the Federal Bureau of Prisons. The Union is an agent of AFGE for the purpose of representing employees of the Respondent within the bargaining unit.

On September 18, 2008, Arbitrator Jack H. Calhoun issued an Opinion and Award sustaining a Union grievance and finding that the Respondent violated the overtime compensation provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (G.C. Ex. 1). He awarded employees overtime pay for three years preceding the date of the grievance up to the time the Respondent takes steps to remedy the problem. (*Id.*). The Arbitrator retained jurisdiction to resolve disputes over the implementation of the Award. (*Id.*). In 2010, the Authority dismissed the Respondent's exception to the Award. *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Atwater, Cal.*, 64 FLRA 810 (2010).

The Respondent paid some employees in 2012, but the Union believes the payments were incomplete. (G.C. Ex. 2). At some point, the Union grieved the Respondent's failure to comply with the Award. (G.C. Exs. 2 & 3). On October 10, 2014, Sandra Aycock, Regional HR Administrator, responded to an email from Union President Donald Martin asking when the Respondent would be making the payouts due under the Award. (R. Exs. 9 & 10). Aycock said that the Respondent planned to begin processing payments in the following week and that Deborah Graham, HR Manager, was working on a memo for each employee to let them know the money is coming. (*Id.*).

A week later, on October 17, Graham sent a notice to employees, including Martin, notifying them that in the next six weeks, the employees would receive a direct deposit of back pay and interest as a result of the Arbitration Award. (G.C. Ex. 2; R. Exs. 3, 8). She explained that the back pay would be included with employees' wages, and the interest would be documented on a separate 1099 form. (*Id.*).

On November 1, Martin told employees that, as he had informed the Respondent, the payments the Respondent was about to make were calculated incorrectly. (G.C. Exs. 2 & 3). He said that the Union had recently filed a grievance about the Respondent's failure to comply with the Arbitration Award. (*Id.*).

Following the issuance of the memorandum, employees and former employees contacted the Union about their payments. (G.C. Exs. 2, 4; R. Exs. 6 & 7). [2] On October 25, 2015, in response to one employee's inquiry about her payment, Martin told the employee to contact Graham to find out why she was not on the payout list. (R. Ex. 6). He said that the Union "remains in litigation with the [Respondent] over a proper payout" and was not "a party to this payout scheme." (*Id.*). The employee responded that Graham had told her that the Union gave her the list and had said that she could not answer any questions and that all questions or concerns needed to be addressed with the Union. (*Id.*). On November 1, Martin replied, copying Graham. (*Id.*). He reiterated that the Union did not give the Respondent the list, was litigating the payout, and was not involved in any manner with the list being paid out, which is why he directed the employee's inquiry to Graham. (*Id.*). Graham countered that she did not say the Union gave her the list, but that she did not have any information other than a list of names. (*Id.*). At some point, Martin also referred a former employee to the Bureau of Prisons Western Regional Office to find out why she was not on the payout list. (G.C. Ex. 2; R. Ex. 7).

Three days after Martin emailed Graham, a bargaining unit employee, Jose Reyes, emailed Graham, and said that his payout was calculated incorrectly. (G.C. Exs. 4 & 5). Graham replied that he would need to provide her with a copy of his daily roster. (*Id.*). Reyes asked where he could get that information. (*Id.*). Graham suggested he check with the Union or find someone in custody to help. (*Id.*). Reyes located the roster and sent it to Graham. (*Id.*). On November 15, he asked whether the information was sent up for review or for an actual payout and what the timeline was. (*Id.*). Graham replied that the region would review it and determine if it was payable. (*Id.*). She said there was no timeline. (*Id.*). In or around early December, Reyes received a larger payout by direct deposit. (G.C. Ex. 5). At some point, Reyes asked Graham whether there was a formula to calculate the back pay. (*Id.*). Graham replied that all she did was submit the information to the region to calculate the amounts. (*Id.*).

The parties' collective bargaining agreement (CBA) addresses overpayments and underpayments. Article 6(q) says that the "Employer and its employees bear a mutual responsibility to review documents related to pay and allowances in order to detect any overpayments [or] underpayments as soon as possible." (R. Ex. 2 at 14). Further, "should

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[2] On September 27, 2015, the Respondent filed a Motion to Strike General Counsel's Exhibit 4, asserting that the document had been materially altered and should not be considered. The document reflects email communications between Human Resource Manager Graham and bargaining unit employee Jose Reyes. The Respondent's objections to the document concern that the heading indicates it was a communication between Graham and Robert Bodnar, Counsel for the General Counsel. Graham denies ever communicating directly with Bodnar. On October 2, 2015, the General Counsel filed an Opposition to Respondent's MSJ. It does not appear to me that the General Counsel was, in fact, asserting that there ever were communications between Graham and Bodnar, but I do agree that the format of Exhibit 4 is confusing. However, I note that the affidavit of Reyes discusses a series of emails that he had with Graham (G.C. Ex. 5). And Graham noted that she had email communications with Reyes about his portal payments (R. Ex. 8). Under these circumstances, I deny the Respondent's Motion to Strike, with the understanding that the General Counsel's Exhibit 4 only reflects the email communications between Graham and Reyes.

the Employer detect that an employee has received an overpayment/underpayment, the Employer will notify the affected employee in writing." And if "an employee realize that he/she has received an overpayment/underpayment, the employee will notify their first[-]line supervisor in writing." (*Id.*).

POSITIONS OF THE PARTIES

General Counsel

The General Counsel alleges that the Respondent violated § 7116(a)(1) and (5) of the Statute when Graham sent memoranda to employees advising that they would be paid unspecified amounts in the future. Further, when, not unexpectedly, employees began contacting Graham, the General Counsel argues that she dealt directly with the employees to increase their payments under the Union's arbitration award without including the Union and thereby bypassed the Union.

The General Counsel asserts that this is a case where management representatives dealt directly with employees about an ongoing grievance issue, which the Authority has repeatedly held to be a bypass. That is, the Authority has held that agencies bypass an exclusive representative when they communicate directly with bargaining unit employees concerning grievances. *See e.g., U.S. DOJ, INS, N.Y. Office of Asylum, Rosedale, N.Y.*, 55 FLRA 1032, 1038 (1999). A bypass demeans the union's status, which inherently interferes with the right of employees to designate and rely upon the union for representation. *U.S. DOJ, BOP, Fed. Corr. Inst., Bastrop, Tex.*, 51 FLRA 1339, 1346 (1996) (*Bastrop*).

The General Counsel argues that the Union was placed in the position of having to justify contesting management's actions in the face of Graham communicating to employees that they were finally going to get paid. The General Counsel adds that the emails between Graham and Reyes leave no doubt that the extent of direct dealing "was total." The General Counsel also asserts that the Respondent left the Union in the dark concerning the remedy obtained for its own grievance and disadvantaged the Union in terms of its ability to explain to members that they should feel confident that they had received appropriate compensation to resolve the grievance the Union filed on their behalf. As soon as the memoranda were delivered, the General Counsel claims that the Respondent unlawfully committed itself to a course of action that denied the Union its right to represent employees, which amounted to a refusal to bargain in good faith and a bypass. The memoranda elicited employee inquiries, which purportedly "snowball[ed] into significant direct dealing." (G.C. Br. at 8).

In response to the Respondent's defense that the ULP charge in this case was insufficient, the General Counsel argues that the Respondent had ample notice of the nature of the bypass allegations it was accused of. It notes that the function of a ULP charge is merely to initiate an investigation, and the charge is sufficient when it informs the alleged violator of the general nature of the violation. *U.S. Penitentiary Florence, Colo.*, 53 FLRA 1393, 1401 (1998). The charge alleges that the Respondent's "direct communication with bargaining unit members about the resolution of a grievance" violated the Statute. Further, the General Counsel informed the Respondent about the extent of the bypass conduct during the investigation of the charge. And

when, as here, all of the allegations in the complaint are closely related to the events complained of in the charge, the Respondent cannot claim unfair surprise. According to the General Counsel, the memoranda and subsequent communications go hand and hand and show the lengths that the Respondent was willing to go to in order to keep the Union out of the loop in its dealings with employees.

Finally, the General Counsel argues that neither the contract nor Martin's actions amount to a waiver of the Union's rights. Article 6(q) of the parties' CBA involves situations where employees receive mistaken payments, particularly overpayments that the employees may have to reimburse the government. It does not apply to payments due pursuant to an Arbitration Award. Further, waivers of rights must be clear and unmistakable. The Respondent did not present evidence that Martin told employees that they were on their own and should try to work out proper payments by themselves, rather than going through the Union. Martin's November 1 email to bargaining unit employees dispels any suggestion that the Union was going along willing, but rather it was protesting the "scheme" that the Respondent arranged.

Because the Respondent has failed to offer any legitimate justification for its actions and no factual dispute is present, the General Counsel argues that summary judgment in its favor is warranted.

Respondent

The Respondent denies that it violated the Statute as alleged. First, the Respondent argues that the Complaint fails to state a claim because simple communication of factual information to bargaining unit staff without any solicitation of response or dialogue does not constitute a bypass as a matter of law. *AFGE, Gen. Comm.*, 28 FLRA 1028, 1029 (1987); *Dep't of HHS, SSA, S.F. Region, S.F., Cal.*, 14 FLRA 712, 728-29 (1984).

Second, the parties' CBA requires written notice to employees when overpayments/ underpayments come to the Respondent's attention. Since the October 17 memorandum notified the Union about the overpayments/underpayments, it did not constitute a ULP as a matter of law.

Third, the Respondent asserts that the November direct dealing allegations are insufficiently related to the allegations in the charge to be actionable without an amended charge. The Authority's regulations require that a charge contain a "clear and concise statement of the facts alleged to constitute an unfair labor practice, a statement of how those facts allegedly violate specific section(s) and paragraph(s) of the Statute, and the date and place of the occurrence of the particular acts." 5 C.F.R. § 2423.4(a)(5). The charge dealt solely with the October 17 memorandum and said nothing about the alleged November one-on-one direct dealing between the Respondent's HR staff and unit staff resulting in changes to payment amounts. According to the Respondent, the allegation related to the November events must be dismissed because it is not sufficiently related to the other allegations in the Complaint. *USDA, Food Safety & Inspection Serv., Wash., D.C.*, 59 FLRA 68 (2003). The Respondent further asserts that it only understood the charge to deal with the October memorandum, and that the General Counsel was on notice from its position statement that it was limited to that notice.

Finally, the Respondent argues that the Union consented to the actions alleged when Union President Martin told bargaining unit staff to deal directly with the Respondent's HR staff regarding any back payment issues from the arbitration. Under the CBA, the Union has the right to elect not to participate in grievance adjustment, and the Union consented to the October 17 written notice.

Based on the foregoing, the Respondent alleges that the Complaint should be dismissed because the Respondent's actions were both consistent with the contract and consensual, the Complaint is outside of the scope of the charge, and the conduct alleged fails to state a claim as a matter of law.

ANALYSIS AND CONCLUSIONS

As an initial matter, I find that the charge was sufficient to serve as the basis of the Complaint in this matter. The charge serves merely to initiate an investigation and to determine whether a complaint should be issued. *U.S. Dep't of VA, VA Med. Ctr., Richmond, Va.*, 68 FLRA 882, 886 (2015) (*VA Richmond*) (citing *U.S. DOJ, BOP, Allenwood Fed. Prison Camp, Montgomery, Pa.*, 40 FLRA 449, 455 (1991). A charge is sufficient if it informs the charged party of the general nature of the violation charged. (*Id.*). Where a procedural defect exists concerning the charge, the charged party must be prejudiced by the alleged defect in order for the Authority to decline to resolve the allegedly defective claim. (*Id.*).

Here, the charge informed the Respondent of the general nature of the violation. That is, it informed the Respondent that it was charged with directly communicating with bargaining unit employees about a grievance matter. While the Union specifically identified only the October 17 communication in the charge, the Authority has cited approvingly precedent under the National Labor Relations Act, 29 U.S.C. §§ 151-169, that it is the function of the complaint, not the charge, to give the respondent notice of the specific claims made against it. (*Id.*). The purpose of a charge is "merely to set in motion the machinery of an inquiry." (*Id.*; citing *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307 (1959)). The investigation may deal with unfair labor practices that are related to those alleged in the charge and which grow out of those allegations while the proceeding is pending. (*Id.*). Here, the subsequent communications grew out of the October 17 memorandum and were sufficiently related to the memorandum as to be actionable.[3] Further, the Respondent did not identify any prejudice it suffered as a result of the alleged defect. Thus, the charge is sufficient.

As to the merits, I find that the General Counsel has not established that the Respondent violated the Statute as alleged. It is well-established under Authority precedent that "[a]gencies unlawfully bypass an exclusive representative when they communicate directly with bargaining-unit employees concerning grievances, disciplinary actions, and other matters relating

[3] In other words, the allegation about the subsequent communications is the same class of violation as the allegation in the charge, it arises from the same general factual situation and sequence of events, and it grew out of the charge-alleged matter while the preceding was pending before the Authority. *See Cellular Sales of Missouri, LLC*, 362 N.L.R.B. No. 27, slip op. at 1 n.9 (2015).

to the collective-bargaining relationship." *VA Richmond*, 68 FLRA at 883 (footnote omitted); *Dep't of the Treasury, IRS, Kan. City Serv. Ctr., Kan. City, Mo.*, 57 FLRA 126, 129 (2001) (quoting *Bastrop*, 51 FLRA at 1346). Such conduct constitutes direct dealing and violates § 7116(a)(1) and (5) of the Statute because it interferes with the union's rights under § 7114(a)(1) of the Statute to act for and represent all employees in the bargaining unit. *Bastrop*, 51 FLRA at 1346. It also constitutes an independent violation of § 7116(a)(1) of the Statute because it demeans the union and inherently interferes with the rights of employees to designate and rely on the union for representation. (*Id.*).

Thus, the Authority has found that when, for example, an agency attempts to resolve a grievance directly with a bargaining unit employee or furnishes a grievance response directly to a represented employee, without furnishing it to the union at the same time, the agency bypasses the exclusive representative and violates the Statute. *VA Richmond*, 68 FLRA at 884; *Dep't of the Treasury, IRS, Memphis Serv. Ctr.*, 17 FLRA 107, 114 (1985); *Soc. Sec. Admin.*, 16 FLRA 434, 449 (1984); *U.S. Dep't of the Air Force, 355th SPTG/CG, Davis-Monthan AFB, Ariz.*, 63 FLRA 635 (2009). When, on the other hand, an agency merely informs employees of an administrative matter in an instructional manner, the agency does not bypass the union. *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Elkton, Ohio*, 63 FLRA 280, 282 (2009) (*BOP Elkton*).

The General Counsel alleges that the Respondent bypassed the Union by issuing the October 17 memorandum and thereafter responding to a bargaining unit employee's payment inquiry and correcting his pay. As to the October 17 memorandum, I find that it merely informed employees of an administrative matter in an instructional manner. In this regard, it merely informed employees that additional pay would be coming. It did not include questions or invite feedback from employees. Moreover, the Respondent notified the Union in advance that it would be making payments and sending notices to affected employees, and it sent a copy of the notice to the Union President. In this context, the Respondent's issuance of the memorandum did not bypass the Union.[4]

I also conclude that Graham's response to Reyes's payment inquiry did not bypass the Union. Here, the context is important. Three days before Reyes contacted Graham, another bargaining unit employee emailed Martin about her payout. She explained that Graham had told her that "[a]ll questions or concerns need[ed] to be addressed with the Union." Martin replied, copying Graham, stating that the Union was litigating the payout and was not involved *in any manner* with the list being paid out. Thus, when Reyes contacted Graham three days later about his payout, Martin had already disclaimed interest in employees' payment concerns. Yet Graham still suggested that Reyes speak to the Union about the paperwork he needed.

Further, the General Counsel has not established that the communication itself interfered with the Union's right to act for and represent the bargaining unit in the grievance process. Both before and after Graham responded to Reyes's inquiry, the Union was challenging the Respondent's payment calculations in the grievance forum. The record evidence does not establish that the communication and payment correction resolved, sought to resolve, or even

[4] Because I have found the memorandum does not constitute direct dealing, I do not pass on the Respondent's contract defense.

impacted the Union's grievance or prejudiced any claims the Union may have had on behalf of Reyes or any other bargaining unit employee concerning the allegedly incorrect calculations. Rather, Graham's acts appear purely ministerial. *See BOP Elkton*, 63 FLRA at 282 (finding no bypass where discussion concerned administrative matters that had no influence or impact on the final decision already made and tendered).

Therefore, the Union was aware that payments it believed were incorrect would be made to bargaining unit employees and subsequently renounced any involvement in what it characterized as the Respondent's "payout scheme." In this context, the interactions alleged to violate the Statute, the memorandum announcing the payments and exchange between an employee and the HR manager, do not establish direct dealing in violation of the Statute. Even leaving aside the Union's disavowal of interest in the payment matters, the evidence is insufficient to establish that the Respondent's conduct bypassed the Union in violation of the Statute.

CONCLUSION

I find that the Respondent did not violate § 7116(a)(1) and (5) of the Statute by dealing directly with bargaining unit employees about a grievance matter and therefore, also did not independently violate § 7116(a)(1) of the Statute.

Accordingly, I recommend that the Authority grant the Respondent's Motion for Summary Judgment, and deny the General Counsel's Cross-Motion for Summary Judgment.

ORDER

It is ordered that the complaint be, and hereby is, dismissed.

Issued, Washington, D.C., October 15, 2015

Susan E. Jelen

SUSAN E. JELEN
Administrative Law Judge