FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424

OALJ 24-19

U.S. DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VA MEDICAL CENTER
POPLAR BLUFF, MISSOURI

RESPONDENT

AND

AMERICAN FEDERATION OF GOVRNMENT
EMPLOYEES, LOCAL 2338, AFL-CIO

CHARGING PARTY

Case No. CH-CA-22-0374

Brittany A. Copper
For the General Counsel

Kelsey Vujnich
For the Respondent

Harold Lampley
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

After receiving a report that one employee had made offensive statements to another employee, the VA hospital's Workplace Violence Prevention Coordinator emailed the complaining employee and asked to interview her on behalf of the Employee Threat Assessment Team, or ETAT. Attached to the email was a brochure explaining the ETAT process. The employee agreed to be interviewed and contacted a union steward to represent her. A few days later, moments before the interview was to begin, the employee decided she didn't want a union representative, and the ETAT Coordinator refused to allow the union steward to join the conference call for the interview.

The issues posed here are whether this interview was a "formal discussion," as that term is defined by Section 7114(a)(2)(A) of our Statute, and if so, whether the Agency violated the Statute by refusing to allow the steward to participate. Because the undisputed facts surrounding the interview establish that it was formal, and that it met the statutory criteria, the answer to the first question is "yes." And because the right to participate in formal discussions belongs directly to the union, not to the employee, the answer to the second question is also yes; the employee could not veto the union's right to participate, as there is no evidence that the union's rights directly conflicted with the rights of the employee.

STATEMENT OF THE CASE

This is an unfair labor practice (ULP) proceeding under the Federal Service Labor-Management Relations Statute (the Statute), Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101-7135, and the Rules and Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. parts 2423 and 2429.

On June 9, 2022, the American Federation of Government Employees, Local 2338, AFL-CIO (the Charging Party or Union), filed a ULP charge against the U.S. Department of Veterans Affairs, John J. Pershing VA Medical Center, Poplar Bluff, Missouri (the Respondent or Agency). After investigating the charge, the Regional Director of the FLRA's Chicago Region issued a Complaint and Notice of Hearing, on behalf of the FLRA's General Counsel (GC), against the Respondent on June 2, 2023. The Complaint alleged that the Respondent violated § 7116(a)(1) and (8) of the Statute by conducting a formal discussion with a bargaining unit employee without allowing the Union to be represented. Complaint at ¶¶ 6-11. On June 27, 2023, the Respondent filed its Answer to the Complaint, admitting some of the factual allegations of the Complaint but denying that its actions violated the Statute. Answer at ¶¶ 6-11.

On September 11, 2023, the General Counsel filed a Motion for Summary Judgment (MSJ), arguing that because the Respondent's Answer had admitted all of the material factual allegations of the Complaint, there was no need for a hearing, and that summary judgment in favor of the GC was warranted. MSJ at 4-5. Specifically, the GC noted that the Respondent admitted that an Agency official conducted a meeting with a bargaining unit employee, and that the Agency refused to allow a Union official to participate in the meeting. *Id.* The GC asserted that the undisputed facts surrounding that meeting demonstrate that it concerned a grievance and that it was formal. *Id.* The Respondent filed its response on September 18, 2023, opposing the GC's request for summary judgment and arguing instead that its Cross Motion for Summary Judgment should be granted. Cross MSJ at 1, 7. Significantly, Respondent incorporated the GC's statement of facts, thereby agreeing that there are no material facts in dispute. *Id.* at 2. The Respondent asserted that these facts showed that the meeting was not formal, that it did not concern a grievance, and that the Union's right to participate in the meeting was superseded by the bargaining unit employee's request that the Union be excluded. *Id.* at 7. On September 27, 2023, I issued an order postponing the hearing indefinitely and closing the record. As this case will be decided on summary judgment, the hearing is hereby cancelled.

DISCUSSION OF MOTIONS FOR SUMMARY JUDGMENT

The Authority has held that motions for summary judgment, filed under § 2423.27 of its Regulations, 5 C.F.R. § 2423.27, serve the same purpose, and are governed by the same principles, as motions filed in United States District Courts under Rule 56 of the Federal Rules of Civil Procedure. *Dep't of VA, Veterans Affairs 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. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In its Motion for Summary Judgment, the GC set forth a statement of facts regarding the pertinent events of this case, and the Respondent has adopted that statement. Attached to the GC's motion are an affidavit from one participant in those events, as well as a number of documents that shed further light on them. The material allegations of the Complaint are that the coordinator of the Agency's Workplace Violence Prevention program conducted an online interview with bargaining unit employee Julie Gregory concerning a report that Gregory had been verbally assaulted by another employee, and that the Agency wrongfully refused to allow a Union official to participate in the interview. The Respondent admits that this interview occurred and that it denied the Union's request to participate. The evidence of record provides the context surrounding the interview and sheds light on the parties' conflicting arguments as to whether the Union was entitled to participate. The dispute between the GC and the Respondent is not over the facts, but rather over the legal interpretation of those facts.

Since the record is sufficient for me to make that interpretation and to determine whether either party is entitled to summary judgment, I conclude that there are no material facts in dispute and that the case can be resolved on summary judgment. I will set forth my findings of facts and make the following conclusions of law and recommendations:

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the certified exclusive representative of nationwide units of employees of the Department of Veterans Affairs. The Union is an agent of AFGE for the purpose of representing unit employees employed at the Respondent.

On May 16, 2022, bargaining unit employee Julie Gregory filed a Disruptive Behavior Report alleging that another employee had "verbally assaulted" her the previous day. GC Ex. 1 at 2. On May 17, Gregory received an email from Dr. Pamela Wallen, a psychologist who was the Agency's Workplace Violence Prevention Coordinator and the Co-Chair of its Disruptive Behavior Committee. *Id.* at 2-3. Dr. Wallen said that she was reaching out to Ms. Gregory on behalf of the Agency's Employee Threat Assessment Team in order to schedule an interview with Gregory regarding her report. *Id.* The email contained a brochure that explained the role of the ETAT, and it included a Teams invitation for Gregory to attend the interview online at

11:00 a.m. on May 23; it also advised her that she could have a union or other representative if she wished. *Id.*; GC Ex. 2. A few minutes after she received this email, Gregory forwarded it to Harold Lampley, Local 2338's 1st Vice-President, and asked him to represent her at the interview. GC Ex. 1 at 2. Lampley then notified Wallen that he would be representing Gregory, and he asked Wallen to add him to the Teams invitation; Wallen promptly did so. *Id.* at 1-2. On May 18 Gregory signed a form designating the Union as her representative in the matter. GC Ex. 3.

Between May 18 and 23, Lampley discussed the possibility of referring the case to mediation, but Wallen advised him that ETAT was a separate process, and that she would interview Gregory on the 23rd as scheduled, as long as Gregory was willing to participate. GC Ex. 4 at 2. At 9:29 a.m. on May 23, Gregory emailed Wallen and Lampley, stating that she did wish to participate in the interview but that she no longer wanted the Union to represent her. *Id.* at 1.

The ETAT interview took place online, via the Teams platform, at approximately 11:00 a.m. on May 23, as scheduled. In addition to Dr. Wallen and Ms. Gregory, Joseph Plasse, the Chief Nurse of Specialist Care, was present, as was Mr. Lampley. Lampley Affidavit at 3. Even though Gregory had changed her mind about union representation, Lampley advised the others that he was present on behalf of the entire bargaining unit, since Gregory's ETAT report implicated at least one other bargaining unit employee. *Id.* Nevertheless, Wallen told Lampley that he didn't have a right to participate, and that it was up to Ms. Gregory whether she wanted a Union representative present or not. Lampley tried to argue about this, but Wallen cut him off from the call, and the interview proceeded without Lampley or anyone else from the Union. *Id.*

POSITIONS OF THE PARTIES

General Counsel

The GC asserts that the interview of May 23 satisfies all of the statutory criteria of a formal discussion. *See* 5 U.S.C. § 7114(a)(2)(A). But since the Respondent has admitted that the interview was a discussion between an Agency representative and a bargaining unit employee, the GC focuses its attention on three points of disagreement: whether the discussion was formal, whether it concerned a grievance, and whether the Union had a right to attend when Gregory declined representation.

First, the GC argues that the interview was formal, as it met nearly all of the criteria of formality identified in Authority precedent. Specifically, the interview was conducted by two mid-level management officials (Wallen and Plasse) who were outside of Gregory's chain of command; it was scheduled by the Agency six days in advance, with an hour set aside for the interview; and Gregory was given a brochure in advance describing the purpose of the meeting. MSJ at 5. Additionally, the interview was part of a formal process established by the VA to deal with possible incidents of violence. The detailed procedures and guidelines established by the VA for addressing these issues (GC Ex. 2, 5) reflect the formality of the May 23 interview. MSJ at 5-6. The GC also claims the Respondent has mischaracterized the interview as

"employee-initiated:" although Gregory filed the initial disruptive behavior report, the GC insists it was the Agency, through Wallen and the ETAT, that reached out to Gregory to schedule the interview. GC Resp. & Opp. to Cross-MSJ at 2-3.

The GC further insists that the May 23 interview concerned a grievance. Noting the broad definition of "grievance" in § 7103(a)(9) of the Statute, the GC says the Authority has long recognized as grievances many types of complaints handled outside of the parties' negotiated grievance procedure, such as EEO and MSPB complaints and even calls to security. MSJ at 6, citing *U.S. DOD, U.S. Air Force, 325th Fighter Wing, Tyndall AFB, Fla.*, 66 FLRA 256, 260 (2011); *Pension Benefit Guaranty Corp., Wash., D.C.*, 62 FLRA 219, 224 (2007) (*PBGC*). Contrary to the assertions of the Respondent, the GC insists that Gregory's disruptive behavior report pertained directly to her employment, as it concerned an incident between two employees while working, and it potentially affected the safety of other employees. GC Resp. & Opp. at 4-5.

Finally, the GC insists that Gregory's decision to proceed without the Union did not deprive the Union of its institutional right under 7114(a)(2)(A) to participate in the interview. The GC quotes the Authority's decision in *Dep't of the Air Force, 436th Airlift Wing, Dover AFB, Dover, Del.*, 57 FLRA 304, 309 (2001) (*Dover AFB*), *aff'd in Dover AFB v. FLRA*, 316 F.3d 280 (DC Cir. 2003) (*Dover AFB v. FLRA*) that "the Statute recognizes that the resolution of an individual employee complaint may have an impact on the rights of other unit employees." MSJ at 7. The impact on other employees here was not merely theoretical, as Gregory's complaint directly implicated the allegedly offending employee, and it further concerned the safety of all employees. GC Resp. & Opp. at 5. Unlike the right to representation at a *Weingarten* interview, which attaches to the employee being interviewed, the GC notes that the right to participate in a formal discussion under 7114(a)(2)(A) attaches directly to the Union and is not dependent on the wishes or request of the employee. *Id.* Although courts and the Authority have recognized that in some cases the right of a victim of discrimination to obtain full relief under Title VII of the Civil Rights Act may take precedence over the rights of a union, the GC asserts that there is no evidence of any direct conflict here and that Gregory had not filed an EEO complaint. *Id.* at 6. Rather, the GC argues this case is similar to the facts of *U.S. Dep't of the Air Force, Davis-Monthan AFB, Tucson, Ariz.*, 64 FLRA 845, 849-50 (2010) (*Davis-Monthan*), where the Authority held that an employee's written request to exclude the union from a formal discussion did not deprive the union of its right to participate.

Respondent

For its part, the Respondent asserts that the May 23 interview was not formal, did not concern a grievance or general condition of employment, and the Union's right to participate was overridden by Ms. Gregory. For each of these reasons, the Respondent defends its actions in excluding Mr. Lampley from the interview with Ms. Gregory. Cross MSJ at 2, 7. On the issue of formality, the Respondent argues that the interview was "employee initiated," in that it was precipitated by Gregory's ETAT report, and that her participation was entirely voluntary. *Id.* at 5. Moreover, holding the interview via Teams allowed it to take place "in a safe space in which she felt comfortable." *Id.* at 6.

As to whether the interview concerned a grievance, as that term is defined by Section 7103(a)(9)(A), the Respondent asserts that "[p]articipation in the interview . . . held no bearing over Ms. Gregory's employment." *Id.* Furthermore, the subject of the interview did not concern a personnel policy or practice or a general condition of employment. *Id.* Rather, it concerned a "discrete event with an individual employee" – precisely the sort of discussion that is not covered by 7114(a)(2)(A), as the Authority held in *AFGE Council 214*, 38 FLRA 309, 330 (1990).

Citing language from the Authority explaining the purpose of a union's formal discussion right as enabling a union "to hear, along with unit employees, about matters of interest to unit employees and be in a position to take appropriate action to safeguard those interests," Respondent asserts that "the meeting between Ms. Gregory and the ETAT representative was not of concern to the bargaining unit as a whole but instead was a personal issue. . . ." Cross MSJ at 3, citing *DOD, Nat'l Guard Bureau, Tex. Adjutant General's Dep't, 149th TAC Fighter Group, Kelly AFB*, 15 FLRA 529, 532 (1984) (*Kelly AFB*). Respondent notes that the Agency advised Gregory that she could have a representative at the meeting, and Gregory told the parties that she wished to proceed with the meeting without the Union. *Id.*

Relying further on *Davis-Monthan* and related court decisions discussing possible conflicts between the rights of employee-complainants and unions at formal discussions, the Respondent argues that Ms. Gregory asserted precisely this sort of "direct conflict," and that her wishes "should . . . presumably be resolved in [her] favor." *Id.* at 4, citing *Davis-Monthan*, 64 FLRA at 849, and *Dover AFB v. FLRA*, 316 F.3d at 286. Respondent asserts that the facts of this case are similar to those in *AFGE Local 3428*, 66 FLRA 156 (2011) (*Local 3428*) (employee's "entirely personal complaint" about a supervisor did not require union participation), and *AFGE, Nat'l Veterans Aff. Council #53*, 70 FLRA 697 (2018) (*Council 53*) (Inspector General interviews of employees regarding conduct of supervisors and outside parties were not formal discussions), where the discussions were found not to concern a grievance, personnel policy, or other general condition of employment. Cross MSJ at 4.

CONCLUSIONS OF LAW

The basic framework for analyzing cases under § 7114(a)(2)(A) of the Statute has long been settled. In order for a union to have a right to be represented under this provision, there must be (1) a discussion; (2) which is formal; (3) between a representative of the agency and a unit employee or the employee's representative; (4) concerning any grievance or any personnel policy or practice or other general condition of employment. *See Davis-Monthan*, 64 FLRA at 848-49, and cases cited there. The parties here agree, and the evidence supports, that the May 23 interview was a discussion, and that it was between two representatives of the Agency (Dr. Wallen and Mr. Plasse) and a unit employee (Ms. Gregory). It remains for me to evaluate whether the other statutory criteria have been met.

The Interview was Formal.

In determining whether a discussion or meeting is "formal" within the meaning of § 7114(a)(2)(A), a number of factors are relevant. These include (1) whether the individual who held the discussion is merely a first-level supervisor or is higher in the management hierarchy; (2) whether any other management representatives attended; (3) where the individual meeting took place (i.e., in the supervisor's office, at each employee's desk, or elsewhere); (4) how long the meeting lasted; (5) how the meeting was called (i.e., with formal advance written notice or more spontaneously and informally); (6) whether a formal agenda was established for the meeting; (7) whether the employee's attendance was mandatory; and (8) the manner in which the meeting was conducted (i.e., whether the employee's identity and comments were noted or transcribed). This list is not exhaustive. Other factors may be identified and applied as appropriate in a particular case. Therefore, in determining formality, we consider the totality of the facts and circumstances presented. *U.S. Dep't of Labor, Off. of the Assistant Sec'y for Admin. & Mgmt., Chicago, Ill.*, 32 FLRA 465, 470 (1988), cited in *Dep't of VA, Veterans Affairs Med. Ctr., Richmond, Va.*, 63 FLRA 440, 441 (2009).

Even a cursory review of the facts of our case reveal that the May 23 interview possessed most of the characteristics of formality listed above. It was conducted by two managers, neither of whom was Gregory's immediate supervisor. In other words, they were not people with whom Gregory would casually interact, and their seniority could be more intimidating than a discussion with her immediate supervisor. The interview was scheduled formally, a week in advance, by email; that is, it was not a spur-of-the-moment idea. We don't know how long the interview lasted, but it was scheduled for one hour – which, again, suggests a more than casual discussion. Gregory's responses in the interview were recorded by Wallen. While there appears to have been no formal agenda drafted for the interview, Dr. Wallen had attached a brochure (GC Ex. 2) with her scheduling invite to Gregory, which explained the purpose and contours of the ETAT program. This, along with the detailed directive and guidelines of the ETAT and Workplace Violence Prevention Program, make it quite clear that an ETAT investigation is a formal process, governed by rules and procedures established through an Agency-wide directive, which Wallen was required to follow. This latter factor weighs most strongly in my analysis, as the documents describing the ETAT process (GC Ex. 2, 5, and 6) demonstrate that the interview was as far as possible from a casual or informal meeting. This conclusion is inescapable, even though the interview may have been conducted in a neutral, online environment, and even though Gregory's participation was voluntary. The entire ETAT process has been created by the VA for the specific purpose of preventing or minimizing disruptive or violent incidents in the workplace. Regardless of whether Gregory agreed to be interviewed, the ETAT team was required to investigate her complaint and to determine whether it raised safety concerns that required further action by management. The preparations for the May 23 interview, including the email conversations between Wallen and Lampley, corroborate this. Even though Ms. Gregory herself may not have been in any disciplinary jeopardy, and even though Dr. Wallen's investigation was not designed to ascertain guilt or impose discipline, it was still part of an extremely structured, formal process.

The Interview Concerned a Grievance.

Evaluating whether the May 23 interview concerned a grievance begins with the text of the Statute. Section 7103(a)(9)(A) defines a grievance as "any complaint . . . by any employee concerning any matter relating to the employment of the employee." As the Authority stated in *Dover AFB*: "By its plain terms, the Statute's broad definition of grievance encompasses *any* employment-related complaint, regardless of the forum in which the complaint may be pursued. Congress's repeated use of the modifier any underscores its intent that the definition be as inclusive as possible." 57 FLRA at 308.

Viewed in this context, it should be clear that Ms. Gregory's disruptive behavior report was a "complaint," and that it was "employment-related." That really is the beginning and the end of the analysis. She asserted that a fellow bargaining unit employee "verbally assaulted" her during a meeting with their immediate supervisor. GC Ex. 3 at 1. Just before the incident, the supervisor was holding a "morning huddle," discussing staffing issues; shortly thereafter, the other employee made comments to Gregory – in front of patients -- that she found offensive. *Id.* Gregory's report was directed to, and handled by, the ETAT team, which has been created precisely for handling incidents of this sort. It was, in the plainest meaning of the word, a "complaint." Similarly, that complaint related directly to Gregory's employment, as well as the employment of the alleged offender and other employees in that unit.

The ETAT process exists to handle and alleviate complaints of disruptive behavior, because disruptive behavior can endanger everyone in the workplace. The very first paragraph of the ETAT brochure sent to Gregory explain that "workplace violence . . . [is] conduct that generates a reasonable concern for safety from violence, where a nexus exists between the behavior and physical safety of employees and others on-site or off-site when related to the organization." GC Ex. 2 at 1. This language flatly contradicts the Respondent's assertion that Dr. Wallen's interview of Ms. Gregory about that alleged verbal assault in the workplace "was not of concern to the bargaining unit as a whole" or that it "held no bearing over Ms. Gregory's employment." Cross MSJ at 3, 6. As the complainant, Gregory may not have been in any jeopardy of being disciplined for the incident, but the interview clearly related to her employment and her safety; furthermore, even though the ETAT does not recommend discipline, Gregory's statements to the ETAT team could potentially have been available to managers following up on the incident, and those statements could have subjected the other employee to discipline.

The cases cited by the Respondent do not support its case. In *Local 3428*, the Authority reviewed an arbitrator's award that found, among other things, that a manager's discussion with an employee did not concern a grievance, but the Authority did not review the merits of that finding; instead, it found that the award was sustainable on separate grounds. 66 FLRA at 157-58. In *Council 53*, the dispute focused on whether an interview concerned a "personnel policy or practice or other general condition of employment;" the parties agreed that the interview did not concern a grievance. 70 FLRA at 699-700. Moreover, the interview in that case involved an Inspector General's investigation into the conduct of supervisors and outside contractors, not bargaining unit employees. *Id.* In circumstances such as those present in our case, the

Authority has consistently held that the discussion concerns a grievance. *See, e.g., U.S. Dep't of Justice, INS, New York Office of Asylum, Rosedale, N.Y.*, 55 FLRA 1032, 1035-37 (1999) (*INS Rosedale*), and cases cited therein.

The Union had an independent right to attend the Interview.

Since I have concluded that the May 23 interview was a discussion between an Agency representative and a bargaining unit employee, that it was formal, and that it concerned a grievance, the statutory criteria of § 7114(a)(2)(A) have been met; therefore, the Agency was required to give the Union the opportunity to be represented there. Nevertheless, the Agency asserts that it was absolved of this obligation because Gregory told Dr. Wallen that she wanted to meet without union representation. I will explain the fallacy of this argument.

Section 7114(a)(2) consists of two subparagraphs, and in my experience agency representatives frequently get them confused. *See* the Authority's extended discussion of both provisions in *Dep't of the Air Force, Sacramento Air Logistics Ctr., McClellan AFB, Calif.*, 29 FLRA 594 at 597-606 (1987) (*McClellan AFB*). Subparagraph (A) – the provision in dispute here – deals with formal discussions, while subparagraph (B) deals with agency examinations of an employee that might result in disciplinary action against the employee. The introduction to both subparagraphs states, "An exclusive representative . . . shall be given the opportunity to be represented . . . ." 5 U.S.C. § 7114(a)(2). Thus the plain reading of that phrase indicates that the right of representation belongs to the union. But in subparagraph (B), the text explicitly provides that a union only has a right to be represented when the employee requests it; by contrast, subparagraph (A) does not in any way limit or condition a union's right. Furthermore, the Authority has made clear that the two provisions were intended to apply to different factual situations, and that the right to representation in (A) inures directly to the union, in order to protect its institutional interests in representing both the specific employee interviewed and the broader interests of the bargaining unit. *Davis-Monthan*, 64 FLRA at 849; *McClellan AFB*, 29 FLRA at 598, 600, 602; *Kelly AFB*, 15 FLRA at 531-32. In the context of our case, it was up to the Union, not Ms. Gregory, to decide whether it wished to participate in the May 23 interview.

Despite the clear thrust of the case law that it is unions which have the right to representation at formal discussions, Respondent argues that Ms. Gregory had a veto over that right. In making this argument, Respondent is attempting to expand a hypothetical conjecture in a footnote of a 1985 court decision beyond its intended meaning. Specifically, in *Nat'l Treasury Emp. Union v. FLRA*, 774 F.2d 1181 (D.C. Cir. 1985), the Court of Appeals held that a union was entitled under 7114(a)(2)(A) to participate in an agency's interview of an employee who was scheduled to testify at another employee's MSPB hearing. *Id.* at 1181. Even though that employee's MSPB case did not involve a discrimination claim under Title VII of the Civil Rights Act, the court observed in a footnote that a union's formal discussion rights under 7114 may be limited by Title VII in some situations. Specifically, it pointed out that Title VII "provides that the right of an aggrieved employee to complete relief takes priority over the general interests of the bargaining unit. . . . Similarly, a *direct* conflict between the rights of an exclusive representative under § 7114(a)(2)(A) and the *rights* of an employee victim of discrimination should also presumably be resolved in favor of the latter." 774 F.2d at 1189 n.12

(emphasis in original) (citations omitted). In various contexts, the Authority has cited this language to recognize that "if there is a conflict between rights under section 7114(a)(2)(A) and those under other statutes, we will consider that conflict in determining whether section 7114(a)(2)(A) has been violated." *Dover AFB*, 57 FLRA at 309; *U.S. Dep't of Justice (Ray Brook, N.Y.)*, 29 FLRA 584, 590 (1987); *see also Davis-Monthan*, 64 FLRA at 849-50.

The case law cited here demonstrates that while a union's right to representation under 7114(a)(2)(A) is not absolute, it will only be negated in extraordinary circumstances, i.e. when a victim of discrimination's rights under other statutes (such as Title VII) directly conflict with the rights of the union. The D.C. Circuit emphasized that such a conflict must be "direct," and the Authority reiterated this when it applied the principle in *Davis-Monthan*. The disputed interview in *Davis-Monthan* involved an EEO complaint filed by an employee who stated that he "objected" to the union's presence at the interview. 64 FLRA at 845. Notwithstanding the employee's objection, the Authority ruled that "an employee's objection, without more, is [not] sufficient to deprive a union of its formal-discussion right." *Id.* at 849. Looking more closely at the facts surrounding the employee's objection to the union's presence, the Authority noted that the employee simply stated that "the Union's presence would be a waste of time." *Id.* at 850. Neither the employee nor the agency representative cited any statutory rights that were at risk, nor did they articulate how the union might interfere with the employee's rights. *Id.*

The record in our case is even more devoid of evidence of a direct conflict than in *Davis-Monthan*. Unlike the latter case, Ms. Gregory's ETAT report did not involve an EEO or Title VII claim, and it did not articulate any other statutory rights of hers that might be jeopardized by the Union's presence at her interview. I have already indicated that her report of a "verbal assault" by another employee in the workplace directly implicated at least one other employee and raised safety concerns for the entire unit. These were legitimate interests of the Union in fulfilling its duty to represent the entire bargaining unit. The Respondent has not identified any facts that would suggest that the Union's presence at the May 23 interview would have directly conflicted with Gregory's rights under any statute. Therefore, the Union was entitled to participate in that interview, and by refusing to allow the Union to participate, the Respondent violated §§ 7114(a)(2)(A) and 7116(a)(1) and (8) of the Statute.

In order to remedy unfair labor practices of this nature, the Authority orders agencies to cease and desist such practices and to affirmatively notify officials who conduct formal discussions that they must provide their unions notice and an opportunity to attend such discussions. *See Davis-Monthan*, 64 FLRA at 851; *PBGC*, 62 FLRA at 225. Here, the appropriate Agency official to sign this notice is the Medical Center Director.

I therefore recommend that the Authority grant the General Counsel's Motion for Summary Judgment and issue the following Order:

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the U.S. Department of Veterans Affairs, John J. Pershing VA Medical Center, Poplar Bluff, Missouri (the Respondent), shall:

1. Cease and desist from:

(a) Conducting formal discussions with bargaining unit employees represented by the American Federation of Government Employees, Local 2338, AFL-CIO (the Union) concerning any grievance, personnel policy or practice or other general condition of employment, including employee threat assessment interviews, without notifying the Union and providing it the opportunity to be represented.

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

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

(a) Provide the Union with notice and the opportunity to be represented at all formal discussions, including employee threat assessment interviews, with bargaining unit employees represented by the Union.

(b) Notify in writing all persons authorized to conduct employee threat assessment interviews on behalf of the Respondent of the Union's right to be notified in advance and to be represented at such interviews of bargaining unit employees.

(c) Post the attached Notice on forms to be provided by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Medical Center Director and shall be posted and maintained for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) In addition to the physical posting of paper notices, disseminate a copy of the Notice electronically, on the same day as the physical posting, through the Respondent's email, intranet, or other electronic media customarily used to communicate with bargaining unit employees. The message of the email transmitted with the Notice shall state, "We are distributing the attached Notice to you pursuant to an order of an Administrative Law Judge of the Federal Labor Relations Authority in Case Number CH-CA-22-0374."

(e) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, Chicago Region, Federal Labor Relations Authority, in writing, within thirty (30) days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., August 29, 2024

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 U.S. Department of Veterans Affairs, John J. Pershing VA Medical Center, Poplar Bluff, Missouri, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT conduct formal discussions with bargaining unit employees represented by the American Federation of Government Employees, Local 2338, AFL-CIO (the Union) concerning any grievance, personnel policy or practice or other general condition of employment, including employee threat assessment interviews, without notifying the Union and providing it the opportunity to be represented.

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

WE WILL provide the Union with notice and the opportunity to be represented at all formal discussions, including employee threat assessment interviews, with bargaining unit employees represented by the Union.

WE WILL notify in writing all persons authorized to conduct employee threat assessment interviews on behalf of the Respondent of the Union's right to be notified in advance and to be represented at such interviews of bargaining unit employees.

_____

(Agency/Activity)

Date: _____ By: _____

(Signature) Medical Center Director

This Notice must remain posted for sixty (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 its provisions, they may communicate directly with the Regional Director, Chicago Region, Federal Labor Relations Authority, whose address is: 224 S. Michigan Ave., Suite 445, Chicago, IL 60604, and whose telephone number is: (872) 627-0020.