63 FLRA No. 129

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

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES
LOCAL 2145
(Charging Party/Union)

WA-CA-07-0087

DECISION AND ORDER

June 5, 2009

Before the Authority: Carol Waller Pope, Chairman and Thomas M. Beck, Member

I. Statement of the Case

This case is before the Authority on exceptions to the attached decision of the Administrative Law Judge (Judge) filed by the General Counsel. The Respondent filed an opposition to the General Counsel's exceptions. [1]

The complaint alleges that the Respondent violated § 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by holding a formal discussion without providing the Union advance notice and the opportunity to attend, in violation of § 7114(a)(2)(A) of the Statute. The Judge found that the Respondent did not violate the Statute and recommended that the complaint be dismissed.

1. After the Respondent filed its opposition, the Authority issued an Order directing the Respondent to correct a failure to comply with the service requirements in 5 C.F.R. § 2429.27. The Order cautioned the Respondent that failure to respond in a timely manner could result in the Authority not considering the opposition. *Id*. After the Respondent missed the deadline in the Order, the Authority issued an Order to Show Cause why the Authority should not disregard the opposition. *See* November 27, 2007 Order. The Respondent filed a timely response to the Order to Show Cause but gave no explanation for its prior failure to respond to the Order. Because the Respondent neither complied with the Authority's Order nor explained its failure to do so, the Authority will not consider the opposition. *See United States Dep't of Veterans Affairs*, 60 FLRA 479, 479 n.1 (2004).

II. Background and Judge's Decision

A. Background

The facts are fully set out in the Judge's decision and are summarized here. In 2005, a bargaining unit employee (the applicant) submitted an application for an educational expense reimbursement under the Respondent's Education Debt Reduction Program (EDRP). The EDRP Coordinator, a unit employee (the Unit Employee) denied the application. Subsequently, the Union filed a grievance on the applicant's behalf, which was eventually scheduled for arbitration. Decision at 3.

A Labor Relations Specialist for the Respondent (the Labor Relations Specialist), who was assigned to represent the Respondent in arbitration, sent an e-mail message to the Unit Employee asking him to come to the Labor Relations Specialist's office to discuss the arbitration at the Unit Employee's convenience on one of two specific days. *Id*. According to the Labor Relations Specialist, the purpose of the meeting was to determine if the Unit Employee had any relevant documents. *Id*.

The Unit Employee came to the Labor Relations Specialist's office as requested, but without an appointment. *Id*. The meeting was held in the Labor Relations Specialist's office because the Unit Employee, who had since transferred to a position as an emergency room nurse, had no office of his own. *Id*. The Unit Employee was not in the Labor Relations Specialist's chain of command. *Id*. at 4.

The Labor Relations Specialist and the Unit Employee offered differing accounts as to whether the Unit Employee's attendance was mandatory. In addition, while the Labor Relations Specialist testified that he did not ask the Unit Employee any questions about the upcoming arbitration, Decision at 3-4, the Unit Employee testified that the Labor Relations Specialist asked him whether he was aware that the educational expense reimbursement request had been referred to the New Orleans office and, again, denied. *Id*. at 3. In addition, the testimony of a third witness, the Union President, differed from that of both the Labor Relations Specialist and the Unit Employee. In this regard, the Union President, who did not attend the meeting, testified that the Unit Employee told her that the Labor Relations Specialist provided him with questions likely to be asked at the hearing and instructed him on how to respond to the questions. *Id*. at 5.

B. Judge's Decision

The Judge found that the sole issue before him was whether the meeting between the Labor Relations Specialist and the Unit Employee constituted a formal discussion under § 7114(a)(2) of the Statute, which requires that an exclusive representative of an appropriate bargaining unit be given notice of and the opportunity to attend a formal discussion.[2] Decision at 7. The Judge, citing *Defense Logistics Agency, Defense Depot Tracy, Tracy, California*, 39 FLRA 999, 1012 (1991), identified the requirements for a formal discussion as being: (1) a discussion; (2) which is formal; (3) between one or more representatives of the agency and one or more bargaining unit employees or their representatives; and (4) concerning any grievance or personnel policy or practices or other general conditions of employment. Decision at 7. The Judge found that the parties disagreed only as to whether the meeting was formal. *Id*.

In addressing whether the meeting at issue was formal, the Judge considered the following criteria set forth in *United States Department of Labor, Office of the Assistant Secretary for Administration and Management, Chicago, Illinois*, 32 FLRA 465, 470 (1988) (*DOL*): (1) whether the meeting was held by a first-level supervisor; (2) whether any other management representative attended; (3) where the meeting took place; (4) how long it lasted; (5) whether the meeting was called with advance notice or spontaneously; (6) whether there was a formal agenda; (7) whether attendance was mandatory; and (8) whether there was a formal record or transcription of attendance and comments. Decision at 7.

As to the first *DOL* factor, the Judge found that although the Labor Relations Specialist was not the Unit Employee's supervisor, his status as a Labor Relations Specialist clearly identified him as a representative of management and suggests that the meeting was formal. Decision at 7. As to the second *DOL* factor, the Judge found that the absence of any other management representative suggests neither formality nor informality. *Id*. Regarding the third *DOL* factor, the Judge found that the location of the meeting in the Labor Relations Specialist's office does not suggest formality. *Id*. at 8. The Judge acknowledged the Unit Employee's testimony that the office setting intimidated him but attributed that to the nature of the discussion, not its location. *Id*. Regarding the fourth *DOL* factor, the Judge found that the meeting lasted between 15 and 30 minutes, and that such a duration does not necessarily indicate formality. *Id*. at 6, 9.

As to the fifth *DOL* factor, the Judge found that although the Unit Employee entered the Labor Relations Specialist's office without giving him advance notice, the meeting was not spontaneous because it was initiated by the Labor Relations Specialist's e-mail request. *Id*. at 8. As to the sixth *DOL* factor, the Judge found that even though the Labor Relations Specialist had a specific reason for requesting the meeting, there was no formal agenda, suggesting that the meeting was not formal. Finding that it was reasonable for the Unit Employee to assume that he was compelled to attend the meeting, the Judge found that the seventh *DOL* factor supports that the meeting was formal. *Id*. While acknowledging evidence that the Labor Relations Specialist may have taken notes during the meeting, the Judge found that no formal record of the meeting existed and that, therefore, the eighth DOL factor indicates that the meeting was not formal. *Id*.

In addition to the above factors, the Judge, following the Authority's guidance in *DOL*, 32 FLRA at 470, considered other factors in determining whether the meeting was formal. In this regard, evidence that the meeting was prolonged by the Unit Employee's questions and expressions of dissatisfaction suggested to the Judge that the meeting was less formal than a duration of up to 30 minutes might otherwise indicate. Decision at 9. The Judge also considered evidence contradicting the General Counsel's position that the purpose of the meeting was to influence the Unit Employee's testimony at the arbitration hearing. *Id*. at 2, 9. In this regard, the Judge found that the evidence did not support the General Counsel's assertion that the Labor Relations Specialist subjected the Unit Employee to "intense questioning" concerning the grievance or his possible testimony. *Id*. at 9. In addition, the Judge found that "in the absence of reliable evidence to the contrary", the Union did not formally identify the Unit Employee as a potential witness before the meeting took place. *Id*. at 6. Accordingly, the Judge found that the purpose of the meeting does not indicate that the meeting was formal.

Based on the foregoing, the Judge found that the meeting fell "into something of a gray area between formality and informality." Decision at 9. On balance, he concluded that the General Counsel did not meet the burden under 5 C.F.R. § 2423.32 to prove the allega-

2. Section 7114(a)(2)(A) of the Statute provides, in relevant part, that:

An exclusive representative . . . shall be given the opportunity to be represented at -

(A) any formal discussion . . . concerning any grievance or any personnel policy or practices or other general conditions of employment[.]

tions in the complaint by a preponderance of the evidence. Therefore, the Judge recommended that the Authority dismiss the complaint. *Id*. at 9-10.

III. Positions of the Parties

A. General Counsel's Exceptions

The General Counsel contends that the Judge erred when he found that the meeting may have lasted only 15 minutes and, instead, should have found that it lasted at least 30 minutes. Exceptions at 6-7. The General Counsel claims that the Judge committed a second factual error by not making a definitive finding that the Labor Relations Specialist took notes of the meeting. *Id*. at 8.

The General Counsel contends that the Judge's conclusion that the General Counsel did not meet the burden of proving that the meeting was formal was based on the Judge's incorrect conclusions as to several indicia of formality. Specifically, the General Counsel contends that, even if the Judge was correct in his finding that the meeting lasted between 15 and 30 minutes, he then should have found, consistent with several Authority decisions, that this duration indicates that the meeting was formal. Exceptions at 8-9. In addition, the General Counsel contends that the Judge should have viewed the location of the meeting, in a Labor Relations Specialist's office, and the Labor Relations Specialist's taking of notes, as additional indicia of formality. *Id*. at 8-11.

The General Counsel asserts that the totality of facts and circumstances establishes that the meeting was a formal discussion and that, therefore, the Respondent violated § 7114(a)(2)(A) of the Statute by holding the meeting without providing the Union notice and the opportunity to be represented at the meeting. Exceptions at 12.

B. Agency's Opposition

As explained above, we do not consider the Agency's opposition.

IV. Analysis and Conclusions

A. The Judge did not err in his findings of fact.

The General Counsel contends that the Judge's finding that the meeting may have lasted only 15 minutes rested on testimony erroneously attributed to the Labor Relations Specialist. Exceptions at 6. In this regard, the Judge made a finding that the Labor Relations Specialist testified that the meeting lasted for about 15 minutes. Decision at 4. Although the Labor Relations Specialist did not testify as to the duration of the meeting, the Unit Employee's testimony supports the Judge's finding that the meeting may have been as short as 15 minutes. In particular, the Unit Employee testified that he left work at 8 a.m. to attend the meeting, that it lasted "[t]hirty minutes, forty minutes", and that it ended at "I don't know, 8:30, something." (Tr. at 50). Further, he testified that "[t]he meeting was just after I got off work, 8, 8:15, thereabouts." (Tr. at 57-58). Therefore, the Unit Employee's testimony suggests that the meeting could have been as short as 15 minutes. We note the General Counsel's contention that the Judge's finding that it would have taken the Unit Employee at least 5 minutes to walk from his work station to the Labor Relations Specialist's office is not supported, and that such a walk might have taken "less than 30 seconds." Exceptions at 7. However, under either scenario, the record supports the Judge's finding that the meeting lasted between 15 and 30 minutes.

The General Counsel contends that the Judge also erred when he failed to find that the Labor Relations Specialist took notes of what the Unit Employee said during the meeting. Exceptions at 8. The General Counsel points out that the Unit Employee testified that the Labor Relations Specialist took notes and that the Labor Relations Specialist did not deny doing so. *Id*. Although the Unit Employee testified that during the meeting "[the Labor Relations Specialist] was writing down things," (Tr. 60), he was not asked if he knew what the Labor Relations Specialist was writing. When asked if he was provided a copy of the notes, he testified that he was not. (Tr. 60-61). Moreover, the Labor Relations Specialist was not asked whether he had taken notes. As such, the preponderance of the evidence does not support a finding that anything said by the Unit Employee during the meeting was transcribed into notes.

Based on the foregoing, we deny the General Counsel's exception. [3]

B. The Judge did not err in finding that the meeting was not formal.

The determination as to whether a meeting is a formal discussion is based on the totality of the facts and circumstances presented. *See F.E. Warren Air Force Base, Cheyenne, Wyoming*, 52 FLRA 149, 155-57 (1996) (*F.E. Warren*). The *DOL* factors, discussed above, are illustrative, and other factors may be identified and applied as appropriate. *F.E. Warren*, 52 FLRA

3. As such, it is unnecessary to address the General Counsel's claim that the note-taking indicates that the meeting was formal.

at 157. In this regard, the Authority has recognized that a meeting can have some indicia of formality and yet, based on the totality of the circumstances, not be a formal discussion. *See United States Department of Veterans Affairs Northern Arizona Veterans Affairs Healthcare, Prescott, Arizona*, 61 FLRA 181,186 (2005) (*Northern Arizona*); *United States Dep't of Justice, U.S. Immigration & Naturalization Service, Los Angeles, California*, 18 FLRA 550, 553 (1985). Moreover, the Authority has found that the purpose of a discussion may be relevant in assessing formality. *See F.E. Warren*, 52 FLRA at 156-57; *Dep't of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California*, 35 FLRA 594, 605 (1990) (*McClellan*) (agency management's interview of a bargaining unit employee with knowledge that union would call employee as a witness to an upcoming arbitration hearing is a formal discussion).

The General Counsel contends that the Judge's conclusions that the meeting's duration and location do not suggest that the meeting was formal are "clearly erroneous." Exceptions at 8. Regarding the meeting's duration, the General Counsel cites two Authority decisions for the proposition that formality is indicated by a meeting that lasts 15 to 30 minutes. *Id*. *See McClellan*, 35 FLRA at 604 (finding that a 15-25 minute witness preparation interview "lasted a significant length of time"); *United States Dep't of Justice, Bureau of Prisons, Fed. Correctional Inst., Bastrop, Tex.*, 51 FLRA 1339, 1343 (1996) (formality is indicated by a meeting that lasts 25 to 30 minutes).

Contrary to the General Counsel's contention, the Authority has not found a meeting length of 15 to 30 minutes to indicate formality under all circumstances. *E.g*., *Northern Arizona*, 61 FLRA at 185 (a 15-minute meeting found to be of "short duration" and an indication of informality); *Defense Logistics Agency, Defense Distribution Region West, Tracy, California*, 48 FLRA 744, 745 n.2 (1993) (meeting lasting "only 15 minutes" was not a formal meeting); *Dep't of Health and Human Services, Social Security Admin. and Social Security Admin. Field Operations, Region II*, 29 FLRA 1205, 1208 (1987) (meeting lasting "about 20 minutes" was not formal). The Judge found that, under circumstances where the Unit Employee prolonged the meeting by asking the Labor Relations Specialist questions and expressing complaints, the meeting's duration is not a reliable indicator of its formality. Decision at 9. The General Counsel points to no precedent to the contrary. Accordingly, we deny the General Counsel's exception on this point.

Regarding the location of the meeting, the General Counsel contends that the Judge should have found that it indicates formality because the meeting was held away from the Unit Employee's work site and in the Labor Relations Specialist's private office. Exceptions at 10. However, the Judge found, and the General Counsel does not dispute, that the meeting took place away from the Unit Employee's work site simply because he did not have an office there. Decision at 3. The General Counsel, having presented no evidence of any other explanation for the location of the meeting, failed to establish that the location indicates formality.

Based on the foregoing, the General Counsel has not demonstrated that the Judge erred in his evaluation of the indicia of formality set out in *DOL*. Further, the General Counsel has not demonstrated that the Judge's decision is inconsistent with *McClellan* and *General Services Administration, Region 9, New York, New York*, 54 FLRA 864 (1998). In the meetings involved in those decisions, counsel representing management in arbitration cases interviewed union employees who had been designated by the union as witnesses in the cases. The Authority recognized that under such circumstances a union would have an interest in being present to be assured that its witnesses would not be coerced or intimidated prior to the hearings. *McClellan*, 35 FLRA at 605. Here, the General Counsel does not except to the Judge's finding that the purpose of the meeting was not to prepare a Union witness for an arbitration hearing. Therefore, these decisions are distinguishable.

Based on the foregoing, we deny the General Counsel's exception.

V. Order

The complaint is dismissed.