UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

DEPARTMENT OF DEFENSE DEFENSE CONTRACT MANAGEMENT AGENCY DEFENSE CONTRACT MANAGEMENT AGENCY EAST INDIANAPOLIS, INDIANA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2121, AFL-CIO Charging Party	Case No. CH-CA-01-0652

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his/her Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **FEBRUARY 24, 2003**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
607 14th Street, N.W., Suite 415
Washington, D.C. 20424

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: January 24, 2003
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: January 24, 2003

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: DEPARTMENT OF DEFENSE
DEFENSE CONTRACT MANAGEMENT AGENCY
DEFENSE CONTRACT MANAGEMENT AGENCY EAST
INDIANAPOLIS, INDIANA
Respondent

and Case No. CH-CA-01-0652

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 2121, AFL-CIO
Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the Stipulation of Facts and other supporting documents filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ 03-15
WASHINGTON, D.C.

DEPARTMENT OF DEFENSE DEFENSE CONTRACT MANAGEMENT AGENCY DEFENSE CONTRACT MANAGEMENT AGENCY EAST INDIANAPOLIS, INDIANA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2121, AFL-CIO Charging Party	Case No. CH-CA-01-0652

John K. Moroney, Esquire
For the Respondent

Greg A. Weddle, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.[1], and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether an EEO mediation was a formal discussion, to which the Union was not given notice and an opportunity to attend in violation of §§16(a)(1) and (8) of the Statute.

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[1] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial, "71", of the statutory reference, i.e., Section 7116(a)(1) will be referred to, simply, as, "§ 16(a)(1)".

This case was initiated by a charge filed on August 13, 2001. The Complaint and Notice of Hearing issued on July 30, 2002, and set the hearing for October 8, 2002. At the pre-hearing conference call on October 1, 2002, the parties requested that the hearing be indefinitely postponed and, if not settled, be submitted to the Administrative Law Judge by Joint Stipulation and Motions for Summary Judgment. The request of the parties was granted and on October 1, 2002, an Order was issued indefinitely postponing the hearing, ordering the parties, if the case was not settled, to submit an agreed Stipulation and Motion for Summary Judgment on, or before October 11, 2002. On October 11, 2002, the parties submitted Joint Stipulation of Facts and a Joint Motion for Decision Based Upon Stipulation of Facts, received on October 15, 2002. General Counsel timely mailed a Brief on November 7, 2002, which was received on November 14, 2002 and Respondent timely mailed a Brief on November 8, 2002, which was received on November 12, 2002. I have carefully considered the Stipulation of Facts and the briefs of the parties and upon the entire record, I set forth the Stipulated facts and make the following conclusions:

STIPULATED FACTS

The parties have jointly stipulated the following facts:

1. The Defense Contract Management Agency (DCMA) is an independent Defense Agency headquartered in Alexandria, Virginia, which reports to the Office of the Under Secretary of Defense, Acquisition, Technology and Logistics.

2. The Defense Contract Management Agency East (DCMAE), located in Boston, MA., is one of three national subordinate headquarters of various geographic regions of DCMA.

3. Defense Contract Management Agency Indianapolis is a subordinate field office of DCMAE and is located in Indianapolis, Indiana.

4. Defense Contract Management Agency Rolls Royce is a subordinate field office of DCMA Indianapolis.

5. American Federation of Government Employees 2121 is the union representing AFGE members who work at DCMA Indianapolis and its subordinate field activities.

6. Mr. Tony Laing is an employee of DCMA Rolls Royce at all times during the events discussed in this case and continues to be an employee of that facility.

7. DCMAE is in charge of the DCMAE EEO Program.

8. The governing regulation for that program is found at Agency Exhibit 2.

9. The EEO Federal Sector program is governed by 29 CFR 1614. (Agency Exhibit 3)

10. The EEOC ADR Program is described in detail at EEO MD 110, Chapter 3. (Agency Exhibit 4)

11. EEOC stated their ADR policy statement at Appendix H of EEO MD 110. (Agency Exhibit 5)

12. The DCMAE ADR Regulation is found at Agency Exhibit 6.

13. The DCMAE Statement of General Policy regarding EEO ADR processing is governed by the document known as the DCMA "One Book." (Agency Exhibit 7)

14. The initial guidebook for the DCMAE mediation program is located at Agency Exhibit 8.

15. A summary information sheet regarding the DCMA EEO mediation process at Agency Exhibit 9.

16. The Commander of DCMA Rolls Royce during the events depicted in this case was Renee Haas, a Lieutenant Colonel in the US Air Force.

17. Mr. Tony Laing, a member of the AFGE Local 2121 bargaining unit, filed a formal EEO complaint on or about March 1, 2001. (Agency Exhibit 1a-d)

18. Mr. Laing did not request Union Representation or anyone to represent him initially regarding that complaint.

19. Mr. Laing received a letter detailing the Agency mediation program. (Agency Exhibit 1a-d)

20. Mr. Laing signed a letter indicating an agreement to mediate his EEO dispute. (Agency Exhibit 10)

21. The Mediation was scheduled on [sic: and conducted] April 5, 2001 in Indiana.

22. A mediator from the U.S. Customs Service, Indianapolis, Indiana, was brought in by the Agency to conduct the mediation. (Agency Exhibit 11)

23. In attendance at the mediation was Lt. Col. Haas, Agency Representative, Mr. Laing complainant and the Mediator, Mr. Lee Sullivan, U.S. Customs Service. (Agency Exhibit 11)

24. Attendance at the mediation was totally voluntary.

25. The mediation was conducted by Mr. Sullivan, who is not an employee of DCMA, in accordance with the Agency's RESOLVE program. (Agency Exhibit 9)

26. The mediation was held in Lt. Colonel Haas' office, which is located in the same building that Mr. Laing, the original EEO complainant worked.

27. The mediation lasted a little over six hours. (Agency Exhibit 11)

28. The [sic] was no preset agenda for the mediation, other than to attempt to resolve Laing's EEO complaint.

29. There were no formal notes taken at the mediation.

30. There were no agency employees at the mediation beyond Mr. Laing, the complainant and Lt. Col. Haas.

31. The mediator drafted simple minutes reflecting who was present at the mediation, that it was not settled and how long it lasted. (Agency Exhibit 11)

32. The Complainant, Mr. Laing signed a memo stating that Mr. Manlove, AFGE 2121 Steward, was the representative for him in this case on April 21, 2002. (Agency Exhibit 1a-d)

33. Mr. Manlove negotiated with Agency officials subsequently and resolved the case to Mr. Laing's satisfaction.

34. The Union was not notified and given an opportunity to be present at the April 5 mediation of Laing's EEO complaint.

Agency exhibits referred to in the Joint Stipulation of Facts, above, are attached as an Appendix, Agency Exhibit 1 (a) through 11."

PRELIMINARY MATTER

The Authority decided a substantially like case in, Luke Air Force Base, Arizona, 54 FLRA 716 (1998), (hereinafter, "Luke"), which was reversed by the Ninth Circuit Court of Appeals in an unpublished decision, 208 F.3d 221 (9th Cir. 1999), cert. denied, 121 S. Ct. 60 (2000).

Following Luke the Authority decided another substantially like case, U.S. Department of the Air Force, 436th Airlift Wing, Dover Air Force Base, Dover, Delaware, 57 FLRA 304 (2001), (hereinafter, "Dover AFB") (Chairman Cabaniss dissenting) and the majority adhered to its decision in Luke, 54 FLRA at 716. The United States Court of Appeals for the District of Columbia Circuit, in No. 01-1373 (Dover AFB) on January 17, 2003, denied the Air Force's petition for review and granted FLRA's cross-application for enforcement of its order.

CONCLUSIONS

Respondent argues, in part, as follows:

> "This case is not primarily about collective [bargaining] rights protected by the Labor Statute. Rather, it implicates individual rights protected by Title VII to have allegations of discrimination thoroughly, impartially, and confidentially investigated and resolved. The primary responsibility for determining how EEO investigations will be conducted vests not with the FLRA but with the EEOC.
>
> "The EEOC has never adopted a rule allowing for the union's presence at mediations; rather, an employee is free to chose whomever he/she wishes as his/her representative for EEOC proceedings. The inclusion of a third party with broader interests and concerns could have a negative impact on this system of reaching individualized settlement of complaints, invade the personal privacy of the employee by breaching the confidentiality of EEOC proceedings, and inject complications into a process intended to be simple and focused. The balancing and weighing of the various factors involved in mediation of EEO matters is the responsibility of the EEOC and is certainly not a matter into which the FLRA should

intrude. This Court should defer to the EEOC's interpretation of its regulations in its administration of the EEO process. FLRA v. Department of the Treasury, 884 F.2d [1446] [D.C. Cir. 1989] at 1454.

. . .

"In this case, the agency employee filed a formal EEO complaint and agreed to the mediation of his complaint pursuant to the EEOC regulations, 29 C.F.R. part 1614, and EEOC MD 110. (Agency Exhibit 10) The mediation was attended by the mediator, the employee, and the agency's representative. Although the employee is permitted to select a representative to attend mediation sessions (29 C.F.R. § 1614.605(a)), here the employee represented himself and did not choose to have a representative present at the mediation. At the mediator's request, the employee and agency representative signed an agreement that the mediation would be confidential. (Agency Exhibit 10). No settlement was reached at the mediation.

"This mediation was part of the EEOC's comprehensive framework for resolving EEO complaints and not part of the negotiated grievance procedure. The employee's complaint was a charge filed under Title VII of the Civil Rights Act of 1964, which is 'a Congressional enactment unconnected to the [Labor] Statute. The EEOC regulation[s] * * * establish[] a procedure for handling such charges unconnected to those established by the [Labor] Statute.' Department of Veterans Affairs Med. Ctr. v. FLRA, 16 F.3d 1526, 1533 (9th Cir. 1994) . . . . (Respondent's Brief, pp. 11-12)

. . .

"Nothing in Section 7114 requires that a person representing the union at a 'formal discussion' keep the information discussed at such meetings confidential. The interests of the union representative and his obligation to keep the bargaining unit informed about issues that affect the unit would chill discussions between the employee and management, and even inhibit employees from filing EEO complaints. Thus, requiring or even permitting union representation

under such circumstances could undermine the entire EEO process.

. . .

"The consequences created by the FLRA's past decisions to require the union's presence during the EEO mediation process are significant. For example, the FLRA's decision contains no provision to prevent the union from attending those sessions where there may be a direct conflict between the rights of the union representative under Section 7114(a)(2)(A) and with the employee victim of discrimination. Although such conflicts should 'presumably be resolved in favor of the latter,' NTEU, 774 F.2d at 1189 n. 12, the FLRA fails to address this very real possibility.

"Finally, the FLRA's past interpretation of Section 7114(a)(2)(A) to create a union representation interest, even when the employee pursues his or her statutory remedies, is especially inappropriate in this case. The collective bargaining agreement between the union and Agency (Agency Exhibit 3 of the earlier Motion to Dismiss for Lack of Jurisdiction) does not exclude claims of discrimination from the grievance procedure. Page 99, Section 5 states 'An employee alleging discrimination .... , may at his/her option raise the matter under the appropriate statutory appellate procedure or under the provisions of this Article, but not both. For purposes of this Section and pursuant to 5 USC 7121(d) and (e)(1), an employee shall be deemed to have exercised his/her option procedure or timely files a grievance in writing in accordance with the provisions of this Article, whichever event occurs first.' Mr. Laing did not file a grievance, but filed a formal EEO complaint on or about March 1, 2001. Thus, the parties have negotiated over this matter and determined that in these instances the collective bargaining agreement has specifically defined rules which apply to this matter. Since the mediation was conducted under the auspices of the EEO rules as a result of Laing's 'formal election', the mediation did not then involve any aspect of the collective bargaining agreement or his contractual rights under that agreement. . . ." (Respondent's Brief, pp. at 15-17)

I am also mindful of Chairman Cabaniss' statements in her dissenting opinion in Dover AFB, 57 FLRA at 304 in part, as follows:

> "Because the Union here is not the EEO complainant's representative, I would find that the presence at this EEO mediation session of union representatives pursuant to § 7114(a)(2)(A) violates Equal Employment Opportunity Commission (EEOC) regulations and guidance, to include Management Directive (MD) 110, and 5 U.S.C. § 574, which constitutes a part of the ADR Act. 29 C.F.R. § 1614.102(b)(2) of the EEOC's regulations require an agency to establish or make available an ADR program for both the pre-complaint and the formal complaint process. Chapter 3 of MD 110, which discusses ADR in the EEO process, specifically notes the confidentiality requirements of 5 U.S.C. § 574.
>
> "The issue here involves whether a union, not acting as the representative of the EEO complainant, constitutes a party to the EEOC proceedings. In examining the ADR Act and the EEOC's regulations I find little support for the majority's position. For purposes of the ADR Act, 5 U.S.C. § 551(3) defines party (footnote omitted) and notes that
>
> > 'party' includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes[.] (footnote omitted)
>
> Nothing in this definition arguably qualifies a union to be present as a party to these proceedings, unless the EEOC has admitted a union as a separate party unto itself for some purpose, limited or otherwise." (id. at 312)

Nevertheless, the majority of the Authority in Dover AFB, held, in part as follows:

> "As explained below, we find that the mediation session of the EEO complaint was a formal discussion within the meaning of § 7114(a)(2)(A) of the Statute. In addition, we find that the Respondent has failed to establish that the presence of a union representative at a mediation session would conflict with EEOC regulations or

the ADR Act. Therefore, we hold that the Respondent violated § 7116(a)(1) and (8) by failing to provide the Union notice and an opportunity to be represented at that mediation session." (id. at 306)

. . .

"Section 7114(a)(2)(A) of the Statute broadly provides for union attendance at meetings concerning any grievance. To ascertain the scope of the term grievance in § 7114(a)(2)(A), the first place to look is the Statute's express definition of grievance in § 7103(a)(9). (id. at 308)

"The express language of § 7103(a)(9) provides no basis for limiting the definition of grievance, as the Respondent argues here, so as to exclude complaints brought pursuant to EEO statutory procedures. To the contrary, the Statute defines grievance as:

"any complaint--

(A) by any employee concerning any matter relating to the employment of the employee[.]

5 U.S.C. § 7103(a)(9)(A)(emphasis added). 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. In this case, Mr. Jones's complaint that he was the victim of illegal discrimination by his employing agency is undeniably a complaint by [an] employee concerning [a] matter relating to [his employment], i.e., a grievance under the Statute's definition. In light of the above analysis, we do not acquiesce in the Ninth Circuit's determination that the formal discussion right does not apply during EEOC proceedings because they are discrete and separate from the grievance process to which 5 U.S.C. §§ 7103 and 7114 are directed, *IRS, Fresno v. FLRA*, 706 F.2d at 1024. Further, we reject the Respondent's argument (Res. Ex. 15) that the provisions of the Statute have no bearing upon EEO complaints." (id. at 308)

. . .

> "In addition, we reject the Respondent's argument that the Union is not a party to the dispute under the ADR Act and therefore not entitled to attend mediation sessions. Under that Act, party includes those entitled as of right to be admitted. 5 U.S.C. § 551(3) (incorporated by reference in 5 U.S.C. § 571(10)(A)). As discussed above, we have determined that this mediation session was a formal discussion under § 7114(a)(2)(A) of the Statute and therefore the Union has a statutory right to be admitted." (id. at 310)

Accord: U.S. Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, A/SLMR No. 278, 3 A/SLMR 290 (1973) (meeting concerning implementation of a decision was a formal discussion).

Of course, now the United States Court of Appeals for the District of Columbia Circuit has affirmed the majority's decision in Dover AFB and has stated, in part, as follows:

> "Section 7103(a)(9) defines 'grievance' as any complaint ... by any employee concerning any matter relating to the employment of the employee.'<SPAN style="mso-spacerun: yes"> </SPAN>5 U.S.C. § 7103(a)(9). Although the Air Force contends that the EEO proceeding initiated by Jones is not a grievance within the meaning of section 7103(a)(9), our decision in NTEU demonstrates otherwise. See 774 F.2d at 1186-87 (holding that a grievance includes both those complaints filed pursuant to a negotiated grievance procedure and those filed pursuant to alternative statutory procedures).<SPAN style="mso-spacerun: yes"> </SPAN> The Air Force suggests that NTEU is distinguishable because it involved a Merit Systems Protection Board ("MSPB") proceeding rather than an EEO proceeding;<SPAN style="mso-spacerun: yes"> </SPAN>however, our analysis in NTEU relied upon the text, structure, and legislative history of the Act and did not rest on the type of grievance in question. </SPAN>See 774 F.2d at 1185-88. We find no reason to distinguish NTEU;<SPAN style="mso-spacerun: yes"> </SPAN>accordingly, we will read the term 'grievance' as we did in that case.

"Because the present case involves a 'grievance' as defined in section 7103, Local 1709's section 7114 formal discussion rights are triggered, and we turn to the issue of whether the FLRA's construction of section 7114(a)(2)(A) passes Chevron muster.<SPAN style="mso-spacerun: yes"> </SPAN> In interpreting an agency's enabling or organic statute, we 'employ[] traditional tools of statutory construction' to determine 'whether Congress has directly spoken to the precise question at issue.'<SPAN style="mso-spacerun: yes"> </SPAN>Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 n. 9, 842 (1984).<SPAN style="mso-spacerun: yes"> </SPAN> We 'must give effect to the unambiguously expressed intent of Congress;'<SPAN style="mso-spacerun: yes"> </SPAN>if the statute is unambiguous on the question at issue, our inquiry ends there.<SPAN style="mso-spacerun: yes"> </SPAN> Id. at 842-43 (Chevron step one).<SPAN style="mso-spacerun: yes"> </SPAN>Where 'the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'<SPAN style="mso-spacerun: yes"></SPAN> Id. at 843 (Chevron step two).<SPAN style="mso-spacerun: yes"> </SPAN>The Supreme Court has stated that the FLRA is entitled to 'considerable deference when it exercises its special function of applying the general provisions of the [Act] to the complexities of federal labor relations.'<SPAN style="mso-spacerun: yes"></SPAN> National Fed'n of Fed. Employees, Local 1309 v. Dep't of the Interior, 526 U.S. 86, 99 (1999) (quotation omitted).

"</SPAN>Section 7114(a)(2)(A) provides that a union has a right to be represented at '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.' 5 U.S.C. § 7114(a)(2)(A).<SPAN style="mso-spacerun: yes"> </SPAN> The FLRA has construed this language as providing Local 1709 the right to have a union representative present at the mediation of a formal EEO complaint filed by Jones, one of Local 1709's members.

"The language of section 7114(a)(2)(A) is quite broad. Because it does not yield a clear and unambiguous interpretation, we move past step one to step two of the Chevron inquiry. The FLRA's construction is a natural reading of the broad statutory language. In addition, the FLRA's construction is supported by our decision in NTEU. 774 F.2d at 1189 (holding that section 7114(a)(2)(A) provides 'that an exclusive representative has the right to be present at any formal discussion of a grievance between management and a bargaining unit employee'). Nevertheless, the Air Force argues that the FLRA's construction is impermissible, urging the Court to follow the Ninth Circuit's reading of section 7114(a)(2)(A) in IRS Fresno, 706 F.2d 1019. In that case, the Ninth Circuit held that a pre-complaint conciliation conference was not a grievance, explaining that EEOC procedures 'are not controlled by [section] 7114(a)(2)(A) because they are discrete and separate from the grievance process to which [sections] 7103 and 7114 are directed.' IRS Fresno, 706 F.2d at 1024. The problem with this argument is that we previously disagreed with the Ninth Circuit's narrow reading of section 7114(a)(2)(A). NTEU, 774 F.2d at 1188. Furthermore, as we pointed out in NTEU, IRS Fresno appears 'to be based primarily on its conclusion that the precomplaint conference did not constitute a "formal" discussion' rather than on its brief analysis of the grievance issue. Id.

"As it did with the grievance issue, the Air Force attempts to distinguish NTEU on the grounds that EEO proceedings utilized by Jones here are a different vehicle than MSPB proceedings utilized in NTEU. The Air Force notes that the Ninth Circuit has treated EEO proceedings and MSPB proceedings differently. Compare IRS Fresno, 706 F.2d 1019 (finding no formal discussion right in EEO proceeding) with Dep't of Veterans Affairs Med. Ctr. v. FLRA, 16 F.3d 1526 (9th Cir. 1994) (finding a formal discussion right in MSPB proceeding). However, the Ninth Circuit itself has noted that our reasoning in NTEU, rejecting the IRS Fresno analysis, is more persuasive than that court's own reasoning in IRS Fresno. Veterans Affairs Med. Ctr., 16 F.3d at 1534 n.4.

"The Air Force also attempts to evade NTEU by emphasizing the primacy of an aggrieved employee's

rights in the context of a discrimination claim. The Air Force notes that in NTEU we acknowledged in a footnote that 'in the case of grievances arising out of alleged discrimination ..., Congress has explicitly decided that a conflict between the rights of identifiable victims of discrimination and the interests of the bargaining unit must be resolved in favor of the former.' 774 F.2d at 1189 n.12. However, the point we made in footnote 12 of NTEU is that '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 ... presumably be resolved in favor of the latter.' Id. Such a direct conflict is not present here.

"The Air Force argues that there is a conflict between the FLRA's construction of section 7114(a)(2)(A) and the confidentiality protections of both sections of the ADR Act (5 U.S.C. § 574(a) & (b)) and the Privacy Act, 5 U.S.C. § 552a. This argument fails because neither of the statutes cited by the Air Force prohibits union attendance at ADR proceedings. The provisions of the ADR Act cited by the Air Force concern only the confidentiality of communications made at an ADR proceeding and do not address what persons or parties may attend an ADR proceeding. 5 U.S.C. § 574.1 Similarly, the Privacy Act concerns the confidentiality of records rather than what parties may attend an ADR proceeding, 5 U.S.C. § 552a, and this case does not present a situation where the presence of a union representative in an ADR proceeding would result in the revelation of confidential information in violation of the Privacy Act. In other words, neither the ADR Act nor the Privacy Act creates a conflict (much less a direct conflict) with section 7114(a)(2)(A).

"The Air Force also argues that the FLRA's construction of section 7114(a)(2)(A) is impermissible because of EEOC regulation 29 C.F.R. § 1614.109(e), which provides that attendance at agency hearings is 'limited to persons determined by the administrative judge to have direct knowledge relating to the complaint.' However, as the Air Force acknowledged at oral argument, this regulation says nothing about what happens at ADR proceedings.

> "Left without a statute or regulation as a hook, the Air Force attempts to hang its hat on an agency manual, MD 110. Section VII of Chapter 3 of MD 110 addresses what it refers to as ADR 'core principles.' It states: 'Confidentiality must be maintained by the parties, by any agency employees involved in the ADR proceeding and in the implementation of an ADR resolution....' MD 110, Ch. 3, § VII(A)(3). The Air Force contends that union presence at ADR proceedings would undermine the confidentiality of the process. This argument amounts to nothing more than the Air Force's doubt that union representatives can keep confidential matters confidential. Union representatives are often in the position of having to maintain confidentiality. More importantly, even assuming that an inconsistency between an agency manual and a statute constitutes a conflict, the Air Force again fails to show a conflict with the FLRA's construction of section 7114(a)(2)(A)." (Department of the Air Force, 436th Airlift Wing, Dover Air Force Base v. FLRA, No. 011373, slip op. at 6-9 (D.C. Cir. Jan. 17, 2003))

Accordingly, I find that the April 5, 2001 mediation concerned a "grievance" within the meaning of §14(a)(2)(A) of the Statute and by its failure to notify the Union and provide the Union an opportunity to be represented at the formal mediation session, Respondent violated §§16(a)(1) and (8) of the Statute and it is recommended that the Authority adopt the following:

ORDER

Pursuant to §2423.41(c) of the Rules and Regulations of the Federal Labor Relations Authority, 5 C.F.R. § 2423.41 (c), and §18 of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7118, the Department of Defense, Defense Contract Management Agency, Defense Contract Management Agency East, Indianapolis, Indiana, shall:

1. Cease and desist from:

(a) Failing and refusing to provide the American Federation of Government Employees, Local 2121, advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning any grievance or any personnel policy or practices or other general conditions of employment, including meetings to

mediate settlement of formal EEO complaints filed by bargaining unit employees.

(b) In any like or related manner, interfering with,

restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Provide the American Federation of Government Employees, Local 2121, with advance notice and an opportunity to be represented at formal discussions with bargaining unit employees concerning mediation of formal EEO complaints.

(b) Post at the Defense Contract Management Agency East, Indianapolis, Indiana facilities, 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 Commander, DCMA East, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to §2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Chicago Region, Federal Labor Relations Authority, 55 West Monroe, Suite 1150, Chicago, Illinois 60603, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

_____
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: January 24, 2003
Washington, D.C.

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the the Department of Defense, Defense Contract Management Agency, Defense Contract Management Agency East, Indianapolis, Indiana, violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to provide the American Federation of Government Employees, Local 2121, with advance notice and an opportunity to be represented at formal discussions with bargaining unit employees concerning any grievance or any personnel policy or practices or other general conditions of employment, including meetings to mediate settlement of formal EEO complaints filed by bargaining unit employees.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL provide the American Federation of Government Employees, Local 2121, with advance notice and an opportunity to be represented at formal discussions with bargaining unit employees concerning mediation of formal EEO complaints.

_____
(Respondent/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 its provisions, they may communicate directly with the Regional Director, Chicago Regional

Office, Federal Labor Relations Authority, whose address is: 55 West Monroe, Suite 1150, Chicago, Illinois 60603, and whose telephone number is: (312)353-6303.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. CH-CA-01-0652, were sent to the following parties:

CERTIFIED MAIL: **CERTIFIED NOS**:

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DATED: JANUARY 24, 2003
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