

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

DEPARTMENT OF THE AIR FORCE LUKE AIR FORCE BASE, ARIZONA Respondent and	Case No. DE-CA-00309
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1547, AFL-CIO Charging Party	

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 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. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **NOVEMBER 26, 2001**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW., Suite 415
Washington, DC 20424-0001

RICHARD A. PEARSON
Administrative Law Judge

Dated: October 23, 2001
Washington, DC

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

MEMORANDUM
2001

DATE: October 23,

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE AIR FORCE
LUKE AIR FORCE BASE, ARIZONA

Respondent

and

Case No. DE-CA-00309

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1547, 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 transcript, exhibits and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

OALJ

02-08

WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE LUKE AIR FORCE BASE, ARIZONA Respondent	 Case No. DE-CA-00309
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1547, AFL-CIO Charging Party	

Hazel E. Hanley, Esquire
For the General Counsel

Phillip G. Tidmore, Esquire
For the Respondent

Brock V. Henderson, President, AFGE Local 1547
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

Statement of the Case

This unfair labor practice case was submitted in accordance with section 2423.26(a) of the Federal Labor Relations Authority's Rules and Regulations, based on a waiver of a hearing and a stipulation of facts by the parties, who have agreed that no material issue of fact exists.

The unfair labor practice complaint issued by the General Counsel alleges that the Respondent violated section

7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7116(a)(1) and (8), by holding formal discussions with a bargaining unit employee concerning the mediation of her formal equal employment opportunity (EEO) complaint without providing the American Federation of Government Employees, Local 1547, AFL-CIO, with notice and an opportunity to be represented as required by section 7114(a)(2)(A) of the Statute.

The Respondent's answer denied any violation of the Statute. Among other things, the Respondent asserted that confidential mediation sessions involving complaints of employment discrimination, brought under one of the statutes administered by the Equal Employment Opportunity Commission, are not formal discussions or grievances which labor organizations must be allowed to attend.

A hearing was scheduled on these issues, but the parties filed competing motions to dismiss and for summary judgment, and the hearing was indefinitely postponed. Subsequently, the parties were able to agree on a joint stipulation of facts, making the hearing unnecessary. In their stipulation, the parties have agreed that the stipulation, along with the exhibits attached thereto, constitute the entire record in this case. The Respondent and the General Counsel have also submitted legal briefs in support of their respective positions. Based on this record, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The Stipulation of Facts, consisting of seventy-two numbered paragraphs, is incorporated in its entirety as my findings of fact. Retaining the original numbering but omitting references to exhibits attached to the stipulation, I cite below those portions of the stipulation that I find most relevant to my decision.

1. Luke Air Force Base (Respondent) is an activity of the United States Department of the Air Force, an agency under 5 U.S.C. § 7103(a)(3).

2. The American Federation of Government Employees, Local 1547, AFL-CIO (the Union or Local 1547), is a labor organization under 5 U.S.C. § 7103(a)(4).

3. Local 1547 is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent.

20. Denise F. Christopher is an employee under 5 U.S.C. § 7103(a)(2) and a member of the bargaining unit described in paragraph 3.

22. On or about May 11, 1997, Christopher filed a formal EEO complaint against the Respondent under 29 CFR Part 1614 with H.K. Brown, EEO Director at Respondent and certified . . . that she had not filed a grievance under 5 U.S.C. § 7121(d).

23. [In] 1993 [the Department of Defense] consolidat[ed] Army, Navy, and Air Force civilian personnel regulations, personnel administrative functions and support services originally provided by the various components of the Department of Defense. Specifically, the [action] consolidated the Army, Navy, and Air Force personnel investigative functions in the Civilian Personnel Management Service (CPMS). The component authorized to investigate Equal Employment Opportunity (EEO) complaints is the Office of Complaint Investigations within the CPMS, Department of Defense. In January 1999, OCI . . . established an alternative dispute resolution (ADR) team. The ADR team consists of seven mediators who are located in the five regional offices. The seven mediators conduct OCI mediation conferences for each EEO complaint, when agreed upon by the parties, pending investigation. When the parties and their respective representatives have agreed to have an OCI mediation conference, the matter is assigned to a mediator on the ADR team, who then contacts the parties to schedule the OCI mediation conference. The military activity involved in the scheduled mediation conference provides appropriate facilities and administrative support.

24. [At all times relevant to this decision], the persons listed below occupied the positions opposite their names.

Captain Jon Burgess	Assistant Staff Judge Advocate (JAG Attorney)
Joanne Elrod	Civilian Personnel Officer
Col. Michael Lischak	56 Medical Group Commander
Edna "Faye" Patitucci	Personnel Management Specialist, Department of Defense, OCI, ADR Team, Sacramento, California

25. [At all relevant times], Elrod and Colonel Lischak were supervisors and/or management officials under 5 U.S.C. § 7103(a)(10) and (11) at the Respondent, and Captain Burgess was management's representative.

26. [At all relevant times], Patitucci was not an employee of Respondent Luke Air Force Base or the Department of the Air Force; however, she is employed by the Department of Defense. Respondent's EEO Director, H.K. Brown, requested the services of OCI, and Patitucci was assigned to conduct a mediation conference with Denise Christopher and Luke Air Force Base Management to resolve Christopher's complaint. . . .

27. [At all relevant times, Elrod, Captain Burgess and Colonel Lischak] were acting on behalf of Respondent, and Patitucci was present as an OCI mediator, acting in response to the parties' [request for] mediation of Christopher's EEO complaint.

29. Local 1547 and Respondent are parties to a collective bargaining agreement covering employees in the bargaining unit described in paragraph 3. Article XXVI, Section B, Paragraph f excludes EEO Complaints from the parties' negotiated grievance procedure.

31. On or about November 9, 1999, Respondent, by Burgess and Elrod, held a meeting with Christopher in the Legal Office, Building 1150, at Respondent to discuss Christopher's EEO complaint.

32. Christopher did not designate a representative from Local 1547 at the [November 9] meeting.

33. Neither Elrod nor Burgess ordered Christopher to attend the [November 9] meeting . . . but Christopher attended the meeting in order to
resolve her EEO complaint.

34. Respondent did not notify Local 1547 that the [November 9] meeting . . . involved the EEO complaint of Christopher, a bargaining unit employee, nor did Respondent give Local 1547 the opportunity to attend that meeting.

36. The [November 9] meeting . . . lasted from 30 minutes to one hour.

37. On or about February 9, 2000, Respondent, by Patitucci and Lischak, held a meeting with Christopher in the Equal Employment Opportunity conference room, Building 1150, at Respondent to discuss Christopher's EEO complaint.

38. Prior to the February 9 meeting . . . Patitucci contacted Respondent's EEO Office for logistical support, including a location to mediate Christopher's EEO complaint. Patitucci requested the names and telephone numbers of

officials at Respondent who were required in the coordination of the OCI mediation conference. Upon receipt of the appropriate names and telephone numbers, Patitucci contacted the parties, including Christopher, in order to seek their agreement to voluntarily participate in mediation. Patitucci requested Burgess to provide her with boilerplate language for settlement. Patitucci contacted Christopher to ask if she had a representative, and if so, the name and telephone number. Patitucci prepared and sent out a letter to Christopher concerning the OCI mediation conference and she requested Christopher to provide certain information.

40. Prior to the [February 9] meeting . . . Patitucci learned from Christopher that she had no representative and she wished to participate in the OCI mediation conference.

41. [At the outset of] the February 9 meeting . . . Patitucci advised Lischak and Christopher . . . that she did not have authority to decide how the issues in Christopher's EEO complaint should be

resolved. . . . Patitucci explained to Lischak and

Christopher that their discussions were confidential

. . . .

44. At about 10:30 to 11:00 a.m., during the February 9 meeting . . . Patitucci conducted a "breakout" or caucus session with Lischak

45. When Patitucci resumed her breakout session with Christopher, . . . she informed Christopher that Lischak had agreed to give her back pay and she would receive an upgrade.

47. During her lunch break from the February 9 meeting . . . Christopher sent a draft of the settlement agreement to Attorney Petit [a private attorney whom Christopher had consulted at various times concerning her EEO complaint]. . . . Christopher did not tell Patitucci whether she had a union representative or not.

54. At about 4:00 p.m., Lischak returned to the February 9 meeting . . . and he agreed to pay Christopher back pay and attorney's fees in the amount of \$5,000.60. Lischak then signed the settlement agreement; however, Christopher refused to do so until Attorney Petit had reviewed it. Patitucci informed both Lischak and

Christopher that she was required to show the agreement to Burgess. Burgess' name was on the OCI scheduling letter as a party to the mediation conference.

55. The February 9 meeting . . . lasted from 9:30 a.m. until after 4:00 p.m.

56. The February 9 meeting . . . was held without affording Local 1547 notice and/or the opportunity to be represented.

57. On or about February 10, 2000, Respondent, through Burgess, held a meeting with Christopher in Burgess' office in Building 1150 at the Respondent to discuss Christopher's EEO complaint . . . and to sign the written agreement prepared by Patitucci regarding that complaint.

58. The [February 10] meeting . . . began at about 10:00 a.m.

59. During the [February 10] meeting . . . Burgess and Christopher discussed the OCI mediation conference that occurred on February 9 . . . and the resolution.

60. During the [February 10] meeting . . . Christopher signed the agreement, that was reached in the [February 9] meeting.

62. The [February 10] meeting . . . lasted about 15 minutes.

63. The February 10 meeting . . . was held without affording Local 1547 notice and/or opportunity to be represented.

70. OCI follows the Justice Center of Atlanta's model during the mediation process. Confidentiality is a critical part of that process. . . . The Justice Center of Atlanta's mediation model encourages that only those persons involved in the dispute be present. Persons cannot just sit in on the mediation process.

72. This Stipulation of Facts, including all Exhibits attached hereto, constitutes the entire record in this case and all parties agree that no oral testimony is necessary or desired by the parties. There is no other agreement of any kind which varies, alters, or adds to this Stipulation of Facts. All parties to this Stipulation of Facts agree that no material issue of fact exist and hereby waive the right to present any evidence other than that contained in this Stipulation and its Exhibits. No party, by entering this

Stipulation, waives its right to raise objections on brief to the relevance, materiality or necessity of any stipulated fact.

Discussion and Conclusions

The General Counsel contends that the Respondent violated section 7116(a)(1) and (8) of the Statute by conducting three formal discussions (on November 9, 1999 and February 9 and 10, 2000) with a bargaining unit employee concerning the mediation of a formal EEO complaint without providing the Union with notice and an opportunity to be represented as required by section 7114(a)(2)(A) of the Statute.

The Respondent admits that it held the three meetings without providing the Union with notice and an opportunity to be represented. It denies that it committed an unfair labor practice, however, for the following reasons. First, the Respondent argues that a union's right under the Statute to participate in formal discussions does not apply to EEO proceedings, because they are not "grievances." Second, the Respondent asserts that the meetings in this case were not "formal discussions" within the meaning of the Statute. Finally, the Respondent contends that the presence of a union representative at EEO mediation sessions would conflict with EEOC regulations, the Alternative Dispute Resolution Act (ADR Act), and other statutes concerning confidentiality.

For the most part, the issues and the parties' arguments in this case are identical to those which were raised in two recent cases: *U.S. Department of the Air Force, 436th Airlift Wing, Dover Air Force Base, Dover, Delaware*, 57 FLRA 304 (2001) (*Dover*); and *Luke Air Force Base, Arizona*, 54 FLRA 716 (1998) (*Luke*), *rev'd sub nom. Luke Air Force Base v. FLRA*, 208 F.3d 221 (9th Cir. 1999) (*Table*), *cert. denied*, 121 S.Ct. 60 (2000). The history of those two cases illustrates the opposing views of the Authority and the Ninth Circuit Court of Appeals concerning the applicability of section 7114(a)(2)(A) to meetings related to an employee's EEO complaint. In *Luke*, the Authority held that such EEO meetings were "formal discussion[s] . . . concerning [a] grievance" and that neither EEOC regulations nor other statutes excluded such meetings from the requirements of section 7114(a)(2)(A). The Ninth Circuit, however, reversed the Authority in that case, rejecting the right of a union to be notified and given the opportunity to participate in the mediation of an employee's formal EEO complaint. In *Dover*, the Authority reviewed the rationale of its *Luke* decision, in light of its rejection by the

Circuit Court, and the Authority refused (albeit less than unanimously) to budge. The Authority reiterated its *Luke* holding that a mediation session of an EEO complaint is a "grievance" within the meaning of section 7114(a)(2)(A), even when the collective bargaining agreement expressly excludes EEO complaints from the negotiated grievance procedure; moreover, the union has a right to attend such mediations, even when they are conducted by a "neutral" party such as an OCI mediator, and even when the employee didn't designate the union as his representative. Notwithstanding the Ninth Circuit's decision in *Luke*, the Authority insisted in *Dover* that the presence of a union at such meetings does not conflict with EEOC regulations, the Privacy Act or other expressions of an EEO claimant's right to confidentiality.

In my decision, I am bound to follow applicable rulings of the Authority, even when the Authority has chosen not to accept the reasoning of a Circuit Court. As noted by ALJ Oliver in his decision in *Dover*, 57 FLRA at 316 n.5, the Authority is not bound by the case law of a single circuit. This results in a somewhat anomalous situation in this case, as the parties here are identical to those in the *Luke* case cited above, and my recommended order is similar to the Authority's order in its 1998 *Luke* decision, which the Ninth Circuit refused to enforce in 1999. Nevertheless, I am constrained to follow the principles expressed by the Authority, and for the reasons set forth below, I conclude that the Respondent violated section 7116(a)(1) and (8) of the Statute by failing to provide the Union with notice and an opportunity to be represented at the meetings on November 9, 1999 and February 9 and 10, 2000.

A. Relevant Statutory Provisions

Section 7114(a)(2)(A) of the Statute provides:

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at-

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment[.]

Section 7116(a)(1) and (8) of the Statute provides:

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

* * * *

(8) to otherwise fail or refuse to comply with any provision of this chapter.

B. Section 7114(a)(2)(A) of the Statute Applies in the Context of EEO Statutory Appeals

The Respondent argues that, as a general matter, the statutory right of a union to attend formal meetings does not apply to "proceedings conducted under the auspices of the EEOC regulations[.]" Resp. Brief at 15. Although this argument was accepted by the Ninth Circuit in its decision, as well as by Chairman Cabaniss in her *Dover* dissent (57 FLRA at 312-14), the Authority expressly rejected it in both its *Luke* and *Dover* decisions. See, *Dover*, 57 FLRA at 310; *Luke*, 54 FLRA at 732-33. There are no new facts present in this case that would distinguish it from those two cases. Accordingly, I find that section 7114(a)(2)(A) is applicable to the EEO meetings between the Respondent and Ms. Christopher; next, I will address whether the three meetings here satisfy section 7114(a)(2)(A)'s requirements.

C. The Meetings Satisfy the Elements of Section 7114(a)(2)(A) of the Statute

In order for a union to have the right to representation under section 7114(a)(2)(A), all the elements of that section must exist. There must be: (1) a discussion; (2) which is formal; (3) between one or more representatives of the agency and one or more unit employees or their representatives; (4) concerning any grievance or any personnel policy or practice or other general condition of employment. *Luke*, 54 FLRA at 723, citing *General Services Administration, Region 9 and American Federation of Government Employees, Council 236*, 48 FLRA 1348, 1354 (1994) (*GSA*).

1. The Three Meetings Regarding the EEO Complaint Were Discussions

The Respondent does not dispute that each of the three meetings with the complainant were discussions, and I so find. The Respondent contests all of the remaining elements.

2. **The Three Meetings Were Formal**

In *GSA*, the Authority stated:

In determining whether a discussion is formal within the meaning of section 7114(a)(2)(A), we have advised that the totality of the circumstances presented must be examined, but that a number of factors are relevant: (1) the status of the individual who held the discussions; (2) whether any other management representatives attended; (3) the site of the discussions; (4) how the meetings for the discussions were called; (5) how long the discussions lasted; (6) whether a formal agenda was established for the discussions; and (7) the manner in which the discussions were conducted.

48 FLRA at 1355. These factors are illustrative, and other factors may be identified and applied as appropriate in a particular case. See, *F.E. Warren Air Force Base, Cheyenne, Wyoming*, 52 FLRA 149, 157 (1996). Therefore, in determining formality, the Authority considers the totality of the facts and circumstances. *Id.*

a. November 9, 1999 Meeting

Based on totality of the circumstances, I find that the November 9 meeting to discuss settlement of Ms. Christopher's EEO complaint was formal. In reaching this conclusion, I rely on the following undisputed facts. First, the meeting was held by a management representative (Captain Burgess, JAG attorney for Respondent) and a management official (Ms. Elrod, the base's Civilian Personnel Officer). Second, the meeting was held in the Respondent's Legal Office, outside the complainant's work site. See, *Luke*, 54 FLRA at 726 ("Meetings held outside an employee's immediate work area are associated with formality, while those held in the work area are not."). Third, the meeting was not impromptu but was scheduled in advance. Fourth, the meeting was not brief, lasting from thirty minutes to an hour. Finally, the meeting had a planned agenda -- to discuss Ms. Christopher's EEO complaint.

The Respondent argues that the meeting was not formal because attendance was voluntary. The voluntary nature of the meeting, however, does not undermine its formality. See, *Dover*, 57 FLRA at 307; *Luke*, 54 FLRA at 728.

b. February 9, 2000 Meeting

Based on the totality of the circumstances, I also find that the February 9 meeting to mediate a settlement of Ms. Christopher's EEO complaint was formal. In reaching this conclusion, I rely on the following undisputed facts. First, the meeting was held by a high-level management representative, Colonel Lischak, the Medical Group Commander. Second, the meeting was held in the Respondent's EEO conference room, outside the complainant's work site. Third, the meeting was scheduled in advance. Fourth, the meeting was not brief, lasting, with breaks, from 9:30 a.m. until after 4:00 p.m. Finally, the meeting had a planned agenda -- to discuss and mediate Ms. Christopher's EEO complaint. As explained above, I reject the Respondent's argument that the meeting was not formal because attendance was voluntary.

c. February 10, 2000 Meeting

Based on the totality of the circumstances, I find that the February 10 meeting to discuss Ms. Christopher's EEO complaint and the settlement agreement was formal. In reaching this conclusion, I rely on the following undisputed facts. First, the meeting was held by a management representative (Captain Burgess, the JAG attorney). Second, the meeting took place in the Respondent's Legal Office, outside the complainant's work site. Third, the meeting was scheduled in advance. Fourth, the meeting, although shorter than the other two meetings, was neither casual nor merely a passing conversation, lasting fifteen minutes. See, *Office of Program Operations, Field Operations, Social Security Administration, San Francisco Region*, 15 FLRA 70, 73 (1984) (finding a meeting that only lasted about 15 minutes to be formal). Finally, the meeting had a planned agenda -- to discuss Ms. Christopher's EEO complaint and to sign the settlement agreement. Again, I reject the Respondent's argument that the meeting was not formal because attendance was voluntary. Despite the relative brevity of the meeting, it was a continuation of the February 9 meeting, in that Ms. Christopher had not yet accepted the settlement agreement, and the February 10 meeting was scheduled in the hope of finalizing it. In the totality of the circumstances, it was formal.

3. The Meetings Were Between a Representative of the Agency and a Bargaining Unit Employee

The November 9 meeting was attended by Ms. Christopher (a bargaining unit employee), Captain Burgess (JAG attorney), and Ms. Elrod (Chief Personnel Officer). The Respondent has stipulated that Captain Burgess was management's representative in the EEO case, that Ms. Elrod

was a management official, and that during the meetings they were acting on behalf of the Respondent. Accordingly, I find that the November 9 meeting was between a "representative of the agency" and a unit employee within the meaning of section 7114(a)(2)(A) of the Statute.

The February 9 meeting was attended by Colonel Lischak (Commander), Ms. Patitucci (mediator), and Ms. Christopher. The Respondent acknowledges that Colonel Lischak was a management official, was acting on behalf of the Respondent during the meeting, and had settlement authority. See, *Luke*, 54 FLRA at 730 (the respondent's representative who had settlement authority was found to be a "representative of the agency" within the meaning of section 7114(a)(2)(A)). Thus, I find that the February 9 meeting was also between a "representative of the agency" and a unit employee within the meaning of section 7114(a)(2)(A) of the Statute.

In light of this finding, and as in *Luke* and *Dover*, it is unnecessary to address the Respondent's argument that the mediator, Ms. Patitucci, was not a representative of the agency.

The February 10 meeting was attended by Captain Burgess and Ms. Christopher. Having determined above that Captain Burgess was a "representative of the agency," I find that the February 10 meeting was also between a "representative of the agency" and a unit employee within the meaning of section 7114(a)(2)(A) of the Statute.

4. The Three Meetings to Discuss the EEO Complaint Concerned a Grievance

With regard to the fourth requirement of section 7114(a)(2)(A), the Respondent makes three arguments. First, the Respondent argues that EEO complaints raised under the statutory EEO appeal procedure are not "grievances" under the Statute. Second, the Respondent contends that EEO complaints are not grievances under the Statute where the parties have excluded EEO complaints from the coverage of their negotiated grievance procedure. Third, the Respondent asserts that EEO complaints raised under the statutory EEO appeal procedure do not concern "other general conditions of employment" within the meaning of section 7114(a)(2)(A) of the Statute.

The Respondent's first two contentions were resolved by the Authority in *Luke* and reaffirmed (over the Chairman's dissent) in *Dover*. The Authority held that a formal EEO complaint filed by an employee constituted a "grievance" within the meaning of section 7114(a)(2)(A) and rejected the

assertion that section 7114(a)(2)(A) cannot recognize as a "grievance" any matter that the parties have excluded from their own grievance procedure. See *Dover*, 57 FLRA at 308-10; *Luke*, 54 FLRA at 730-32. In light of this precedent, I find that the three meetings regarding the EEO complaint concerned a "grievance" within the meaning of section 7114(a)(2)(A). In light of my finding that the meetings concerned a "grievance," I need not address the Respondent's argument that the meetings did not concern "other general conditions of employment."

D. The Presence of a Union Representative at a Mediation or Settlement Discussion of an EEO Complaint Would Not Conflict with EEOC Regulations or the Confidentiality Provisions of the ADR Act and Other Statutes

Finally, the Respondent contends that allowing a union representative to attend the mediation or settlement discussion of an EEO complaint would conflict with EEOC regulations and the confidentiality provisions of the ADR Act and other statutes. In making this argument, the Respondent raises certain hypothetical problems that are not at issue in this case. For example, the Respondent argues that in some other ADR session, "there may be a direct conflict" between the interests of the union representative and those of the employee complainant. Resp. Brief at 23. No facts illustrating such a direct conflict have been elicited in this case.

The Authority has previously rejected similar arguments regarding a conflict. *Dover*, 57 FLRA at 310; *Luke*, 54 FLRA at 732-33. First, the Authority has held that the presence of a union representative at a mediation session of an EEO complaint would not conflict with EEO regulations or the ADR Act. Second, the Authority has refused to address hypothetical problems such as those raised by the Respondent here that might arise in another ADR session involving EEO complaints. *Dover*, 57 FLRA at 310.

In light of these findings, I conclude that by holding formal discussions with a bargaining unit employee without affording the Union notice and an opportunity to be represented, as required by section 7114(a)(2)(A), the Respondent violated section 7116(a)(1) and (8) of the Statute, as alleged.

Based on the above findings and conclusions, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the Department of the Air Force, Luke Air Force Base, Arizona, shall:

1. Cease and desist from:

(a) Failing or refusing to provide the American Federation of Government Employees, Local 1547, AFL-CIO, 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 negotiations pertaining to formal EEO complaints.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining unit 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 1547, AFL-CIO, 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 its Luke Air Force Base facilities, where bargaining unit employees represented by the American Federation of Government Employees, Local 1547, AFL-CIO, are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, Luke Air Force Base, 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 section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Denver Regional Office, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, October 23, 2001.

RICHARD A. PEARSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of the Air Force, Luke Air Force Base, Arizona, 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 or refuse to provide the employees' exclusive representative, the American Federation of Government Employees, Local 1547, AFL-CIO (the Union), 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 negotiations pertaining to 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 Union with advanced notice and the 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 any of its provisions, they may communicate directly with the Regional Director, Denver Regional Office, Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 100, Denver, CO 80204 and whose telephone number is: (303)844-5224.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. DE-CA-00309, were sent to the following parties:

CERTIFIED MAIL:

CERTIFIED NUMBERS:

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CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: OCTOBER 23, 2001

WASHINGTON, DC