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

U.S. DEPARTMENT OF ENERGY ROCKY FLATS FIELD OFFICE GOLDEN, COLORADO Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1103 Charging Party	Case No. DE-CA-90894

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 **JULY 2, 2001**, and addressed to:

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

ELI NASH

Chief Administrative Law Judge

Dated: May 31, 2001
Washington, DC

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

MEMORANDUM DATE: May 31, 2001

TO: The Federal Labor Relations Authority

FROM: ELI NASH
CHIEF ADMINISTRATIVE LAW JUDGE

SUBJECT: U.S. DEPARTMENT OF ENERGY
ROCKY FLATS FIELD OFFICE
GOLDEN, COLORADO

Respondent

and Case No. DE-CA-90894

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1103

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.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ

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WASHINGTON, D.C.

U.S. DEPARTMENT OF ENERGY ROCKY FLATS FIELD OFFICE GOLDEN, COLORADO Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1103 Charging Party	Case No. DE-CA-90894

James D. Long, Esquire
For the Respondent

Bruce E. Conant, Esquire
For the General Counsel of the FLRA

Before: ELI NASH
Chief Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint in this case 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 bargaining unit employees concerning the settlement of a formal EEO complaint filed by a bargaining unit employee without providing the Charging Party (the Union) with notice and an opportunity to be represented as required under section 7114(a)(2)(A) of the Statute. Respondent's amended answer denies any violation of the Statute.

For the reasons explained below, I conclude that the Respondent violated the Statute as alleged in the complaint.

A hearing was held in Denver, Colorado. The parties were represented and afforded a full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs.1 The Respondent and the General Counsel filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

A. Background

Respondent, Rocky Flats Field Office, is an activity within the U.S. Department of Energy. In 1997, the Charging Party, American Federation of Government Employees, Local 1103, obtained exclusive recognition for a bargaining unit consisting of professional and non-professional employees stationed at Rocky Flats Field Office. At the times relevant to the complaint in this case, Marcy Nicks served as President of the Charging Party and Larry Helmerick, who is a public affairs specialist at Rocky Flats Field Office, served as Vice President.

1/ The General Counsel filed a motion to strike footnote 11 and appendices 3 and 4 to the Respondent's post-hearing brief. The Respondent opposes the motion to strike. I grant General Counsel's motion to strike. In footnote 11, Respondent raises issues regarding the credibility of one of the General Counsel's witnesses and the General Counsel's actions in objecting during the hearing to a question regarding statements that the witness allegedly made during a settlement conference conducted pursuant to section 2423.25(d) of the Federal Labor Relations Authority's (the Authority) regulations, 5 C.F.R. § 2423.25(d). Appendices 3 and 4 are documents that Respondent asserts support its position with respect to those issues. Section 2423.25(d)(4) provides that no evidence regarding, among other things, statements made and conduct during such settlement conferences shall be admissible in any proceeding before the Administrative Law Judge or the Authority, except by stipulation of the parties. Additionally, appendix 4, which Respondent asserts supports its contention that the witness is not credible, was never properly submitted for evidence during the course of the hearing.

The Respondent requests permission to reply to the General Counsel's post-hearing brief. The Respondent's request is denied.

The parties signed a collective bargaining agreement on December 2, 1998. Article 2, section 2, of that agreement provides that advance notice of formal discussions will be given to the Union President in writing or through the Respondent's electronic mail system as soon as possible but not less than 24 hours in advance of the formal discussion. Article 25, section 6 (B), of the collective bargaining agreement provides that the filing of a formal Equal Employment Opportunity (EEO) complaint by a unit employee constitutes an election to use the statutory appeals (EEOC) procedure concerning a complaint of employment discrimination and precludes the use of the negotiated grievance procedure.

On or about December 18, 1996, Mr. Helmerick filed an EEO complaint and on or about June 30, 1997, submitted a request for a hearing regarding his complaint. Mr. Helmerick requested Michael F. Hurley, an American Federation of Government Employee national representative, to act as his representative in his EEO case.[2]

Mr. Michael McCann is an attorney advisor at Rocky Flats Field Office whose work assignments involve, among other things, settlements of EEO complaints. On or about June 3, 1999, at an arbitration regarding another matter, Mr. McCann and Mr. Hurley discussed the possibility of using alternative dispute resolution (ADR) to address Mr. Helmerick's EEO complaint. With Mr. Hurley's approval, Mr. McCann approached Mr. Helmerick and proposed that he consider using ADR to resolve his pending EEO complaint. Mr. McCann referred Mr. Helmerick to Mr. Jon Dreger as the point of contact for ADR processes at Rocky Flats Field Office. Mr. McCann sent Mr. Helmerick a letter dated June 8, 1999, confirming this conversation and requesting that he contact Mr. McCann as soon as possible if he was agreeable to using ADR.

B. **The Meetings between Mr. Helmerick and Mr. McCann**

Based on the testimony of Mr. Helmerick and Mr. McCann, I find that at unidentified times during the period between June 8 and August 3, 1999, there were two meetings between them at which settlement of Mr. Helmerick's EEO complaint was discussed. Mr. McCann and Mr. Helmerick agreed that the two meetings occurred in Mr. McCann's office and only the two of them were present. Mr. Helmerick and Mr. McCann, however, offered conflicting testimony as to who initiated the two meetings. According to Mr. McCann's account, which

[2] Mr. Helmerick did not, however, recall executing a form designating Mr. Hurley as such.

I credit on this point, both meetings resulted when Mr. Helmerick came to Mr. McCann's office voluntarily.[3]

According to Mr. McCann's description of the two meetings, the first lasted less than a minute and consisted of Mr. Helmerick standing in the door and advising Mr. McCann that he did not want to pursue ADR and suggesting that Mr. McCann make him a settlement offer. According to Mr. Helmerick's description, however, the first meeting lasted between 30 minutes and 1 hour and was conducted with the door to Mr. McCann's office closed. Mr. Helmerick described the meeting as including a discussion of why Mr. Helmerick did not want to go through mediation and the remedy that Mr. Helmerick requested in his EEO complaint.[4] Mr. Helmerick stated that Mr. McCann questioned the reasonableness of his requested remedy and he responded that he wanted at least a promotion to GS-14. According to Mr. Helmerick, as the discussion continued, he advised Mr. McCann that his bottom line was a three-step salary increase. It was Mr. Helmerick's understanding from this meeting that Mr. McCann was going to discuss his proposal

[3] Although Mr. Helmerick asserted that Mr. McCann initiated both meetings, he could not remember any details of how or when Mr. McCann had scheduled the meetings. Mr. Helmerick could not produce anything that showed that he had written down an appointment with Mr. McCann. Mr. Helmerick testified that he interacts "a lot" on a professional basis with the attorneys at Rocky Flats Field Office and "just see [s]" Mr. McCann. Tr. 47. Moreover, in testifying with respect to a subsequent incident in which he notified Mr. McCann of his decision to accept a settlement offer, Mr. Helmerick stated that he couldn't recall whether he telephoned Mr. McCann or "just stopped by his office." Tr. 52. Thus, the record as a whole indicates that just stopping by Mr. McCann's office is consistent with Mr. Helmerick's relationship with Mr. McCann. Based on the record as a whole, I find Mr. McCann's description of the two meetings having occurred when Mr. Helmerick voluntarily came to his office more credible than Mr. Helmerick's account.

[4] In his EEO complaint, Mr. Helmerick requested as remedy: a GS-14 position with CED (apparently Communications and Economic Development) or another GS-14 position accompanied by a training period to allow for familiarization with the position; back pay retroactive to October 27, 1996; reimbursement of legal fees and costs; and assurance that no detail or assignment to a position outside of Rocky Flats Field Office for an extended period of time would occur without mutual agreement.

with Jessie Roberson, Manager of the Rocky Flats Field Office. I credit Mr. Helmerick's version of these events.[5]

Mr. Helmerick conceded that Mr. McCann did not tell him that his attendance at the meeting was mandatory but asserted that he believed that if he didn't meet with Mr. McCann, he could not settle his EEO complaint. No evidence was submitted to show that anything along the line of minutes or notes of the meeting was kept.

After the first meeting, Mr. McCann discussed settlement of Mr. Helmerick's EEO complaint with Ms. Roberson.

The second meeting occurred subsequent to Mr. McCann's discussion with Ms. Roberson. Again, only Mr. McCann and Mr. Helmerick were present. According to Mr. McCann's account, which, as stated above, I credit to the extent that it concerned how the meeting was initiated, Mr. Helmerick voluntarily came to his office and inquired whether Mr. McCann had heard from Ms. Roberson. According to Mr. McCann, this meeting like the first was of exceedingly limited duration and Mr. Helmerick stood in the doorway throughout the exchange. Mr. McCann described the meeting as consisting of the following: Mr. McCann informed Mr. Helmerick that Ms. Roberson was prepared to offer him a one-step salary increase as a settlement of his EEO complaint; Mr. Helmerick expressed disappointment at the low offer; Mr. McCann suggested that Mr. Helmerick discuss the matter with Mr. Hurley; Mr. Helmerick responded that instead he would talk it over with his wife; and Mr. McCann offered to go back to Ms. Roberson and see if she would make a better offer.

Mr. Helmerick described the second meeting as lasting less than thirty minutes and occurring with the door closed.

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[5] I find Mr. Helmerick's description of the two meetings and their duration more credible than Mr. McCann's. I do not question that the testimony of both men reflected their memory of events, and attribute the differences in their accounts to imperfect recollections. I find, however, that Mr. Helmerick's account was more consistent with behavior one would normally expect from a person who had been pursuing an EEO complaint for a period of over 2 years rather than that portrayed by Mr. McCann's account. Additionally, I find that although Mr. Helmerick's recollections were flawed insofar as how the meetings were initiated, he generally was forthright in his testimony and in acknowledging that he was uncertain or did not recall certain details.

Mr. Helmerick described the meeting as proceeding as follows: Mr. McCann informed him that Ms. Roberson was offering a one-step increase; Mr. Helmerick attempted to ascertain whether there were other things he could counter propose; Mr. McCann responded that a one-step increase was all Ms. Roberson was willing to offer; Mr. Helmerick told Mr. McCann that he wanted to talk the matter over with his wife and he and Mr. McCann discussed how long he had to make a decision.

With respect to the duration of the second meeting and question of whether the door remained open or was closed, I find Mr. Helmerick's account more credible than that of Mr. McCann for the reason that I stated above. I also find Mr. Helmerick's account more credible insofar as he asserts that the meeting included efforts on his part to explore the possibility of making a counterproposal to Ms. Roberson's offered settlement.

As with the first meeting, no evidence was offered that Mr. McCann told Mr. Helmerick that the second meeting was mandatory or that any minutes or notes regarding the meeting were made. Mr. Helmerick stated that he felt that he had to meet with Mr. McCann if he wanted to find out what the settlement offer was.

After the second meeting, Mr. Helmerick discussed the matter with his wife and decided to accept the offer of a one-step increase. Mr. Helmerick informed Mr. McCann of his decision but could not recall whether he did so by calling Mr. McCann or stopping by Mr. McCann's office.

Mr. Helmerick signed the settlement agreement on August 5, 1999. Mr. Helmerick acknowledged that Mr. Hurley encouraged him to go see what Mr. McCann had to say about settlement and that he did not discuss the meetings with Ms. Nicks or anyone else in the Union. Mr. McCann did not notify Ms. Nicks of his meetings with Mr. Helmerick.

Discussion and Conclusions

For the following reasons, and based on the Authority's decision in *Luke Air Force Base, Arizona*, 54 FLRA 716 (1998) (*Luke AFB*), *rev'd sub nom. Luke Air Force Base v. FLRA*, 208 F.3d 221 (9th Cir. 1999) (*Luke AFB v. FLRA*), *cert.*

denied 121 S.Ct. 60 (2000),[6] I conclude that the two meetings described above constituted "formal discussions" concerning "grievances" within the meaning of section 7114 (a)(2)(A) of the Statute, and therefore 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 those meetings.

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[6] In *Luke AFB*, the Authority, applying the same decisional analysis that it uses for all alleged "formal discussion" violations, held that a mediation/investigation session to resolve a formal EEO complaint constituted a formal discussion under the Statute at which an exclusive bargaining representative had the right to be represented in order to safeguard its interests and the interests of employees in the bargaining unit. The Authority also reaffirmed its position that a grievance within the meaning of section 7114(a)(2)(A)--as defined in section 7103(a)(9)--can encompass a formal EEO complaint filed under the EEOC's applicable statutory appeal procedure. The Authority's decision in *Luke AFB* was reversed by the Ninth Circuit in an unpublished opinion which was not remanded to the Authority for further action, and, therefore, the Authority had no opportunity to signal whether it intended to acquiesce in that court's interpretation and application of the law. The Authority is not obliged to, and does not always, adopt the reasoning of a single circuit. *See, e.g., Headquarters, National Aeronautics and Space Administration, Washington, D.C. and National Aeronautics and Space Administration, Office of the Inspector General, Washington, D.C.*, 50 FLRA 601, 612-14 (1995)(*NASA*), *enforced* 120 F.3d 1208 (11th Cir. 1997), *aff'd* 527 U.S. 229 (1999)(Authority declined to follow the D.C. Circuit's interpretation of section 7114(a)(2)(B) of the Statute as it pertained to representatives of an agency). In this instance, I conclude that the Authority has clearly signaled its intention to continue applying its *Luke AFB* view in this and future cases. Thus, in both its petition for rehearing and petition for rehearing *en banc* before the Ninth Circuit and its subsequent petition for *certiorari* to the United States Supreme Court, the Authority emphasized that the court's opinion in *Luke AFB* was not only inconsistent with other Ninth Circuit precedent, but also with the better result reached by the D.C. Circuit in *National Treasury Employees Union v. FLRA*, 774 F.2d 1181 (D.C. Cir. 1985) and the Tenth Circuit in its decision in *Department of Veterans Affairs v. FLRA*, 3 F.3d 1386 (10th Cir. 1993). Under these circumstances, I shall continue to apply the Authority's rationale and rulings in the *Luke AFB* decision until either the Authority or the Supreme Court reverses them.

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--
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> (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. Elements of Section 7114(a)(2)(A) of the Statute

In order for a union as the exclusive representative to have the right to representation under section 7114(a)(2)(A), all 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; and (4) concerning any grievance or any personnel policy or practice or other general condition of employment. *Luke AFB*, 54 FLRA at 723 (citing *General Services Administration, Region 9 and American Federation of Government Employees, Council 236*, 48 FLRA 1348, 1354 (1994)(*GSA I*)).

B.A The two meetings between Mr. Helmerick and Mr. McCann concerning his EEO complaint were discussions

As the Authority held in *Veterans Administration, Washington, D.C. and VA Medical Center, Brockton Division, Brockton, Massachusetts*, 37 FLRA 747, 754 (1990), the term

"discussion" is synonymous with "meeting." There can be no doubt that the two meetings at issue in this case were meetings as commonly understood.

B.B The discussions between Mr. McCann and Mr. Helmerick were formal

In *F.E. Warren Air Force Base, Cheyenne, Wyoming*, 52 FLRA 149, 155-57 (1996) *(F.E. Warren)*, the Authority, in discussing the element of formality in section 7114(a)(2)(A), noted that in some cases, formality is established based on the purpose of a discussion. In other cases, formality is assessed through an examination of several factors set forth in Authority precedent. *See F.E. Warren*, 52 FLRA at 155-57. Whichever approach is used, the Authority reaffirmed that the totality of the facts and circumstances presented in each case must be considered in determining formality. *See id.*

The factors that the Authority has identified as relevant to determining formality include: (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. *See, e.g., Luke AFB,* 54 FLRA at 724. These factors are illustrative, and other factors may be identified and applied as appropriate in a particular case. *See F.E. Warren*, 52 FLRA at 157.

The two meetings were held in the office of Mr. McCann who was the attorney advisor assigned to represent the Respondent in Mr. Helmerick's EEO complaint. The meetings were held away from Mr. Helmerick's immediate work area. Although the meetings were directly initiated by Mr. Helmerick, his action in coming to Mr. McCann's office was in response to overtures by Mr. McCann proposing a settlement attempt with respect to the latter's EEO complaint. The first meeting lasted approximately 30 minutes to one hour and the second lasted under 30 minutes. Although they had no formal agenda, it was evident that the purpose, or agenda, of the discussions that developed was settlement of Mr. Helmerick's EEO complaint. The two meetings consisted of a dialogue between Mr. Helmerick and Mr. McCann regarding settlement of Mr. Helmerick's EEO complaint. Although Mr. McCann did not advise Mr. Helmerick that it was mandatory that they meet, Mr. Helmerick reasonably believed that he needed to discuss settlement of his EEO complaint with Mr. McCann if that was going to be accomplished.

The meetings between Mr. McCann and Mr. Helmerick bear some but not all of the characteristics that normally establish that a meeting is formal. I find, however, that the predominant characteristics of the two discussions were that they were between an employee who was pursuing an EEO complaint against the Respondent and the attorney advisor who was assigned to represent the Respondent in the case and had the purpose of developing settlement terms for the employee's complaint. Based on these predominant characteristics, I find that in the totality of the circumstances, the discussions were formal. *Cf. GSA I*, 48 FLRA at 1355-56 (by their very nature, negotiations and discussions of the terms of an agreement that would settle an employee's appeal to the Merit Systems Protection Board (MSPB) did not have the predominant aspects of informality that characterize discussions that the Authority has found to be informal).

I find that the fact that Mr. McCann did not call the two meetings or schedule them in advance does not mean the discussions were necessarily informal. The Authority has found that even if a meeting does not begin as a formal discussion, it may nonetheless develop into or become a formal discussion. *See U.S. Department of the Army, New Cumberland Army Depot, New Cumberland, Pennsylvania*, 38 FLRA 671, 677 (1990). In this case, I find that even if the meetings did not originate as formal discussions, they became such when they evolved into settlement discussions between Mr. Helmerick and Mr. McCann.

3. The two discussions involved "one or more employees in the unit" and "one or more representatives of the agency"

There is no dispute, and I find, that the two discussions constituting formal discussions involved bargaining unit employee Larry Helmerick. There is also no dispute, and I find, that in the context of the two discussions, Mr. McCann was a "representative of the agency" within the meaning of section 7114(a)(2)(A) of the Statute.

4. The two discussions between Mr. McCann and Mr. Helmerick concerned a grievance

The Respondent contends that EEO complaints are not grievances under the Statute for the reasons stated by the Ninth Circuit in *Luke AFB v. FLRA*, citing its earlier decision in *Internal Revenue Service, Fresno Service Center, Fresno, California v. FLRA*, 706 F.2d 1019 (9th Cir. 1983),

and because of the confidentiality requirements in the EEOC's statutory appeals process and other laws including the Alternative Dispute Resolution (ADR) Act. As previously indicated, however, the Authority has not adopted the Ninth Circuit's narrow interpretation of the term "grievance," but instead has applied the broad definition of grievance found in section 7103(a)(9) of the Statute which both the D.C. and Tenth Circuits have endorsed.7 Based on the Authority's decision in *Luke AFB*, I find that the two meetings between Mr. McCann and Mr. Helmerick concerned a grievance within the meaning of section 7103(a)(9) and, by extension, section 7114(a)(2)(A). 54 FLRA at 730-31. The Authority also has held that a union's presence at formal discussions during the EEO process would not conflict with EEO regulations or the ADR Act. *See id.* at 730-33. *See also NASA*, 527 U.S. at 243-44, where the Supreme Court recognized that the need for confidentiality even in the context of an Inspector General's investigations was insufficiently substantial to justify a nontextual construction of section 7114(a)(2)(B) of the Statute rejected by the Authority. While this case involves section 7114(a)(2)(A) of the Statute, the same reasoning should apply.

In this case, the Respondent also argues that the Privacy Act, "by EEOC decision," protects a complainant's confidentiality throughout the EEO process. In *General Services Administration and American Federation of Government Employees, Council 236*, 53 FLRA 925 (1997) (*GSA II*), the Authority rejected an analogous claim in which an agency asserted that an arbitrator's remedy affording a union representation at settlement negotiations of an MSPB appeal was inconsistent with the Privacy Act. In *GSA II*, the agency argued that the union's presence at such meetings would necessarily result in disclosure of information in documents protected by the Privacy Act. In addressing that argument, the Authority stated that the Privacy Act restricts "disclosure," and redisclosure, of personally identifiable records and noted that courts hold that

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7/ The Court in *Luke AFB,* in finding that the EEO complaints were not "grievances," appears to rely in part on "[t]he fact that the collective bargaining agreement explicitly excludes discrimination claims from the grievance procedure . . . ." While I do not think that the foregoing is a factor to be considered, it should be noted that the parties in this case included EEO complaints within the scope of their negotiated grievance and arbitration procedure, at the option of the employee in lieu of the EEO statutory appeal procedure. I also note that the collective bargaining agreement was not in effect at the time that Mr. Helmerick filed his EEO complaint.

"disclosure" is the actual retrieval of any information from a "record" within the meaning of that Act.[8] 53 FLRA at 933-34. In finding that the arbitrator's remedy was not inconsistent with the Privacy Act, the Authority stated that speculation that such disclosures might occur did not provide a sufficient basis to nullify a union's rights under section 7114(a)(2)(A). *Id.* at 934-36. The Authority noted, however, that to the extent that records within the meaning of the Privacy Act might be disclosed at settlement negotiations, the agency would be a full participant in the negotiations and in charge of the records within its control and, thus, would be in a position to avoid prohibited disclosures. *Id.* at 936. In the event that actual problems with respect to disclosures arose during settlement negotiations, they could be dealt with at the time when disclosure issues were no longer speculative and could be evaluated under Privacy Act precedent. *Id.*

The Authority's rationale in *GSA II* is applicable to the Respondent's suggestion in this case that permitting a union to be present in settlement discussions relating to EEO cases will compromise employee rights under the Privacy Act. I find that the Respondent's speculation in this case that the Union's presence at formal discussions regarding settlement of EEO complaints would compromise employee rights that are protected by the Privacy Act does not provide a basis for limiting the Union's rights under section 7114(a)(2)(A).

C. The Union's Rights Under Section 7114(a)(2)(A)

The Respondent asserts that even assuming that the meetings between Mr. McCann and Mr. Helmerick constituted formal discussions, the Union was on notice of the meeting and represented by Mr. Helmerick. The Respondent also argues that the Union cannot now object to the meetings between Mr. McCann and Mr. Helmerick because it did not do so when EEO settlement conferences were conducted without Union representation in the past.

Under section 7114(a)(2)(A), the Union has the right to notice of a formal discussion as well as the right to designate a representative of its own choosing to attend the discussion. *See, e.g., Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base,*

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[8] The Authority recognized that the "actual retrieval" standard is inapplicable where a disclosure is made by agency personnel who had a role in creating the record that contains the information and that "independent knowledge" gained by the creation of records, cannot be used to sidestep the Privacy Act. *Id.* at 934.

California, 29 FLRA 594, 604-06 (1987). The fact that a union may have "actual representation" at a formal discussion does not satisfy its rights under section 7114(a)(2)(A). *See id.* at 605-06. Although formal notice of the meeting is not required to satisfy the Union's right to notice, the Authority has stated that it will determine whether actual notice was sufficient to provide the Union an opportunity to be represented and designate a representative of its own choosing. *See, e.g., id.* at 606.

It does not follow from the fact that Mr. Helmerick, who was Vice President of the Union, attended the two meetings with Mr. McCann that the Union was afforded its right under section 7114(a)(2)(A) to be represented by a representative of its own choosing at the meetings. Article 2, section 2, of the parties' collective bargaining agreement identifies the Union President as the Union representative to whom notice of formal discussions is to be provided. It is clear that even though the meetings evolved into formal discussions no notice was given to Ms. Nicks, the Union President, or that she had an opportunity to determine whether the Union would attend the meetings and choose who would serve as the Union's representative at the meetings. Particularly in view of the specific provision that notice of formal discussions is to be given to the Union President, I find that the fact that Mr. Helmerick, the Vice President, knew of the meetings did not constitute notice to the Union that was sufficient to afford it the opportunity to designate a representative of its own choosing to attend the two meetings.

In support of its assertion that the Union has acquiesced in a past practice of permitting EEO settlement negotiation meetings to occur without Union representation, the Respondent cites testimony by Ms. Nicks in which she stated that the Union had never been notified of any EEO settlement meetings and no Union representative had ever attended any EEO settlement meetings in that capacity. Ms. Nicks also testified that she had participated in a settlement meeting with respect to an EEO complaint that she had filed where no Union representative was in attendance. Ms. Nicks testified that prior to attending that particular settlement meeting, she consulted with Mr. Hurley who advised her to go on her own as the remedy she was seeking would not affect other bargaining unit employees. The Respondent also relies on testimony by Mr. McCann that in the few years preceding the hearing in this case, he knew of three EEO complaints, all of which involved Union officials, in which settlement discussions had been conducted. Mr. McCann testified that the Respondent had never notified the

Union of the meetings in which the settlement negotiations were conducted.

A union may waive its statutory rights. *See, e.g., National Labor Relations Board*, 46 FLRA 107, 111-12 (1992). Such waivers must be clear and unmistakable.[9] *See, e.g., U.S. Department of the Navy, Naval Surface Warfare Center, Indian Head Division, Indian Head, Maryland and American Federation of Government Employees, Local 1923*, 56 FLRA 848, 850 (2000). The Authority has stated that waivers of statutory rights may be established by past practice. *See U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire,* 44 FLRA 205, 207 (1992). The record as a whole does not support a finding that the Union waived its statutory right to an opportunity to be represented at formal discussions. As noted earlier, the parties' collective bargaining agreement specifically provides that notice of formal discussions will be given the Union President. The limited number of instances in which Respondent claims that its failure to involve the Union in EEO settlement meetings went unchallenged does not, in my view, establish that the Union clearly and unmistakably waived its rights under section 7114(a)(2)(A) of the Statute.

It is concluded that by holding formal discussions with a bargaining unit employee without providing the Union notice and an opportunity to be represented at the discussions 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, and applicable Authority precedent to date, it is recommended that the Authority issue the following Order:

ORDER

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9 In circumstances, however, where a respondent claims as a defense to an unfair labor practice charge that a specific provision of a collective bargaining agreement allowed the action alleged to constitute the unfair labor practice, the Authority no longer applies the clear and unmistakable waiver analysis. *See Internal Revenue Service, Washington, D.C.*, 47 FLRA 1091 (1993) (*IRS*). In this case, the Respondent does not assert as a defense that the parties' collective bargaining agreement allowed it to conduct formal discussions without affording the Union an opportunity to be represented, and, consequently, the analytical framework articulated in *IRS* does not apply.

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 U.S. Department of Energy, Rocky Flats Field Office, Golden, Colorado, shall:

4.1 Cease and desist from:

(a) Failing or refusing to provide the American Federation of Government Employees, Local 1103, the employees' exclusive bargaining representative, with 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 involving settlement negotiations pertaining to formal EEO complaints.

(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.

4.2 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 1103, the employees' exclusive bargaining representative, with advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning the settlement of formal EEO complaints.

(b) Post at its facilities at Rocky Flats Field Office, Golden, Colorado, where bargaining unit employees 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 Manager, Rocky Flats Field Office, 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, Federal Labor Relations Authority, in writing, within 30 days of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, May 31, 2001.

_____
ELI NASH
Chief 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 Energy, Rocky Flats Field Office, Golden, Colorado, 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 American Federation of Government Employees, Local 1103, the employees' exclusive bargaining representative, with 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 involving settlement negotiations pertaining to formal EEO complaints.

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 1103, with advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning the settlement 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, Denver, CO 80204-3581, and whose telephone number is: (303)844-5224.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by ELI NASH, Chief Administrative Law Judge, in Case No. DE-CA-90894, were sent to the following parties:

_____

CERTIFIED MAIL AND RETURN RECEIPT — **CERTIFIED NOS:**

Bruce E. Conant, Esq. — **P 855 724 108**
Counsel for the General Counsel
Federal Labor Relations Authority
1244 Speer Boulevard, Suite 100
Denver, CO 80204

James D. Long, Esq. — **P 855 724 109**
U.S. Department of Energy
Rocky Flats Field Office
P.O. Box 928
Golden, CO 80402-0928

Marcy Nicks, President — **P 855 724 110**
AFGE, Local 1103
10808 Highway 93, Unit A
Golden, CO 80403-8200

REGULAR MAIL:

President
AFGE, AFL-CIO
80 F Street, NW.
Washington, DC 20001

Dated: May 31, 2001
Washington, DC