

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

MEMORANDUM

DATE: November 18, 2004

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: DEFENSE FINANCE AND ACCOUNTING SERVICE
HEADQUARTERS
ARLINGTON, VIRGINIA

and

DEFENSE FINANCE AND ACCOUNTING SERVICE
SEASIDE, CALIFORNIA

Respondents

and

Case No. SF-CA-04-0170

BOHDAN CISYK, AN INDIVIDUAL

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, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
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WASHINGTON, D.C. 20424-0001

DEFENSE FINANCE AND ACCOUNTING SERVICE HEADQUARTERS ARLINGTON, VIRGINIA and DEFENSE FINANCE AND ACCOUNTING SERVICE, SEASIDE, CALIFORNIA Respondents	
AND BOHDAN CISYK, AN INDIVIDUAL Charging Party	Case No. SF-CA-04-0170

NOTICE OF TRANSMITTAL OF DECISION

Pursuant to §2423.26 of the Authority's Rules and Regulations, the above-entitled case was stipulated to the undersigned Administrative Law Judge. 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. §§2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **DECEMBER 20, 2004**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

—
PAUL B. LANG
Administrative Law Judge

Dated: November 18, 2004
Washington, DC

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

DEFENSE FINANCE AND ACCOUNTING SERVICE, HEADQUARTERS ARLINGTON, VIRGINIA and DEFENSE FINANCE AND ACCOUNTING SERVICE, SEASIDE, CALIFORNIA <p style="text-align: center;">Respondents</p>	
<p style="text-align: center;">AND</p> BOHDAN CISYK, AN INDIVIDUAL <p style="text-align: center;">Charging Party</p>	<p style="text-align: right;">Case No. SF-CA-04-0170</p>

Amita Baman Tracy
 For the General Counsel

Mark Collins
 For the Respondent

Bohdan Cisyk
 For the Charging Party

Before: PAUL B. LANG
 Administrative Law Judge

DECISION

Statement of the Case

On December 8, 2003, Bohdan Cisyk (also known as Bo Cisyk), an individual, filed an unfair labor practice charge against the Defense Finance and Accounting Service, Seaside, California (DFAS Seaside). On March 23, 2004, Cisyk filed an amended unfair labor practice charge against the Defense Finance and Accounting Service Headquarters, Arlington, Virginia (DFAS HQ) and DFAS Seaside (collectively, the Respondents or DFAS). On April 15, 2004, the Regional Director of the San Francisco Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing in which it was alleged that the

Respondents committed an unfair labor practice in violation of §7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (Statute) by failing to provide the American Federation of Government Employees, Local 1222, AFL-CIO (Union) an opportunity to be represented at a formal discussion which was held on December 10, 2003, to investigate a charge of employment discrimination (EEO complaint) which had been filed by Cisyk.

On July 28, 2004, the parties filed a Joint Motion Transferring Case to the Chief Administrative Law Judge in which they requested that, pursuant to §2423.26 of the Rules and Regulations of the Authority, a Decision be issued without a hearing and on the basis of the stipulations of fact and exhibits included with the joint motion. The Chief Administrative Law Judge has assigned this case to me for disposition.

Upon consideration of the stipulations of fact and exhibits I have concluded that the motion should be, and hereby is, granted. Accordingly, I will proceed to decide the case on its merits. This Decision is based upon consideration of the stipulations of fact and attached exhibits and of the briefs submitted by the parties.¹

Positions of the Parties

The General Counsel maintains that, on December 10, 2003, an independent investigator from the Department of Defense, Civilian Personnel Management Service, Office of Complaint Investigations (OCI) conducted a formal fact-finding conference (FFC) concerning Cisyk's discrimination charge. The General Counsel further maintains that the FFC was a formal discussion within the meaning of §7114(a)(2)(A) of the Statute and that the Union, as the exclusive representative of the collective bargaining unit of which Cisyk was a member, had a right to be represented at the FFC. Contrary to the requirements of the Statute, the Respondents refused to allow a Union representative to attend the FFC on the grounds that it was an investigation rather than a discussion and that Cisyk had not designated the Union as his representative at the FFC.

The Respondents maintain that the FFC was not a formal discussion within the meaning of §7114(a)(2)(A) of the Statute but was instead an investigation as contemplated in §7114(a)(2)(B). The Union had no right to be represented at the investigation because it had no legitimate representa-

1

The Respondents have submitted a single brief and have raised no defenses which are unique to either of them.

tional interest in its outcome and because Cisyk had not designated the Union as his representative.

Findings of Fact

The stipulations of fact submitted with the joint motion are attached hereto as Attachment A and are incorporated as findings of fact.

Discussion and Analysis

The Controlling Law

The parties are in agreement as to the controlling law, but disagree as to its application to the facts in this case. §7114(a) of the Statute provides, in pertinent part, that:

(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; or

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if -

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation.

In *United States Department of the Air Force, Luke Air Force Base, Arizona*, 58 FLRA 528, 531 (2003) (*Luke II*) the Authority confirmed that the independent right of a union to be present at a meeting, regardless of whether an affected employee requests union representation, is dependent upon whether (a) the meeting is a discussion, (b) the discussion is formal, (c) the discussion is between representatives of an agency and either a bargaining unit employee or the

representative of that employee, and (d) whether the discussion concerns a grievance or any personnel policy or practice or other general condition of employment.²

The FFC Was a Discussion

The Authority has held that the term "discussion" is to be interpreted broadly so as to apply to meetings at which no actual discussion or dialogue occurs, *U.S. Department of the Army, New Cumberland Army Depot, New Cumberland, Pennsylvania*, 38 FLRA 671, 677 (1990). In *United States Immigration and Naturalization Service, United States Border Patrol, El Paso, Texas*, 47 FLRA 170, 183 (1993), the Authority held that interviews of bargaining unit members by agency representatives in preparation for third party proceedings were formal discussions. The obvious purpose of the FFC was to interview witnesses, including bargaining unit employees, in preparation for the disposition of Cisyk's complaint by the Equal Employment Opportunity Commission which is a third party.

The Respondents' argument that the FFC was an investigation rather than a discussion is unpersuasive. The most obvious flaw in that argument is that there is no evidence that Cisyk believed that the examination of witnesses by the OCI investigator might have resulted in disciplinary action, nor would such a belief have been reasonable. The sole purpose of the FFC was to gather testimony concerning Cisyk's discrimination claim (Stipulation 16). Furthermore, the evidence indicates that Cisyk unequivocally indicated his desire to have a representative of the Union present at the FFC. Cisyk expressed this desire on December 4, 2003, in an e-mail message to Robert Golinski, an attorney for the Respondents (Ex. 113; Stipulation 6). In that message Cisyk stated:

2

In *Luke II* the Authority confirmed its holdings in *Luke Air Force Base, Arizona*, 54 FLRA 716, 723 (1998) (*Luke I*) and *U.S. Department of the Air Force, 436th Airlift Wing, Dover Air Force Base, Dover, Delaware*, 57 FLRA 304 (2001) (*Dover*), enforced in *Department of the Air Force, 436th Airlift v. F.L.R.A.*, 316 F3d 280 (D.C. Cir. 2003). The Authority thereby rejected the rationale of *Luke Air Force Base v. F.L.R.A.*, 208 F3d 221 (9th Cir. 1999) (issued without an opinion) in which the 9th Circuit declined to enforce *Luke I*.

3

Each of the cited e-mail messages are included in Exhibit 11.

If DFAS Seaside management decides, at the last minute, to object to the presence of an impartial union representative, then based on my attorney's advice, I will not be party to the proceedings on December 10th.

By message dated December 5, 2003, from Cisyk to Golinski he stated that, "Should DFAS decide not to allow the union access, I will immediately take the time to prepare and file a FLRA complaint." In a second message to Golinski on December 5, 2003, Cisyk stated that, in view of the refusal of DFAS to allow the Union to attend the FFC, he would take "appropriate action through FLRA on Monday, December 8th."

In view of this evidence, there can be no legitimate doubt that, although Cisyk did not formally designate the Union as his representative at the FFC, he wanted a Union representative to be present to protect his interests as well as those of the Union itself. It is significant to note that Cisyk had no other representative at the FFC.

The FFC Was a Formal Discussion

An application of the criteria set forth in *Dover* (cited by the Respondents in support of their position) indicates that the FFC was a formal discussion. Those criteria are as follows:

1. The Status of the Individual Who Held the Discussion

Although the Respondents have emphasized that the OCI investigator was an "independent third party", he conducted the FFC as a representative of one or both of the Respondents pursuant to 29 C.F.R. §1614.108(b) (Stipulation 17; Ex. 2). That regulation unequivocally charges the agency against which an employment discrimination complaint has been filed with the responsibility of conducting an investigation and of developing an "impartial and appropriate factual record upon which to make findings on the claims raised by the written complaint."

The status of the OCI investigator is comparable to that of the mediators whose sessions were held to be discussions in *Luke I* and its progeny. Furthermore, as the Authority indicated in *Social Security Administration, Office of Hearings and Appeals, Boston Regional Office, Boston, Massachusetts*, 59 FLRA 875, 880 (2004) an outside

investigator is an agency representative if, as in this case, he acts at the request of the agency.

2. Whether Any Other Management Representatives Attended

The Respondents have attempted to minimize the significance of Golinski's attendance at the conference by emphasizing that he was not allowed to cross-examine witnesses but was limited to asking "clarifying questions". Although the Respondents have not explained what they contend Golinski's status to have been, it is clear that, as the Respondents' attorney, he was a management representative. The limits placed on Golinski's activities at the FFC reflect the fact that it was not an adversarial proceeding. The General Counsel has not alleged that the activities of the Union representative were improperly curtailed, but that the Union was excluded from the FFC altogether.

3. The Site of the Discussion

The FFC was conducted in a conference room on the Respondents' premises (Stipulation 23). While the site might not have been intimidating to Cisyk, it was not his regular work station. In any event, the location of the FFC is of little consequence since it clearly was not a routine event.

4. How the Meeting for the Discussion Was Called

The Respondents contend that the FFC was initiated by Cisyk because he filed the EEO complaint that created the requirement for the Respondents to conduct an investigation. That rationale, if adopted by the Authority, would also apply to meetings called for the mediation of discrimination complaints. The decisions in *Luke I*, *Luke II* and *Dover* indicate that the Authority has not adopted the rationale urged by the Respondents.

The Respondents have cited Stipulations 13 and 16 in support of their position. Stipulation 13 merely states that Cisyk filed a formal employment discrimination complaint and that the Respondents accepted the complaint. To the extent that this stipulation is germane to the issue of how the meeting was called, it indicates that the Respondents caused it to occur by accepting Cisyk's complaint.

Stipulation 16 indicates that the FFC is an investigation of a formal discrimination complaint which is

conducted according to 29 C.F.R. §1614.108(b). The FFC was conducted according to "A Participant's Guide to Fact-Finding Conferences in Complaint Investigations" (Ex. 8), which is a publication provided to complainants by the OCI. The Respondents have not indicated what portion of the OCI publication states or implies that anyone other than the Respondents themselves initiated the FFC. Moreover, an examination of the publication suggests that the Respondents' reliance on it is misplaced. On page 2 of the publication, in the third paragraph under the heading "WHO PARTICIPATES?" it is stated that:

The investigator is not an employee of the agency under investigation, but is a neutral third party who does not make a decision on the merits of a case. *The deciding official is usually an agency official who relies on the investigative record but may weigh the evidence differently from the investigator. . . .*

(Emphasis supplied.)

This language corroborates the proposition that the FFC was designed to provide the Respondents with information necessary for the discharge of their legal obligation.

29 C.F.R. §1614.108(b) assigned the responsibility for an impartial fact finding process to the Respondents. If Cisyk or the Union had initiated the FFC, the Respondents would not have had the authority to expel the Union representative in spite of Cisyk's desire that the representative be present.

5. The Length of the Discussion

The Respondents have not relied on the length of the FFC in support of their position. The transcript of the FFC

(Ex. 12) indicates that it began at approximately 8:20 a.m. and ended at 2:02 p.m. with a lunch break of slightly less than 30 minutes. It is therefore apparent that the FFC consumed the greatest part of the work day and was not an informal meeting.

6. Whether a Formal Agenda Was Established

By memorandum dated September 25, 2003, the OCI investigator issued a memorandum to the Respondents' EEO Officer with copies to Cisyk and Golinski (Ex. 7). Included with the memorandum was an investigation schedule which listed the participants by name or function, established

specific times for the testimony of each witness and provided for specific times for a lunch break and for closing statements.⁴ Contrary to the Respondents' contentions, it is difficult to imagine a more precise and formal agenda.

7. The Manner in Which the Discussion Was Conducted

The Respondents contend that bargaining unit members were in no danger of coercion because the FFC was not conducted by a management representative. Consequently, the Union had no right to be represented at the FFC because it had no interest in protecting the rights of bargaining unit members. As stated above, the OCI investigator, although independent and neutral, was acting on behalf of the Respondents. More importantly, Golinski was present and was allowed to question witnesses. Therefore, there was a possibility that witnesses would be coerced even if the Respondents had no intention of doing so.

The formality of the FFC was further established by the fact that it was conducted according to the guidelines contained in "A PARTICIPANT'S GUIDE TO FACT-FINDING CONFERENCES IN COMPLAINT INVESTIGATIONS" (Ex. 8), which was issued by OCI and was enclosed with the memorandum from the OCI investigator. In addition, a reporter was present and a verbatim transcript (Ex. 12) was prepared.

Upon consideration of each of the above factors, I have concluded that the FFC was a formal discussion within the meaning of §7114(a)(2)(A) of the Statute.

The FFC Was Between One or More Agency Representatives and One or More Bargaining Unit Employees

As indicated above, both the OCI investigator and Golinski were representatives of the Respondents. Cisyk was present throughout the FFC and one of the witnesses was Tamato Kolone; both Cisyk and Kolone are members of the bargaining unit (Stipulations 12, 23 and 25). Therefore, this element of the *Luke II* test has been satisfied.⁵

The FFC Concerned a Grievance

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Although the indicated times were approximations, witnesses were directed to be available when scheduled.

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It is of no consequence that Kolone was interviewed by telephone.

The Respondents have not denied that Cisyk's discrimination complaint was a grievance within the meaning of §7114(a)(2)(A) of the Statute and the holding in *Luke II*, 58 FLRA at 533.

In view of the fact that the FFC met each of the *Luke II* tests, I have concluded that it was a formal discussion to which the Union had a right to be represented regardless of whether it had been designated as Cisyk's representative.

The Respondents' contention that the Union had no legitimate representational interest in attending the FFC flies in the face of the Authority precedent already cited and of the circumstances of the situation. The discriminatory practices of which Cisyk complained, if substantiated, could well affect some or all of the other members of the bargaining unit. Furthermore, the remedy for the alleged discrimination could have included a "make whole" element whereby Cisyk would be promoted or reassigned to a position which would otherwise have been occupied by another member of the bargaining unit.

In view of the foregoing, I have concluded that the Respondents committed an unfair labor practice in violation of §7116(a)(1) and (8) by failing to provide the Union with the opportunity to be represented at the FFC regarding Cisyk's complaint of employment discrimination. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to §2423.41 of the Rules and Regulations of the Federal Labor Relations Authority (Authority) and §7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the Defense Finance and Accounting Service Headquarters, Arlington, Virginia and the Defense Finance and Accounting Service, Seaside, California (Respondents) shall:

1. Cease and desist from:

(a) Conducting formal discussions with bargaining unit employees represented by the American Federation of Government Employees, Local 1222, AFL-CIO (Union) concerning any grievance or any personnel policy, practice or other general condition of employment, including investigatory interviews in connection with formal complaints to the Equal Employment Opportunity Commission, without affording the

Union an opportunity to be represented at the formal discussions.

(b) 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 Statute:

(a) Notify in writing all persons, including contractors, authorized to investigate formal complaints to the Equal Employment Opportunity Commission on behalf of the Respondents of the right of the Union to receive notice and an opportunity to attend interviews of bargaining unit employees as required by the Statute.

(b) Post at its facilities at Seaside, California copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the Director of Defense Finance and Accounting Service and 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 Rules and Regulations of the Authority, notify the Regional Director of the San Francisco Region, Federal Labor Relations Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, November 18, 2004

PAUL B. LANG
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 Defense Finance and Accounting Service Headquarters, Arlington, Virginia and the Defense Finance and Accounting Service, Seaside, California, 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 conduct formal discussions with bargaining unit employees represented by the American Federation of Government Employees, Local 1222, AFL-CIO (Union) concerning any grievance or any personnel policy, practice or other general condition of employment, including investigatory interviews in connection with formal complaints to the Equal Employment Opportunity Commission, without affording the Union an opportunity to be represented at the formal discussions.

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

WE WILL notify in writing all persons, including contractors, authorized to investigate formal complaints to the Equal Employment Opportunity Commission on behalf of the Respondents of the right of the Union to receive notice and an opportunity to attend interviews of bargaining unit employees as required by the Statute.

(Agency)

Dated: _____ 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, San Francisco Regional

Office, whose address is: Federal Labor Relations Authority,
901 Market Street, Suite 220, San Francisco, CA 94103-1791,
and whose telephone number is: 415-356-5002.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. SF-CA-04-0170 were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT

CERTIFIED NOS:

Amita Baman Tracy

7000 1670 0000 1175

4663

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REGULAR MAIL:

President

AFGE

80 F Street, NW
Washington, DC 20001

Dated: November 18, 2004
Washington, DC