

UNITED STATES OF AMERICA  
FEDERAL LABOR RELATIONS AUTHORITY  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20424

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VETERANS ADMINISTRATION  
(WASHINGTON, D.C.) AND  
VA MEDICAL CENTER  
BROCKTON DIVISION  
(BROCKTON, MASSACHUSETTS)  
Respondent  
and  
NATIONAL ASSOCIATION OF  
GOVERNMENT EMPLOYEES,  
LOCAL R1-25, SEIU, AFL-CIO  
Charging Party  
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Case No. 1-CA-80185

David F. Toomey, Esquire  
For the Respondent

Gerard M. Greene, Esquire  
For the General Counsel

BEFORE: WILLIAM B. DEVANEY  
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-  
Management Relations Statute, Chapter 71 of Title 5 of the  
United States Code, 5 U.S.C. § 7101 et seq.,<sup>1/</sup> and the

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<sup>1/</sup> For convenience of reference, sections of the Statute  
hereinafter are, also, referred to without inclusion of the  
initial "71" of the statutory reference, e.g., Section 7116  
(a)(8) will be referred to, simply, as "§ 16(a)(8)".

Rules and Regulation issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether two meetings called for the purpose of selecting shifts, and a third impromptu encounter at which an employee was asked if she wished to make a shift selection, were formal discussions within the meaning of § 14(a)(2)(A) of the Statute. For reasons set forth herein-after, I find that they were not.

This case was initiated by a charge filed on March 10, 1988 (G.C. Exh. 1E). On May 26, 1988, an Order Consolidating Cases Complaint and Notice of Hearing issued (G.C. Exh. 1K) which consolidated this case with other cases and set the hearing for July 13, 1988, in Boston, Massachusetts. On May 31, 1988, a Further Order Consolidating Cases Amended Complaint and Further Notice of Hearing issued (G.C. Exh. L) which consolidated this case with still other cases and, of course, amended the Complaint, but the date and place of hearing remained unchanged. By Order dated June 28, 1988, the location of the hearing was changed from Boston, Massachusetts to Brockton, Massachusetts (G.C. Exh. O); and by Order dated July 7, 1988 (G.C. Exh. P) the Complaint was further Amended to sever Case Nos. 1-CA-80209 and 1-CA-80220, the Regional Director having approved the request for withdrawal. Pursuant thereto, a hearing was duly held on July 13, 1988, in Brockton, Massachusetts, before the undersigned.<sup>2/</sup>

All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument. At the close of the hearing, September 6, 1988, was fixed as the date for mailing post-hearing briefs. Respondent and General Counsel each timely mailed a brief, received on, or before, September 9, 1988, which have been carefully considered. On the basis of the whole record <sup>3/</sup>, including my observation of the

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<sup>2/</sup> Hearings in Case Nos. 1-CA-80164 and 1-CA-80193 were to follow the hearing in Case No. 1-CA-80185; however, the parties having reached an adjustment, on motion of the General Counsel, to which Respondent had no objection, Case Nos. 1-CA-80164 and 1-CA-80193 were remanded to the Regional Director for appropriate disposition (Tr. 132).

<sup>3/</sup> General Counsel's Motion To Correct Transcript, to which there was no objection, is granted and the transcript is hereby corrected as more fully set forth in Appendix A hereto.

witnesses and their demeanor, I make the following findings and conclusions:

### Findings

1. National Association of Government Employees, Local R1-25, SEIU, AFL-CIO (hereinafter referred to as the "Union") represents non-professional employees at the VA Medical Center, Brockton Division, Brockton, Massachusetts (hereinafter referred to as "Respondent"), as the agent for the National Association of Government Employees, SEUI, AFL-CIO which is the exclusive representative of a consolidated bargaining unit of non-professional employees of the Veterans Administration.

2. On November 30, 1987, Respondent notified Union President William Brunelle of the Dietetic Service's proposed changes in the work schedules of WG-5 and WG-8 Cooks and WG-4 Ingredient Control Room (ICR) personnel at the Brockton Division (G.C. Exh. 2; Tr. 10). The parties met on December 15, 1987, to negotiate over the proposed changes<sup>4/</sup> (Tr. 10). The Union was represented by Chief Steward Steve Gilberti and by Mr. Paul Lennon, a WG-8 Cook and steward for Dietetic Service (Tr. 10, 11); and Respondent was represented by the Chief, Dietetic Service, Angie Espinosa and by the Chief, Food Processing and Service, Patricia Morrissey (Tr. 11, 80-81, 97-98).

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<sup>4/</sup> The changes were to provide five cooks on Saturday and Sunday and six daily, Monday through Friday; whereas, there had been five on Saturday, Sunday, Monday and Tuesday, six on Wednesday, and seven on Thursday and Friday.

The changes were slight, indeed. Thus, for the WG-8 Cooks, there were three changes to two shifts: (a) the 6:00 a.m. - 2:30 p.m. shift was changed to 5:30 a.m. - 2:00 p.m.; (b) the days off for the 8:30 a.m. shift were changed from Wednesday and Thursday to Thursday and Friday; and (c) the hours were changed from 8:30 a.m. - 5:00 p.m. to 9:00 a.m. - 5:30 p.m.

For the WG-5 Cooks, the only change was that the days off for the 5:30 a.m. - 2:00 p.m. shift were changed from Monday and Tuesday to Wednesday and Thursday. In addition, the hours of the WG-4 ICR were changed from 7:30 a.m. - 4:00 p.m. to 8:00 a.m. - 4:30 p.m. (G.C. Exh. 2; Res Exh. A)

3. By memorandum dated December 17, 1987, Ms. Espinosa notified Union President Brunelle that the proposed changes of work schedules would be implemented January 3, 1988 (G.C. Exh. 3; Tr. 11-12). The memorandum stated, in part,

" . . . The choice of shift, as in the past, will be based on a seniority basis . . . ." (G.C. Exh. 3).

4. Rather than alter the January work schedule, which had been posted in mid-December, Ms. Morrissey decided to begin the new schedule for the WG-8 Cooks with the February schedule (Tr. 99-100). Ms. Morrissey further testified that, although they originally thought the change could be implemented on January 3, 1988, she could not meet with employees in late December because of the holidays and employees on leave (Tr. 99). Accordingly, Respondent implemented the change on January 5, 1988, by having the WG-8 Cooks select their shifts for the February schedule. The record does not indicate why Respondent did not "implement" the change for the WG-5 Cooks at the same time by having them select their new shifts since the change as to them was so slight (as noted in n.4, supra, the only change for the WG-5 Cooks was that the days off for the 5:30 a.m. shift were changed from Monday and Tuesday to Wednesday and Thursday).

5. On the morning of January 5, 1988, between 11:30 and twelve o'clock (Tr. 61) Ms. Morrissey asked Mr. Henry Moss, a Food Processing Supervisor (Tr. 80), to tell the WG-8 Cooks that there would be a meeting in her office at 1:00 p.m. for the selection of shifts (Tr. 14-15, 61, 82-83). All WG-8 Cooks were expected to attend and all who were on duty did attend.<sup>5/</sup> At the outset of the meeting, Ms. Morrissey distributed a copy of the current schedule and the new schedule (G.C. Exh. 2) to each cook (Tr. 15, 63, 86, 102). Mr. Lennon testified that ". . . she handed out the proposed schedule changes and asked everybody if they were

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<sup>5/</sup> All seem to agree that only David Silva, who was scheduled off that day, was absent (Tr. 13, 61, 62-63, 85); however, if the meeting were, in fact, held on January 5, 1988, a Tuesday, the "Current Schedule" (G.C. Exh. 2, Res. Exh. A) shows that two WG-8 Cooks were scheduled off on Tuesday. Whether the meeting was, or was not, held on Tuesday, January 5, 1988, is immaterial to the issue involved and, except to note an apparent inconsistency, I make no resolution of the discrepancy.

familiar with it, and everybody said 'yes'." (Tr. 15; see also, Tr. 87). Mr. Lennon further testified that Ms. Morrissey then, ". . . told us that she had . . . contacted David Silver (sic) [Silva], who was the most senior WG-8 Cook, that morning, to find out what shift he wanted, because he had first choice . . . Pat [Morrissey] let us know what shift David Silver (sic) had selected and then we next in line, as far as seniority" (Tr. 15-16) selected their shifts and Ms. Morrissey and Mr. Moss each wrote the name of the employee alongside the shift chosen on their copies (Tr. 18, 109; Res. Exh. A).6/

6. On January 20, 1988, Ms. Esther Garrod, a WG-5 Cook, came into the office of Mr. Arthur Anderson, Food Processing Supervisor, to ask a question concerning the menu or the floor (Tr. 38, 51). Mr. Anderson was in the process of making out the March schedule, i.e., the new schedule, and he showed Ms. Garrod the schedule that was going into effect (Tr. 29; see Tr. 87) and asked her if she, as the senior WG-5 Cook (Tr. 37), wished to select her shift (Tr. 29, 51, 89) and she said she did not because she didn't agree with the days off; that she wanted the same shift she was working, 5:30 a.m. - 2:00 p.m., but she thought that after eighteen years she should be able to have a weekend day off (Tr. 29). Actually, had she wished, she could have selected the 6:00 a.m. - 2:30 p.m. shift which would have given her Saturday off. In any event Ms. Garrod turned to Ms. Morrissey, who was in Mr. Anderson's office checking the supervisors log, and told her ". . . Pat, I'm not going to make a selection" (Tr. 90) and Ms. Morrissey, who had overheard the conversation between Ms. Garrod and Mr. Anderson, told her, she had to, ". . . pick according to the shift, the days off go with it." (Tr. 30; 52, 90). Ms. Garrod declined and stated that she left the office and talked to shop steward Lennon (Tr. 30).

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6/ By setting forth the testimony of Mr. Lennon, I do not in any manner discredit the testimony of Mr. Moss or of Ms. Morrissey. Indeed, the testimony of Mr. Moss and Ms. Morrissey concerning Mr. Silva is wholly credible and is more convincing than Mr. Lennon's; but Mr. Lennon's is shorter and sufficient. It is wholly unnecessary to make any credible resolution since when Mr. Silva was contacted is immaterial. There is no question that the sole purpose of the meeting was for the cooks to select their shifts which they did in the order of their seniority.

7. On the morning of February 3, 1988, Ms. Morrissey told Mr. Moss to tell the WG-5 Cooks to be in her office at 1:00 p.m. to make their shift selections for March (Tr. 65-66, 92). Mr. Moss told the three WG-5 Cooks (Tr. 31) and all were present for the meeting. (Tr. 30, 93). As with the WG-8 Cooks, Ms. Morrissey at the outset of the meeting distributed copies of the existing schedule and the new schedule so that they could compare them (Tr. 32, 77). Ms. Morrissey asked Ms. Garrod to select first because she was senior (Tr. 32, 33, 93). Ms. Garrod said she, ". . . still didn't agree with the days off . . . and she [Morrissey] said that it was according to the shift you pick, so if I wanted a weekend day, I would have to take and pick a shift with a weekend day. . . But I did not want that shift, I wanted the 5:30 to 2:00." (Tr. 33). So, reluctantly, Ms. Garrod selected ". . . the Wednesday and Thursday . . . ." (Tr. 33), i.e., the 5:30 a.m. - 2:00 p.m. shift.

#### Conclusions

§ 14(a)(2) of the Statute provides in relevant part, as follows:

"(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be representd 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 practice or other general condition of employment; . . . ." (5 U.S.C. § 7114(a)(2)(A)).

In U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution (Ray Brook, New York), 29 FLRA 584 (1987), the Authority stated,

". . . As the Authority has held, '[i]n order for a union's right under section 7114(a)(2)(A) to attach, all of the elements set forth in that section must be found to exist.' Bureau of Government Financial Operations, Headquarters, 15 FLRA 423, 425 (1984), rev'd on other grounds, NTEU v. FLRA, 774 F.2d 1181 (D.C. Cir.

1985). Thus, in order for the section 7114(a)(2)(A) right to exist, (1) there must be a discussion; (2) which is formal; (3) between one or more agency representatives and one or more unit employees or their representatives; (4) concerning any grievance or personnel policy or practice or other general condition of employment. Furthermore, in examining each of these elements, we will be guided by that section's intent and purpose -- to provide the union with an opportunity to safeguard its interests and the interests of employees in the bargaining unit -- viewed in the context of a union's full range of responsibilities under the statute. (29 FLRA at 588-589) (Emphasis supplied).

Applying these elements to the three meetings in question, I conclude that they were not formal discussions within the meaning of § 14(a)(2)(A) of the Statute:

A. The Meetings of January 5 and February 3, 1988.

There is no question that some of the indicia of formality were present. Thus, each meeting was held in the office of the second level supervisor, the Chief of Food Processing and Service - Patricia Morrissey; and present were Ms. Morrissey and the employee's immediate supervisor, Food Processing Supervisor, Henry Moss. Ms. Morrissey called the meeting in advance and there was an agenda; however, the notice of the meeting was oral and the sole purpose (agenda) was for the employees to select their shifts. The only record made was the noting of each shift selection.

The interests of the unit would not have been furthered by the Union's presence. The "meeting" was solely for the purpose of shift selection. At the January 5, 1988, meeting of the WG-8 Cooks, there was no discussion; the employees were all familiar with new schedule; the meeting was very short, the employees made their selections ". . . bang, bang, bang" (Tr. 87), and the meeting ended. There were five WG-8 Cooks, only four of whom were present. While each cook present was expected to attend, the only mandatory element was that each must make his, or her, selection in order of seniority. The absent WG-8 Cook either initially made his selection by proxy, with later telephonic confirmation, or initially made his selection by telephone.

At the meeting on February 3, 1988, with the three WG-5 Cooks, the only "discussion" was a comment by Ms. Garrod

that she still didn't agree with the days off and Ms. Morrissey's reply that the days off went with the shift and that if Ms. Garrod wanted a weekend day off she would have to take a shift with a weekend day off. When employees raised trading of days off, Ms. Morrissey said it could not be done on a permanent basis but that if Ms. Garrod needed a Sunday a trade would be permitted and that Ms. Garrod's supervisor would make accommodations for any doctor's appointments made prior to the schedule change.<sup>7/</sup> But on neither January 5 nor February 3 did Ms. Morrissey or Mr. Moss meet with employees concerning changes in shift schedules. To the contrary, the sole purpose of the meeting was for the employees to select their shifts. The changes in shift schedules had been the subject of Respondent's November 30, 1987, notice to the Union on which the parties met and negotiated on December 15, 1987, and Respondent had notified the Union on December 17, 1987, that the proposed changes of work schedules would be implemented. To support the allegations of the complaint, General Counsel in his arguments engages in a bit of legerdemain to make it appear that the January 5 and February 3 meetings were for the same purpose on which, "Respondent had offered to meet with the Union in December. . . ." (General Counsel's Brief, p. 15).

The changes in shift schedules had already been accomplished and the Union had been informed that the new schedules were to be implemented. All that remained to be done at the meetings of January 5 and February 3, 1988, was the ministerial act of the employees selecting their shifts in the order of their seniority.<sup>8/</sup> There were a total of five WG-8 Cooks and a total of three WG-5 Cooks; the record shows that each employee in each group well knew the relative seniority of the employees in that group; and they had selected their shifts in precisely the same manner in the past. Accordingly, guided by the intent and purpose of § 14(a)(2)(A), namely, to provide the Union with an

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<sup>7/</sup> As noted in n. 4, supra, the only change for the WG-5 Cooks was that the days off for the 5:30 - 2:00 p.m. shift, which Ms. Garrod had occupied under the current schedule and elected to retain under the new schedule, were changed from Monday and Tuesday to Wednesday and Thursday (G.C. Exh. 2, Res. Exh. A).

<sup>8/</sup> The sole allegation of the Complaint, and, therefore, the only issue before me, is whether the meetings of January 5 and 20, and February 3, 1988, were formal discussions (G.C. Exh. 1L, Par. 12).

opportunity to safeguard its interests and the interests of employees in the bargaining unit, I conclude that the meetings of January 5 and February 3, 1988, were not formal discussions within the meaning of the § 14(a)(2)(A) of the Statute.

B. The Meeting of January 20, 1988.

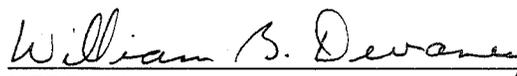
On January 20, 1988, Ms. Garrod came to the office of her immediate supervisor, Mr. Anderson, and while she was there Mr. Anderson asked if she, as the senior WG-5 Cook, would like to select her shift. Ms. Garrod stated that she did not want to select a shift because she didn't agree with the days off. Ms. Morrissey, Ms. Garrod's second level supervisor, happened to be in the office and told Ms. Garrod she had to pick according to the shift, the days off go with it.

None of the indicia of formality was present. The meeting was not planned, there was no notice, there was no agenda, no notes were taken, was very brief, and the second line supervisor was not present for the purpose of speaking with Ms. Garrod. Under the circumstances, this impromptu meeting was not a "formal discussion" within the meaning of § 14(a)(2)(A) of the Statute. Office of Program Operations, Field Operations, Social Security Administration, San Francisco Region, 9 FLRA 48, 50 (1982); United States Customs Service, Region VIII, San Francisco, 18 FLRA 195, 198-199 (1985). Nor would the interests of the unit have been furthered by the Union's presence at this meeting. U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution (Ray Brook, New York), supra.

Having found that Respondent did not violate §§ 16(a)(8) or (1) of the Statute, I recommend that the Authority adopt the following:

ORDER

The Complaint in Case No. 1-CA-80185 be, and the same is hereby, dismissed.



WILLIAM B. DEVANEY  
Administrative Law Judge

Dated: May 17, 1989  
Washington, D.C.