

Office of Administrative Law Judges WASHINGTON, D.C.

TINKER AIR FORCE BASE OKLAHOMA CITY AIR
LOGISTICS CENTER OKLAHOMA CITY, OKLAHOMA
Respondent and

Case No. DA-CA-90328

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, LOCAL 916 Charging
Party

Maj. Telin Ozier, Esquire For the Respondent Ron Kisslinger,
Representative For the Charging Party William D. Kirsner, Esquire Melissa
J. McIntosh, Esquire For the General Counsel Before: Eli Nash, Jr.
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 investigation of two formal EEO complaints filed by other bargaining unit employees 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 answer denies any violation of the Statute, and more specifically alleges that the investigation at issue was conducted by an individual who was not under its control.

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

A hearing was held in Oklahoma City, Oklahoma. 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, Charging Party, 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

• Background

1. the parties' relationship

Respondent Tinker Air Force Base is an activity within the United States Air Force, a primary national subdivision of the United States Department of Defense (DoD), the latter being the "agency" as defined in section 7103(a)(3) of the Statute. As applicable herein, the American Federation of Government Employees (AFGE), is the exclusive bargaining representative of a nationwide consolidated unit of certain Air Force employees, including the employees located at Tinker Air Force Base, and the Union is AFGE's agent for purposes of representing bargaining unit employees at Respondent's Oklahoma City facility. The parties have negotiated a collective bargaining agreement which provides in part, that any unit employee may use either the negotiated grievance procedure or the applicable statutory appeals (EEOC) procedure concerning a complaint of employment discrimination.

2. the processing of EEO complaints at Respondent's

Oklahoma City facility

The parties stipulated that on August 30, 1993, DoD, the agency, established its Civilian Personnel Management Service (CPMS); that the Office of Complaint Investigations (OCI) is a division within the CPMS; that Kathleen Toyoda is the Regional Director of OCI's San Antonio Regional Office; and that Thomas Mahoney is a Personnel Management Specialist within the CPMS under Toyoda's supervision. It is undisputed that DoD created the CPMS and its component OCI as an agency-wide investigative operation in order to save money and positions by eliminating the duplication caused by each branch of the armed forces doing its own investigations. As explained by Toyoda, the OCI (consisting of 13 offices in 5 regions) was created by transferring some employees from each branch's separate investigative office to the OCI for the purpose of conducting investigations (including EEO complaints) involving all three military branches in a standardized manner.

Ever since OCI was created to perform EEO investigations on an agency-wide basis, management representatives at Tinker Air Force Base such as Donna Frymire interact with designated OCI investigators like Thomas Mahoney in the following manner. When Frymire is notified that a formal EEO complaint has been filed by an employee at Tinker and that she has been assigned to the case, she conducts a preliminary investigation (with an attorney's assistance) during which she gathers all relevant documents and identifies witnesses to be interviewed by the OCI

investigator. Frymire also writes a "management position paper" setting forth the activity's position that no unlawful discrimination occurred. All of this information is turned over to the OCI investigator upon his or her arrival at the activity to begin the investigation.⁽²⁾ Frymire plays no further role in the investigation, but if the OCI investigator decides to engage in settlement discussions with the employee complainant, Frymire would attend those discussions.⁽³⁾

When the OCI investigator arrives at Tinker Air Force Base to begin an EEO investigation, the activity provides logistical support such as a private meeting rooms, telephones, and other administrative assistance.⁽⁴⁾ The activity also is responsible for the travel, per diem, and miscellaneous expenses, but not the salary of the OCI investigator. The activity does not participate in deciding how the investigation is to be conducted, but does have input with respect to the content of the investigator's report.⁽⁵⁾

• The EEO Investigation in this Case

Two bargaining unit employees Roy Shobert and Elmer Love, filed EEO complaints and thereafter designated the Union to be their representative at all phases of the EEO process. In turn, the Union notified James Coil, the Chief of Employee and Labor Relations at Tinker Air Force Base, of the specific individual designated in each case to be present whenever unit employees were to be "interviewed by Agency representatives (including OCI investigators)" ⁽⁶⁾ Coil never replied to the Union's letter.⁽⁷⁾ Respondent did accept both of the EEO complaints and requested that the OCI designate a complaints investigator to conduct investigations into the allegations of unlawful discrimination against the employees. An OCI investigator named Barbara Sudbury originally was assigned to conduct the investigations, but Thomas Mahoney subsequently was assigned to substitute for her.

Following his usual practice, Mahoney notified Respondent in advance of his arrival to begin the investigations. The unit employees who were on Mahoney's list of witnesses to be interviewed received notice from their supervisors a few days in advance of Mahoney's arrival as to when and where the interviews would take place. Thus, Steven Rolland was told by his supervisor two or three days in advance that he was to meet with Mahoney in the Administration building where the Personnel Office is located, an area of the activity where Rolland did not work and seldom went. Rolland was not advised that he could refuse to attend, and assumed his presence was mandatory.⁽⁸⁾ When Rolland appeared at the meeting room in his jeans and T-shirt, Mahoney, clad in a dark suit and tie, gave Rolland a look at his OCI investigator's badge and introduced himself, explaining that he was there to investigate the EEO complaints.⁽⁹⁾ Mahoney questioned Rolland alone for about an hour concerning the EEO complaints,

and had Rolland sign an affidavit which included a statement that Rolland would be subject to disciplinary action if he failed to testify.

Lorenzo Vaden, another unit employee, similarly was told by his supervisor four days in advance that he was to meet with Mahoney in Building 3001 where Vaden did not work and had not visited previously. Mahoney, wearing a dark business suit and tie, questioned Vaden about Love's EEO complaint for about 12 minutes, after which Vaden, feeling pressured to give a statement and believing he could be disciplined for failing to do so, signed an affidavit prepared by Mahoney.⁽¹⁰⁾

The Union was never notified by Mahoney or the Respondent of the foregoing scheduled interviews with the bargaining unit employees, and therefore had no opportunity to attend them.⁽¹¹⁾

Discussion and Conclusions

For the following reasons, and based on the Authority's decision in *Luke Air Force Base, Arizona*, 54 FLRA 716 (1998), *rev'd sub nom. Luke Air Force Base v. FLRA*, 208 F.3d 221 (9th Cir. 1999), *cert. denied* 121 S.Ct. 60 (2000) (*Luke AFB*),⁽¹²⁾ I conclude that the interviews conducted with and the statements taken from bargaining unit employees Rolland and Vaden, by Thomas Mahoney the OCI investigator, in connection with the formal EEO complaints of unit employees Shobert and Love, 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 investigatory interviews.

• 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 present 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.

• 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)).

1. the investigative interviews of unit employees concerning the EEO complaints were discussions

In its comprehensive 30-page post-hearing brief, the Respondent presents many arguments in support of the position that the Union had no right to be represented at investigative interviews conducted by Thomas Mahoney with bargaining unit employees concerning the formal EEO complaints filed by unit employees Shobert and Love. However, Respondent never argued that the interviews in question were not discussions, and I conclude that they were. As the Authority has long held in *Veterans Administration, Washington, DC and VA Medical Center, Brockton Division, Brockton, Massachusetts*, 37 FLRA 747, 754 (1990), the term "discussion" is synonymous with "meeting," and there can be no doubt that the investigative sessions at issue in this case were meetings as commonly understood.

2. the discussions between Mahoney and the two unit employee witnesses were formal

In *Luke AFB*, 54 FLRA at 724, (quoting *GSA I*, 48 FLRA at 1355), the Authority stated as follows:

In determining whether a discussion is formal within the meaning of section 7114(a)(2)(A), [the Authority has] 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. 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) (*Warren*). Therefore, in determining formality,

the Authority considers the totality of the facts and circumstances. *Id.*

The investigatory interviews in question were conducted by Thomas Mahoney, an OCI investigator from the Civilian Personnel Management Service's Regional Headquarters in San Antonio with authorization to investigate and report regarding EEO complaints throughout the entire Department of Defense. Mahoney was visiting the base at the written request of the Chief of Respondent's EEO Complaints Office, to commence investigations into a number of EEO complaints filed by the Respondent's employees, including unit employees Shobert and Love. The meetings with unit employees Rolland and Vaden were sought by Mahoney well in advance of his arrival at Tinker Air Force Base for the express purpose of taking sworn statements from them as witnesses in the formal EEO process.⁽¹³⁾ The affected employees were told of the scheduled interviews by their respective supervisors several days in advance of the meetings and reasonably believed that their attendance and cooperation at the meetings were required if they wished to avoid discipline or other adverse consequences. The interviews were conducted by Mahoney in a private meeting room within the Administration building, away from where the employees work and in a location where the employees seldom if ever had ventured. Mahoney presented himself to the employees in a dark business suit and tie,⁽¹⁴⁾ formally displayed his OCI investigator's credentials to them, and followed his agenda of interviewing and taking sworn statements from them concerning the pending formal EEO complaints. The meetings lasted from about 15 minutes to one hour, and concluded when Mahoney prepared written statements for them to swear to and sign. Under these circumstances, I conclude that the meetings were formal in nature even though the Respondent had no other management representative present.

3. the formal 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 investigative interviews constituting formal discussions involved bargaining unit employees Rolland and Vaden. The question raised by the Respondent is whether OCI investigator Mahoney was a "representative of the agency" at the interviews within the meaning of section 7114(a)(2)(A) of the Statute, a matter which the Authority expressly found it unnecessary to decide in *Luke AFB*, 54 FLRA at 724-25 inasmuch as other management representatives were present at the meeting along with the OCI investigator in that case.

I conclude that Mahoney was a representative of the agency for the following reasons. First, it is undisputed that Mahoney is an employee of the Department of Defense, the "agency" within the

definition of that term as an "Executive agency" in section 7103(a) (3) the Statute. Ordinarily, when an exclusive bargaining relationship has been established at a sub-component level within an agency, such as the Air Force in this case, the rights created and the obligations imposed by the Statute are implemented at the level of exclusive recognition. Accordingly, in the past, Respondent Tinker Air Force Base conducted its own investigations of EEO complaints filed by bargaining unit employees and notified the Union as the employees' exclusive representative when interviews of unit employees as witnesses were to take place. The Union was then entitled to attend those investigative interviews which constituted formal discussions. Nevertheless, the agency--DoD in this case--had the responsibility to investigate EEO claims and could designate anyone it chose (including independent contractors outside the agency) to perform those functions.⁽¹⁵⁾ When DoD decided in 1993 to create the OCI within the Civilian Personnel Management Service to investigate EEO complaints agency-wide, as a way of eliminating duplication of personnel in its various components and thereby conserving its limited resources, that was its undeniable right. However, the agency could not thereby extinguish whatever rights the exclusive representative otherwise would have with respect to notice and opportunity to attend formal discussions simply because OCI rather than the Respondent was now delegated the authority to conduct EEO investigations. To decide otherwise would enable agencies to reorganize their way out of many duties imposed by Congress in the Statute and would be inconsistent with the purposes and policies of the Statute.⁽¹⁶⁾ See *NASA*, 527 U.S. at 234.

Moreover, in analogous circumstances, the Authority and the courts, including the United States Supreme Court, have held that a DoD-wide component with investigative authority was a "representative of the agency" under section 7114 of the Statute and therefore was required to honor the rights of unit employees and their exclusive bargaining representatives even though the investigative component had no duty to bargain with the union representing the employees at the activity who were being interviewed. *Id.* at n.12; *Department of Defense, Defense Criminal Investigative Service; Defense Logistics Agency and Defense Contract Administration Services Region, New York*, 28 FLRA 1145 (1987), *aff'd sub nom. DCIS v. FLRA*, 855 F.2d 93 (3rd Cir. 1988) (representatives of DoD's Inspector General were required to honor unit employees' section 7114(a) (2) (B) *Weingarten* requests for union representation at investigative interviews because the IG was a representative of the agency).

In this case, Mahoney was the Respondent's representative also because of the totality of circumstances. Thus, Mahoney received from Respondent's management representatives not only a list of unit employees to be interviewed but also a report of the preliminary investigation they conducted, which report presented management's reasons for concluding that no unlawful discrimination had occurred. When Mahoney concluded his own investigation, including the interviews of witnesses in the bargaining unit, his report on the investigation was turned over to the Respondent for further use in the EEO process, and the report itself was prepared in accordance with Respondent's requests as to form and content.

I therefore conclude that Mahoney was a representative of the agency when he interviewed employees Steven Rolland and Lorenzo Vaden as witnesses in the formal EEO complaints of employees Roy Shobert and Elmer Love.

4. Mahoney's interviews of Rolland and Vaden concerned

grievances

The Respondent contends that the EEO complaints are not grievances under the Statute for the reasons stated by the Ninth Circuit in *Luke AFB*, 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 Administrative 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.⁽¹⁷⁾ 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 *Luke AFB*, 54 FLRA 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.

It is concluded that by holding formal discussions with bargaining unit employees⁽¹⁸⁾ without providing the Union with 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.⁽¹⁹⁾

Based on the above findings and conclusions, including applicable Authority precedent to date, it is recommended that the Authority issue 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 Tinker Air Force Base, Oklahoma City Air Logistics Center, Oklahoma City, Oklahoma, shall:

◆ Cease and desist from:

(a) Failing or refusing to provide the American Federation of Government Employees, Local 916, the employees' exclusive bargaining representative, advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning any grievance or any personnel policy or practices or other general conditions of employment, including meetings to interview unit employees as witnesses in connection with 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.

◆ 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 916, the employees' exclusive bargaining representative, advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning interviews of unit employees as witnesses in connection with formal EEO complaints.

(b) Post at its facilities at Tinker Air Force Base 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 Commander, Tinker 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, Dallas 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, March 27, 2001.

ELI NASH, JR.

Administrative Law Judge

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that Tinker Air Force Base, Oklahoma City Air Logistics Center, Oklahoma City, Oklahoma, 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 916, 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 to interview unit employees as witnesses in connection with 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 916, the employees' exclusive bargaining representative, with advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning interviews of unit employees as witnesses in connection with 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, Dallas Regional Office, Federal Labor Relations Authority, whose address is: 525 Griffin Street, Suite 926, Dallas, TX 75202, and whose telephone number is: (214)767-4996.

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