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WASHINGTON, D.C.

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U.S. DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE

CUSTOMS MANAGEMENT CENTER

MIAMI, FLORIDA

Respondent
and

Case No. AT-CA-90682

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

Maria D. Capo-Sanders

Counsel for the Respondent

Steven P. Flig

Counsel for the Charging Party

Lawrence L. Kuo

Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER

Administrative Law Judge

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DECISION

Statement of the Case

The unfair labor practice complaint, as amended at the hearing, alleges that the Respondent failed to comply with section 7115(a) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7115(a), on or about June 24, 1999, when it refused to process four SF-1187 forms, Request for Payroll Deductions for Labor Organization Dues, submitted by four GS-1801-11 Canine Enforcement Officers (Team Leaders).^[1] The Complaint further alleges that the Respondent's conduct constituted an unfair labor practice in violation of section 7116(a)(1) and (8) of the Statute.

Respondent's answer admitted the jurisdictional allegations as to the Respondent, the Union, and the charge, but denied any violation of the Statute. The Respondent alleged that it could not process the forms as the position occupied by the employees encompasses supervisory duties and responsibilities and was not in the bargaining unit.

For the reasons explained below, I conclude that a preponderance of the evidence supports the alleged violations.

A hearing was held in Miami, Florida. The parties were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and 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

The Parties

The Charging Party is the exclusive representative of an appropriate nationwide consolidated unit of employees of the U.S. Customs Service, excluding, among others, supervisors as defined in section 7103 of

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the Statute. It is undisputed that GS-9 Canine Enforcement Officer employees are members of the bargaining unit represented by NTEU.

Dues Deduction Forms Submitted

On or about April 19, 1999, the Charging Party submitted to the Respondent five SF-1187 forms, Request for Payroll Deductions for Labor Organization Dues, completed by GS-11 Canine Enforcement Officers. The Respondent refused to process these SF-1187 forms because the subject employees were considered to be non-bargaining unit employees.

Position Created

The position of GS-11 Canine Enforcement Officer (Team Leader) was implemented sometime after November 1, 1995 changing the title of the GS-11 position from supervisor to team leader. In a September 27, 1995 memorandum announcing the change, the Respondent stated, in part:

The responsibility for disciplinary actions and annual performance appraisals will become the function of the GS-12 canine supervisor This action changes the focus of the GS-11 position to that of an instructor or mentor with responsibility for improving proficiency training, measuring performance, and assessing individual canine team abilities. . . . Also, the GS-11 canine officer will have the opportunity to participate as an evaluator in the yearly canine recertification process while retaining some limited supervisory functions. (Joint Exh. 4).

The Canine Enforcement Officer (Team Leader), GS and GG 1801-11 position description provides, in part, as follows:

INTRODUCTION

Senior journey-level, administrative position. Position is located in a Customs office or facility. Serves as a resource person and Team Leader for a group of Canine Enforcement Officers (CEO), with

the following responsibility: (1) provides expert technical advice to lower grade employees; (2) coordinates day-to-day team assignments, overtime, weekends and holidays; (3) implements

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and coordinates team proficiency training needs; (4) plans and carries out a variety of troubleshooting assignments involving delicate relationships and critical issues; and (5) functions as a working officer using an assigned detector

dog to screen arriving cargo, passengers, or conveyances.

MAJOR DUTIES

1. Serves as a resource person, team leader and training officer for assigned group of journeyman and trainee CEO s. Acts in the absence of supervisor, and performs a range of tasks such as assuring coverage for emergency or unscheduled overtime and approving leave requests. Incumbent has technical responsibility and accountability for proper employment, utilization and productivity of assigned canine enforcement teams. Responsible for planning, scheduling, and overseeing a wide variety of simultaneous canine activities at one or more locations within assigned area(s).

2. Monitors daily task-related training and monthly training records of assigned CEO s or team to identify remedial training needs. Personally conducts non-task related training and implements remedial training to correct both handler and dog deficiencies. Serves as an evaluator assessing CEO team capabilities during biennial program evaluations. Reviews and inputs canine statistics from the CF-240's.

....

FACTOR LEVELS

....

FACTOR 2, Supervisory Controls, Level 2-4, 450 points

Works under general direction of a Supervisory Canine Officer. Works with a high degree of independence, providing leadership and resolving problems. Special assignments have objectives stated in general terms, usually in the form of an identified problem or an area for analysis or investigation. Organizes approach, determines extent of fact-finding and analysis, and adapts techniques and methods to the particular problem involved. Work is typically accepted as completed staff work. Recommendations on changes in procedures and practices are reviewed for effect on other operations, and administrative and policy considerations such as time, staff, and costs.

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Joint Exh. 2.

According to Nat Aycox, former Director of the Canine Program, the supervisory duties encompassed in the Canine Team Leader position, while acting in the absence of a supervisor, include accountability for employment use, productivity, planning, scheduling, approval of leave, coverage for emergency or unscheduled overtime, and making sure that the team performed the duties assigned. He also added that the position description authorized the team leaders to exercise independent judgment in evaluating the performance of both Canine Officer and dog.

The Four Team Leaders At Issue

The four Team Leaders at issue, described from the record in further detail below, are employed at the Respondent's Miami Airport and Miami Seaport locations. The canine team at the Miami Seaport is under a separate chain of command from the canine team at the Miami Airport. Each Team Leader is assigned a dog and utilizes the dog for the interdiction of narcotics and/or currency. The parties stipulated that the Team Leaders also input time, attendance and pay records into the Respondent's COSS computer system. The parties further stipulated that all of the Team Leaders prepare quarterly inventory and monthly vehicle reports.

1. Canine Team Leader (CTL) William Gernaat

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Mr. Gernaat has held the position of CTL - GS-11 since 1997/1998. Mr. Gernaat is assigned to the Courier and Foreign Mail office located in the Miami International Airport. The team is comprised of Gernaat and four (4) GS-9 Canine Enforcement Officers (CEOs), and together they cover five facilities, including the courier stations, such as UPS, DHL, MICA, Miami CFS, and Federal Express, and the Foreign Mail Facility. Mr. Gernaat also has a dog assigned to him, and he performs inspections approximately seventy-five to eighty percent of the time. There is no difference in the canine work performed by Gernaat versus that performed by the GS-9 CEOs on his team. Mr. Gernaat is supervised by Dwight Raleigh, a GS-12 Supervisory Canine Officer. Raleigh is also considered the supervisor for the GS-9 CEOs on the Courier Team.

Mr. Gernaat testified that his supervisor [Raleigh] leaves a lot up to him in providing coverage of five areas. Mr. Raleigh only contacts Mr. Gernaat as to the assignment of duties about twice a week, and Mr. Raleigh observes the CEOs only about two to three times during a month, usually on a weekend. Mr. Gernaat is responsible for making sure that

the officers are at their work place performing their duties and is accountable for the assignments being completed. Mr. Gernaat normally makes sure that the officers are where they are supposed to be by driving by the facility, seeing that their van is there, or by calling them on the radio. Gernaat does not routinely assign CEOs to perform work at a particular facility. Instead, the members of the Courier Team use their own discretion and rotate among each facility. However, one CEO on the Courier Team is permanently assigned to the Foreign Mail Facility because of her dog's health. For the other four areas, it is generally known which CEO will work at a particular area based on the day.

Customs Inspector Al Feingold, a GS-11 senior inspector in the bargaining unit, holds the position of Enforcement Coordinator. He contacts Mr. Gernaat directly four to

five times a week and informs him when a large amount of merchandise needs to be cleared at a particular facility. Mr. Gernaat then decides who from his team is to be assigned to conduct the inspection. Gernaat testified that he does not apply any evaluation of the CEOs in deciding which CEO to send in such instances, but knows that certain CEOs feel more comfortable in certain areas than others. According to Mr. Gernaat, the CEOs have never contested his authority to assign them to a particular inspection.

If overtime work is needed from the members of the Courier Team, the need for overtime is determined by Inspectors, not by Team Leader Gernaat. Overtime is assigned according to a "low man out" system. When working overtime, Gernaat competes in the same overtime pool as the GS-9 CEOs and does not compete in the overtime pool with the Respondent's supervisors.

When Gernaat is not performing canine handling duties, about 25 percent of his time is spent performing non-task related training for CEOs on his team or for CEOs on other teams. The non-task related training is considered to be technical training. Gernaat performs non-task related training twice a week for a total of eight hours a week. The purpose of the non-task related training is to correct any deficiencies that the dog or CEO may have.

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The training is reported on Customs Form CF 312, Detector Dog Team Performance Evaluation form. During the weekly training, Mr. Gernaat rates the CEO's performance and the dog's performance on the CF 312. Mr. Gernaat exercises independent judgment in assessing the CEO's performance on the CF 312 as either satisfactory or unsatisfactory. He also provides the CEOs with corrective guidance if there are any deficiencies with the CEO or the dog. Mr. Gernaat testified that in the past, a CEO was allowed to set up training and complete the CF 312; however, he explained that it was done, for the most part, to show him conducting or being part of the exercise, and that it has happened a couple of times a year.

Gernaat submits the completed CF-312 forms to Supervisory CEO Ron Miller, not Supervisory CEO Raleigh. If a CEO receives poor evaluations, Mr. Gernaat may be requested to provide input as to the CEO's performance. According to Mr. Gernaat the CF 312s have been used to recommend termination of a probationary employee. Mr. Gernaat explained that he wrote a letter to his supervisor that the employee's performance was not going very well. Mr. Gernaat made a recommendation to his supervisor, and he believes that he recommended that the employee continue in the break-in process as he was not ready to be released into working the normal duties. He and the supervisor together recommended the employee be terminated, met with the employee, and the employee subsequently resigned. He also counseled an employee at the specific direction of his supervisor who personally observed that an employee had left a dog in a vehicle without proper ventilation.

Supervisor Raleigh appraises Gernaat as well as everyone else on the Courier Team. Mr. Gernaat testified that as a CTL he has input as to employee performance appraisals, and that on occasion his supervisor has requested his input as to employee performance. Additionally, on occasion Mr. Gernaat has met with the CEOs when they receive their performance evaluations from Mr. Raleigh.

In regard to discipline, Supervisory CEO Raleigh has all functions relating to discipline of employees. Gernaat has never suspended or disciplined anyone. Gernaat has never issued a letter of reprimand. Gernaat confirmed that he has issued a letter of counseling, but Supervisor Raleigh had observed the incident that was the subject of the letter and directed Gernaat to write the letter. It is also noted that the letter of counseling by Gernaat was issued after the unfair labor practice charge and complaint was filed. Gernaat has no authority to adjust employee grievances.

As a Team Leader, Gernaat cannot approve annual leave. Requests for annual leave can only be approved by Raleigh or one of the three other GS-12 Supervisors. Gernaat has only approved annual leave when he has been designated as an Acting Supervisor, GS-12. Gernaat can approve a request for sick leave by a CEO only if the CEO has trouble contacting a supervisor or if no supervisor is available. Gernaat cannot deny and has not denied an employee's request for sick leave. Requests for other types of extended leave must be directed to a supervisor.

On one occasion Mr. Gernaat as a CTL participated in a ranking panel by reviewing applications and compiling a best qualified list for the CEO position.

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Mr. Gernaat has attended supervisory training, such as EEO for managers and safety management. Mr. Gernaat has also attended sporadic supervisory meetings.

2. CTL Heather Kelly Shelton

Heather Shelton has been employed by the Respondent as a GS-11 CTL since about November 1997 or 1998. Shelton works in the Respondent's Outbound Currency Task Force, located at the Miami Airport. Ms. Shelton has two CEO GS-9s in her team. The team's primary responsibility is to work their dogs alongside Customs Inspectors to find currency. The CEO's work location could be at warehouses off the field, flights, or cargo.

Shelton's first level supervisor is Dwight Raleigh in his capacity as Supervisory CEO. Raleigh also supervises the CEOs on Shelton's team. Mr. Raleigh only visits the work site about once a month.

Ms. Shelton has a dog assigned to her, and she spends about seventy-five percent of her time handling her dog. Ms. Shelton testified if someone needs to make a decision as to who is going to work cargo it would be her. However, it is hardly ever necessary for her to do so because the handlers decide where to go among themselves. Shelton does not make decisions based on an evaluation of the CEO's abilities. All of the Currency team CEOs are equally qualified to do the same work. Occasionally, Shelton may tell a handler to work at a particular location. The CEOs have not contested her authority concerning a certain assignment.

Shelton and other members of the Currency team also receive calls from bargaining unit GS-11 Senior Inspector Al Feingold for canine coverage. Shelton testified that whichever team member answers a call from Feingold usually responds to the call.

As a CTL, Ms. Shelton performs non-task related training every week. When conducting this training, Shelton uses the same CF-312 form used by Gernaat to evaluate how an officer works with their dog. Shelton testified that she did not know if the GS-12 Supervisors rely on these forms to assess the effectiveness or performance of the canine team. Ms. Shelton testified that her supervisor has asked her for input regarding the performance of the officers.

Shelton testified that Supervisory CEO Raleigh is in charge of the CEOs' annual performance evaluations and that she does not have any role in the yearly performance appraisal of CEOs and does not meet with employees to talk about their yearly performance appraisals. Shelton testified that she believed that the Form 312s are not used in employees' annual performance appraisal. Team Leaders do not sign performance

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appraisals.

On April 8, 2000, Ms. Shelton executed a questionnaire prepared by the General Counsel, FLRA concerning her duties as a CTL. In that document she was asked whether she distributed work in accordance with her evaluation of the capabilities of the employees and she answered yes. Ms. Shelton was asked whether she prioritized work, and she answered yes. She was asked to what extent she must rely on instructions from others or on standards operating procedures in assigning work, and she responded very little to none. Ms. Shelton was asked whether she instructs employees on how to perform work and she answered yes. She was also asked to what extent was she responsible for the completion of quality of work from the work group, and she answered that she was ultimately responsible for the work that her assigned handlers produced. Ms. Shelton was asked whether she had the authority to approve leave and she answered yes. ^[2] Ms. Shelton was also asked to describe the work she performed, and how it differs from or is similar to subordinates and she, in part, answered that she assigns her subordinates to the area needed to perform the work and that it includes detailing them to the Seaport or Port Everglades. She was also asked whether she had recommended that an employee be counseled, reprimanded,

suspended or removed, and she answered, yes. ^[3] (Respondent Exh. 2).

As a Team Leader, Shelton has had opportunities to work overtime. Overtime is assigned according to a low earner system. Shelton is considered in the same overtime group as GS-9 employees.

Shelton has never hired an employee or been involved in any hiring process. Shelton does not make decisions regarding promotions for employees and is not involved in the promotion process. Shelton has never detailed an employee to a different location. Shelton testified that one day requests for a currency dog from the Seaport must go through the Supervisor. Shelton testified that she cannot assign employees to these types of details and that she has nothing to do with extended TDY type details.

Shelton attends supervisory meetings on weekly basis. She has also attended supervisory training concerning management safety and EEO.

The Supervisor of Gernaat and Shelton

Mr. Dwight Raleigh has been the Acting Chief for the Miami Canine Program since November of 1999. Mr. Raleigh holds the permanent position of Supervisory Canine Enforcement Officer (GS 12) and he has held that position since 1995. As Supervisory Canine Enforcement Officer he supervised the outbound operations, courier and mail operations. Mr. Raleigh supervised William Gernaat and Heather Shelton.

The position description of Mr. Raleigh reflects that he is the first-level supervisor of the canine enforcement unit. He is responsible for assigning all work activities of the unit. He assigns work to subordinates based on priorities, evaluates work performance, approves leave, has authority to take minor disciplinary actions, such as warnings and reprimands, and recommends actions in more serious cases.

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(General Counsel Exh. 2).

Mr. Raleigh testified that the CTL, while in the field, control the CEOs and the work they do. The CTLs have the right to tell a certain CEO to do a specific duty and how best to use the dog. The CTLs also have the authority to advise a CEO how to properly conduct a specific search at a specific location. Mr. Raleigh explained that the CTLs make these decisions on a daily basis without consulting him. The CTLs are responsible for making sure that his team accomplishes the work assigned. According to Mr. Raleigh, the CEOs have never contested the CTL s assignments.

Mr. Raleigh testified that the training is the most critical element of the Canine Program and that training is an important function of the CTLs. The CTLs are primarily responsible for conducting training and preparing the CF 312 evaluation forms. He explained that the purpose of the CF 312 is to measure the search criteria of the dog and certain elements of the dog handling ability of the handler. A CF 312 is prepared for each employee once a week. According, to Mr. Raleigh the CTLs have independent judgment in appraising the officer and the dog when they are performing the training. The CF 312s are maintained for 90 days and he reviews them when a problem has been identified by a CTL concerning a dog or handler. He testified that the CTLs have authority to address training problems with CEOs, and they are expected to correct or make recommendations to resolve problems.

Mr. Raleigh testified that the CF 312s are an integral part of the appraisal performance process. He explained that when the CF 312s reflect that the employee is having problems, such as making routine errors that affect the performance of the dog, he uses the CF 312 to justify action or appraisals. In the absence of the CF 312, Mr. Raleigh relies directly on the word of the CTL. Mr. Raleigh also requests input from the CTLs concerning CEO performance. Mr. Raleigh explained that he has had the CTLs present when he has discussed an appraisal with a CEO, and he remembered Mr. Gernaat being present during one of the appraisals. Mr. Raleigh explained that CF 312s were used as primary documentation to initiate termination of two employees. Mr. Raleigh testified that he was aware that in the past that a CEO evaluated a CTL; however, he explained that was not his policy, and that he has advised his CTLs that that will not happen again.

Mr. Raleigh testified he has given the CTLs the authority to grant leave which implied the authority to deny leave. He has never given them a written instruction to this effect, and the CTLs uniformly testified that they understand that they have the right to grant sick leave, but not the right to deny it.

3. Ellen Stamey

Ellen Stamey has been employed by the Respondent as a GS 11 CTL for about five years. Stamey is currently the Team Leader for the four GS-9 CEOs at the Respondent's Miami Seaport location. Stamey has also been employed as a Team Leader at the Miami Airport and Port Everglades. Ms. Stamey is supervised by Armando Johnson, GS-12 Supervisory Canine Enforcement Officer.

As a Team Leader, Ms. Stamey has a dog assigned to her, and she spends about seventy-five percent of her time performing inspections. Stamey testified that there is no difference in the canine handling work performed by the CEOs than by herself.

Stamey testified that the members of her team move among different locations, work independently, and do not require a lot of direction from her. If canine coverage must be transferred from one area to another, she becomes involved in deciding which location a CEO is to go to if her supervisor is not there. Her supervisor is only in the office about fifty percent of the time. She is responsible for making sure that the CEOs perform their assignments. Ms. Stamey listens to the CEOs on the radio, and if a CEO is not at the assigned place, she makes sure that the CEO gets there. The CEOs in her team have never contested her authority concerning the assignment of work.

The CEOs utilize a predetermined rotating work schedule for employees' days off. Stamey testified that she does not create the work schedule, but enters changes to the work schedule when delegated to do so by her supervisor, such as changes caused by an employee taking sick leave. As a CTL, Stamey can only approve employee requests for sick or emergency leave and must still check with her supervisor before approving leave if her supervisor is there. Stamey cannot disapprove sick or emergency leave. Non-emergency requests for annual leave must be approved by Stamey's supervisor.

Like Gernaat and Shelton, Stamey also performs non-task related training about eight hours per week. Stamey also uses the CF-312 form to record the performance of the handler and the dog during training exercises. Stamey exercises independent judgment in rating the CEOs on the CF 312. Stamey stated that she appraises the handling of the dog during non-task related training, such as reading the dog's alert signals, handling the leash, using proper search techniques. She corrects handling technique problems on the spot.

Stamey testified that her supervisor sees the CF-312s, but she did not know if he looks at them before his annual appraisal of the CEOs. The CEOs at the Miami Seaport receive their annual performance appraisal from Supervisor Johnson. Stamey has never written a performance appraisal for an employee. Stamey testified that her opinion may be asked by her supervisor in the performance appraisal process, as she is with

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the handlers in the field more than the supervisor, but she does not have a say in the final appraisal.

Stamey does not have independent authority to hire, promote, reward, transfer, furlough, layoff, or recall employees. Stamey cannot suspend, discipline or remove employees. If she is unable to correct a canine handling problem, she first discusses the problem with her supervisor before turning it over to her supervisor to observe the problem himself. Stamey has no authority to adjust employee grievances.

CTL Carnell Green

Carnell Green has been a GS-11 CTL for about three and a half years. He is presently assigned to the passenger processing section at the Miami International Airport and has been there for about seven months. He was previously assigned to the courier section. His team at passenger processing consists of five CEOs, and the team is responsible for screening passengers upon arrival. He has a dog assigned to him, and while assigned to a previous station, spent about fifty percent of his time performing inspections with his dog. Green is presently supervised by Steve Davis who reports to Dwight Raleigh.

Green testified that all of the GS-9 employees on his team perform the same work and are equally qualified to perform the work. Green testified that his supervisor, Davis, is responsible for coordinating work schedules. Green is not responsible for making the schedule for employees. In regard to the distribution of work, Green testified that his team sits as a group when they come to work. He might make suggestions as to where he would like them to work but they usually decide where they want to work by group consensus. Green is not responsible for assigning overtime and does not have the authority to authorize overtime.

Dwight Raleigh was Green's supervisor while assigned to the courier section. As a CTL, Green made daily decisions as to the assignment of work for the CEOs. Green testified that he was in control when he was on the field. He would make the decision to request a specific employee to perform a specific task. He did not involve his supervisor in these decisions. According to Mr. Green it was very rare for Mr. Raleigh to go to the field and observe the performance of the CEOs. While at the courier facility he was responsible for insuring that the assignment of the CEOs was accomplished. The CEOs never contested his authority concerning the assignment of work.

As a Team Leader, Green's responsibilities include approving requests for sick leave. In regard to his approval of sick leave, Green stated that he only has this authority if his supervisor is not present or if the situation requires immediate attention. Green does not have the authority to disapprove sick leave. Green does not have the authority to approve other forms of leave such as annual leave. Green's supervisor is usually responsible for approving annual leave. Green stated that annual leave must be requested through a CEO's immediate supervisor or the supervisory Inspector on duty.

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As a Team Leader, Green is responsible for conducting non-task related training of the five members of his canine team. Green conducts non-task related training about one day a week for four hours. As part of this training, Green completes CF-312 forms and exercises independent judgment in evaluating the CEOs. Green testified that if an officer does not perform satisfactorily during the non-task related training, he is able to recommend remedial training to his supervisor. He has not had occasion to do so. Green also makes sure that the CEOs take their required weapons training on the range in order to carry weapons.

Green's supervisor is responsible for reviewing the performance of employees. Green is not involved in performance appraisals and does not make recommendations regarding employee performance appraisals. Green testified that his supervisors have briefly questioned him how a specific employee is doing. CEOs receive annual performance appraisals from their supervisor, and Green is not present when CEOs receive performance appraisals.

Green does not have independent authority to hire, promote, reward, transfer, furlough, layoff, or recall employees. Green has no authority to adjust employee grievances.

Green testified that his supervisor is responsible for making disciplinary decisions. In regard to recommending discipline, Green described one instance in which he made a recommendation to Port Director Winkowsky about being professional to passengers and made the same suggestion to the four employees on his team.

Green attends regular meetings with his supervisor to give input from the CEO's perspective. After becoming a CTL, Green has attended training for managers on EEO, the employee assistance program and safety.

Discussion and Conclusions

Section 7103(a)(10) of the Statute defines a supervisor as:

an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment[.]

The Authority has consistently held that an employee is a supervisor if the employee consistently exercises independent judgment with regard to any one of the supervisory responsibilities set forth in section 7103(a)(10). *United States Small Business Adm. District Office, Casper, Wyoming and Solidarity, U.S.A.*, 49

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FLRA 1051 (1994) (*SBA*); *U.S. Department of the Army, Army Aviation Systems Command and Army Troop Support Command, St. Louis, Missouri and National Federation of Federal Employees Local 405*, 36 FLRA 587, 592 (1990). Additionally, the Authority has held that if the evidence is not conclusive to establish that an individual exercises supervisory authority, certain secondary indicia of supervisory status will be considered. *Department of the Interior, Bureau of Indian Affairs, Navajo Area Office, Gallup, New Mexico and American Federation of Teachers, National Council of Bureau of Indian Affairs Educators*, 45 FLRA 646 (1992).

Each of the GS-11 Team Leaders in this case serves as a resource person, team leader, and training officer for an assigned group of GS-9 CEOs. They spend from 50 to 80% of their time performing the same canine handling functions as bargaining unit GS-9 CEOs. The majority of the remainder of the Team Leaders' time is devoted to performing technical training and routine clerical functions (i.e. recording time and attendance records and completing inventory and vehicle reports).

The testimony of each of the four Team Leaders clearly establishes that none of the four Team Leaders has authority to promote, reward, transfer, furlough, layoff, or recall employees or adjust grievances. In regard to the Team Leaders' authority to hire, direct, assign, suspend, discipline, or remove employees, an examination of the record establishes that the Team Leaders possess little or no independent authority in these areas, have not effectively recommended such actions, and do not consistently exercise independent judgment in these areas.

Because the evidence establishes that the GS-9 CEOs

are equally qualified, work independently, and routinely distribute the work among themselves based on group consensus, it is rarely necessary for the Team Leaders to make decisions to direct employees or assign work even though their GS-12 supervisors are absent for about 50-75% of the time. Inasmuch as the work is primarily routine in nature, each of the Team Leaders do not consistently exercise independent judgment in directing employees or making work assignments to meet the definition of a supervisor. *General Services Administration, Region 2, New York, New York*, 54 FLRA 864, 876-77 (1998); *SBA*, 49 FLRA at 1053-54; *U.S. Department of the Treasury, Office of Chief Counsel and National Treasury Employees Union*, 32 FLRA 1255 (1988); *U.S.A. Darcom Materiel Readiness Support Activity (MRSA), Lexington, Kentucky and U.S. Army Central Test Measurement Diagnostic Equipment Activity, Lexington, Kentucky and American Federation of Government Employees, Local 894, AFL CIO*, 8 FLRA 46 (1982).

The Team Leaders, as senior journey-level resource persons and training officers, each perform and evaluate non-task related training for CEOs on their team for a total of about eight hours a week. They report the performance of the CEOs and dogs on weekly CF-312 forms. The training is considered to be technical training based on the Team Leader's extensive technical knowledge of canine behavior and detector dog training techniques as well as their extensive knowledge of regulations and procedures relating to search and seizure. The Team Leader endeavors to correct any deficiencies on the spot. The Team Leader has independent judgment in preparing the CF 312 evaluation of the handler and the dog.

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The record reflects that the CF 312 prepared by the GS-11 Team Leader is reviewed and used by the GS-12 supervisor mainly to identify problems in the dog or handler. It is the GS-12 supervisor, upon notice of the performance or deficiency identified by the Team Leader as a resource person and training officer, who consistently uses independent judgment in preparing performance appraisals looking toward promotion or reward or counseling the CEO regarding errors, or effectively recommending corrective action toward discipline or removal.

The record does not establish that the GS-11 Team Leaders in issue consistently exercise independent judgment with regard to the supervisory responsibilities contained in section 7103(a)(10) to the degree that the performance of a supervisory function may be deemed to be performed jointly with the GS-12 supervisor. *See Department of Veterans Affairs, Veterans Administration Medical Center, Allen Park, Michigan, 35 FLRA 1206 (1990)*. It is noted that Team Leader Gernaat cited a single instance of advising his supervisor in writing that a probationary employee was not doing well and recommending that he be continued in the break-in process. According to Gernaat, he and the supervisor together then recommended the employee be terminated. The record does not reflect that Gernaat was free to reject the recommendation of his supervisor prior to jointly agreeing that the employee should be terminated. According to the Authority in *VA, Allen Park, 35 FLRA at 1212*, this would be an essential factor to support a conclusion that both exercised independent judgment in reaching the conclusion and exercising their authority.^[4]

The other indicia of supervisory authority in the record, such as mere attendance at supervisory training or meetings, is not sufficient to make any of the employees a supervisor within the meaning of section 7103(a)(10) of the Statute.

Applying the Statute and Authority's established precedents, the facts establish that none of the four GS-11 CEO Team Leaders meets the definition of a supervisor as defined in section 7103(a)(10) of the Statute. As the four GS-11 CEO Team Leaders do meet the definition of employee in section 7103(a) of the Statute, the Respondent's failure to process the four SF-1187 forms submitted by the Union for these employees on or about April 19, 1999 constituted a failure by the Respondent to comply with section 7115(a) of the Statute^[5] and a violation of section 7116(a)(1) and (8) of the Statute. *U.S. Department of the Treasury, U.S. Mint and AFGC Mint Council, C-157, 35 FLRA 1095 (1990)(U.S. Mint)* (a good faith belief concerning the bargaining unit eligibility of an employee is not a defense; an agency acts at its peril if it refuses to process a valid request for dues withholding based on this belief).

Remedy

As the General Counsel urges, the payment of back dues to the Charging Party by the Respondent is an appropriate remedy in this case. In *U.S. Mint, 35 FLRA at 1100*, the Authority found that the remedy for failing to comply with section 7115(a) of the Statute properly includes a requirement that an agency reimburse a union for the dues it would have received but did not as a result of the unlawful conduct.

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Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the U.S. Department of the Treasury, U.S. Customs Service, Customs Management Center, Miami, Florida shall:

1. Cease and desist from:

(a) Refusing to comply with the provisions of section 7115(a) of the Federal Service Labor-Management Relations Statute by refusing to accept and honor valid written dues assignments from bargaining unit employees William H. Gernaat, Heather K. Shelton, Ellen Stamey, and Carnell G. Green, or by refusing to accept and honor valid written dues assignments from other bargaining unit employees for the payment of regular and periodic dues to the National Treasury Employees Union, the exclusive representative of the unit employees.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Reimburse the exclusive representative, National Treasury Employees Union, in an amount equal to the regular and periodic dues it would have received from the pay of bargaining unit employees William H. Gernaat, Heather K. Shelton, Ellen Stamey, and Carnell G. Green, but which dues it did not receive as a result of the unlawful refusal to honor the employees' valid written dues assignments for such purpose.

(b) Commencing with the first pay period after the date of this Order, deduct regular and periodic dues from the pay of William H. Gernaat, Heather K. Shelton, Ellen Stamey, Carnell G. Green, and any other bargaining unit employee who may in the future complete a valid written dues allotment of such dues to the exclusive representative, National Treasury Employees Union.

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(c) Post at all locations where employees serviced by the Respondent's South Florida Customs Management Center 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 Respondent's Port Director(s) 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.

(d) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Boston Region, Federal Labor Relations Authority, 99 Summer Street, Suite 1500, Boston, MA, 02110-1200, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, August 22, 2001

GARVIN LEE OLIVER

Administrative Law Judge

Office of Administrative Law Judges

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 the Treasury, U.S. Customs Service, Customs Management Center, Miami, Florida (Agency) 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 refuse to comply with the provisions of section 7115(a) of the Federal Service Labor-Management Relations Statute by refusing to accept and honor valid written dues assignments from bargaining unit employees William H. Gernaat, Heather K. Shelton, Ellen Stamey, and Carnell G. Green, or by refusing to accept and honor valid written dues assignments from other bargaining unit employees for the payment of regular and periodic dues to the National Treasury Employees Union, the exclusive representative of the unit employees.

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

WE WILL reimburse the exclusive representative, National Treasury Employees Union, in an amount equal to the regular and periodic dues it would have received from the pay of bargaining unit employees William H. Gernaat, Heather K. Shelton, Ellen Stamey, and Carnell G. Green, but which dues it did not receive as a result of the unlawful refusal to honor the employees' valid written dues assignments for such purpose.

WE WILL commencing with the first pay period after the date of this Order, deduct regular and periodic dues from the pay of William H. Gernaat, Heather K. Shelton, Ellen Stamey, Carnell G. Green, and any other bargaining unit employee who may in the future complete a valid written dues allotment of such dues to the exclusive representative, National Treasury Employees Union.

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(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 its provisions, they may communicate directly with the Regional Director, Boston Region, Federal Labor Relations Authority, whose address is 99 Summer Street, Suite 1500, Boston, MA 02110-1200, and whose telephone number is (617) 424-5730.

^[1]At the hearing, the complaint was amended to withdraw Team Leader William Dave Eckard from the complaint.

^[2]In regard to leave, Shelton testified that Raleigh is in charge of all types of leave. As the Team Leader, Shelton is only able to approve sick and annual leave if a supervisor is not available. Shelton cannot disapprove leave. If a supervisor is available, employees are expected to go directly to the supervisor for all types of leave requests.

^[3]Shelton testified that Supervisory CEO Raleigh is in charge of CEOs' counseling and discipline. Shelton testified that as a Team Leader, she has not taken disciplinary action against an employee. Shelton described an instance in which she had a conflict with a GS-9 employee and approached her supervisors about the situation. Shelton made a recommendation to her Supervisor to take action against the employee, but her recommendation was not accepted. Furthermore, the subject employee did not consider Shelton a supervisor and no action resulted. About a year later, Shelton was involved in a different incident with the same employee. This incident was an altercation in which Shelton felt threatened. Shelton then wrote a statement which did not include any recommendation for action to be taken, but indicated that it was a hostile work environment and one of them had to be moved. Shelton testified that Raleigh was responsible for taking action concerning this incident. If an employee were to file a grievance, Raleigh would also be responsible for responding to the grievance.

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[4] Gernaat also once counseled an employee in writing at the specific direction of his supervisor who had observed the incident. The supervisor's initial involvement in the process and direction to Gernaat detracts from any exercise of independent judgment by Gernaat in the matter.

[5] Section 7115(a) of the Statute provides the following:

If an agency has received from an employee in an appropriate unit a written assignment which authorizes the agency to deduct from the pay of the employee amounts for the payment of regular and periodic dues of the exclusive representative of the unit, the agency shall honor the assignment and make an appropriate allotment pursuant to the assignment. Any such allotment shall be made at no cost to the exclusive representative or the employee. Except as provided under subsection (b) of this section, any such assignment may not be revoked for a period of 1 year.