

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

MEMORANDUM

DATE: August 5, 2005

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE NAVY
NAVAL AIR STATION
PENSACOLA, FLORIDA

Respondent

and

Case No. AT-CA-04-0349

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1960

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 transcript, exhibits, and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
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WASHINGTON, D.C. 20424-0001

DEPARTMENT OF THE NAVY NAVAL AIR STATION PENSACOLA, FLORIDA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1960 Charging Party	Case No. AT-CA-04-0349

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. §2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **SEPTEMBER 6, 2005**, 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: August 5, 2005
Washington, DC

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

DEPARTMENT OF THE NAVY NAVAL AIR STATION PENSACOLA, FLORIDA <p style="text-align: center;">Respondent</p>	
<p style="text-align: center;">and</p> AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1960 <p style="text-align: center;">Charging Party</p>	<p style="text-align: center;">Case No. AT-CA-04-0349</p>

Brent S. Hudspeth
 For the General Counsel

Charles H. Herring
 For the Respondent

Before: PAUL B. LANG
 Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an unfair labor practice charge filed on April 28, 2004, by the American Federation of Government Employees, Local 1960 (Union) against the U.S. Department of the Navy, Naval Air Station, Pensacola, Florida (Respondent or NAS Pensacola). On December 6, 2004, the Regional Director of the Atlanta Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing in which it was alleged that the Respondent had committed an unfair labor practice in violation of §7116(a)(1) of the Federal Service Labor-Management Relations Statute (Statute) by denying permission to the Union to conduct a series of "Lunch and Learn" meetings with firefighters who were in the bargaining unit represented by the Union.

A hearing was held in Pensacola, Florida on March 16, 2005. Both parties were present at the hearing, with counsel, and were afforded the opportunity to submit evidence and to cross-examine witnesses. This Decision is

based upon consideration of the evidence, including the demeanor of witnesses, and of the post-hearing briefs submitted by the parties.

Positions of the Parties

The General Counsel

The General Counsel maintains that, in spite of the fact that firefighters are paid for their entire 24 hour shifts, the portion of the shift in which they are allowed to eat and engage in nonwork related activities is "nonduty time" within the meaning of §7131(b) of the Statute. Therefore, the Respondent violated §7116(a)(1) of the Statute by refusing to grant the Union's request to hold Lunch and Learn sessions.¹

The General Counsel also maintains that the Respondent has failed to prove the existence of such special circumstances as would justify a general prohibition against solicitation during nonwork time. The Respondent's blanket prohibition against solicitation during the shift is not justified by the fact that firefighters must be prepared to respond to emergencies at any time. The General Counsel acknowledges the Respondent's right to assign emergency duties at any time and asserts that the Lunch and Learn sessions would not interfere with the ability of firefighters to respond.

The General Counsel asserts that Article 28 of the collective bargaining agreement (CBA) between the parties does not provide the Respondent with a valid defense because the language of the CBA does not address the issue of the use of the Respondent's facilities for Lunch and Learn sessions, nor does it address the locations at which the Union may meet with employees. Furthermore, the Respondent did not cite the CBA in its denial of the Union's request, but relied solely on the fact that the firefighters were paid for the entire shift.

The Respondent

The Respondent maintains that, since firefighters work and are paid for an entire 24 hour shift, they do not have any nonduty time within the meaning of §7131(b) of the Statute. Consequently, the granting of the Union's request would be a violation of the Statute. This is so because the

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The purpose of the Lunch and Learn sessions is to solicit membership in the Union. There is no evidence as to the duration or form of these sessions.

Firefighter Pay Reform Act of 1998, P.L. 105-277, eliminated standby time for firefighters.

The Respondent further maintains that, even if the General Counsel's distinction between duty time and standby time were valid, it was still justified in denying the Union's request. Firefighters are assigned duties in addition to emergency responses even in the less structured portion of the shift. Furthermore, the Union made it clear that it wished to hold the Lunch and Learn sessions at midday, which is during the most structured part of the shift.

Finally, the Respondent argues that the CBA does not require the Respondent to provide the Union with space for the Lunch and Learn sessions and it is under no statutory obligation to do so.

Findings of Fact

The Respondent is an agency as defined in §7103(a)(3) of the Statute. The Union is a labor organization within the meaning of §7103(a)(4) of the Statute and is the exclusive representative of a unit of the Respondent's employees which is appropriate for collective bargaining.

Firefighters' Daily Routine

The pertinent facts are undisputed. The Union represents a bargaining unit which includes firefighters, all of who work in 24 hour shifts during which they are in a paid status. The shift begins at 7:30 a.m. Firefighters report by 7:25 a.m., at which time the new shift² or platoon obtains information from the shift that is being relieved (Tr. 51). The new shift then carries out a regular routine of equipment maintenance or firehouse cleaning followed by training either at the firehouse or at other locations. They also engage in "pre-fire planning" which consists of familiarization with the base as well as with surrounding areas where they may be required to lend assistance. That activity is followed by a lunch break of about an hour. The lunch break generally occurs some time between 11:00 a.m. and 1:00 p.m., but firefighters may eat lunch outside of this time period as long as they have no conflicting work-related activities (Tr. 34). Training and teaching continue after the lunch break until around 4:00 p.m. (Tr. 25, 26).

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The term "shift" refers to the personnel as well as to the hours during which they work.

After 4:00 p.m. the members of the shift often pursue personal activities³ such as self-study (which need not be job-related), watching television, cooking and eating meals, exercise in the firehouse gym and softball as part of a team. Softball practice takes place at a field which is two or three miles from the firehouse. They take their firefighting equipment, including the trucks, with them so that they can respond to emergency calls if necessary (Tr. 26, 28, 29). Firefighters are also required to hold about one night drill per calendar quarter; these take place after dark (Tr. 27). The routine is the same at all of the fire stations at NAS Pensacola with the exception of Station 3 which is responsible for the manning of crash trucks whenever the airfield is open (Tr. 31).⁴

Other activities routinely occur after 4:00 p.m. These include mail runs and the movement of vehicles from one station to another so as to ensure coverage during preventative maintenance periods. There are also nonemergency calls such as keys locked in cars and activated alarm systems. Firefighters also inspect the base nightclubs, including electrical and public address systems (Tr. 54).

CFC campaigns are conducted at each fire station on an annual basis.⁵ The captain in charge of the campaign visits each station, passes out literature and gives a group presentation either in a conference room or the galley⁶ where the firefighters are used to gathering (Tr. 29, 30).

The Union's Request

By letter dated February 17, 2004 (Jt. Ex. 1), from Cecilia S. Gentry, the Union's Business Agent, to Fire Chief Carl Thoman, the Union requested permission to have a Lunch and Learn session at the number 1 fire station on February 26. The letter further stated that:

³
Training may occur after 4:00 p.m. if the shift has to respond to an emergency call (Tr. 27, 28).

⁴
The duties and responsibilities of firefighters are set forth in OINST 11320.1E (Resp. Ex. 3). However, there is no evidence as to any formal directive which establishes the daily schedule at the fire stations.

⁵
I take official notice that CFC stands for Combined Federal Campaign which is the federal version of the United Fund.

⁶
I take official notice that "galley" is a nautical term for a kitchen and dining area.

We would need to use a break area for approximately four hours scheduled around their normal lunch periods.

A Lunch and Learn is for the purpose of educating our bargaining unit employees on why they should become union members. We will not be talking to them except when the firefighters are on their own time, such as lunch or before or after shift changes.

Thomann⁷ responded to Gentry in an undated memorandum (Jt. Ex. 2), stating, in pertinent part, that, "The firefighters are paid in 24 hour shifts and do not have any non-duty time during their shift. Therefore, I must deny your request."

Beverly Hayslip is a Human Resource Specialist for the Respondent and was assigned to handle the underlying unfair labor practice charge at the local level. Hayslip testified that Thomann had contacted her to discuss Gentry's request and had stated that firefighters had no nonduty time while on shift. Hayslip thereupon passed that information along to Gentry (Tr. 60, 61).⁸

Hayslip also testified that she had informed Gentry that the Respondent would be willing to schedule Lunch and Learn sessions either before or after the shift. According to Hayslip, Gentry seemed receptive to the proposal at first, but did not accept it (Tr. 61). There is no evidence of further communication between the parties on the subject of Lunch and Learn sessions.

The Collective Bargaining Agreement

Article 6 of the CBA (Resp. Ex. 4, p. 14), entitled "UNION RIGHTS", states, in pertinent part:

Section 6.03. Nothing in this Agreement shall be interpreted to interfere with or restrain the Union in the exercise of its rights as defined in 5 USC Chapter 71 [the Statute], except as otherwise negotiated and set forth in this Agreement.

⁷

Thomann's name had been misspelled in Gentry's letter.

⁸

It is unclear whether Thomann or Hayslip first advised the Union of the Respondent's position.

Section 6.04. The EMPLOYERS⁹ agree that at the time of check-in, a new UNIT employee shall be:

* * * * *

3. Introduced to their UNION representative where available within the employee's assigned department for the purpose of briefing UNIT employees on representation rights. . . .

* * * * *

Section 6.06. The UNION has the right, in accordance with law, to communicate with UNIT employees. Article 28, Union Facilities and Services, outlines the methods, equipment, and EMPLOYERS' policies governing use of equipment for communications purposes. . . .

Article 28 of the CBA (Resp. Ex. 4, p. 53) obligates the Respondent to provide the Union, at no cost, with bulletin boards and office space, when available, along with furnishings and telephone service.¹⁰ There is no mention of the use of other facilities for Union business, nor is there a definition of "nonduty time" (Tr. 63).

Discussion and Analysis

The Legal Framework

This case presents, for the first time, the issue of the effect of The Firefighter Pay Reform Act (Act) on the right of a labor organization to solicit membership during the work day. The Act, which is part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, P.L. 105-277, contains an amendment to 5 U.S.C. §5545b(b)(2) whereby the basic pay of certain firefighters, including those employed by the Respondent, was changed to include "an amount equal to the firefighter's basic hourly rate . . . for all hours in such firefighter's regular tour of duty (including overtime hours)." The Act eliminated the prior practice of providing standby pay for certain hours within

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The CBA is between the Union and 12 organizations, including the Respondent, in the Pensacola area.

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As of the time of the hearing the Respondent was not providing the Union with office space because of the destruction caused by Hurricane Ivan (Tr. 62). The Union maintains an office off base (Tr. 32).

the shift. There is no definition of nonduty time, nor does the Act amend any portion of the Statute.¹¹

§7131(b) of the Statute provides that:

Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, . . .) shall be performed during the time the employee is in a nonduty status.

In *Social Security Administration*, 13 FLRA 409 (1983) the Authority held that:

. . . an employee's protected right to solicit union membership while in a nonduty status may be exercised in a work area where the employees being solicited also are in a nonduty status, absent any disruption of the activity's operations or any other unusual circumstances (*Id.* at 412).

In the same decision the Authority confirmed its holding in *Oklahoma City Air Logistics Center (AFCC), Tinker Air Force Base, Oklahoma (Tinker)*, 6 FLRA 159, 162 (1981) that a rule prohibiting all solicitation of membership by a union during paid breaks is a violation of §7116(a)(1) of the Statute.

Since the Act does not define "nonduty time" and does not amend the Statute, the circumstances of this case fall within the scope of *Tinker* and its progeny. Simply stated, the fact that employees are in a pay status does not, in itself, mean that they are in a duty status so as to prohibit solicitation by a labor organization.

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A more detailed explanation of the effect of the Act on the pay of firefighters is contained in Retirement and Insurance Service Benefits Administration Letter Number 01-107 which is a publication of the Office of Personnel Management (Resp. Ex. 2).

The Effect of the CBA

In ascertaining the meaning of contract language, consideration must be given to the contract as a whole, *U.S. Department of Energy, Western Area Power Administration, Golden, Colorado*, 56 FLRA 9, 25 (2000). An examination of the CBA as a whole leads me to the conclusion that the Respondent's reliance on Article 28 as an affirmative defense is misplaced.

The Respondent has correctly stated that Article 28 only obligates it to provide the Union with a bulletin board as well as an office, telephone and furnishings if available. However, that language deals with facilities which are to be provided to the Union for its exclusive use on a long term basis. In this case the Union did not request that any portion of the Respondent's premises be turned over to it permanently for Lunch and Learn sessions. Indeed, there is no evidence to show that the Union needed any portion of the firehouse for its exclusive use on even a temporary basis. The Union only requested permission to have its representatives speak to employees during their lunch breaks. The Respondent did not inquire as to the format of the Lunch and Learn sessions, but based its denial solely on the fact that the firefighters were paid for the entire 24 hours of their shift.

Since Article 28 does not, at least on its face, eliminate the right of the Union to conduct Lunch and Learn sessions in the galley or another gathering place in the firehouse, it is appropriate to determine how the interpretation urged by the Respondent comports with other portions of the CBA. Section 6.03 of the CBA states that it is not to be interpreted so as to interfere with or restrain the Union in the exercise of the rights assured by the Statute except as "otherwise negotiated and set forth in this Agreement." Since, as shown above, Article 28 does not explicitly prohibit the temporary and short-term use of the Respondent's facilities by the Union, it would be inconsistent with the language of Section 6.03 to construe Article 28 so as to bar the Union from conducting Lunch and Learn sessions in the firehouse.

Section 6.04 provides for the introduction of a Union representative to new employees for the purpose of a briefing on their representational rights (the Union representative is to perform this function while on official time). Presumably, the Respondent would not insist that the briefing take place in the Union office, even if such an office were in existence because it would require that the new employees leave the firehouse. Therefore the section

would be rendered essentially meaningless if the Union representative could not brief the employees somewhere in the firehouse.¹²

Section 6.06 acknowledges the right of the Union to communicate with members of the bargaining unit. The section refers to Article 28 regarding the use of *equipment*, not facilities, for the purposes of communication, a point acknowledged by Hayslip (Tr. 64). Thus, the CBA itself implies that Article 28 is not to be construed as a limitation on the location in which communication is to take place.

The Respondent's position is not improved by the fact that it suggested that the Lunch and Learn sessions be held either before or after the shift changes, *i.e.*, while the firefighters were not being paid. Since, as shown above, the Union had a right to conduct the sessions during the shift, it was under no obligation to accept the Respondent's proposal.

This Decision should not be construed as limiting the right of the Respondent to schedule work-related activities at any time during the shift nor as authorizing the Union to disrupt scheduled training and maintenance. My interpretation of the CBA, the Act and the Statute merely means that the pay status of firefighters is an insufficient reason to deny the Union permission to hold Lunch and Learn sessions during the shift. Furthermore, the Respondent cannot legitimately claim that the Lunch and Learn sessions are more disruptive to the work routine or to the readiness of firefighters to respond to emergencies than the CFC presentation or the multitude of nonwork-related activities, including meals, that it allows while firefighters are in a pay status.

In view of the foregoing, I have concluded that the Respondent committed an unfair labor practice in violation of §7116(a)(1) of the Statute by denying the Union's request to hold Lunch and Learn sessions because the employees who were to attend those sessions were in a pay status. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

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It would not be reasonable to construe Section 6.04 as providing for the briefing of employees who are off shift because the Union would have the right to do so regardless of the language of the CBA.

Pursuant to 2423.41(c) of the Rules and Regulations of the Authority and §7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the U.S. Department of the Navy, Naval Air Station, Pensacola, shall:

1. Cease and desist from:

(a) Refusing to allow the American Federation of Government Employees, Local 1960, AFL-CIO to conduct Lunch and Learn sessions with firefighters on the basis that firefighters work 24 hour shifts and do not have any nonduty time during their shifts.

(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:

(a) Post at its Pensacola, Florida facility copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the Commanding Officer of that facility, 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.

(b) Pursuant to §2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director of the Atlanta 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, August 5, 2005

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 U.S. Department of the Navy, Naval Air Station, Pensacola, Florida 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 allow the American Federation of Government Employees, Local 1960, AFL-CIO to conduct Lunch and Learn sessions with firefighters on the basis that firefighters work 24 hour shifts and do not have any nonduty time during their shifts.

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.

(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, Atlanta Regional Office, whose address is: Federal Labor Relations Authority, Suite 701, Marquis Two Tower, 285 Peachtree Center Avenue, Atlanta, GA 30303-1270, and whose telephone number is: 404-331-5300.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. AT-CA-04-0349, were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT

CERTIFIED NOS:

Brent S. Hudspeth

7000 1670 0000 1175

6278

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President

AFGE

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Washington, DC 20001

Dated: August 5, 2005
Washington, DC