

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

MEMORANDUM

DATE: October 17, 2006

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG  
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE ARMY  
HEADQUARTERS, 10<sup>TH</sup> MOUNTAIN DIVISION  
(LIGHT INFANTRY) & FORT DRUM  
FORT DRUM, NEW YORK

and

DEPARTMENT OF THE ARMY  
U.S. ARMY MEDICAL ACTIVITY  
FORT DRUM, NEW YORK

Respondent

AND

Case Nos. BN-CA-05-0227  
BN-CA-05-0370

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO, LOCAL 400

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**  
Office of Administrative Law Judges  
WASHINGTON, D.C. 20424-0001

DEPARTMENT OF THE ARMY HEADQUARTERS, 10 <sup>TH</sup> MOUNTAIN DIVISION (LIGHT INFANTRY) & FORT DRUM FORT DRUM, NEW YORK  and  DEPARTMENT OF THE ARMY U.S. ARMY MEDICAL ACTIVITY FORT DRUM, NEW YORK  Respondents	
AND  AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 400  Charging Party	Case Nos. BN-CA-05-0227 BN-CA-05-0370

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 **NOVEMBER 20, 2006**, and addressed to:

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

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PAUL B. LANG

Administrative Law Judge

Dated: October 17, 2006  
Washington, DC

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

DEPARTMENT OF THE ARMY HEADQUARTERS, 10 <sup>TH</sup> MOUNTAIN DIVISION (LIGHT INFANTRY) & FORT DRUM FORT DRUM, NEW YORK  and  DEPARTMENT OF THE ARMY U.S. ARMY MEDICAL ACTIVITY FORT DRUM, NEW YORK  <p style="text-align: center;">Respondents</p>	
<p style="text-align: center;">AND</p> AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 400  <p style="text-align: center;">Charging Party</p>	<p style="text-align: right;">Case Nos. BN-CA-05-0227          BN-CA-05-0370</p>

Gerald M. Greene, Esquire  
 For the General Counsel

Joseph A. Fedorko, Esquire  
 Edward White  
 For the Respondents

Robin Johnson  
 For the Charging Party

Before: PAUL B. LANG  
 Administrative Law Judge

**DECISION**

**Statement of the Case**

On March 11, 2005, the American Federation of Government Employees, Local 400 (Union or Charging Party) filed an unfair labor practice charge against the Headquarters, 10<sup>th</sup> Mountain Division (Light Infantry) and Fort Drum (Respondent/Fort Drum). (GC Ex. 1(a)) On February 9, 2006, the Regional Director of the Boston

Regional Office of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing (GC Ex. 1(c)) alleging that the Respondent committed an unfair labor practice in violation of §7116(a)(1) of the Federal Service Labor-Management Relations Statute (Statute) by instructing the President of the Charging Party not to use official time for activities involving the National Security Personnel System (NSPS), including speaking to bargaining unit employees about NSPS or distributing literature to bargaining unit employees about NSPS in non-work areas during non-work time. The Respondent/Fort Drum filed a timely Answer (GC Ex. 1(g)) in which it admitted telling the Charging Party's President she could not use official time to distribute literature and/or make oral presentations regarding NSPS, but denied it had prohibited any activity in non-work areas during non-work time. Further, the Respondent denied it had committed the alleged unfair labor practice.

On June 16, 2005, the Charging Party filed an unfair labor practice charge against the U.S. Army Medical Activity (MEDDAC) (Respondent/MEDDAC). (GC Ex. 1(b)) On February 9, 2006, the Regional Director of the Boston Regional Office of the Authority issued a Complaint and Notice of Hearing (GC Ex. 1(d)). On March 13, 2006, Counsel for the General Counsel filed a motion, which was granted, to amend the Complaint. (GC Ex. 1(i) and (j)) As amended, the complaint alleged that Respondent committed an unfair labor practice in violation of §7116(a)(1) of the Statute by instructing the President of the Charging Party that representatives of the Charging Party could not use official time for activities concerning the NSPS, including speaking to bargaining unit employees about NSPS or distributing literature to bargaining unit employees about NSPS in non-work areas during non-work time. The Respondent/MEDDAC filed a timely Answer (GC Ex. 1(h)) to the Complaint in which it admitted it advised the Charging Party's President it was adopting the position of Respondent/Ft. Drum concerning the use of official time to distribute literature and/or make oral presentations relating to the issue of NSPS. Respondent/MEDDAC asserted that, as the Charging Party's President was not an employee of MEDDAC, it had no role in approving her official time but acknowledged the adopted policy would have applied if any stewards of the Charging Party employed by MEDDAC had any made official time requests for such activity, which they did not.<sup>1</sup>  
Respondent/MEDDAC denied it committed the alleged unfair

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No further Answer was filed by Respondent/MEDDAC subsequent to the amendment of the Complaint. Respondent/MEDDAC has not alleged that it was not properly joined as a respondent.

labor practice. (GC Ex. 1(h)) On March 20, 2006, the Regional Director issued an order consolidating the two complaints for hearing. (GC Ex. 1(k))

A hearing was held in Syracuse, New York, on June 22, 2006. The parties were present with counsel and were afforded the opportunity to present evidence and to cross-examine witnesses. This Decision is based upon the evidence, including the demeanor of the witnesses, as well as the post-hearing briefs submitted by the parties.

### **Findings of Fact**

#### **Background**

The Respondents are agencies as defined in §7103(a)(3) of the Statute. (GC Exs. 1(c), 1(d), 1(g) and 1(h)) 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 Respondents' employees which is appropriate for collective bargaining. (GC Exs. 1(c), 1(d), 1(g) and 1(h)) Approximately 400 employees in the bargaining unit are employed by Respondent/Ft. Drum and approximately 300 are employed by Respondent/MEDDAC. (Tr. 15) At all times material to this case, a collective bargaining agreement (CBA) covering the bargaining unit was in effect. (Tr. 15-16) Of particular relevance to the dispute in this case is Article 6 of the CBA, which addresses official time use by Union representatives. (GC Ex. 2) In relevant part, Article 6 provides as follows:

Article 6 - OFFICIAL TIME

. . .

#### SECTION 2

In the interests of efficient conduct of government business and the economical use of government time, and in order to draw a reasonable distinction between official and non-official activities, those activities concerned with internal management of labor organizations such as membership meetings, solicitation of membership, collection of dues, campaigning for labor organizations offices, and distribution of literature will be conducted outside of regular working hours or in non-duty status; and none of the above activities will be done at Employee work stations. Literature may be distributed to

Employees in break rooms or handed out in break areas.

. . .

#### SECTION 5

The Union agrees that Union officials will request permission from their immediate Supervisor when they wish to leave their assigned duties for the purpose of performing representational duties. The Supervisor's permission will normally be granted except when work loads preclude such release. When permission is not granted when requested, it will be granted at a later time. If the Union representative needs to visit a work site, the Union will coordinate with the Supervisor. The Union agrees that its officers and stewards will guard against the use of excessive time in performing duties considered appropriate by the Agreement.

. . .

#### SECTION 7

A. Official time will only be granted to officers and stewards of the Union. These blocks of official time will be computed starting with the first pay period after the effective date of this contract. The parties agree to the following official time:

- (1) President - 100%
- (2) 1<sup>st</sup> Vice President - 704 hours annually
- (3) 2<sup>nd</sup> Vice President - 440 hours annually
- (4) Chief Steward - 440 hours annually

The Union agrees to send a representative, normally the President, to command level meetings, briefings when requested e.g. Garrison staff call, executive council.

B. The Employer agrees to grant the local President a block of 800 hours to distribute for use in representational matters by local stewards, as he/she deems appropriate.

[Subsections C. through E. provide for additional grants of official time for specified activities, *i.e.*, future A-76

study or process, attendance at labor relations training and other training.]

. . .

F. Following each pay period the President will submit a report (e-mail) to the LRO [Labor Relations Officer] showing all official time used, by name, during that period. The Union President's time keeper will be in the CPAC.

(GC Ex. 2)

### **Events Surrounding the Publication of the Proposed Rule on NSPS**

These cases center on events that relate to the publication of a proposed rule to establish the NSPS. The NSPS is essentially a new human resources system for the Department of Defense (DoD), which would govern basic pay, staffing, classification, performance management, labor relations, adverse actions and employee appeals, and differ in many respects from the traditional civil service system established under title 5, U. S. Code. (Jt. Ex. 1) On February 14, 2005, DoD and the Office of Personnel Management (OPM) published a proposed rule establishing NSPS in the Federal Register for public comment. (Jt. Ex. 1) Comments were to be received on or before March 16, 2005. (Jt. Ex. 1)

Shortly before publication of the proposed rule in the Federal Register, Col. Ray Helton, the Garrison Commander at Ft. Drum, sent an e-mail dated February 10, 2005, to a number of addressees instructing them to disseminate an attached fact sheet concerning NSPS to employees.<sup>2</sup>

(GC Ex. 3) One of the addressees on Helton's e-mail was Robin Johnson, the President of the Union. (GC Ex. 3) Johnson, intending to forward Helton's message to the Union's officers and stewards, sent an e-mail dated February 11, 2005, that was inadvertently addressed to other individuals. (Tr. 21-22, GC Ex. 3) Beneath Johnson's "signature" on the e-mail was a note in which Johnson characterized NSPS, which she stated was scheduled to be implemented in July 2005, as "the most significant change to the DoD personnel system during your career," and advised that a 30-day comment period would follow publication in the

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The term "Garrison" is unexplained in the record. It is, however, generally used in conjunction with Respondent/Ft. Drum and I take it to refer to that Respondent rather than Respondent/MEDDAC.



Federal Register. Johnson's note further stated that the comment period would be "your only chance to provide input to the new system." (GC Ex. 3)

In response, Ed White<sup>3</sup>, who was one of the unintended recipients of Johnson's e-mail, sent Johnson an e-mail questioning her choice of addressees and also informing her that her "footnote" was misleading because it suggested that all aspects of the NSPS would go into effect at Ft. Drum in July 2005. (GC Ex. 3) In a subsequent e-mail Johnson sent White the same day on an NSPS related issue, the "footnote" was modified to state that regardless of what "spiral" an activity fell in with respect to the implementation of NSPS, the labor relations provisions were scheduled to take effect in July 2005 and the employee relations and pay changes were scheduled to begin at the same time for CPAC and for other organizations after that. (GC Ex. 4)

On February 15, 2005, a regular, quarterly briefing for the purpose of apprizing employees of current events and upcoming changes was conducted. (Tr. 25-26) At the entrance to the briefing room, the Union handed out a flier containing information about NSPS and the deadline for submitting comments. (Tr. 27, GC Exs. 5 and 6) During that period, the Union began leaving fliers in various places and distributing copies to employees at any "lunch and learn" sessions it conducted and in various areas around the lunch period. (Tr. 33-34) Two versions of a flier distributed by the Union were submitted into evidence. Each contained some information about NSPS, provided contact information, and encouraged employees to submit comments in response to the Federal Register publication. (GC Exs. 5 and 6)

During early March 2005, there was another e-mail exchange between Johnson and White in which White contended that some of the information the Union representatives were giving out about NSPS was not accurate. (GC Ex. 8) In the course of that exchange, White asserted in a March 9, 2005, e-mail to Johnson that under Section 2 of Article 6 of the CBA, distribution of literature was analogous to oral presentations and, in accordance with that contractual

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White was identified by the General Counsel in the complaint in Case No. BN-CA-05-0227 as the "Acting Labor Relations Officer." (GC Ex. 1(c)) In its answer to that complaint, the Respondent identified White as the Chief of the Civilian Personnel Advisory Center (CPAC) at Ft. Drum. (GC Ex. 1(g)) White's correct title was never definitively established in the record; however, it is clear that he functioned in some capacity as a representative at Ft. Drum for purposes of labor relations.

provision, could not be done on official time. (GC Ex. 8) Johnson provided undisputed testimony that at about the same time she received this e-mail from White, she had a telephone conversation with Joseph Fedorko, a Labor Counselor for one or both Respondents, in which Fedorko conveyed to her the Deputy Garrison Commander's belief that NSPS activities were not an appropriate use of official time. (Tr. 44-45) According to Johnson, during their conversation, Fedorko supported this view with the assertion that NSPS was being imposed on Ft. Drum from a higher level and, hence, was not a "representational" matter within the meaning of section 7114 of the Statute and the concern that employees might get upset about NSPS and do something inappropriate. (Tr. 45-46)<sup>4</sup> Johnson stated that during her conversation with Fedorko, she asked him whether she was going to be charged leave for time she had already spent distributing material related to NSPS and he responded she would not but in the future she should not use official time to talk about NSPS. (Tr. 45-46) Johnson requested Fedorko to send her something in writing and he responded that he would get with White and would probably do that. (Tr. 47) Johnson never received anything in writing from Fedorko. (Tr. 53)

After her conversation with Fedorko, Johnson sent an e-mail to the Union officers and stewards recounting her exchange with Fedorko about official time and advising them that they should not engage in activities or discussions involving NSPS on "duty time." (GC Ex. 9) In her e-mail, Johnson suggested that an officer or steward should be available around lunchtime or whenever people wanted to talk about NSPS and, if the officer or steward ran over his/her scheduled lunch, take leave or LWOP (leave without pay). (GC Ex. 9) Subsequent to her conversation with Fedorko, Johnson continued to distribute information about NSPS but did it during her lunch period or before and after duty hours. (Tr. 75) The only time Johnson did not engage in such activities was when she was on official time. (Tr. 75) In one instance, Johnson advised White she may have engaged in a discussion about NSPS with an employee outside her lunch period and requested leave if White thought her activity was not appropriate for official time. (GC Ex. 10) White's response was only to ask whether the amount of time beyond Johnson's normal lunch period involved one-half hour or one hour. (GC Ex. 10) Johnson testified she did not recall whether she was actually charged leave. (Tr. 86)

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The Respondents did not pursue this issue in their post-hearing brief.

At the hearing, Johnson stated it had been the Union's plan to "make a push" toward the end of the comment period to ensure employees were aware of the comment period and its significance. (Tr. 61) Johnson asserted that the limitations placed on the Union with respect to using official time restricted its ability to carry out its plan. (Tr. 61)

At some point after Johnson learned of Respondent/Ft. Drum's position that activities relating to NSPS were not appropriate for official time, he queried officials at Respondent/MEDDAC on whether they would apply the same policy as the Garrison. (Tr. 53) According to Johnson, she did this because it was her experience that MEDDAC didn't always do the same thing the Garrison did. (Tr. 53-54) Johnson also testified that, when she first presented the question to the officials at MEDDAC, she informed them that the Union representatives were refraining from engaging in NSPS distributions and discussions while on official time until she got an answer. (Tr. 58) Johnson did not receive Respondent/MEDDAC's response until June when MEDDAC officials essentially advised her that it would apply the same policy as the Garrison. (Tr. 54; GC Ex. 11)

#### **Positions of the Parties**

The General Counsel alleges that the Respondents violated section 7116(a)(1) of the Statute by interfering with the Union's right under section 7102 of the Statute to speak with employees about NSPS and distribute Union literature about NSPS in non-work areas during non-work time. The General Counsel asserts that it is not disputed that the distributions involved were occurring in non-work areas and that the bargaining unit employees receiving the literature were on non-work time. The General Counsel argues that official time is, for all practical purposes, non-work time and, consequently, Respondents' actions in prohibiting the Union representatives from making distributions of Union literature while in that status transgressed their rights under section 7102. The General Counsel contends that the evidence shows that Respondents' imposition of an overly broad no-solicitation/no-distribution rule occurred at a critical time and restrained the Union from communicating with bargaining unit employees regarding NSPS to the extent it originally planned.

The General Counsel further maintains that the Respondents have not asserted that using official time for the purpose of publicizing matters relating to NSPS was internal Union business which is prohibited under section 7131(b) of the Statute; but rather have relied on Article 6

of the CBA. The General Counsel asserts that under *Internal Revenue Service, Washington, D.C.*, 47 FLRA 1091 (1993) (*IRS*), the burden is on the Respondents to show by a preponderance of the evidence that Article 6 allowed them to impose the restraints they did. The General Counsel argues that Article 6 does not support the Respondents' view and that the record fails to support the Respondents' interpretation of that Article as prohibiting the use of official time for the Union's NSPS activities.

As a remedy, the General Counsel seeks an order requiring the Respondents to rescind the prohibition placed on Union representatives distributing literature about the NSPS in non-work areas and speaking about that matter while on official time, and to post notices to employees.

The Respondents deny that they violated the Statute as alleged. They acknowledged that they told the Union that its representatives could not use official time to distribute literature or make oral presentations regarding NSPS. They deny that they prohibited the representatives from engaging in those activities in non-work areas during non-duty times or that the Union was prevented from making distributions or presentations. The Respondents assert that the General Counsel has failed to establish otherwise.

The Respondents argue that, although employees, acting in a representational capacity, have the right under section 7102 of the Statute to publicize issues and distribute literature concerning working conditions, the matter of whether they may use duty time to do so is subject to negotiation under section 7131(d). Furthermore, the Respondents contend that disputes involving contractual provisions relating to use of official time under section 7131(d) do not constitute statutory violations but should be resolved through negotiated grievance procedures.

### **Discussion and Analysis**

The parties define the legal issue in this case differently. The General Counsel sees the central issue as being employee rights under section 7102 of the Statute to speak about labor relations matters with other employees during non-work times and distribute literature in non-work areas during non-work times. The Respondent, while acknowledging employees' section 7102 rights, sees the dispute as purely a matter of official time use negotiated pursuant to section 7131(d) of the Statute.

#### **Employee Rights under Section 7102 of the Statute**

This case presents a dispute that intertwines issues of employee rights under section 7102 and the use of official time governed by section 7131(d) of the Statute. Resolving this case initially requires defining the nature and scope of the rights under section 7102 that are at issue. It is well-established that employees' right under section 7102 to "form, join, or assist any labor organization" encompasses the right to distribute union literature in non-work areas during non-work times, *United States Department of the Air Force, Randolph Air Force Base, San Antonio, Texas*, 58 FLRA 14, 18 (2002). Section 7102 also includes the right of employees to publicize issues having a direct bearing on the working conditions of bargaining unit employees, *National Federation of Federal Employees, Local 122 and U.S. Department of Veterans Affairs, Regional Office, Atlanta, Georgia*, 47 FLRA 1118, 1123 (1993) (*VA, Atlanta*). The right of employees to publicize such matters applies to communications with the press and the public, *VA, Atlanta*. It also extends to communications that publicize such matters to bargaining unit employees. See *General Services Administration*, 9 FLRA 213, 215, 222 (1982) (*GSA*) (Employee had right to distribute leaflet regarding pay reform legislation to bargaining unit employees in parking lot). Section 7102 also affords employees the right to engage in discussions of a collective bargaining agreement in work areas during non-work time where there is no disruption of work. See *U.S. Department of the Navy, Naval Aviation Depot, Naval Air Station Alameda, Alameda, California*, 36 FLRA 705 (1990) (*NAS, Alameda*). It follows from this precedent that the employees who were functioning as union representatives had the right under section 7102 to discuss

NSPS and distribute literature about NSPS in non-work areas during non-work times.<sup>5</sup>

There is no dispute that the discussions and distributions that the Union representatives were engaging in were occurring in non-work areas. Thus, that is not in issue and to that extent the activities came within the scope of the employees' section 7102 rights. What remains in determining whether the activities were encompassed within the rights granted employees under section 7102 is the question of whether official time constitutes "non-work" time for the purpose of engaging in representational activity.

The official time provisions found in section 7131 of the Statute essentially authorize employees to engage in

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*NAS, Alameda*, indicates that the right of employees to engage in discussions, as contrasted with making distributions, regarding the Union's view of NSPS may extend to work areas during non-work times as long as there is no disruption of work. The manner in which the complaints were framed and the case litigated at hearing did not make clear that the General Counsel was drawing a distinction between the limitations that could be placed on employee discussions as contrasted with distributions of literature. In the post-hearing brief submitted by the General Counsel, there is some indication that he intended to draw such a distinction. I find, however, that the post-hearing brief did not provide the Respondents with adequate notice that, in addition to being charged with a violation based on restricting employees who were functioning as representatives of the Union from engaging in discussions of NSPS in **non-work areas** during non-work times, they were also charged with a violation based on restricting conversations and discussions about NSPS in **work areas** during non-work times.

The Authority does not judge a complaint based on rigid pleading requirements, *OLAM Southwest Air Defense Sector (TAC), Point Arena Air Force Station, Point Arena, California*, 51 FLRA 797, 807 (1996). Thus, the Authority will consider matters that are fully and fairly litigated between the parties even though such matters are not specified in the complaint or where the complaint is ambiguous, *Bureau of Prisons, Office of Internal Affairs, Washington, D.C. and Phoenix, Arizona, et. al.*, 52 FLRA 421, 429 (1996) (*Bureau of Prisons*). The test of full and fair litigation is whether the respondent knew what conduct was at issue and had a fair opportunity to present a defense. *Bureau of Prisons*, 52 FLRA at 429.

certain labor-management relations activities under the Statute on "paid time," meaning they are released from their duties to perform such activities without loss of pay or leave. See, e.g., *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89 (1983). Put another way, official time under section 7131 allows employees performing various labor-management relations activities to be paid "as if they were at work." See, *Id.* at 92. If they were not on official time, the employees engaged in such activity when they would otherwise be in duty status would not receive their normal salary compensation without charge to leave. See *American Federation of Government Employees, Local 3615 and Social Security Administration, Arlington, Virginia*, 17 FLRA 955 (1985).

The Authority has held that the performance of representational functions does not constitute "work" within the meaning of section 7106 of the Statute. See *American Federation of Government Employees, National Council of HUD Locals 222, AFL-CIO*, 60 FLRA 311, 313 (2004). In one decision, the Authority characterized official time as being neither duty time nor non-duty time but "a distinct third category of time" in which an employee performs representational functions for the union while receiving compensation from the agency. *Association of Civilian Technicians, Old Hickory Chapter and U.S. Department of Defense, North Carolina National Guard Bureau, Raleigh, North Carolina*, 55 FLRA 811, 813 (1999).

A reasonable argument could be made that, if official time constituted work time or if labor-management activities on behalf of a union constituted work, there would be no need for official time in the first place. I find that the very existence of statutory provisions providing for official time and the precedent explaining official time and the term "work" support a conclusion that official time does not constitute work time for purposes of construing employee rights under section 7102.

Based on the foregoing, I find that official time equates to non-work time for purposes of employee's rights to engage in distributions and discussions under section 7102 of the Statute. I further find that the discussion of NSPS and distribution of literature relating to NSPS by employee representatives of the Union on official time in non-work areas constituted an exercise of their rights under section 7102 of the Statute.

I find that the circumstances here are distinguishable from those involved in *U.S. Department of the Air Force, HQ Air Force Materiel Command*, 49 FLRA 1111 (1994) (AFMC).

In that case, the Authority found, among other things, that although unions have a statutory right to designate their own representatives, that right does not mean that the union's chosen representative has the right to engage in labor-management activity on official time encompassed by section 7131(d). *AFMC* at 1119-20. In this case the right involved is that of employees to engage in discussions and discussions **on non-work time**. Hence, the scope of the rights involved in *AFMC* and in this case are different.

### **Contractual Limitations on Statutory Rights**

Having determined that the employee representatives of the Union were engaged in an exercise of a statutory right, the applicable analytical framework for determining whether a violation of the Statute occurred is that set forth in *IRS*, 47 FLRA 1091.6 In that decision, the Authority articulated an approach for resolving unfair labor practice complaints in which a respondent claims that a provision of a collective bargaining agreement permits the action alleged to be an unfair labor practice. Under the framework set forth in *IRS*, where the General Counsel "makes a *prima facie* showing that a respondent's actions would constitute a violation of a statutory right, the respondent may rebut the General Counsel's showing of a prima facie case. This may be done by establishing by a preponderance of the evidence that the parties' collective bargaining agreement allowed the respondent's actions." 47 FLRA at 1110.

As discussed above, the General Counsel has shown that the Respondents restricted the rights of employees who were representing the Union to discuss NSPS and distribute literature on that subject in non-work areas during non-work times. Thus, the General Counsel has made a *prima facie* showing that the Respondents engaged in actions that would violate employees' section 7102 rights. At this stage of the analysis the focus prescribed by *IRS* is on interpreting the parties' agreement to determine whether it permitted the restrictions that the Respondents placed on the employees' rights.

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In their post-hearing brief, Respondents rely on the Authority's decision in *National Archives and Records Administration*, 24 FLRA 245 (1986), in support of their assertion that the dispute should be resolved through the parties' negotiated grievance procedure. That decision predated *IRS* and, to the extent it may suggest a different approach than articulated in *IRS*, it has been superseded by *IRS*.



The only evidence submitted by either party regarding the collective bargaining agreement is a copy of Article 6.7

(GC Ex. 2) Article 6 authorizes blocks of official time for various union representatives and, additionally, blocks of time for some specified purposes, *i.e.*, participation in A-76 studies and attendance at certain types of training. As to the blocks of time authorized for the officers and stewards, the article establishes no restrictions on the purpose for which the time may be used other than those contained in Section 2. That section, in part, reflects the provisions of section 7131(b) of the Statute in terms of restricting the use of official time for the activities concerned with the internal business of the Union.

By its wording, the limitations in Section 2 are confined to "the internal management of the labor organization." Although distribution of literature is one of the items mentioned in that section, it appears as one of the activities presented as an example of "internal management." It is not reasonable to read the inclusion of "distribution of literature" in those examples as extending the reach of the prohibition on using official time for distributions to all literature that the Union might want to distribute. It is more reasonable to interpret the prohibition as applying only to literature that fits within the confines of the phrase "internal management of the labor organization." Literature publicizing NSPS and the opportunity to comment on the proposed system cannot reasonably be construed as coming within that category. Rather, it relates to matters that directly concern the conditions of employment of bargaining unit employees as contrasted with internal business of the Union, which is more commonly viewed as involving things such as membership matters, elections of officers and dues collections.

I find, based on its express language, that nothing in Article 6 permitted the Respondents to restrict the Union's right to engage in discussion and distribution of literature concerning NSPS in non-work areas during non-work time. There is no other evidence in the record that would show the intent of the parties or their past practice in applying the contract. Thus, I find that the Respondents have failed to establish by a preponderance of the evidence that the collective bargaining agreement permitted their action that otherwise violated the Statute.

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Other than a single joint exhibit that consisted of the proposed rule establishing NSPS published in the Federal Register, the Respondent presented no witnesses or other evidence at the hearing.

In finding that Responent/MEDDAC violated the Statute as alleged, I note it did not confirm its adoption of the policy initially communicated to Johnson on behalf of Respondent/Ft. Drum until considerably after the end of the period for public comment on NSPS. Respondent/MEDDAC was, however, informed by Johnson in mid-March that, until advised otherwise, she would instruct the stewards assigned to MEDDAC to refrain from conducting discussions and distributions relating to NSPS while on official time. Respondent/MEDDAC took no immediate action to confirm or deny the correctness of Johnson's assumption that there was a good chance that the same practice applied both at Ft. Drum and MEDDAC and ultimately it confirmed that it was following the same practice. Although the comment period on the proposed rule establishing NSPS had passed, the restrictions on discussions and distributions relating to NSPS remained and effectively prevented any such activity on the part of Union representatives while on official time that they might have wanted to engage in subsequent to the comment period.

For the foregoing reasons, I have concluded that the Respondents violated the Statute by restricting the employees' right to engage in discussions and distributions of material relating to NSPS in non-work areas during non-work times. Accordingly, I recommend that the Authority adopt the following Order:

#### **ORDER**

Pursuant to §2423.41 of the Rules and Regulations of the Federal Labor Relations Authority (Authority) and §7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the Department of the Army, Headquarters, 10<sup>th</sup> Mountain Division (Light Infantry) & Fort Drum, Fort Drum, New York, shall:

1. Cease and desist from:

(a) Restricting representatives of the American Federation of Government Employees, AFL-CIO, Local 400 (Union) from discussing the National Security Personnel System (NSPS) with bargaining unit employees or distributing literature concerning NSPS in non-work areas during non-work times.

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Rescind the restriction on representatives of the Union and allow them to discuss NSPS with bargaining unit employees and distribute literature about the NSPS in non-work areas during non-work times.

(b) Post at all locations where bargaining unit employees are located, copies of the attached Notice "A" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt, such forms shall be signed by the Garrison Commander and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that these Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to §2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director of the Boston Regional Office, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Pursuant to §2423.41 of the Rules and Regulations of the Authority and §7118 of the Statute, it is hereby ordered that the Department of the Army, U.S. Army Medical Activity, Fort Drum, New York, shall:

1. Cease and desist from:

(a) Restricting representatives of the Union from discussing the NSPS with bargaining unit employees or distributing literature concerning NSPS in non-work areas during non-work times.

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Rescind the restriction on representatives of the Union and allow them to discuss NSPS with bargaining unit employees and distribute literature about the NSPS in non-work areas during non-work times.

(b) Post at all locations where bargaining unit employees are located, copies of the attached Notice "B" on

forms to be furnished by the Federal Labor Relations Authority. Upon receipt, such forms shall be signed by the Commander and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that these Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to §2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director of the Boston Regional Office, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, October 17, 2006.

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PAUL B. LANG  
Administrative Law Judge

**NOTICE "A"**

**NOTICE TO ALL EMPLOYEES**

**POSTED BY ORDER OF**

**THE FEDERAL LABOR RELATIONS AUTHORITY**

The Federal Labor Relations Authority has found that the Department of the Army, Headquarters, 10<sup>th</sup> Mountain Division (Light Infantry) & Fort Drum, Fort Drum, New York, has violated the Statute and has ordered us to post and abide by this Notice.

**WE HEREBY NOTIFY OUR EMPLOYEES THAT:**

**WE WILL NOT** restrict representatives of the American Federation of Government Employees, AFL-CIO, Local 400 (the Union) from discussing the National Security Personnel System (NSPS) with bargaining unit employees or distributing literature concerning NSPS in non-work areas during non-work times.

**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** rescind the restriction on representatives of the Union and allow them to discuss NSPS with bargaining unit employees and distribute literature about the NSPS in non-work areas during non-work times.

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(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 any of its provisions, they may communicate directly with the Regional Director, Boston Region, Federal Labor Relations Authority, whose address is: 10 Causeway

Street, Suite 473, Boston, MA 02222, and whose telephone number is: 617-565-5100.

**NOTICE "B"**

**NOTICE TO ALL EMPLOYEES**

**POSTED BY ORDER OF**

**THE FEDERAL LABOR RELATIONS AUTHORITY**

The Federal Labor Relations Authority has found that the Department of the Army, U.S. Army Medical Activity, Fort Drum, New York, has violated the Statute and has ordered us to post and abide by this Notice.

**WE HEREBY NOTIFY OUR EMPLOYEES THAT:**

**WE WILL NOT** restrict representatives of the American Federation of Government Employees, AFL-CIO, Local 400 (Union) from discussing the National Security Personnel System (NSPS) with bargaining unit employees or distributing literature concerning NSPS in non-work areas during non-work times.

**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** rescind the restriction on representatives of the Union and allow them to discuss NSPS with bargaining unit employees and distribute literature about the NSPS in non-work areas during non-work times.

\_\_\_\_\_  
-  
(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 any of its provisions, they may communicate directly with the Regional Director, Boston Region, Federal Labor Relations Authority, whose address is: Thomas P. O'Neill, Jr. Federal Building, 10 Causeway Street, Suite 473, Boston, MA 02222, and whose telephone number is: 617-565-5100.





**CERTIFICATE OF SERVICE**

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case Nos. BN-CA-05-0227 and BN-CA-05-0370 were sent to the following parties:

**CERTIFIED MAIL AND RETURN RECEIPT**

**CERTIFIED NOS:**

Gerard M. Greene

**7004 2510 0004 2351**

**2105**

Counsel for the General Counsel  
Federal Labor Relations Authority  
Thomas P. O'Neill, Jr. Federal Bldg.  
10 Causeway Street, Suite 472  
Boston, MA 02222

Joseph A. Fedorko, Labor Counselor

**7004 2510 0004 2351**

**2112**

Edward White  
Office of the Staff Advocate General  
10<sup>th</sup> Mountain Division (LI) & Fort Drum  
Fort Drum, NY 13602-5000

**REGULAR MAIL:**

Robin Johnson, President  
AFGE, Local 400  
P.O. Box 400  
Fort Drum, NY 13603

President  
AFGE  
80 F Street, NW  
Washington, DC 20001

Dated: October 17, 2006

Washington, DC