

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

MEMORANDUM

DATE: March 4, 2010

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER
BATTLE CREEK, MICHIGAN

RESPONDENT

AND

Case No. CH-CA-09-0186

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
LOCAL 1629, AFL-CIO

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

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EMPLOYEES, LOCAL 1629, AFL-CIO

CHARGING PARTY

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard by the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves her 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. §§2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **APRIL 5, 2010**, and addressed to:

Office of Case Intake & Publication
Federal Labor Relations Authority
1400 K Street, NW., 2nd Floor
Washington, DC 20424-0001

SUSAN E. JELEN

Administrative Law Judge

Dated: March 4, 2010
Washington, D.C.

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
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U.S. DEPARTMENT OF VETERANS AFFAIRS
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RESPONDENT

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Case No. CH-CA-09-0186

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1629, AFL-CIO

CHARGING PARTY

Greg A. Weddle, Esq.
For the General Counsel

Margaret A. Smith, Esq.
For the Respondent

Jeffrey Cunningham
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §7101, *et. seq.* (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority/FLRA), 5 C.F.R. Part 2423.

On December 31, 2008, the American Federation of Government Employees, Local 1629, AFL-CIO (Charging Party or Union), filed an unfair labor practice charge with the Chicago Region of the Authority against the U.S. Department of Veterans Affairs Medical Center, Battle Creek, Michigan (Respondent or VA Battle Creek). (G.C. Ex. 1(a)) On September 29, 2009, the Regional Director of the Chicago Region of the Authority issued an Order Consolidating Cases and a Consolidated Complaint and Notice of Hearing, which alleged that the Respondent violated section 7116(a)(1) and (8) of the Statute by holding a formal meeting on December 18, 2008, without giving the Union notice and an opportunity

to be represented. (G.C. Ex. 1(b))¹ On October 23, 2009, the Respondent filed an Answer to the complaint in which it admitted certain allegations, while denying the substantive allegations of the complaint. (G.C. Ex. 1(d))

A hearing was held in Battle Creek, Michigan, on November 18, 2009, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. The General Counsel and the Respondent filed timely post-hearing briefs, which have been fully considered.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions, and recommendations.

STATEMENT OF THE FACTS

The Respondent is an agency within the meaning of section 7103(a)(3) of the Statute. (G.C. Ex. 1(c), (d)) The Union is a labor organization within the meaning of section 7103(a)(4) of the Statute. (G.C. Ex. 1(c), (d)) Donald Swierenga has been the Chief of the Dental Service at VA Battle Creek since March 3, 2008, and at all times material to this matter, has been a supervisor and/or management official within the meaning of section 7103(a)(10) and (11) of the Statute. (Tr. 47; G.C. Ex. 1(c), (d))

The Dental Service is located in Building 2 on the second floor and has about eleven employees, including dentists, dental assistants, dental hygienists and lab technicians. (Tr. 40) Since arriving, Dr. Swierenga instituted weekly meetings of the Dental staff. These meetings are held every Thursday from 12:45p.m. to 1:45p.m., in Room 1195, which is also located in Building 2, but on the first floor. It is not part of the Dental Service office, but in the Mental Health Service area. (Tr. 11-12, 20, 48). Dr. Swierenga identified four different types of meetings: dental executive function (administrative oversight); professional staff function; dental team growth and development sessions; and dental chats. (Tr. 48)

On Thursday, December 18, 2008, a meeting of the Dental Service was held in Room 1195, Building 2. This was a regularly scheduled meeting, considered a dental team growth and development session. Dr. Swierenga also sent the employees an email on December 15, reminding them of the scheduled meeting, and informing them that a survey would be conducted. A planned holiday ceremony would be held after the meeting. (Tr. 24, 64; R. Ex. 2)

The December 18 meeting was delayed because two of the employees were working on a dental emergency which lasted about an hour. (Tr. 12) All of the staff were present, except for two employees who were on approved leave. (Tr. 13) Dr. Swierenga led the meeting and there were no other supervisory or management officials present. (Tr. 13) The

¹ The Chicago Region issued a consolidated complaint on September 29, 2009, covering three separate unfair labor practice charges: CH-CA-09-0186, CH-CA-09-0314 and CH-CA-09-0354. Prior to the hearing, the cases were severed and this case was heard separately.

primary purpose of the meeting was for the employees to answer a survey that Dr. Swierenga had created, in response to an email he had received from one of the other dentists regarding an incident of workplace lateral (meaning not physical) violence. (Tr. 52-53)

The survey was called a “Climate Perception Feedback”, was four pages in length and had three components. (G.C. Ex. 2) The first two parts of the survey asked employees to compare their perception of the way things were in the Dental Service in the Fall of 2007 with that of the Fall of 2008. Part A asked employees for their views regarding “Support, Tools, Preparedness and Understanding.” Specifically, employees were asked to judge improvements in the amount of “direct support” they received from the Dental Service; the equipment they had to work with; their emergency preparedness; their respect for Dental Service leadership; the Dental Service’s carpet, paint, calendars and computers; and the overall Dental Clinic climate. Part B of the survey asked for the employees’ views on “Relationships, Attitudes, Teamwork”. Employees were asked to compare their prior and current opinions of their individual contributions at work; their relationship with the clinic, their personal level of effort; and the overall “attitudes” in the Dental Service. This part of the survey also asked employees to provide their perspective on the amount of polarization versus togetherness among employees, and whether one or more Dental Service employees do not “get it” regarding “where we’re going as a team?” Finally, Part C of the survey listed the name of each employee within the Dental Service, and employees were asked, with regard to each employee, whether that employee was part of a “polar group (e.g. separate from the rest)” for both the Fall of 2007 and the Fall of 2008. (Tr. 17, 28; G.C. Ex. 2)

Dr. Swierenga read each question of the survey, explaining and giving examples of what he meant and how the employees should respond. The employees filled out their own responses to the questions. (Tr. 17) Usually, the employees sat around the conference table, but for this meeting, the chairs were arranged so that people were not sitting next to each other. (Tr. 14-16, 61)

This meeting lasted a total of three hours (included the one hour spent waiting for the two employees who were working on a dental emergency) and concluded around 3:45p.m. The employees returned to the Dental Service and did an abbreviated version of the holiday celebration since it was close to the end of their shift. (Tr. 18-19)

The survey was never discussed with the Dental staff, due, apparently, to complaints. (Tr. 18) Dr. Swierenga testified that the timing of the December 18 was unfortunate, but that he felt the meeting was important and necessary for the Dental Service. (Tr. 88)

The Union was not notified of or given an opportunity to attend the December 18 Dental Service meeting, and was not notified of any of the prior Dental Service meetings referenced during the hearing. (Tr. 7, 44)

POSITION OF THE PARTIES

General Counsel

The General Counsel (GC) asserts that the Respondent violated section 7116(a)(1) and (8) of the Statute by failing to provide the Union with an opportunity to attend the December 18 Dental Service meeting. The GC asserts that the December 18 meeting was a formal meeting within the meaning of section 7114(a)(2)(A). The GC further asserts that the Respondent's defenses that the December 18 meeting was not a formal discussion because several meetings preceded it without objection by the employees and that the Union could have attended the meeting if employees had requested the Union's presence, are without merit.

Respondent

The Respondent asserts that the evidence does not show that a formal discussion occurred in this matter. The Respondent asserts that the December 18 meeting was a Dental Service team growth and development session which included the Climate Perception Feedback Survey, but did not involve any discussion concerning either a grievance or personnel policy, practice or other condition of employment of unit employees, as required by section 7114(a)(2)(A). Therefore, the complaint in this matter should be dismissed.

DISCUSSION AND ANALYSIS

Section 7114(a)(2)(A) of the Statute provides:

- (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at-
 - (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment[.]

A union is entitled to representation under section 7114(a)(2)(A) only if all elements of that section exist. There must be: (1) a discussion; (2) which is formal; (3) between one or more representatives of the agency and one or more unit employees or their representatives; and (4) concerning any grievance or any personnel policy or practice or other general condition of employment. *Department of the Air Force, Sacramento Air Logistics Center, McClellan AFB, Cal.*, 29 FLRA 594, 597-98 (1987) (*McClellan*). In examining these elements, the

Authority is guided by the intent and purpose of section 7114(a)(2)(A), which is to provide a union with an opportunity to safeguard its interests and the interests of bargaining unit employees, as viewed in the context of the union's full range of responsibilities under the Statute. *General Services Administration*, 50 FLRA 401, 404 (1995) (*GSA*). This is not a separate element of the statutory analysis, but rather a "guiding principle that informs our judgments in applying the statutory criteria." *Id.* at 404 n.3.

There is no dispute in this matter that a meeting was held on December 18, 2008, between a representative of management and unit employees, and that the Union was not provided notice or an opportunity to attend the meeting. The primary issues to be decided are whether the December 18 meeting was "formal" and whether it concerned "any grievance or any personnel policy or practice or other general condition of employment."

Was the Meeting Formal?

In *General Services Administration, Region 9*, 48 FLRA 1348, 1355 (1994), the Authority stated:

In determining whether a discussion is formal within the meaning of section 7114(a)(2)(A), we have advised that the totality of the circumstances presented must be examined, but that a number of factors are relevant: (1) the status of the individual who held the discussions; (2) whether any other management representatives attended; (3) the site of the discussions; (4) how the meetings for the discussions were called; (5) how long the discussions lasted; (6) whether a formal agenda was established for the discussions; and (7) the manner in which the discussions were conducted.

These factors are illustrative, and other factors may be identified and applied as appropriate in a particular case. See *F.E. Warren AFB, Wyo.*, 52 FLRA 149, 157 (1996).

Looking at the circumstances of the Dental Service meeting, the facts are split on whether the meeting was formal or not. The meeting was mandatory and lasted three hours, even though part of that time was spent waiting for two employees to join them following a dental emergency in the Service. While staff meetings were held every Thursday by the Dental Service, the employees were reminded of this meeting by email the Monday before the scheduled meeting. The meeting was conducted by the employees' first level supervisor who is also the Dental Service Chief. Although the evidence reflects that the Equal Employment Manager for the VA was invited, the evidence fails to establish that she was actually present at the meeting. The meeting took place in a conference room downstairs from the Dental Service work area; although this conference room was not in the same work area, the Dental Service staff uses this same conference room every week for their general staff meetings. At this particular meeting, however, the conference room was specifically reconfigured so that employees did not sit next to each in order to take the survey independently. Although there was not a formal agenda, it is clear that the purpose of the meeting was to conduct the survey, and that Dr. Swierenga was highly organized in his manner of presenting the survey to the employees, since he read and explained each question individually. There is no evidence that notes were taken of the meeting, although Dr. Swierenga retains the survey answers. In reviewing all of these factors, I find that most of the factors weigh in favor of a finding of formality; specifically, that the Chief of the Dental Service conducted the meeting; that the meeting took place in the reconfigured conference room; that the meeting lasted 3 hours; that the meeting was a regularly scheduled meeting with an email reminder sent to the employees; that the survey was conducted in an organized and controlled manner by the Chief; and that attendance at the meeting was mandatory. Taking all these factors into consideration, I find that the meeting was formal within the meaning of section 7114(a)(2)(A) of the Statute.

Did the Meeting Concern "any grievance or any personnel policy or practice or other general condition of employment"?

The evidence reflects that the specific purpose of this meeting was the survey that Dr. Swierenga created. Entitled "Climate Perception Feedback" Dr. Swierenga created the survey in response to a complaint regarding the atmosphere in the Dental Service and an accusation of workplace lateral violence, meaning abusive verbal treatment rather than physical assault. Dr. Swierenga testified of the importance of this issue and that his survey was an attempt to get the employees to consider the changes in the Dental Service from the fall of 2008 to the time of the survey. The survey itself covered a wide-range of items, including the workplace physical environment, such as carpeting, paint, calendars, and

computers, as well as the overall workplace climate. Employees were asked to judge their respect for Dental Service leadership and to rate their individual contributions to work; their relationship to the clinic and their personal level of effort. Employees were asked for their views on the amount of polarization or togetherness in the Dental Service and to identify whether they felt one or more of their coworkers did not “get it” with regard to where the Dental Service was going as a team. Finally, employees were asked to identify, by name, which groups within the Dental Service their coworkers associated with.

As noted above, the Respondent asserts that the meeting in question was a Team Growth and Development Session and did not involve any discussion concerning either a grievance or personnel policy, practice or other condition of employment, as required by the Statute. Dr. Swierenga has conducted approximately twelve such Team Growth and Development Sessions between March and December 2008, and they generally involve “soft skills” and target interpersonal relationships and how employees can work together. The “Climate Perception Feedback” was prepared with the intention of helping the employees see the good that had been accomplished, and to seek anonymous feedback to identify those employees that “didn’t get” the teamwork concept. Dr. Swierenga admitted that the survey had hard questions and made the staff uncomfortable. (Tr. 55) However, no specific employee was ever identified and no formal counseling was ever considered.

After a careful review of the evidence, I find that the meeting in question concerned “personnel polic[ies] or practice[s] or general condition[s] of employment” within the meaning of section 7114(a)(2)(A) of the Statute. *See, DOD, Defense Logistics Agency, Defense Depot Tracy, Tracy, Cal., 37 FLRA 952 (1990)*. In that regard the survey asked questions regarding the employees “perceptions” of their physical work environment, such as carpeting and paint; their technical work environment, such as computers; and their emotional work environment, such as interpersonal relationships, abilities to get along with other employees; their own contributions to the work, and overall attitudes in the Dental Service. All of these issues related to the working conditions of all of the employees in the Dental Service. *See also GSA, 50 FLRA at 401*, in which the supervisor, among other things, sought information concerning the general environment in the office, including matters involving employee morale and social relationships. Under these circumstances, the Union had the right to be offered an opportunity to be present and to represent the employees. The fact that the Dental Service conducts staff meetings on a regular basis does not negate the Union’s rights under the Statute to be present at this particular meeting. The Respondent’s argument that the Union was more than welcome at the meeting is not sufficient to refute its failure to specifically give the Union notice and an opportunity to be present.

Accordingly, all of the statutory elements of a formal discussion under section 7114 (a)(2)(A) were satisfied. The Respondent’s failure to provide the exclusive representative with an opportunity to be represented at the formal discussion on December 18, 2008, is an unfair labor practice under section 7116(a)(1) and (8) of the Statute.

Based on the above findings and conclusions, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the U.S. Department of Veterans Affairs Medical Center, Battle Creek, Michigan, shall:

1. Cease and desist from:

(a) Conducting formal discussions with employees in the bargaining unit represented by the American Federation of Government Employees, Local 1629, AFL-CIO, without affording the Union prior notice of and the opportunity to be represented at the formal discussions.

(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) Post at its facility in Battle Creek, Michigan, 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 Director, VA Medical Center, 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 section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Chicago Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., March 4, 2010

SUSAN E. JELEN
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 Veterans Affairs, Battle Creek, Michigan, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT conduct formal discussions with our employees in the bargaining unit exclusively represented by the American Federation of Government Employees, Local 1629, AFL-CIO (the Union), without affording the Union prior notice and the opportunity to be represented at the formal discussions.

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 Statute.

WE WILL notify the Union and afford it the opportunity to be represented at formal discussions with bargaining unit employees represented by the American Federation of Government Employees, Local 1629, AFL-CIO.

(Agency/Activity)

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, Chicago Region, Federal Labor Relations Authority, and whose address is: 55 W. Monroe, Suite 1150, Chicago, Illinois 60603, and whose telephone number is: (312)866-3465.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. CH-CA-09-0186, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT

CERTIFIED NOS:

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Catherine Turner
Office of Administrative Law Judges
Federal Labor Relations Authority

Dated: March 4, 2010
Washington, DC