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

MEMORANDUM DATE: May 20, 2005

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: DEPARTMENT OF HOMELAND SECURITY
BORDER AND TRANSPORTATION
SECURITY DIRECTORATE
U.S. CUSTOMS AND BORDER PROTECTION
EL PASO, TEXAS

Respondent

and Case Nos. DA-CA-04-0533
DA-CA-04-0576

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1929

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 stipulation, 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 HOMELAND SECURITY BORDER AND TRANSPORTATION SECURITY DIRECTORATE U.S. CUSTOMS AND BORDER PROTECTION EL PASO, TEXAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1929 Charging Party	Case Nos. DA-CA-04-0533 DA-CA-04-0576

NOTICE OF TRANSMITTAL OF DECISION

Pursuant to §2423.26 of the Authority's Rules and Regulations, the above-entitled case was stipulated to the undersigned Administrative Law Judge. 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 **JUNE 20, 2005**, and addressed to:

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

SUSAN E. JELEN
Administrative Law Judge

Dated: May 20, 2005
Washington, DC

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C.

DEPARTMENT OF HOMELAND SECURITY BORDER AND TRANSPORTATION SECURITY DIRECTORATE U.S. CUSTOMS AND BORDER PROTECTION EL PASO, TEXAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1929 Charging Party	Case Nos. DA-CA-04-0533 DA-CA-04-0576

Nora E. Hinojosa, Esquire
For the General Counsel

Christopher Ryan, Esquire
Robert H. Humphries, Esquire
For the Respondent

James A. Stack
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

Statement of the Case

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §§7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. Chapter XIV, Part 2423. The case was submitted in accordance with section 2423.26(a) of the Rules and Regulations, based on a waiver of a hearing and a stipulation of facts by the parties.

On June 10, 2004, the American Federation of Government Employees, Local 1929 (Charging Party or Local 1929) filed an unfair labor practice charge in Case No. DA-CA-04-0533

against the Department of Homeland Security, Border and Transportation Security Directorate, U.S. Customs and Border Protection, El Paso, Texas (Respondent or Agency). On September 29, 2004, the Acting Regional Director of the Dallas Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing in which it was alleged that, on May 26, 2004, the Respondent held a formal discussion with a member of the bargaining unit represented by the Union. It was further alleged that the discussion concerned a grievance filed by the Charging P arty and that the Respondent failed to allow the Union's chosen representative to attend the meeting. The Respondent therefore failed to comply with the section 7114(a)(2)(A) of the Federal Service Labor-Management Relations Statute (Statute) and thereby committed unfair labor practices in violation of section 7116(a)(1) and (8) of the Statute.[1]

On July 16, 2004, the Charging Party filed an unfair labor practice charge in Case No. DA-CA-04-0576 against the Respondent. On October 29, 2004, the Regional Director of the Dallas Region of the Authority issued a Consolidated Complaint and Notice of Hearing in which it was alleged that, on June 14, 2004, the Respondent held a formal discussion with a member of the bargaining unit represented by the Union. It was further alleged that the discussion concerned a grievance filed by the Charging Party and that the Respondent failed to afford the Charging Party notice or the opportunity to attend the meeting. The Respondent therefore failed to comply with the section 7114(a)(2)(A) of the Statute and thereby committed unfair labor practices in violation of section 7116(a)(1) and (8) of the Statute.

On October 15, 2004 and November 17, 2004, the Respondent filed its Answers to the respective complaints, in which it admitted certain allegations while denying the substantive allegations of the complaint.

A hearing on these consolidated cases was originally scheduled for December 7, 2004, at a place to be determined in El Paso, Texas. The scheduled hearing was postponed until February 22, 2005 and then March 8, 2005, while the parties attempted to produce a stipulation of facts.

On March 2, 2005, the Respondent, the Charging Party and the General Counsel entered into a Joint Stipulation of

[1] On January 18, 2005, the Counsel for the General Counsel filed a Motion to Amend Complaint in Case No. DA-CA-04-0533. The Respondent has not objected to the motion. Therefore, as the motion is consistent with the language of the parties' Stipulation, the General Counsel's Motion to Amend Complaint is hereby granted.

Undisputed Facts, pursuant to section 2423.26 of the Authority's Rules and Regulations. The parties agreed that the Charges, the Complaints and Notices of Hearing, Respondent's Answers, and all Pleadings and Orders in this matter (Jt. Exs. 1(a)-(z)), the Stipulation and its attached exhibits (Jt. Exs. 2-7), and the parties' post-stipulation briefs constitute the entire record in this case and that no oral testimony is necessary or desired by any party as no material issue of fact exists. Since the parties waived their right to a hearing before the Administrative Law Judge, no hearing has been held and this decision is based on the formal papers, the stipulation of facts and attached exhibits.

Findings of Fact

The parties agreed to the following stipulation of facts:

1. The Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Customs and Border Protection, El Paso, Texas (Respondent), is an Agency under 5 U.S.C. §7103(a)(3).

2. The American Federation of Government Employees, AFL-CIO, National Border Patrol Council (Council) is a labor organization under 5 U.S.C. §7103(a)(4) and is the exclusive representative of a unit of employees appropriate for collective bargaining at Respondent.

3. The American Federation of Government Employees, National Border Patrol Council, Local 1929 (Local 1929 or Charging Party) is an agent of the Council for the purpose of representing employees of Respondent within the unit described in paragraph 2.

4. During the time period covered by the Stipulation, the persons listed below occupied the positions opposite their names:

Joseph Maurer	Labor Relations Specialist
Irene Ramirez	Labor Relations Specialist
Christine A. Dixon	Attorney, Office of Assistant Chief Counsel

Christopher C. Smith Attorney, Office of Assistant Chief Counsel

Robert H. Humphries Assistant Chief Counsel

5. During the time period covered by the Stipulation, Joseph Maurer and Irene Ramirez were advisors for supervisors and/or management officials under 5 U.S.C. §7103(a)(10) and (11) at the Respondent.

6. During the time period covered by the Stipulation, Christine A. Dixon, Christopher C. Smith, and Robert H. Humphries, were advisors and advocates for supervisors and/or management officials under 5 U.S.C. §7103(a)(10) and (11) at the Respondent.

7. During the time period covered by the Stipulation, Mr. Maurer, Ms. Ramirez, Ms. Dixon, Mr. Smith and Mr. Humphries were acting on behalf of Respondent.

8. During the time period covered by the Stipulation, the persons listed below were employees under 5 U.S.C. §7103(a)(2) and were in the bargaining unit represented by Local 1929:

Jackson Lara	Border Patrol Agent
Omar Ortiz	Border Patrol Agent
Joseph Todd	Firearms Training Specialist
Robert Arnold	Senior Border Patrol Agent
Bryan Garnsey	Senior Border Patrol Agent
James Stack	Senior Border Patrol Agent and Local 1929 President

9. In June 2004, Local 1929 presented two employee grievances for arbitration: Jackson Lara, set for hearing on June 15, 2004 (hereafter referred to as the Lara Arbitration) and Omar Ortiz, set for hearing on June 17, 2004 (hereafter referred to as the Ortiz Arbitration).

The Lara Arbitration

10. On Friday, May 21, 2004, Joseph Maurer notified Local 1929 President Stack by telephone that Christine Dixon wanted to interview bargaining unit employees Garnsey and Todd, on May 25 and 26, 2004, respectively. Maurer also notified Stack at this time that Local 1929 would be permitted to send a representative to attend the meeting, but that the representative could not be any representative of Local 1929 that would be representing Local 1929 at the upcoming arbitration (hereafter referred to as the Arbitration Representative) concerning the disciplinary actions taken against Jackson Lara. The basis Maurer gave Stack for this exclusion was "attorney work product privilege."

11. By e-mail dated May 21, 2004, Stack notified Humphries that Maurer had contacted him regarding Dixon's desire to interview bargaining unit employees Garnsey and Todd. Stack requested that the dates and times of the interviews be rescheduled, as he was unavailable on those dates, since he was already scheduled to be representing the Union on other matters on those dates and times. With regard to the "attorney work product privilege" exclusion, Stack stated that such an exclusion was inconsistent with the collective bargaining agreement and the Statute. (Joint Exhibit 2)

12. By e-mail dated May 24, 2004, Humphries responded to Stack's e-mail, indicating that any scheduling decisions would be left up to the attorney handling the arbitration. With regard to the "attorney work product privilege" exclusion, Humphries stated that having the Arbitration Representative or the Technical Assistant who would be representing Local 1929 at the Lara Arbitration at the interviews with the employees would preclude the Respondent from adequately preparing its case, by requiring the government counsel to either disclose attorney work product or to do an inadequate job of interviewing witnesses. (Joint Exhibit 3)

13. By letter dated May 24, 2004, Humphries formally notified Stack that Respondent would be meeting with Garnsey on May 25, 2004, and with

Todd, on May 26, 2004. Mr. Humphries' letter further provided:

> The Union is entitled to have a representative present during these interviews. However, since the compilation of questions and the mode in which they will be asked constitutes attorney work product, Union Representatives who will represent the Union at the arbitra-tion hearing will not be allowed to attend the interviews described above. This includes the Union Representative presenting the case and any Technical Assistant(s). (Joint Exhibit 4a and 4b)

14. On May 26, 2004, Maurer and Dixon met with Todd to discuss the facts related to the Lara Arbitration, including his training and experience as a Firearms Training Specialist and Armorer and Gun Smith; how to properly clear a Beretta pistol; how Border Patrol Agents were taught to clear a Beretta pistol; whether a Border Patrol Agent could tell the difference between a snap-cap round (used during dry firing) and a live round of ammunition and, if so, how an Agent could distinguish between the two; and the different weights and textures which differentiate a snap-cap round and a live round.

15. The May 26, 2004, meeting between Respondent's representatives Maurer and Dixon and bargaining unit employee Todd was called by Christine Dixon, an agent of Respondent outside of Todd's supervisory hierarchy; Maurer was present as a representative of the Labor Relations Office and Dixon was present as a representative of the Chief Counsel's office; the meeting took place at the El Paso Sector Headquarters Conference Room; the meeting lasted approximately one hour; Todd was notified of the meeting by telephone call from Maurer prior to the date of the meeting; and notes were made of Todd's answers to Maurer's and Dixon's questions.

16. Local 1929 President Stack appeared at the May 26, 2004, interview to represent Local 1929, but Maurer and Dixon would not permit Stack to represent Local 1929 during Todd's interview because Stack was going to be the Arbitration Representative for Local 1929 in the Lara Arbitration. No other representative of Local 1929 was present during the interview of Todd because Local 1929 was not permitted to designate its representative for the meeting. (Joint Exhibit 5)

The Ortiz Arbitration

17. Bargaining unit employee Robert Arnold was listed as a witness for Local 1929 in the Ortiz Arbitration set for hearing on June 17, 2004.

18. On June 14, 2004, Ramirez and Smith held a meeting with bargaining unit employee Arnold to discuss the Ortiz Arbitration. During this meeting, Arnold discussed his recollection of events related to July 9, 2000, on which date Ortiz had called Arnold and requested sick leave from Arnold as an Acting Supervisory Border Patrol Agent. Subsequent to approving the leave, Arnold had created a document which, although contemporaneous to the events, was not used or relied upon in the decision to discipline Ortiz. All questions posed by Ramirez and Smith related to Arnold's actions while he was serving as an acting supervisor on July 9, 2000. (Joint Exhibits 6 and 7)

19. The June 14, 2004, meeting between Respondent's representatives Ramirez and Smith and bargaining unit employee Arnold was called by Ramirez, an agent of Respondent outside of Arnold's supervisory hierarchy; Ramirez was present as a representative of the Labor Relations Office and Smith was present as a representative of the Chief Counsel's office; the meeting took place at the Labor Relations Office; the meeting lasted approximately one hour; Arnold was notified of the meeting by telephone call from Ramirez prior to the date of the meeting; and notes were made of Arnold's answers to Ramirez' and Smith's questions.

20. Local 1929 was given no notice or an opportunity to attend the June 14, 2004, meeting

held between Respondent's representatives Ramirez and Smith, and bargaining unit employee Arnold.

The Lara Arbitration

Issues

Whether the Respondent violated section 7116(a)(1) and (8) of the Statute by holding a formal discussion with bargaining unit employee Todd concerning a grievance without affording Local 1929 an opportunity to be represented at the discussion, as required by section 7114(a)(2)(A) of the Statute?

Whether the Respondent's defense that the "attorney work product privilege" should permit the Respondent to exclude those representatives of Local 1929 who will represent Local 1929 at the arbitration hearing from being the representative at the formal meeting, while permitting any other Local 1929 representative to attend the formal meeting, is a reasonable exception to section 7114(a)(2)(A)?

Positions of the Parties

General Counsel

The General Counsel asserts that by interviewing Todd without providing Local 1929 with the right to designate its representatives and to be represented at the formal discussion, the Respondent deprived Local 1929 of its Statutory right to represent bargaining unit members. The Respondent refused to allow James Stack, the President of Local 1929 and the Arbitration Representative for the Lara Arbitration, to attend the meeting. The General Counsel notes that the Authority has consistently held that a union has the right to choose its own representative at formal discussions. *General Services Administration, Region 9, Los Angeles, California*, 56 FLRA 683, 685 (2000). Section 7114(a)(2)(A) of the Statute requires prior notification so that the union may have the opportunity to choose its representatives and prepare for the formal meeting. *National Labor Relations Board*, 46 FLRA 107 (1992). *See, also, U.S. Department of Defense, Defense Logistics Agency, Defense Depot Tracy, Tracy, California*, 37 FLRA 952, 961 (1990).

The General Counsel further argues that the Respondent's defense that the "attorney work product privilege" should permit it to exclude those representatives of the union who would represent the union at the arbitration hearing from being the representative at the

formal meeting, while permitting any other Local 1929 representative to attend the formal meeting, is not a reasonable exception to section 7114(a)(2)(A). The General Counsel asserts that the Authority has specifically rejected this privilege, citing *Department of Veterans Affairs, Medical Center, Denver, Colorado*, 44 FLRA 768, 770 (1992); *Department of the Air Force, Sacramento Air Logistics Command, McClellan Air Force Base, California*, 38 FLRA 732, 733-34 (1990) (*McClellan III*); *Department of the Air Force, Sacramento Air Logistics Command, McClellan Air Force Base, California*, 35 FLRA 594, 607 (1990) (*McClellan II*).

The General Counsel cites to *McClellan II*, noting that after finding the interviews at issue constituted formal meetings, the Authority then rejected the "attorney work product privilege", noting that the union has the right to safeguard its representational interest of ensuring its witnesses are not coerced or intimidated prior to appearing at third-party proceedings. *Id.* at 607. The Authority further stated that finding that the union has a right to be represented during a management attorney's interview of an employee, does not interfere with the attorney's ability to create documents reflecting the attorney's thought or impressions resulting from the interview, nor requires the attorney to disclosure to the union his thoughts or impressions resulting from the interview. *Id.* at 607-608.

The General Counsel asserts that Stack's attendance at the Lara Arbitration pre-arbitration interview of Todd would not have interfered with the Respondent questioning the employees and preparing its defense since Respondent was not required to disclose its thoughts, impressions, legal theories or litigation strategy before, during or after the interview with Todd.

Respondent

The Respondent asserts that it fully recognized the rights of Local 1929 under section 7114(a)(2)(A) and appropriately gave Local 1929 notice and an opportunity to have a representative present at the meeting with Todd. The Respondent admits, however, that it did not allow the Union's arbitration representative, James Stack, in the Lara Arbitration, to function as the Union representative during the witness preparation interview of Todd, a bargaining unit employees and a witness for the Respondent. The Respondent was willing for any other Local 1929 representatives to be present during the interview, as long as they were not representatives for Local 1929 at the Lara Arbitration. The Respondent based this preclusion on the theory that to allow a Local 1929 arbitration representative to be present would

force the disclosure of attorney work product and trial strategy to the opposing arbitration representative prior to the hearing.

The Respondent admits that it placed a minimal restriction on the Union's right to designate its representative, but argues that the Authority, the National Labor Relations Board and the Merit Systems Protection Board have all recognized that the union right to designate a representative is not an unfettered right. Further, the Authority has recognized situations in which the preclusion of a specific representative was found not to violate the Statute. *See Federal Bureau of Prisons, Office of Internal Affairs, Washington, D.C., et al.*, 54 FLRA 1502 (1998) (union's right to designate its representative was only a presumptive right that an agency can rebut by demonstrating "special circumstances" that warrant precluding a particular individual from serving in this capacity.)

The Respondent asserted in its defense that recognizing such a restriction simply means that the Union's rights are ensured by the presence of a representative other than the union's third-party hearing representatives. Since no familiarity with the facts or the applicable law in a grievance is needed to protect witnesses from intimidation and coercion, the Union loses nothing by having an unrelated representative attend the witness interviews, other than an improper opportunity to gain insight into the Agency's case preparation. On the other hand, a failure to recognize this limitation forces Agency counsel into revealing attorney work product to his/her opposing representative or inadequately prepared its witnesses.

Analysis and Conclusion

Under section 7114(a)(2)(A) of the Statute, a union has the right to be represented at a formal discussion between one or more agency representatives and one or more unit employees or their representatives concerning a grievance, personnel policy or practices, or other general condition of employment. *United States Department of Justice, Immigration and Naturalization Service, New York Office of Asylum, Rosedale, New York*, 55 FLRA 1032, 1034 (1999). For the section 7114(a)(2)(A) right to attach, there must be: (1) a discussion; (2) that is formal; (3) between an agency representative and a unit employee or the employee's representative; (4) concerning any grievance or any personnel policy or practice or other general condition of employment. *General Services Administration*, 48 FLRA 1348, 1354 (1994) (*GSA*).

The Authority has previously found that preparing a witness for an arbitration, or other third-party proceeding, constitutes a discussion, within the meaning of section 7114 (a)(2)(A) of the Statute. *McClellan II,* 35 FLRA 594. *See also General Services Administration, Region 2, New York, New York*, 54 FLRA 864 (1998) (*GSA New York)*. It is not disputed in this matter that the Respondent did, in fact, give Local 1929 notice of the scheduled meeting.

As stated above, the Respondent did not allow the Union's designated representative, Robert Stack, to attend the meeting, since Stack was also the designated representative for Local 1929 in the upcoming Lara Arbitration, which was the subject of the meeting with Todd. The Respondent asserts that, by allowing any other Union representative to be present during the meeting, it has complied with the meaning of section 7114(a)(2)(A), and therefore has not violated the Statute. The Respondent argues that allowing the designated arbitration representative to attend the meeting on behalf of Local 1929 circumvents the "attorney work product privilege" and constitutes "special circumstances" which warrant preclusion of the arbitration representative from acting as the Union's designated representative at said witness interviews.

While acknowledging the Authority decision in *McClellan II*, 35 FLRA 607-608, and subsequent affirming case law, *Veterans Administration Medical Center, Long Beach, California*, 41 FLRA 1370 (1991) (*VA Long Beach*), the Respondent asserts that *McClellan II* recognized the need to protect attorney work product, but did not address the specific issue presented in this case. Further, *McClellan II* addressed the preclusion of all union representatives from the witness interviews, not the preclusion of one specific representative.

The Respondent disagrees with an interpretation of *McClellan II* and other related cases as holding that allowing a union's arbitration (or third-party hearing) representative to attend the agency's preparation of its own witnesses does not force an agency counsel to disclose his/her work product. The Respondent argues that allowing a union's representative from attending the meeting forces the agency counsel to choose between disclosing his/her thoughts or impressions, whether written or otherwise, resulting from the interview or violating his/her ethical obligation by inadequately preparing for the arbitration hearing. In essence the Respondent argues that it has a justifiable need to preclude the union's arbitration representative from attending the agency counsel's interviews of agency witnesses.

In *McClellan II*, the Authority specifically dealt with the issue of attorney work product in relation to management interviews of bargaining unit employees who had been designated as agency witnesses. The Authority considered, and explicitly rejected, the agency argument regarding the attorney work product privilege.

> We find no merit in Respondent's argument and we reject the Respondents' exception. The question before us is whether the Respondent was required under section 7114(a)(2)(A) of the Statute to afford the Union an opportunity to be represented at interviews of bargaining unit employees known to be Union witnesses in a scheduled arbitration hearing. In *McClellan AFB* [29 FLRA 594 (1987)], the Authority rejected the holding of earlier cases such as *U.S. Customs Service* [9 FLRA 951 (1982)] and found that unions must be afforded an opportunity to be represented at interviews of unit employees in preparation for third-party proceedings where the "formal discussion" criteria are met. . . .
>
> In short, contrary to the Respondent's contention, nothing in our decision would "effectively destroy management's right to prepare its defense and thus destroy its right to a fair hearing." . . . Rather, our decision effectuates the intent of section 7114(a)(2)(A) of the Statute to allow a union to safeguard its representational interest by making sure that its witness is not coerced or intimidated prior to appearing at a scheduled arbitration hearing.

The *McClellan II* rationale is still valid under the particular circumstances of this case. Although Local 1929 was given notice of the meeting, it was not allowed to designate its own representative to the meeting. The Authority has routinely held that unions have a right to designate their own representatives and an agency's interference with that right is violative of the Statute. Although the Respondent may clearly prefer for another representative other than the designated arbitration representative to be present during these types of meetings, the choice of representative is not for the Respondent to make.

Essentially the Respondent argues that the "attorney work product privilege" would attach if the Union's arbitration representative is present for the meeting, but would

not attach if another Union representative is present. The Respondent even asserts that "Any competent union official can perform this service." (Respondent's Post Hearing Brief at page 8) The Respondent fails to explain why "any" representative from the Union would not compel the Agency's counsel to choose between revealing its case and its ethical duty. This is clearly because there is no coherent explanation for the Respondent's position, particularly in light of consistent, long-term Authority policy.

In considering the evidence as a whole, I find that the Respondent's interview with bargaining unit employee Todd in connection with the Lara Arbitration was a meeting within the meaning of section 7114(a)(2)(A) of the Statute, in that it was a discussion, that was formal, between an agency representative and a unit employee or the employee's representative; and concerning any grievance or any personnel policy or practice or other general condition of employment.[2] Further, although the Respondent gave Local 1929 advance notice of the meeting, it specifically excluded James Stack, the arbitration representative, as Local 1929's representative at the meeting. The Union has a right to choose its own representative, and the Authority has held that the "attorney work product privilege" does not work to exclude the Union, or its designated representative, from the formal meeting. Further the evidence fails to support the Respondent's defense that Stack's attendance at the Lara Arbitration pre-arbitration interview of Todd would have interfered with the Respondent's questioning the employee and preparing its defense since the Respondent's counsel was not required to disclose its thoughts, impressions, legal theories or litigation strategy before, during, or after the interview with a witness. *McClellan II; VA Long Beach; Department of Veterans Affairs, Medical Center, Denver, Colorado,* 44 FLRA 768 (1992).

Under these circumstances, I find that the Respondent failed to comply with section 7114(a)(2)(A) of the Statute

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[2] The parties stipulated that the May 26, 2004, meeting was called by Dixon, an agent of Respondent outside of Todd's supervisory hierarchy; the meeting was scheduled for the El Paso Sector Headquarters Conference Room; the meeting lasted approximately one hour; Todd was notified of the meeting by telephone from Maurer prior to the date of the meeting; and notes were made of Todd's answers to Maurer's and Dixon's questions. Dixon was a representative of the Chief Counsel's office and Maurer was present as a representative of the Labor Relations Office. During the meeting, Todd was asked questions related to the Lara Arbitration. (Stip. ¶¶15 and 16)

by refusing to permit Local 1929 to designate its representatives and provide an opportunity to attend the formal discussion and thereby violated section 7116(a)(1) and (8) of the Statute.

The Ortiz Arbitration

Issues

Whether the Respondent violated section 7116(a)(1) and (8) of the Statute by holding a formal discussion with bargaining unit employee Arnold concerning a grievance without affording Local 1929 notice and an opportunity to be represented at the discussion, as required by section 7114 (a)(2)(A) of the Statute?

Whether the Respondent's defense that, because the scope of the interview with Arnold was limited to actions Arnold took as an acting supervisor on July 9, 2000, did not therefore require the Respondent to provide notice and opportunity for Local 1929 to be present and therefore Arnold was not a bargaining unit employee on July 9, 2000 for purposes of section 7114(a)(2)(A) of the Statute, lacks merit?

Positions of the Parties

General Counsel

The General Counsel asserts that the Respondent violated section 7116(a)(1) and (8) of the Statute by conducting a meeting with bargaining unit employee Arnold on June 14, 2004, without giving Local 1929 notice and the opportunity to be present. The General Counsel asserts that the Respondent's argument that Arnold was an Acting Supervisor on July 9, 2000 is irrelevant to the issue in this matter. The General Counsel asserts that the four elements needed to establish a formal meeting are present in this case and the Respondent's conduct was violative of the Statute.

In this matter, the meeting between bargaining unit employee Arnold and the Respondent's representatives concerned the grievance of another bargaining unit employee that was scheduled for arbitration, the Ortiz Arbitration. The discussion with Arnold centered on his actions as acting supervisor as they related to the Ortiz grievance. Therefore, the General Counsel asserts that the Authority's decision *Nuclear Regulatory Commission*, 29 FLRA 660 (1987) is inapposite, since that case rested on whether the subject matter of the EEO complaint concerned a grievance, personnel

policy or practice, rather than the status of the employee who was interviewed.

Further, the Authority has held that the Union has the right to attend a formal discussion where the bargaining unit employee was being questioned concerning events that occurred when he was an acting supervisor. In *Department of the Air Force, F.E. Warren Air Force Base, Cheyenne, Wyoming*, 31 FLRA 541 (1988) (*F.E. Warren*), the employee was considered to be acting on behalf of the Agency at the time of the acts which were the subject of the interview. The Authority found that the interview met all the elements of a formal discussion and that the agency had fulfilled its statutory obligations to notify the Union and provide it the opportunity to attend. *Id.* at 552.

In *McClellan III*, 38 FLRA 732, the Authority found that alternate supervisors were considered bargaining unit employees since they continued to be covered by the parties' collective bargaining unit during the time they performed as alternate supervisors and they continued to be subject to dues withholding. Therefore, the Authority found that although designated an alternate supervisor, the employee who was interviewed was a bargaining unit employee. Similarly, in the interview prior to the Ortiz Arbitration, Arnold was a bargaining unit employee and Local 1929 was entitled to be given notice of the meeting and the opportunity to be represented. The Respondent's failure to do so was violative of the Statute.

Respondent

The record is undisputed that the June 14, 2004 interview with Arnold, in connection with the Ortiz Arbitration, was limited to his recollection of events related to July 9, 2000, when he was an Acting Supervisory Border Patrol Agent. The Respondent asserts that Arnold was clearly an Acting Supervisory Border Patrol Agent at the time in question who exercised the supervisory authority of that position, *i.e.*, the granting of sick leave requests. The facts in this case can be distinguished from those cases in which an employee is given an acting or alternate supervisory title in name only.

The Respondent distinguished the Authority's decisions in *Department of the Treasury, Bureau of Engraving and Printing*, 4 FLRA 33 (1980) and *F.E. Warren*, *supra*, in which the Authority indicated that it believed that meetings with current bargaining unit employees about times during which the employee was acting as a management representative, constituted "formal discussions." Noting that in *F.E.*

Warren, the Authority expressly reserved ruling on the related issue of the application of Brookhaven when the employee was acting as management's agent, the Respondent asserts that the Authority was leaving open the question of what protections apply to a bargaining unit employee when he is interviewed solely regarding a time during which he was acting as management's agent.

Further, in *McClellan III*, the Authority found a meeting was a formal discussion, because the "alternate supervisor" appointment was basically in name only and did not include any transfer of real supervisory authority or responsibility to the employee. Both the ALJ and the Authority in that case focused exclusively on the employee's status at the time of the acts that were the subject of the questioning, not at the time of the questioning itself. The Respondent therefore argues that a similar analysis is necessary with the Arnold interview, noting that the only evidence in the record indicates that Arnold did, in fact, have and exercised traditional supervisory authority, specifically the granting of sick leave. (See Jt. Ex. 6) Because Arnold was acting with supervisory authority as a management representative on July 9, 2000, and the subsequent interview on June 14, 2004, was limited to a discussion of the events of July 9, 2000, the June 14, 2004 meeting did not constitute a formal discussion between the employer and a bargaining unit employee. Under those circumstances, Local 1929 was not entitled to notice and an opportunity to be present at the interview and the Respondent's conduct with regard to the Ortiz Arbitration was not violative of the Statute.

Analysis and Conclusion

As previously noted, the Authority has found that preparing a witness for an arbitration, or other third-party proceeding, constitutes a discussion, within the meaning of section 7114(a)(2)(A) of the Statute. *McClellan II; GSA New York.* It is not disputed in this matter that the Respondent did, in fact, conduct an interview with bargaining unit employee Arnold on June 14, 2004 in preparation of the Ortiz arbitration and did not give Local 1929 notice or the opportunity to be present at the meeting. The Respondent argues that Local 1929 was not entitled to be present, since the interview with Arnold only related to actions on July 9, 2000 when Arnold was an Acting Supervisory Border Patrol Agent.

One of the criteria of section 7114(a)(2)(A) is whether there is a discussion "between one or more agency representatives and one or more unit employees". In this

matter, there is no dispute that Arnold was a bargaining unit employee on the date in question, June 14, 2004. The Respondent defends its actions by asserting that Arnold was not a bargaining unit employee on the date of the alleged acts that are related to the Ortiz Arbitration. However, the Union has a primary representational interest in safeguarding its bargaining unit employees and ensuring that witnesses are not coerced or intimidated prior to an appearance at the scheduled arbitration hearing. *McClellan II.* Therefore, in agreement with the General Counsel, I do not find that the status of Arnold on July 9, 2000, is relevant to the issue of whether a formal meeting was held on June 14, 2004, when Arnold was interviewed by two of the Respondent's representatives prior to the Ortiz Arbitration. The Authority has consistently been concerned with the status of the employee on the date of the actual discussion, rather than any other time frame. See *GSA, New York; Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California*, 35 FLRA 1230 (1990).

Furthermore, even if Arnold's status on June 9, 2000, is an issue in determining whether there has been a formal discussion in this matter, I find that Arnold does not meet the criteria for supervisor and thus was a bargaining unit employee on that date. Section 7103(a)(10) of the Statute sets forth the criteria for determining if someone is a "supervisor".[3] The stipulated record does not provide any evidence that Arnold had any authority to transfer, furlough, layoff, recall, suspend, or remove employees, or to adjust grievances or to effectively recommend such action. The Respondent only offers evidence that Arnold had the ability to approve leave as supervisory indicia. In *GSA, New York*, the Authority agreed with the Administrative Law Judge that the Respondent violated the Statute when the union was not notified of a formal discussion that occurred between the Respondent's Assistant Regional Counsel and a Team Leader in preparation for a pending arbitration hearing. The Administrative Law Judge had found that the individual in question had the authority, among other things, to and did approve leave requests for forty hours or

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[3] Section 7103(a)(10) states: "'supervisor' means 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, ..."

less for team members. Before he signed any leave slip he consulted with the first-line supervisor to make sure he was consistent with the vacation schedule. The Administrative Law Judge found that his authority to approve leave requests for forty hours or less for each team member was not sufficient to make him a supervisor within the meaning of section 7103(a)(10) of the Statute, which does not include the ability to approve leave as a criteria for being a supervisor. *U.S. Small Business Administration District Office, Casper, Wyoming and Solidarity, USA*, 49 FLRA 1051, 1060-61 (1994); *U.S. Department of Veterans Affairs, Veterans Administration Medical Center, Allen Park, Michigan*, 34 FLRA 423, 426 (1990). Therefore, for the purposes of section 7114(a)(2)(A) the employee was found to be an employee in the unit represented by the union and the failure to notify the union of the pre-arbitration interview was a violation of section 7116(a)(1) and (8).

Under these circumstances, I find that the evidence that Arnold had the authority to approve leave on June 9, 2000, absent any of the criteria set forth in section 7103 (a)(10), is insufficient to establish that he was a supervisor within the meaning of the Statute. Therefore, the Respondent's defense to its failure to give Local 1929 notice and an opportunity to be present at the June 14, 2004 meeting is rejected.

In considering the evidence as a whole, I find that the Respondent's interview with bargaining unit employee Arnold in connection with the Ortiz Arbitration was a meeting within the meaning of section 7114(a)(2)(A) of the Statute, in that it was a discussion, that was formal, between an Agency representative and a unit employee or the employee's representative; and concerning any grievance or any personnel policy or practice or other general condition of employment.[4]

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[4] The parties stipulated that the June 14, 2004, meeting was called by Ramirez, an agent of Respondent outside of Arnold's supervisory hierarchy; Ramirez was present as a representative of the Labor Relations Office and Smith was present as a representative of the Chief Counsel's office; the meeting took place at the Labor Relations Office; the meeting lasted approximately one hour; Arnold was notified of the meeting by telephone call from Ramirez prior to the date of the meeting; and notes were made of Arnold's answers to Ramirez' and Smith's questions. During the meeting Arnold was asked questions related to the Ortiz arbitration. (Stip. ¶¶18 and 19)

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 Department of Homeland Security, Border and Transportation Security Directorate, U.S. Customs and Border Protection, El Paso, Texas, shall:

1. Cease and desist from:

(a) Conducting formal discussions with bargaining unit employees represented by the American Federation of Government Employees, AFL-CIO, Local 1929, concerning any grievance or any personnel policy or practices or other general conditions of employment, including interviews conducted in preparation for arbitration hearings, without affording the American Federation of Government Employees, AFL-CIO, Local 1929, prior notice of and an 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 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) Give the American Federation of Government Employees, AFL-CIO, Local 1929, the exclusive representative of our employees, prior notice of and an opportunity to be represented at formal discussions with bargaining unit employees concerning grievances, personnel policies and practices or other general conditions of employment, to include interviews with bargaining unit employees concerning third-party litigation.

(b) Post at all locations in the El Paso Sector, where bargaining-unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Respondent's Chief Patrol Agent, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to

ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Dallas Regional Office, Federal Labor Relations Authority, 525 S. Griffin Street, Suite 926, LB 107, Dallas, Texas, 75202-1906, in writing, within 30 days of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, May 20, 2004.

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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 Department of Homeland Security, Border and Transportation Security Directorate, U.S. Customs and Border Protection, El Paso, Texas, 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 bargaining unit employees represented by the American Federation of Government Employees, AFL-CIO, Local 1929 (Union), concerning any grievance or any personnel policy or practices or other general conditions of employment, including interviews conducted in preparation for arbitration hearings, without affording the Union, prior notice of and an opportunity to be represented at the formal discussions.

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

WE WILL give the American Federation of Government Employees, AFL-CIO, Local 1929, the exclusive representative of its employees, prior notice of and an opportunity to be represented at formal discussions with bargaining unit employees concerning grievances, personnel policies and practices or other general conditions of employment, to include interviews with bargaining unit employees concerning third-party litigation.

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Department of Homeland Security

Border and Transportation Security Directorate
U.S. Customs and Border Protection
El Paso, Texas

Date: _____ By: _____
(Signature)

(Chief Border Patrol Agent)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Dallas Region, Federal Labor Relations Authority, whose address is: 525 S. Griffin Street, Suite 926, LB-107, Dallas, TX 75202-1906, and telephone number is: 214-767-4996.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case Nos. Case Nos. DA-CA-04-0533 and DA-CA-04-0576, were sent to the following parties:

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CERTIFIED MAIL & RETURN RECEIPT **CERTIFIED NOS:**

Nora E. Hinojosa, Esquire **7000 1670 0000 1175 5622**
Federal Labor Relations Authority
Suite 926, LB-107
525 S. Griffin Street
Dallas, TX 75202-1906

Christopher Ryan, Esquire **7000 1670 0000 1175 5639**
Robert H. Humphries, Esquire
U.S. Customs Service
U.S. Department of the Treasury
9400 Viscount Blvd., Suite 108
El Paso, TX 79925

James A. Stack, President **7000 1670 0000 1175 5646**
AFGE, Local 1929
2316 Camino Del Rey
Alamogordo, NM 88310

REGULAR MAIL:

President
AFGE
80 F Street, NW
Washington, DC 20001

DATED: May 20, 2005
Washington, DC