

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

MEMORANDUM

DATE: December 12, 2003

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE AIR FORCE
60TH AIR MOBILITY WING
TRAVIS AIR FORCE BASE, CALIFORNIA

Respondent

and

Case No. SF-CA-02-0902

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1764, 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

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

DEPARTMENT OF THE AIR FORCE 60 TH AIR MOBILITY WING TRAVIS AIR FORCE BASE, CALIFORNIA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1764, AFL-CIO Charging Party	Case No. SF-CA-02-0902

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/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. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JANUARY 12, 2004**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, Suite 201
Washington, DC 20424-0001

SUSAN E. JELEN
Administrative Law Judge

Dated: December 12, 2003
Washington, DC

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

DEPARTMENT OF THE AIR FORCE 60 TH AIR MOBILITY WING TRAVIS AIR FORCE BASE, CALIFORNIA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1764, AFL-CIO Charging Party	Case No. SF-CA-02-0902

Yolanda Shepherd Eckford, Esquire
For the General Counsel

Major Douglas Huff, Esquire
For the Respondent

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an unfair labor practice charge filed on September 12, 2002, by the American Federation of Government Employees, Local 1764, AFL-CIO (Union) against the Department of the Air Force, 60th Air Mobility Wing, Travis Air Force Base, California (Respondent). On December 23, 2002, the Regional Director of the San Francisco Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing alleging that the Respondent committed unfair labor practices in violation of § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute) by bypassing the Union and dealing directly with a bargaining unit employee concerning terms and conditions of employment. The complaint also alleged that the Respondent violated section 7116(a)(1) by interfering with the employee's right to designate the Union as her

representative and by stating to a bargaining unit employee words to the effect that the Union did not represent the employee unless the employee had signed a legal form naming the Union as the employee's representative.

A hearing was held in Fairfield, California on April 23, 2003. The parties appeared with counsel and were given an opportunity to present evidence and to examine and cross-examine witnesses. This Decision is based upon careful consideration of all of the evidence, including the demeanor of witnesses, as well as the post-hearing briefs submitted by the parties.

Findings of Fact

The American Federation of Government Employees, Local 1764, AFL-CIO has been the exclusive representative of a bargaining unit of approximately 500 non-appropriated funds (NAF) employees of the Respondent. (G.C. Ex. 1(d) and (e); Tr. 49:19-50) Additionally the Union represents four other bargaining units at Travis AFB, including approximately 1,200 appropriated funds employees. (Tr. 87, 89)

The 60th Service Squadron at Travis Air Force Base encompasses a number of support activities, including three Child Development Centers (CDC) which provide day care to the children of military and civilian personnel. Alan Tornay is the Director of CDC #2 and is in charge of its operations. During the time that is covered in the complaint in this matter, Irma Paulini was employed as a childcare worker at CDC #2 1 and was included in the Union's bargaining unit of non-appropriated funds employees at Respondent's facility. (Tr. 7 - 8)

On July 29, 2002, 2 Tornay issued a Notice of Proposed Suspension to Paulini, based on alleged statements that Paulini had made to children and on Paulini having allegedly grabbed a child's ear. (G.C. Ex. 2) Upon receiving the proposed suspension, Paulini contacted Patricia Sims, the

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Paulini had transferred to another facility and was no longer employed at Respondent when the hearing on this matter was conducted. She did not testify at the hearing although she was included on the General Counsel's witness list. (Tr. 8)

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All dates are 2002 unless otherwise indicated.

Chief Steward for the Union's NAF bargaining unit, 3 and requested assistance from Sims in responding to the proposed suspension. (Tr. 6; 9)

The proposed discipline allowed five days for a response. (G.C. Ex. 1) Paulini and Sims met three times between July 29 and August 2 and during these times, Sims advised Paulini regarding the contents of her submission. These meetings were held at CDC #2 and were arranged by Tornay or his assistant. (Tr. 9, 10, 12, 13, 76) After Sims approved of her final response, Paulini submitted her response to the proposed discipline on August 2. The response was signed by Paulini; Sims did not sign and is not mentioned in the document and was not in the area when Paulini submitted her response. (G.C. Ex. 3; Tr. 12-13, 79)

According to Sims, after the response was submitted, Paulini asked her to contact Tornay on her behalf and inquire about the status of the proposed action. (Tr. 13-14) Approximately 15 days after Paulini submitted her August 2 response, Sims called Tornay. (Tr. 13-14) Sims asked Tornay when Paulini was going to get her response. Tornay indicated that it would be ready in a few days. Tornay asked if Paulini was filing a grievance, and Sims told him that she didn't have the final decision yet. Tornay asked Sims if she had Paulini's signed authorization slip and Sims said no. Sims told Tornay that this was just a proposed discipline and that she was representing the employee and helping her respond to the letter. (Tr. 15) According to Sims, Tornay kept asking about the authorization slip. She told Tornay that the employee wanted her to be present at the meeting and if he needed a signed slip, she would get him one. (Tr. 15, 34-35)

Tornay did not recall this particular telephone conversation, although he testified about a discussion he had with Sims just prior to issuing his final decision. At the time of this conversation, Tornay thought there was a possibility that Paulini was represented, although he had not received a signed representation form. (Tr. 78) He asked her if she had the written document that had been used in the past. Sims told him she thought she did and looked through her papers, but could not find it. Tornay told her that when she found it, to fax it to him and Sims said okay. Tornay also told her that he had the decision letter and he wanted to meet with Paulini. Sims asked when he was going to meet with Paulini but Tornay would not divulge any

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Sims had been Chief Steward for the NAF unit since March or April, 2002. Shelly Walker was the Chief Steward for the NAF unit prior to that time.

specific information until he got the representation form since Paulini might not want her there. Sims told him that if Paulini didn't want her there, she wouldn't be there, but if she did, that Sims wanted to be there. (Tr. 70-71) 4

Tornay never received a representation form from Sims and on August 29, called Paulini into his office. Paulini asked if Sims was going to be there and Tornay told her no, that he asked for the representation form and Sims was unable to provide it. Tornay asked Paulini if she wanted Sims and he could call her if she did. Paulini said no, that she just wanted to get this over with. Tornay then delivered the decision letter. Paulini did not ask any questions and the meeting ended. (Tr. 59, 72)

According to Tornay, Paulini met him in the hallway at work the next day. She wanted to clarify why Sims had not been present. Tornay told her that there was a representation form that the Union needed to fill out and that Sims was not able to provide it. Paulini said okay and then asked about moving her suspension days. (Tr. 58, 72-73)

Sometime later, Sims called Paulini at work to speak to her (Paulini) and was told she was not at work. Sims called her at home and Paulini told her that she had been suspended. Sims claimed she and Paulini were both so upset that she terminated the phone call so that she could calm down. She then called Paulini back. Paulini told her that Tornay gave her the final decision letter on August 29. 5

Sims told Paulini to bring her a copy of the suspension letter, which she did. They decided to start working on a grievance over the suspension. Paulini signed a representation form at that time. Although the form is dated "Aug 02" the form was apparently not signed on that date, but sometime after she received the formal decision letter. (Tr. 19, 20; G.C. Ex. 5) Sims asserted that she

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It is apparent to me that Tornay and Sims were both testifying regarding the same telephone conversation, which took place some time prior to Paulini's receipt of the final decision letter on August 29. I do not find that the actual date of the telephone conversation, whether August 15 or August 28, to be material to the decision in this matter.

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Since Paulini did not testify, Tornay's version of his meetings with Paulini on August 29 and August 30 is not disputed. I do not credit Sims recounting of what Paulini told her about the meeting, as the most obvious form of hearsay and totally unreliable.

had Paulini sign the representation form since the Union would be requesting information and some of that information would be confidential. (Tr. 21) There is no evidence that Sims requested any information in the Paulini grievance.

On September 9, Sims met with Tornay and asked why she had not been present for the meeting with Paulini. Tornay told her that the only thing he did was hand her an envelope with the decision letter and that Sims did not need to be present. Sims argued that Paulini and Tornay had a conversation, which Tornay denied. (Tr. 22) During this meeting Sims and Tornay talked about other things related to the case. Tornay wanted her to give him a copy of the signed representation form, which she did. He told her that he needed the representation form before he could even talk to her about the grievance. He was not going to speak to her unless she gave him the form. (Tr. 22-23)

Sims asserted that this was an internal union form, which is used to protect the Union from an employee claiming that the Union was not his/her representative. (Tr. 45) She admitted that she had given managers the form in the past, but only when they asked for it and told her they had to have it. She said not all managers requested the form, just the managers at the CDC centers. (Tr. 24, 25) Sims went to great lengths to explain that the managers asked for the form, they did not demand it. They would tell her that they had to have it for their records. Since they needed it for their records, she supplied it willingly. (Tr. 38) Sims also explained that she didn't get Paulini to sign the form earlier because there had not been a meeting yet. (Tr. 44)

Tornay testified that in his experience, the Union provides a representation form in all cases where they represent an employee in a discipline action. (Tr. 62) He finally received a representation form designating Sims as

Paulini's representative on September 9, 2002. (Tr. 62) 6
Since 2000, Tornay has been involved in about 24
disciplinary actions and the Union has represented the
employee in about six of those actions. Tornay received a
representation form in all of those cases except for
Paulini. (Tr. 64)

Amy Bettencourt is the Human Resources Officer at
Travis AFB, 60th Service Squadron for non-appropriated funds
personnel. (Tr. 118) She testified that in July 2000, she
had a discussion with Shelly Walker, the then NAF Chief
Steward, regarding problems the parties' were having with
representation and timeliness. She suggested that if the
Union would give management the representation form, then
management would clearly be on notice and could avoid
problems in the future. Walker agreed to do this. Walker
also agreed that all correspondence would come through
Bettencourt's office; this related to the issue of
timeliness. (Tr. 128-129)7 There is no evidence that
President Hall was involved in these discussions or the
agreement.

According to Bettencourt, the parties followed this
practice until the Paulini case. The Union would submit its
written designation of representation form to management and
they would be included in all discussions. The Union
represents employees in about a quarter of the disciplinary
actions taken. (Tr. 132, 149)

Jerry Hall has been president of AFGE 1764 since
January 1995. He is not involved in the day to day
activities of the non-appropriated funds unit, but does get

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In its brief, the General Counsel offered an explanation of
why the representation form was dated Aug 02, theorizing
that Paulini dated the form August 2, 2002 (the date of the
proposal) because in her view that was the date Sims began
representing her. (GC brief, n.14) The proposal is
actually dated July 29 and it is Paulini's response that is
dated August 2. Since Sims could not provide any
explanation of why the form was dated Aug 02 and the General
Counsel did not call Paulini as a witness in this matter, I
do not find the General Counsel's offered explanation
convincing. Whatever the reason for the date on the form,
it is clear that the representation form was not signed
until after the meetings between Tornay and Paulini in
August.

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Walker was not called as a witness by either the Union or
the Respondent.

involved in overall issues. The representation form is an internal form used by the Union to document representation. According to Hall, the Union is not required to present the form in order to be recognized. (Tr. 84-85, 88) Mr. Hall was not aware of any agreement by the former Chief Steward of the NAF unit that representation forms would be completed in each case in which the Union was representing a bargaining unit employee.

Positions of the Parties

General Counsel

The General Counsel asserts that the Respondent bypassed the Union by delivering its decision on Paulini's proposed suspension to Paulini without providing the Union a copy of the decision and by discussing the proposal with Paulini despite being put on notice that the Union was Paulini's representative. *438th Air Base Group (MAC), McGuire Air Force Base, New Jersey*, 28 FLRA 1112 (1987) (McGuire); *Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California*, 35 FLRA 345 (1990) (McClellan); and *Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, et al.*, 39 FLRA 298 (1991). The General Counsel argues that Tornay was aware that Sims was Paulini's representative on August 29, 2002, when he delivered his decision on the proposed suspension to Paulini and on the following day when he discussed the suspension with Paulini.

The General Counsel further asserts that Respondent's defense that it need not recognize the Union in the absence of a representation form must be rejected. The General Counsel asserts that any imposing of a restriction on the Union's right to represent employees, such as a required signed representation form, is a waiver of a statutory right. And the Respondent has not established that the Union clearly and unmistakably waived its right to be recognized as an employee's representative unless it submits a representation form to the Respondent. The General Counsel would also reject Respondent's attempt to establish its waiver defense based on an inference on a contractual provision, or by oral agreement. Further the General Counsel argues that if an oral agreement had been reached in 2000, the parties entered into contract negotiations in 2001 and during that time, the requirement of the form was proposed by Respondent. The current collective bargaining agreement does not include any requirement that the Union produce a representation form to demonstrate that it represents an employee. Therefore there was no such

agreement in effect when Respondent bypassed the Union with regard to the Paulini decision letter.

Finally the General Counsel argues that Tornay's refusal to recognize the Union in the absence of a representation form and his statement to Paulini that Sims did not represent her in the absence of a representation form created separate violations of section 7116(a)(1) of the Statute. The question to be determined is whether, under the circumstances, the conduct and statement by Tornay could reasonably tend to coerce or intimidate the employee or whether the employee could reasonably have drawn a coercive inference from the statement or conduct. See *Ogden Air Logistics Center, Hill Air Force Base, Utah*, 34 FLRA 834, 837 (1990) (*Hill AFB*).

Respondent

Respondent denies that it violated the Statute as alleged in the complaint. The Respondent asserts that by verbal agreement and past practice, the Union provides the Agency with the written representation form signed by the employee prior to discussing the employee's case with the Agency. Respondent thus asserts that there has been a past practice of providing written designation of representation to the Agency in the NAF bargaining unit. This practice has been consistently followed over a significant period of time, having begun in July 2000.

Respondent also asserts that the August 29 delivery of the decision letter by Tornay to Paulini and the subsequent meeting on August 30 did not constitute a formal discussion.⁸

Respondent denies that the conversation between Tornay and Paulini constituted a bypass, citing *Defense Logistics Agency, Defense Depot Tracy, Tracy, California*, 14 FLRA 475 at 478 (1984) (*Tracy*), which held that "With respect to the issue of alleged bypass, the Authority notes that to establish a bypass, it is incumbent on the General Counsel to prove that the Respondent attempted to deal directly with employees over conditions of employment." Respondent argues that Tornay did not deal directly with Paulini; that he did not attempt to deal, bargain or negotiate with her, but merely delivered the decision letter on her proposed discipline.

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Since the complaint did not allege that either meeting constituted a formal meeting within the meaning of the Statute, I have not addressed this issue in this decision.

Respondent further denies that there was a bypass under the *McClellan-McGuire* analysis. Respondent argues that this matter is legally and factually distinguishable from *McClellan* and *McGuire*, where management clearly knew that the Union represented the employee. In this case, the Union never provided the representation form to Respondent, even though Sims told Tornay that she would send it to him. Respondent argues that there was no intentional effort to exclude the Union, as set forth in *McClellan* and *McGuire*. Rather the Respondent attempted to clarify the Union's role in representing Paulini and required the representation form as the routine practice between the parties. Even at the meeting, Tornay offered to stop the meeting and call Sims if Paulini wanted her present, but Paulini declined and wanted the meeting to proceed. Since Paulini did not sign a representation form until requested to do so by the Union in September 2002, the meeting in August was not a violation of the Statute.

Further Tornay's statement or actions did not constitute separate violations of the Statute. Tornay's statement to Paulini regarding the need for a representation form was consistent with the past practice and with the collective bargaining agreement, and therefore does not meet the standard for section 7116(a)(1).

Discussion and Analysis

The General Counsel asserts that the Respondent violated section 7116(a)(1) and (5) of the Statute when it bypassed the Union by delivering its decision on Paulini's proposed suspension without providing the Union a copy of the decision and by discussing the decision with Paulini despite being put on notice that the Union was Paulini's representative.

The Authority established that an agency bypasses a union in violation of section 7116(a)(1) and (5) of the Statute when it deals directly with a unit employee concerning a disciplinary matter when the union has been designated as the employee's representative. *McGuire*, 28 FLRA 1112. The delivery of a final decision to an employee without providing the Union a copy of the decision is considered direct dealing under *McGuire*, as found in *McClellan*, 35 FLRA 345.

There is no question in this matter that Tornay met with Paulini on August 29, 2002, in order to deliver her the decision on her proposed suspension, and that Sims, the NAF Chief Steward, was not present at this meeting. It is clear that Tornay did not inform Sims of the meeting or give her

a copy of the decision letter delivered to Paulini. The question, therefore, is whether or not the Respondent was aware that Sims represented Paulini in this disciplinary action and whether its conduct in not having Sims present at the meeting was a violation of the Statute.

The evidence shows that Sims did tell Tornay, prior to the meeting, that she was representing Paulini in this action. The evidence also shows that Tornay expressed his need for the written representation form before he could include Sims in any discussions. I credit Tornay that he requested a copy of the written representation form from Sims and that she agreed to send it to him. I find Tornay's testimony in this matter to be consistent and logical. I did not find Sims' attempts to deny Tornay requesting a copy of the representation form to be believable. Sims attempts to distinguish Tornay's asking if she had an authorization form and his actual request that she give him a copy of the form was disingenuous at best.

In both the *McGuire* and the *McClellan* cases, the facts showed that the Respondent was on written notice that the Union represented the individual employees. In this case, although Sims stated she was the representative, she did not, and could not, present a signed designation of representative because she had not even requested such a form from the employee until after the final decision was issued.

Based on the evidence, I do not find that the Respondent's insistence that a written representation form be furnished by the Union was a violation of the Statute. In that regard, the evidence shows that the parties have clearly followed a practice of the Union furnishing such designations either on their own or on the request of the agency representatives. This was a practice that had been established in July 2000 and continued to date. Respondent's witnesses concerning the development of this practice with the Union are consistent with the documentary evidence. Even Sims testified that she gave the representation form when requested. ⁹ Further the General Counsel failed to call Walker, the Union Chief Steward for the NAF unit at the time of the agreement, to testify regarding the agreement with the Respondent to furnish the signed representation form. Without any explanation for

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I find Sims distinction between management representatives "requesting" and "demanding" such forms to be forced and contrived. Her acknowledgment that she furnished such representation forms on request supported the practice as set forth by Respondent.

such a vital witness' absence, I can only take an adverse inference that she would have testified consistently with Respondent's witnesses Bettencourt and Tornay regarding the practice in effect. *Federal Aviation Administration*, 55 FLRA 1271 at 1283 (2000). I further find that this agreement and subsequent practice effectively waived the Union's rights with regard to the manner in which it informed Respondent that it represented bargaining unit employees. *U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 44 FLRA 205 at 207 (1992).

I do not find the intervening collective bargaining agreement disrupted this practice, since the evidence shows that Sims continued to follow this practice when she became Chief Steward for the NAF unit. The evidence presented by the Respondent, in the form of various representation forms, shows that the practice was widespread within the NAF unit.

Only one participant at the August 29 meeting testified at the hearing; Paulini was not called to testify. Tornay's version of the meeting is consistent with the practice as set forth by the Respondent. Further I find no evidence to contradict his version of the events. In that regard I find that, at the meeting, Paulini asked if Sims would be present and that Tornay said she would not because there was no written representation form. I further find that he asked Paulini if she wanted Sims present and that he would call her. Since Paulini declined this offer and requested that the meeting continue, I do not find that the Respondent had knowledge that Sims was representing Paulini in this matter. Therefore, I do not find that the Respondent violated the Statute by Tornay's delivering the decision letter to Paulini without Sims being present. I further do not find that Tornay's statement to Paulini that the Union did not represent the employee unless the employee signed a representation form is violative of section 7116(a)(1) of the Statute, since this is consistent with the parties' practice. Under such circumstances Tornay's statement could not be considered coercive or threatening and the employee could not have reasonably drawn a coercive inference. *Hill AFB*. And I do not find that Tornay and Paulini's conversation in the hall the following day was violative of the Statute for the same reasons as set forth above.

Therefore, I do not find that the Respondent's conduct violated the Statute in any way alleged in the complaint.

Based on all of the above, it is recommended that the Authority adopt the following:

ORDER

It is hereby ordered that the Complaint in SF-CA-02-0902, be, and it hereby is, dismissed in its entirety.

Issued: December 12, 2003, Washington, DC

SUSAN E. JELEN
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. SF-CA-02-0902 were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT

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President
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Dated: December 12, 2003

Washington, DC