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

MEMORANDUM DATE: November 4, 2005

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2145

Respondent

and Case No. WA-CO-04-0697

DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
RICHMOND, VIRGINIA

Charging Party

Pursuant to Section 2423.34(b) of the Rules and Regulations 5 C.F.R. §2423.34(b), I am hereby transferring t he 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

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2145 Respondent	
and DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER RICHMOND, VIRGINIA Charging Party	Case No. WA-CO-04-0697

NOTICE OF TRANSMITTAL OF DECISION

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

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

Any such exceptions must be filed on or before **DECEMBER 5, 2005**, and addressed to:

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

_____

PAUL B. LANG
Administrative Law Judge

Dated: November 4, 2005
Washington, DC

OALJ 06-02

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

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2145 Respondent	
and DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER RICHMOND, VIRGINIA Charging Party	Case No. WA-CO-04-0697

Greg A. Weddle, Esquire
For the General Counsel

M. Jefferson Euchler, Esquire
For the Respondent

Charles Snow
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

On August 24, 2004, the Department of Veterans Affairs Medical Center, Richmond, Virginia (VA) filed an unfair labor practice charge against the American Federation of Government Employees, Local 2145 (Union or Respondent). On November 30, 2004, the Regional Director of the Washington Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing in which it was alleged that the Union committed an unfair labor practice in violation of §7116(b)(2) of the Federal Service Labor-Management Relations Statute (Statute) by directing the VA to make Alma R. Ereso, an employee of the VA and a member of the bargaining unit represented by the American Federation of Government Employees Council of Locals (AFGE) of which the Union is an agent, available for an arbitration hearing.

A hearing was held in Richmond, Virginia on June 22, 2005.[1] The parties were present with counsel and were afforded the opportunity to present evidence and to cross-examine witnesses. This Decision is based upon consideration of the evidence, including the demeanor of witnesses, and of the post-hearing briefs submitted by each of the parties.

Findings of Fact

The VA is an agency as defined in §7103(a)(3) of the Statute. AFGE is a labor organization within the meaning of §7103(a)(4) of the Statute. The Union is an agent of AFGE for the purposes of representing certain employees of the VA who are part of a unit which is appropriate for collective bargaining. Ereso is a member of the bargaining unit and is an employee as defined in §7103(a)(2)(A) of the Statute.

At all times pertinent to this case the VA and AFGE were parties to a collective bargaining agreement (CBA). Article 40 of the CBA is entitled "**ARBITRATION**"; Section 2B of Article 40 states, in pertinent part:

> . . . Both parties shall be entitled to call and cross-examine witnesses before the arbitrator. All witnesses necessary for the arbitration will be on duty time if otherwise in a duty status. On sufficient advance notice from the union, management will rearrange necessary witnesses' schedules and place them on duty during the arbitration hearing whenever practical. Such schedule changes may be made without regard to contract provisions on Hours of Duty. A reasonable amount of preparation time for arbitration will be granted in accordance with the provisions of Article 45 Official Time and local supplementary agreements.[2] (GC Ex. 2)

Article 32 of the CBA (Jt. Ex. 1) is entitled "**TIME AND LEAVE**". Section 2F states:

> Management recognizes the needs of employees to plan vacation and personal time off. Therefore, management will not cancel leave which has been

[1] The Respondent's Motion for Summary Judgment was denied by Order of April 26, 2005.

[2] Neither Article 45 of the CBA nor any supplementary agreements were offered in evidence.

> approved without the consent of the employee, except for rare and unusual circumstances.

Neither of the parties have cited contractual language which specifically provides for the involuntary cancellation of leave to ensure a witness' attendance at an arbitration hearing.

Pursuant to the contractual grievance procedure, the Union initiated a grievance on behalf of Tammie Daniels, a member of the bargaining unit who had received a five day suspension for allegedly insubordinate behavior. Because the grievance was not resolved at an intermediate step of the grievance procedure it was referred to arbitration. The arbitration hearing was eventually scheduled to take place on April 5, 2004 (GC Ex. 1(f), Attachment 2).[3]

Regina Wallace, the Union's Vice President for Title 38, was involved in the Union's preparation for the hearing. She testified that the hearing was originally scheduled for about a month earlier but was postponed because of a problem with her being released from duty. Wallace had submitted a witness list to the VA in anticipation of the original hearing and, to the best of her knowledge, there had been no changes (Tr. 42).

On March 25 Wallace sent an e-mail message[4] to six prospective witnesses, including Ereso, stating, in pertinent part:

> The following witnesses will need to report to the multipurpose room, Director's Side on 3/26/2004 to meet with the Union attorney to prepare for the scheduled arbitration hearing set for 4/5/2004.
>
> [There is a list of the six witnesses and the times they are to be available. Ereso was scheduled from 11:30 a.m. to Noon.]
>
> I am forwarding this e-mail to your immediate supervisor so that they will afford coverage for your release from duty on 3/26/04 in order to arrive at your designated appointment time to prepare for this hearing.

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[3] All subsequently cited dates are in 2004 unless otherwise indicated.

[4] This and all subsequent e-mail messages are part of GC Ex. 3.

I am including Charles Snow, Ted Knicely, Doug Butler on this e-mail for HRM notification.[5]

Ereso made the following response on March 26:

I will try to be there. We are short handed today. I will not be here on the 5th of April.

On March 26 Jennifer Marshall, the Union President, responded to Ereso stating:

Alma, the agency is required to make witnesses available for the arbitration and if that includes cancelling you[r] annual leave then that must occur. You are expected to come to the hearing on 4/5/2004. You are also expected to come to your scheduled appointment today to prepare with the Union retained attorney.

Ruth[6], you need to ensure that this employee is available for the 4/5/2004 arbitration hearing.

Ereso made the following response to Marshall on March 26:

I am schedule[d] to fly out today at 4p and returning on the 6th. This is an important business[.]

Snow thereupon sent the following message on March 26:

Being an arbitration witness is a voluntary undertaking and management cannot compel employees to serve as union witnesses.

Please, cite any case law or other authority that would mandate management to unilaterally cancel

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[5] Snow is the Respondent's Labor Relations Specialist who was responsible for coordinating the arbitration. Knicely is the Chief, Human Resources, Medical Service. Butler is a Supervising Human Resources Management Specialist (Tr. 24).

[6] The list of recipients on the second page of GC Ex. 3 suggests that Marshall was referring to Ruth November who, according to Marshall's testimony, is an attorney for VA (Tr. 48).

> approved annual leave in order to have the employee testify at the arbitration hearing.
>
> Please respond ASAP in order to eliminate any concerns that the employee may have regarding the approved leave.
>
> Approximately one minute later Wallace replied:
>
> Thanks for the input. Everything has been taken care of.

There is no evidence of further communication between the parties on the subject of Ereso's availability.

Wallace testified that, while Ereso did not object to being a witness, she was concerned about a conflict between the date of the arbitration hearing and her scheduled leave during which she had an airline reservation.[7] Wallace told her not to be concerned and asked her to write a statement, which she did in Wallace's presence. They did not discuss Ereso's attitude toward the Union; Wallace stated that she had no reason to believe that Ereso was resistant to testifying on behalf of the Union other than with regard to the scheduling conflict (Tr. 43).

Marshall testified that her customary practice prior to an arbitration was to inform Human Resources and prospective witnesses of the Union's intention to call the witnesses and to inform them of the time which had been set aside for preparation. She would also tell the prospective witnesses that they could forward her message to their supervisors for scheduling purposes. The Chief of Human Resources would issue a memorandum notifying the affected employees that they had been identified as arbitration witnesses and that their presence at the hearing was mandatory.[8] That practice prevailed for eleven and a half years, but has not been followed since six months prior to the hearing (Tr. 48, 49). She herself has received several such memoranda (Tr. 60). Marshall also testified that she recognized no distinction under Section 2B of Article 40 of the CBA between the adjustment of the work schedule of a prospective witness and the cancellation of his or her leave. She also stated that, because Human Resources regarded attendance as mandatory, she had never before been involved in a situation where

[7] Ereso did not testify at the hearing in this case.

[8] It is unclear whether it was considered mandatory for prospective witnesses to meet with the Union's attorney prior to the arbitration hearing.

leave was an issue (Tr. 50, 51). She knew of no bargaining unit employee whose leave had been cancelled so that he or she could attend an arbitration hearing or prepare for arbitration. However, she felt that she would not have known about it because the Chief of Human Resources would have informed the employee that attendance was mandatory (Tr. 52, 53). When asked during cross-examination whether the Union had ever requested the cancellation of an employee's leave because of arbitration, she responded that, "It's never come up" (Tr. 58, 59). Neither of the parties presented other evidence to show that the leave of a prospective arbitration witness had been involuntarily cancelled in the past or that the Union had ever requested that an employee's leave be cancelled.

In response to my questioning Marshall testified that prospective witnesses for the Union sometimes state that they do not wish to meet with the Union's attorney or do not wish to testify at the arbitration hearing. Marshall stated that the Union did not force them to testify because "you want to only present friendly witnesses" (Tr. 69, 70).

Although the General Counsel did not challenge Marshall's testimony that notices from the VA to arbitration witnesses characterized their attendance at the hearing as "mandatory", it is possible that the use of that term was intended to ensure that supervisors did not try to prevent employees from leaving their duty stations to testify; in other words, that it was mandatory that they be excused from their regular work assignments.[9] Such evidence alone is insufficient to show that the parties intended to provide for involuntary testimony by employees at arbitration hearings, especially since the Union had never before asked the VA to cancel the leave of a prospective witness and the VA has never done so on its own initiative. In spite of Marshall's testimony that she would not have been involved in such an occurrence, it is highly unlikely that a member of the bargaining unit whose leave had been cancelled would not have either initiated a formal protest or, at the very least, have complained to the Union. This conclusion is corroborated by Marshall's testimony to the effect that the Union would not force an employee to testify, if only to avoid the possibility of adverse testimony.

Positions of the Parties

The General Counsel maintains that Ereso's decision not to attend the arbitration hearing was protected activity

[9] Neither of the parties offered an example of such a notice in evidence.

within the meaning of §7102 of the Statute inasmuch as she had the right to refrain from assisting the Union regardless of her reason. The Union knowingly and intentionally attempted to induce the VA to force Ereso's attendance at the hearing by virtue of Marshall's e-mail message to Ereso stating that her leave might have to be cancelled and asking the attorney for the VA to ensure Ereso's availability.

The General Counsel also maintains that the Union failed to support the affirmative defense that its action was justified by Article 40, Section 2B of the CBA. There is no evidence that, even if the parties to the CBA were entitled to waive the rights of employees under §7102 of the Statute, they effectively did so. According to the General Counsel the language of the CBA does not support the position of the Union and there is no evidence of bargaining history.

The Union has raised the following defenses:

1. Article 40, Section 2B of the CBA obligated the VA to place arbitration witnesses on a duty status whenever practical. This obligation is not conditional upon the willingness of the witness to participate in the arbitration process.

2. The foregoing construction of the CBA is consistent with longstanding practice at the VA.

3. Ereso's desire to be excused from attending the arbitration hearing was not protected activity.

4. The Authority has held that the interest of a union in preparing for arbitration outweighs the right, if any, of an employee under §7102 of the Statute to refuse to cooperate.

Discussion and Analysis

The Legal Framework

§7116(b)(2) of the Statute[10] prohibits labor organizations from taking action:

> . . . to cause or attempt to cause an agency to discriminate against an employee in the exercise by the employee of any right under this chapter . . . .

[10] Further citations to this and other portions of the Statute will be identified only by the section numbers.

§7102, entitled "Employees' rights", provides that:

> Each employee shall have the right to . . . assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. . . .

In view of the above provisions, it will first be necessary to determine whether Ereso was engaged in an activity protected by the Statute. If not, the inquiry ends and the case must be dismissed. Otherwise, the focus turns to whether the Union attempted to cause the VA to discriminate against Ereso on account of her protected activity and, if so, whether such action by the Union was justified by the provisions of the CBA.

The Nature of Ereso's Activity

There is nothing in the language of §7102 which limits the exercise of employee rights to actions motivated by pro- or anti-union sentiments. As stated in *United States Department of the Treasury, United States Customs Service, Miami, Florida*, 58 FLRA 712, 717 (2003) (*Customs Service*), "Section 7102 does not protect only academic interests, but also selfish, financial ones." The clear import of that holding is that an employee may refuse to engage in activities sponsored by a union or to cooperate with a union for any reason, including personal conviction, apathy or, as with Ereso, conflicts with personal plans. Therefore, it is of no consequence that Ereso did not express anti-Union sentiments or that her reluctance to attend the arbitration hearing was not based on opposition either to the Union or to the Union's position with regard to the grievance.

The Union argues that compulsory attendance at an arbitration hearing is "viewpoint neutral" inasmuch as a witness is not forced to testify in any particular way. That argument is somewhat disingenuous since it is logical to assume that the Union would not have identified Ereso as a potential witness if it had not expected that her testimony, or her written statement in lieu of testimony, might benefit its case.[11] It follows that Ereso's unwillingness to appear at the arbitration hearing was tantamount to a decision to refrain from assisting the Union as described in §7102.

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[11] As previously stated, Marshall testified that the Union did not like to call unfriendly witnesses (Tr. 69, 70).

In summary, Ereso's statement of her unavailability on the date of the hearing was protected activity under §7102 and was thereby a "right under this chapter" within the meaning of §7116(b)(2).

The Nature of the Union's Action

An assessment of the nature of the Union's action naturally requires an analysis of the action which the Union urged on the VA since, if the cancellation of Ereso's leave would not have had a discriminatory effect regarding a condition of her employment, there could have been no violation of §7116(b)(2), *American Federation of Government Employees, Local 1931, AFL-CIO, Naval Weapons Station Concord, Concord, California*, 34 FLRA 480, 488 (1990).

In analyzing the action which the Union attempted to induce the VA to take, it must be recognized that it differs from that in other cases in which a Union has been found to have violated §7116(b)(2). See, for example, *American Federation of Government Employees, Local 3475, AFL-CIO (U.S. Department of Housing and Urban Development, New Orleans, Louisiana)*, 45 FLRA 537, 545 (1992) in which the union sought to have an employee disciplined after he had charged that the union had violated its own bylaws. See also, *Department of the Army, Watervliet Arsenal, Watervliet, New York*, 39 FLRA 318, 336 (1991)[12], in which the union sought to have the agency grant administrative leave only to its members in order to allow them to participate in an asbestos testing program. Contrary to the circumstances in those and other cases, the proposed cancellation of Ereso's leave would not have been an act of retaliation or disparate treatment. Rather, it was an attempt to nullify her decision to take leave on the day of the arbitration hearing, thereby preventing her from testifying on behalf of the Union. The Authority has never before considered whether such action by a labor organization constitutes an unfair labor practice.[13]

No useful guidance is to be had from the private sector. The provision of the National Labor Relations Act, 29 U.S.C. §151, *et seq.* (NLRA) which is closest to §7116(b)

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[12] This was a consolidated case in which charges against the agency were combined with charges against a labor organization.

[13] It is likely that the cancellation of Ereso's leave on the VA's own initiative would have been in violation of §7116(a)(1), (a)(2) or both.

(2) is §8(b)(2) which prohibits labor organizations from taking action:

> . . . to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)[14] or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated . . . .

There are no private sector cases in which an employer has been found in violation of §8(b)(2) of the NLRA other than for attempting to induce an employer either to discriminate

or retaliate against an employee for engaging in protected activity.[15]

Although there is no controlling precedent by the Authority or guidance from the private sector, the Authority has addressed the elements of a finding of unlawful discrimination. In *305th Air Mobility Wing, McGuire Air Force Base, New Jersey*, 54 FLRA 1243, 1245 n.2 (1998) (*McGuire*), the Authority made it clear that proof of disparate treatment of similarly situated employees is not a necessary element of a *prima facie* case of discrimination under §7116(a)(2). In view of *McGuire* there would seem to be no difference in the standards for evaluating alleged acts of interference, restraint or coercion under §7116(a)(1) (or §7116(b)(1) whose language is identical) and those which are alleged to constitute discrimination under §7116(a)(2) other than with regard to effect. Under §§7116(a)(1) and (b)(1) the alleged actions must be in contravention of the exercise of any activity protected under the Statute while, under §7116(a)(2), the alleged actions must be intended to encourage or discourage union membership and must be connected with

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[14] §8(a)(3) of the NLRA prohibits employers from discriminating "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization".

[15] The NLRB imposes a higher standard for finding that a labor organization in the private sector has violated §8(b)(2). There must be evidence of economic pressure by the union in addition to a request that an employer take discriminatory action, *Association of Journeymen & Apprentices of Plumbers & Pipefitters*, 112 NLRB 1385 (1955). Under Authority precedent, no such requirement exists for a finding that a union has violated §7116(b)(2).

"hiring, tenure, promotion, or other conditions of employment." Indeed, a finding that an agency has violated §7116(a)(1) is routinely found as a derivative of a finding that it has committed any other unfair labor practice. In the context of this case it makes no difference whether the cancellation of Ereso's leave by the VA would have been a violation of §7116(a)(1) or (a)(2). The critical factor in this case is whether the cancellation of Ereso's leave affected a condition of employment and could reasonably have been expected to have had an adverse effect on her exercise of a protected right.

In *Letterkenny Army Depot*, 35 FLRA 113, 118 (1990) (*Letterkenny*) the Authority held that, in order to support a charge of discrimination under §7116(a)(2), the General Counsel must produce evidence that the employee against whom adverse action was taken had been engaged in a protected activity and that consideration of the activity was a motivating factor in the adverse action. I have already found that Ereso had been engaged in protected activity. As shown by Marshall's e-mail message to Ereso, with a copy to the attorney for the VA (GC Ex. 3), the *only* reason for the Union's requested cancellation of Ereso's leave, and the only reason for the VA to have actually cancelled her leave, had it done so, was to ensure her availability to appear at the arbitration hearing at the behest of the Union. Accordingly, the Union's request to the VA was motivated by Ereso's protected activity.

In determining whether a matter involves a condition of employment the Authority will consider (a) whether it pertains to bargaining unit employees, and (b) whether there is a direct connection between the matter and the work situation of bargaining unit employees, *Antilles Consolidated Education Association and Antilles Consolidated School System*, 22 FLRA 235, 237 (1986) (*Antilles*). The proposed leave cancellation meets the first prong of the *Antilles* test since Ereso is a member of the bargaining unit. The proposed action also meets the second prong since the Authority has long held that the issue of leave affects the work situation of employees, *56th Combat Support Group, MacDill Air Force Base, Florida*, 43 FLRA 1565 (1992). Thus, the proposed cancellation of Ereso's leave was an adverse action affecting a condition of her employment.

In *American Federation of Government Employees, Local 987, Warner Robins, Georgia*, 35 FLRA 720, 724 (1990) (*Warner Robins*) the Authority held that an objective standard is to be applied in determining whether action by a union is coercive within the meaning of §7116(b)(1). Therefore, it makes no difference whether the union intended to discourage

the exercise of a protected right or whether the employee involved believed that she was being intimidated. Rather, the test is whether the union's action could reasonably have been construed as coercive. Applying the *McGuire* rationale, the same test is applicable to a determination as to whether a union has caused or attempted to cause an agency to discriminate against an employee in violation of §7116(b)(2).

In applying the *Warner Robins* analysis I have concluded that Marshall's message to the VA on behalf of the Union could reasonably have been expected to have a coercive effect on the exercise of protected rights by Ereso and other members of the bargaining unit. The likely and foreseeable inference which employees would draw from Marshall's message is that the Union was prepared to pressure the VA to have an employee's leave cancelled to ensure that he or she was available to testify on the Union's behalf regardless of the wishes of that employee. That is clearly the sort of action that §7116(b)(2) is designed to prevent.

The Union maintains that it does not have an interest in the arbitration case, "other than to fulfill its own statutory obligation to represent members of the bargaining unit" and that it, "could not refuse to arbitrate under these circumstances even though the Union itself does not derive any benefit." The apparent point of this argument is that the Union could not have been in violation of §7116(b)(2) because it had no choice but to represent Daniels in the grievance arising out of her suspension and could have derived no benefit from the successful resolution of the grievance which it initiated on behalf of Daniels.

Even if the Union were correct in assuming that its duty of fair representation under §7114(a)(1) requires it to take all grievances to arbitration, it does not follow that such a duty would outweigh the right of employees under §7102 to refrain from assisting it. The Union has presented no legal basis for the far-fetched proposition that §7102 only entitles employees to refrain from assisting labor organizations in their efforts on their own behalf rather than on behalf of individual members of the bargaining units which they represent.[16] The Union's argument flies in the face of the language of §7103(a)(4) which defines a labor organization as an entity which "has as a purpose the

[16] It is difficult to imagine a situation in which a labor organization would have a legitimate interest cognizable under the Statute which does not arise out of its representative capacity.

dealing with an agency concerning grievances and conditions of employment".

Contrary to the Union's assertion, its request for the cancellation of Ereso's leave is not equivalent to a request that a subpoena be issued for testimony at a legal proceeding. The most obvious difference is that a subpoena is issued by a governmental entity rather than by an agency which is subject to the Statute.[17] Another distinction between action by an agency and a subpoena is that the person named in the subpoena would have a right to request that it be revoked; see, for example, §2423.28(e) of the Rules and Regulations of the Authority.

Although this case does not present a classic example of a violation of §7116(b)(2), my review of the evidence and of pertinent law leads me to conclude that the Union attempted to cause the VA to discriminate against Ereso because of her exercise of a right protected by the Statute and with regard to a condition of her employment. Furthermore, the Union's action could reasonable have been expected to have had a coercive or discriminatory effect and was thereby a violation of §7116(b)(2).

The Union's Affirmative Defense

As an alternative to its assertion that Ereso's reluctance to attend the arbitration hearing was not a protected activity, the Union contends, as an affirmative defense, that its action was justified by the terms of the CBA. In support of its defense, the Union relies on the holding in *Patent Office*. That reliance is misplaced.

The Union correctly maintains that *Patent Office* stands for the proposition that the rights of individual employees under §7102 are not absolute, but must be balanced against the rights of an agency and a union to prepare for arbitration. However, that holding arises out of a factual situation that is distinguishable from the facts in this case. In *Patent Office* the Authority concluded that the parties could lawfully negotiate contract language to provide for compulsory interviews by either the union or the agency of witnesses which the adverse party had identified as supporting its position in an impending arbitration. The

[17] The distinction between a subpoena and unilateral action by an agency was recognized in *Patent Office Professional Association and U.S. Department of Commerce, Patent and Trademark Office*, 41 FLRA 795, 828 (1991) (*Patent Office*), a case cited by the Union in support of its affirmative contractual defense.

Authority also observed that an effective discovery process can facilitate settlement, 41 FLRA at 828. However, unlike the construction of the CBA upon which the Union relies, the proposal did not provide a mechanism for forcing unwilling employees to testify for either party or to assist either party in preparing for arbitration.

In *Patent Office* the right of the parties to conduct pre-hearing discovery was held to have outweighed the possibility of interference with protected activity.[18] In this case, the Union argues that its right to select arbitration witnesses outweighs the rights of employees to refrain from testifying. The Authority has neither endorsed nor rejected that result in *Patent Office* or in any other of its rulings. Therefore, it will be necessary to construe the language of the CBA upon which the Union relies and, if the Union's construction is deemed to be valid, to determine whether it is consistent with the Statute and thereby enforceable.

Although the construction of contractual language is usually reserved to arbitrators, the Authority, in evaluating a contractual defense to an unfair labor practice charge, will itself interpret the agreement at issue and will apply the same standard used by arbitrators. In so doing, the intent of the parties is to be given controlling weight, *Internal Revenue Service, Washington, DC*, 47 FLRA 1091, 1103, 1110 (1993). In determining the intent of the parties, consideration will be given to extrinsic evidence along with the language of the agreement as well as inferences drawn from the agreement as a whole, *U.S. Department of Housing and Urban Development, Rocky Mountain Area, Denver, Colorado*, 55 FLRA 571, 574 (1999). Extrinsic evidence of past practice may only be considered to resolve ambiguous contract language, *Quick v. NLRB*, 245 F.3d. 231, 247 (3d Cir. 2001).

Article 40, Section 2B of the CBA makes no mention of the involuntary cancellation of leave for arbitration witnesses, nor does it state whether witnesses may be compelled to testify. The critical language is: "On sufficient advance notice from the union, management will rearrange necessary witnesses' schedules and place them on duty during the arbitration hearing whenever practical." No other portions of the CBA are in evidence other than

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[18] In response to the argument that the proposal might lead to the intimidation and coercion of prospective witnesses, the Authority stated that otherwise negotiable proposals are not rendered nonnegotiable merely because of the possibility of abuse, 41 FLRA at 829 n.11.

Article 32, entitled "**TIME AND LEAVE**" (Jt. Ex. 1) and Article 61, entitled "**DURATION OF AGREEMENT**" (GC Ex. 2); neither of those articles address involuntary cancellation of leave. I have already found as a fact that the Union had never requested that leave be cancelled and that the VA had never done so on its own initiative. Accordingly, the evidence does not meet the criteria for a past practice as set forth in *United States Patent & Trademark Office*, 57 FLRA 185, 191 (2001) since there has been no showing that the leave of prospective arbitration witnesses has ever been cancelled, let alone that such a practice has been consistently followed over a significant period of time.

Leaving aside the question as to whether the parties to the CBA could legally have provided for the mandatory attendance of witnesses and the involuntary cancellation of leave, I have concluded that the Union and the VA did not do so in this case. If the parties had intended to impose such a drastic limitation on the rights of employees under §7102 it is highly likely that they would have stated so explicitly. Assuming that the Union could validly waive the protected rights of individual employees, such an waiver must, in the words of the Authority, be "clear and unmistakable", *Social Security Administration and American Federation of Government Employees, AFL-CIO* (Leahy, Arbitrator), 31 FLRA 1277, 1279 (1988). Accordingly, the Union's reliance on the CBA was not justified and its affirmative defense is insufficient.

In view of the foregoing factors, I have concluded that the Union Respondent committed an unfair labor practice in violation of §7116(b)(2) of the Statute by attempting to induce the VA to cancel the annual leave of Alma Ereso so as to ensure her availability to testify on behalf of the Union at an arbitration. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to §2423.41(c) of the Rules and Regulations of the Authority and §7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the American Federation of Government Employees, Local 2145 (Union) shall:

1. Cease and desist from:

(a) Attempting to cause the Department of Veterans Affairs Medical Center, Richmond, Virginia (Agency) to discriminate against Alma Ereso or any other employee who is a member of a bargaining unit represented by the Union

because that employee has exercised rights accorded to them by §7102 of the Statute to refrain from joining or assisting the Union.

(b) In any like or related manner, interfering with, restraining or coercing 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 business offices and its normal meeting places, including all places where notices to its members and to members of the bargaining unit which it represents at the Agency are customarily posted, 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 President of the Union and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places where bargaining unit employees of the Agency represented by the Union are located. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced or covered by any other material.

(b) Provide signed copies of the Notice to the Director of the Agency for posting in conspicuous places where Agency employees represented by the Union are located. Copies of the Notice should be posted and maintained for 60 consecutive days.

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

Issued, Washington, DC, November 4, 2005.

Paul B. Lang
Administrative Law Judge

NOTICE TO ALL MEMBERS AND
BARGAINING UNIT EMPLOYEES
POSTED BY ORDER OF
THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the American Federation of Government Employees, Local 2145 has violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY ALL BARGAINING UNIT EMPLOYEES THAT:

WE WILL NOT attempt to cause the Department of Veterans Affairs Medical Center, Richmond, Virginia (Agency) to discriminate against Alma Ereso or any other employee who is a member of a bargaining unit represented by the Union because that employee has exercised rights accorded to them by §7102 of the Statute to refrain from joining or assisting the Union.

WE WILL NOT, in any like or related manner, interfere with, restrain or coerce employees in the exercise of their rights assured by the Statute.

_____
(Agency)

Dated: _____ By: _____
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Chicago Regional Office, whose address is: Federal Labor Relations Authority, 55 W. Monroe, Suite 1150, Chicago, IL 60603, and whose telephone number is: 312-886-3465.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. WA-CO-04-0697 were sent to the following parties:

_____

CERTIFIED MAIL AND RETURN RECEIPT **CERTIFIED NOS:**

Greg A. Weddle **7004 2510 0004 2351 0071**
Federal Labor Relations Authority
Chicago Regional Office
55 W. Monroe, Suite 1150
Chicago, IL 60603

M. Jefferson Euchler **7004 2510 0004 2351 0088**
708 S. Rosemont Road, Suite 202
Virginia Beach, VA 23452

Charles Snow **7004 2510 0004 2351 0095**
HRMS, VAMC
1201 Broad Rock Boulevard
Richmond, VA 23249

REGULAR MAIL

President
AFGE
80 F Street, NW
Washington, DC 20001

Dated: November 4, 2005
Washington, DC