FEDERAL LABOR RELATIONS AUTHORITY OALJ 15-15
Office of Administrative Law Judges
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 4056 CHARGING PARTY	Case No. AT-CA-13-0257

Brian R. Locke
For the General Counsel

Terri-Ann Jones
For the Respondent

Gil Caveda
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (Authority/FLRA), Part 2423. The case was submitted in accordance with § 2423.26(a) of the Authority's Rules and Regulations based on a waiver of hearing and a stipulation of facts by the parties.

On March 5, 2013, the American Federation of Government Employees, Local 4056 (Union), filed an unfair labor practice (ULP) charge against the Social Security Administration (Respondent). (Jt. Ex. 1(a)). On July 10, 2013, the Acting Regional Director of the Atlanta

Region of the FLRA issued a Complaint and Notice of Hearing alleging that the Respondent violated § 7116(a)(1) of the Statute by making certain statements to the Union's representative. (Jt. Ex. 1(b)). The Respondent timely filed an Answer to the complaint, in which it denied the allegation that it violated the Statute. (Jt. Ex. 1(c)).

A hearing in this case was originally scheduled for September 19, 2013, at a place to be determined in Naples, Florida. (Jt. Ex. 1(b)). The hearing was rescheduled for September 24, 2013, due to the unavailability of two of the Respondent's witnesses. (Jt. Exs. 1(g) & (i)).

On September 20, 2013, the Respondent, the Union and the General Counsel entered into a Joint Stipulation of Facts, pursuant to § 2423.26 of the Rules and Regulations of the Authority. The parties agreed that the Charges, the Complaint and Notice of Hearing, the Respondent's Answer, the Pleadings and Orders (Jt. Exs. 1(a)-(k)), the Stipulation and its attached exhibits (Jt. Exs. 2-12), and the parties' stipulation briefs, would constitute the entire record in this case. The parties further agreed to waive their right to a hearing before the Administrative Law Judge. Therefore, no hearing was held in this matter and this decision is based on the formal pleadings and documents, parties' joint stipulation of facts and its attached exhibits.[1]

FINDINGS OF FACT

The parties agreed to the following stipulation of facts:

1. This unfair labor practice complaint and notice of hearing issued under 5 U.S.C. §§ 7101-7135 and 5 C.F.R. Chapter XIV.

2. The Social Security Administration (Respondent) is an agency under 5 U.S.C. § 7103(a)(3).

3. The American Federation of Government Employees, AFL-CIO (AFGE), 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.

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[1] After stipulation briefs were filed, the Respondent filed a Motion to Strike portions of the GC's brief. The Respondent requested that I strike (1) the GC's "statement of facts" because it is inconsistent with the Stipulation of Facts, and (2) "extemporaneous arguments" in the GC's brief which are not contained in the stipulated record. Having considered the Respondent's motion and the GC's opposing motion, I grant in part, and deny in part, the Respondent's Motion to Strike. I will strike the GC's "statement of facts" and I will rely only on the facts contained in the Stipulation of Facts. However, I will not strike the GC's argument in favor of electronic Notices as a "traditional remedy" under the Statute. The GC's legal argument concerning the remedy does not need to have a basis in the stipulated record. Even though the parties agreed in the stipulation that the agency would distribute the Notice to Employees electronically in the event the Respondent is found guilty of an ULP, paragraph 26 of the stipulation states: "The parties will address the General Counsel's remedy requests in their briefs." With that said, I will not review the GC's argument concerning electronic Notices because the Authority recently made a determination on the matter. *See U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014).

4. The American Federation of Government Employees, Local 4056 (Union) is an agent of AFGE for the purposes of representing employees in the Naples, Florida facility.

5. The charge in Case No. AT-CA-13-0257 was filed by the Union with the Atlanta Regional Director on March 5, 2013.

6. A copy of the charge described in paragraph 5 was served on the Respondent.

7. At all times material, Linda Partin (Partin) occupied the position of Assistant District Manager.

8. At all times material, Partin was a supervisor and/or management official for the Respondent.

9. At all times material, Partin was acting on behalf of the Respondent.

10. At all times material, Gil Caveda (Caveda) was an employee under § 7103(a)(2).

11. At all times material, Caveda was a Union official.

12. On or about February 26, 2013, the Respondent scheduled a formal meeting with bargaining unit employees for February 28, 2013.

13. The Respondent invited all employees in the Naples office to attend the office's staff meeting. Caveda was invited to the meeting because he is an employee in the office. In addition, the Respondent invited Caveda to the meeting because he was the Union's representative for the office. The Respondent's witness John Lanham will testify that the meeting was not mandatory. Caveda will testify that the meeting was mandatory because the Respondent did not give employees any indication that the meeting was voluntary and that everyone working in the office at the time attended the meeting.

14. Between February 26 and February 28, Partin and Caveda exchanged the emails in Jt. Ex. 2.

15. On February 28, before the meeting, Caveda requested one hour of official time to attend the February 28 meeting. The Respondent approved the request before the meeting started.

16. The meeting was held on February 28, 2013. Caveda did not attempt to speak as a Union representative at the meeting.

17. According to Article 30, Section 5B of the parties' collective bargaining agreement (CBA), AFGE is allowed to use up to 250,000 official time hours (the "Bank") every fiscal year for official time activities. AFGE distributes these hours to all SSA union officials throughout the nation. According to the Agency's records, in Fiscal Year 2011, AFGE used 220,244 of the total 250,000 official time hours available. In Fiscal Year 2012, AFGE used 223,870 of the total 250,000 official time hours available. As of September 17, 2013, AFGE had used 210,520 of the total 250,000 official time hours available for fiscal year 2013, which ends on September 30, 2013. Caveda is a recognized 520 user, which means that the union can allot him up to 520 hours of official time.

18. Between October 1, 2012 and February 28, 2013, Caveda used 60 hours of official time. He had approximately 30 hours of official time left in his allotment at the time of the meeting on February 28, 2013. Caveda will testify that he did not know whether AFGE had used the entire Bank time in the past or whether he would be able to get additional official time from AFGE in the future. Also, Caveda will testify that he has used personal time to complete many of his Union activities in an effort to conserve his official time.

19. According to Article 30, Section 5A of the parties' CBA, union officials such as Caveda will be granted official time subject to the availability of official time for representational activities such as dispute resolution (e.g. processing grievances, arbitrations, processing appeals), general labor-management relations (e.g. formal meetings, investigatory interviews, labor relations training and all other general labor relations activities consistent with 5 U.S.C. 71), and negotiating collective bargaining agreements.

20. Caveda would testify that he used a lot of his official time to give statements to the Federal Labor Relations Authority in relation to ULP charges, for pretrial preparation for this case, and for negotiations.

21. At the hearing, the Respondent witness Ralph Patinella, the Respondent's chief negotiator and spokesperson for the parties' 2012 national agreement, would testify that the parties had an understanding during term negotiations that Article 30, the official time article, applies to all representational activities described throughout the contract. He would further testify that anytime a union representative acts in his official capacity during duty time, he must be on official time.

22. At the hearing, the General Counsel's witness, Witold Skwierczynski, AFGE's chief negotiator, will testify that, during term negotiations, the parties never considered or addressed whether a union official must request official time to represent the union in formal discussions if the union official was also invited as part of his or her regular duties. The parties merely agreed that Article 30 would

apply when and if union officials needed to request official time. If a union official does not need to request official time then Article 30 does not apply. He will also testify that most other facilities do not require union officials to take official time to represent the union in meetings if they were also invited as part of their regularly-assigned duties.

23. The Respondent had three similar meetings between the time Caveda became the union representative at the end of July 2012 and the February 28, 2013 meeting. Caveda was invited to attend the staff meetings on the basis of his employment in the Naples office. Before the meetings, the Respondent also invited Caveda to attend each meeting as the Union representative. The Respondent did not ask him to request official time. The Respondent introduced Caveda as the Union representative and he was allowed to make a statement in each meeting. He did not have to request official time for these meetings. The Respondent's witness, Partin, would testify that Caveda is the first on-site designated union representative that the office has had in many years. While it is true that Caveda was not asked to submit official time in the meetings prior to February 28, 2013, once management realized its actions were contrary to the parties' CBA, it took corrective action to come into compliance with the parties' national agreement.

24. The Respondent has had three similar meetings after the February 28, 2013, meeting. Caveda was invited to attend the staff meetings as part of his employment in the Naples office. The Respondent also invited Caveda to attend each meeting as the Union representative and asked him to request official time if he wanted to represent the Union. Caveda requested official time to attend two of the meetings, but each request indicated that his request was under protest. Caveda would testify that he did not request official time to attend the third meeting in order to conserve his official time.

25. On February 5, 2013, John Lanham (Lanham), Caveda's immediate supervisor, had an informal meeting with his employees. Caveda attended the meetings as a staff member. Caveda will testify that he stated that a policy discussed during the meeting violated the CBA. Also, he will state that Lanham told him that he was not allowed to discuss the matter because he was not on official time. Lanham will testify that Caveda asserted some concerns about the subject matter of the meeting. Also, Lanham will testify that he told Caveda that the meeting was not a formal discussion and that he was available to address Caveda's concerns at a later time. Subsequently, the parties exchanged emails. (Jt. Ex. 3). Caveda will testify that this incident caused him to request official time for the February 28 meeting in order to protect his right to speak on behalf of the Union.

26. If it is found that the Respondent violated the Statute by requiring Caveda to use official time for the February 28, 2013 meeting, the GC requests that the Respondent credit Caveda with official time for the February 28, 2013, meeting

and any other subsequent meetings where Caveda requested official time to attend but he was also invited to attend as part of his employment. In addition, the GC seeks an Order requiring the Respondent to stop forcing Caveda to request official time to attend any further staff meetings that he would have attended as part of his employment in the Naples office.

27. The GC, the Union, and the Respondent agree that if it is found that the Respondent violated the Statute by requiring Caveda to use official time for the February 28, 2013 meeting, the Respondent should email the Notice, signed by the District Manager of the Naples Office, to all bargaining unit employees in the Naples, Florida field office. A bulletin board Notice is not required.

28. The parties do not waive their appeal rights.

On February 26, 2013, Partin emailed Caveda an invitation to attend the February 28, 2013, formal meeting. (Jt. Ex. 2). In the email, Partin stated, "If you wish to attend the meeting as the AFGE representative, you should submit the request for official time in advance of Thursday's meeting." *Id.* at 3. The next day, on February 27th, Caveda emailed Partin and stated that he did not need to request official time to attend the meeting. *Id.* at 2-3. He further stated that he would attend the meeting as the Union's representative and "speak as such . . . ." *Id.* Partin replied, "If you are attending the meeting as a union official, you must request official time . . . ." *Id.* at 2. On February 28th, Caveda emailed Partin again stating that he would not request official time and he would "[act] as [a] [U]nion representative during the meeting[.]" *Id.*

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) alleges that the Respondent, through Partin, violated § 7116(a)(1) of the Statute by insisting that Caveda request and attain official time to attend a meeting that he was invited to attend as an employee. The GC relies on three considerations in support of the alleged violation.

First, the GC maintains that the Statute does not require employees to request official time to attend meetings as the Union's representative if that employee is also invited as part of his regularly assigned duties. The GC cites the Office of Personnel Management's (OPM) definition of official time as "paid time off from assigned government duties to represent a [U]nion." U.S. Office of Personnel Management, *Labor-Management Relations, Reports on Official Time*, http://www.opm.gov/policy-data-oversight/labor-management-relations/reports-on-official-time/ (last visited Dec. 19, 2014). Based on this definition, the Respondent was prohibited from forcing Caveda to take official time because his attendance at the meeting was an assigned duty. The GC also relies on *U.S. Dep't of the Treasury, U.S. Customs Serv., Miami,*

Fla., 58 FLRA 712, 718 (2003) (*Treasury*) for the proposition that Union representatives are not required to be on official time in order to engage in protected activity. Therefore, according to the GC, Caveda had the right to attend the meeting and engage in protected activity, without first requesting official time.

Second, the GC argues that Partin's statements interfered with Caveda's ability to represent the Union. Partin forced Caveda to exhaust his official time at an accelerated rate. In turn, Caveda's ability to represent the Union in the future was "likely" impeded. (G.C. Br. at 8).

Third, the GC contends that the parties' CBA does not provide the Respondent with a defense. *Internal Revenue Serv., Wash., D.C.*, 47 FLRA 1091 (1993) (*IRS*). According to the GC, the parties' agreement does not require Union representatives to request official time prior to attending formal meetings. The GC relies on the parties' bargaining history to establish the parties' intent. Specifically, the GC presents two proposals for Article 3 ("Requirements for Formal Discussions"). (Jt. Exs. 10 & 11). Both proposals reference Article 30 ("Official Time") and both proposals were rejected. Alternatively, the GC maintains that the Respondent's failure to require Caveda to request official time for three similar meetings over the course of seven months constitutes a past practice that modified the parties' agreement and could not be altered by the Respondent.

As for the remedy, the parties agree to an electronic Notice, signed by the District manager, sent to all bargaining unit employees in the Respondent's Naples, Florida office. (Stip. ¶27). The GC also requests a status quo ante relief and a cease and desist Order.

Respondent

The Respondent argues that it is not guilty of the alleged ULP because Partin's statement cannot reasonably be considered coercive or intimidating. Partin was merely enforcing the parties' negotiated agreement. The Respondent contends that Article 30, § 7(A) of the parties' CBA obligates Union representatives to request official time before engaging in representational activity, and participation in a formal meeting by the Union representative is clearly a representational activity under Article 30, § 5(A)(4). (Jt. Ex. 5). Moreover, Caveda specifically informed Partin that he wished to attend the meeting in his representational capacity. Accordingly, the Respondent maintains that Article 30, § 7(A) applied and required Caveda to request official time prior to representing the Union at the February 28th formal discussion.

The Respondent further contends that Caveda's diminishing official time is irrelevant to the ULP allegation. The Respondent avers that Article 30 of the parties' CBA applies even if Union representatives are running low on official time. According to the Respondent, it is not responsible for the Union's mishandling of official time.

The Respondent disputes the GC's position that the parties created a past practice of permitting Union representatives to attend formal discussions without first requesting official time. The Respondent maintains that three meetings over seven months does not constitute the

"significant period of time" necessary to establish a past practice. Moreover, the Respondent cites *Dep't of Health, Educ. & Welfare, Region V, Chi., Ill.*, 4 FLRA 736, 737 (1980) (*HEW*) for the proposition that an agency does not commit a ULP by reaffirming provisions in a CBA that require advanced approval for official time.

The Respondent also alleges that the GC's reliance on *Treasury* is misplaced because that case is factually distinct. It deals with an employee, not a Union representative, who was ineligible for official time. Moreover, the employee in *Treasury* was asserting a right that emanated from a CBA, whereas Caveda sought to violate the parties' CBA by not abiding by Article 30. The Respondent asserts that there is a vast difference between an employee and an employee who is a Union representative and this case deals with the latter.[2]

ANALYSIS AND CONCLUSIONS

This case concerns a dispute that convolutes the use of official time, issues of employee rights, and provisions of the parties' negotiated agreement. The Statute sets forth the rights and restrictions for the use of official time in § 7131. 5 U.S.C. §§ 7131(a)-(c). Sections 7131(a) and (c) authorize Union representative's official time for contract bargaining and participation in certain Authority proceedings. 5 U.S.C. §§ 7131(a), (c). Section 7131(b) proscribes the use of official time for strictly internal Union matters. 5 U.S.C. § 7131(b). The use of official time for all other "labor-management relations activities" is subject to negotiation under § 7131(d) "in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest." 5 U.S.C. § 7131(d); *see AFGE, Local 2761*, 32 FLRA 1006, 1012 (1988) (*Local 2761*). The Authority has consistently held that the negotiation of official time under § 7131(d) includes "its amount, allocation and scheduling." *See U.S. Dep't of the Air Force, HQ Air Force Materiel Command*, 49 FLRA 1111, 1119 (1994) (quoting *Military Entrance Processing Station, L.A., Cal.*, 25 FLRA 685, 689 (1987)).

The Authority has not explicitly held that representing the Union at a formal discussion falls within the scope of § 7131(d). However, § 7131(d) of the Statute permits Unions and agencies to negotiate official time "in connection with any . . . matter covered by this chapter." 5 U.S.C. § 7131(d)(2). Clearly, formal discussions are a matter covered by the Statute. *See* 5 U.S.C. § 7114(a)(2). Moreover, in *Local 2761*, the Authority provided a non-exhaustive list of matters which are covered under § 7131(d), including "the investigation and attempted informal

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[2] The Respondent additionally maintains that allegations concerning the February 5, 2013, meeting cannot be reviewed by the Authority because such allegations were not included in the Complaint. *See AFGE, Local 2501, Memphis, Tenn.*, 51 FLRA 1657, 1660-61 (1996) (citing *U.S. DOL, Wash., D.C.*, 51 FLRA 462, 467 (1995). The GC's brief clearly states that the events of that meeting are not allegations of a separate ULP. (G.C. Br. at 8 n.2). Rather, the circumstances of the February 5th meeting are facts. Both parties' agreed to the facts in this case and the February 5th meeting is part of the stipulated record. (Stip. ¶25); (Jt. Ex. 3). Accordingly, I will consider the events of the February 5th meeting only as facts in evaluating whether the Respondent violated § 7116(a)(1) of the Statute as alleged in the Complaint.

resolution of employee grievances[,]" and "meetings of committees on which both the labor organization and management are represented[.]" 32 FLRA at 1012. In contrast, the Authority has found some activities so unrelated to labor-management relations that they were deemed inappropriate for official time under § 7131(d) of the Statute. *Id.* at 1012 (attending an employee's funeral); *Nat'l Archives & Records Admin.*, 24 FLRA 245 (1986) (assisting employee with private matter with police); *Dep't of Health & Human Serv., SSA*, 27 FLRA 391, 392-93 (1987) (representing a former employee in an unemployment compensation hearing).

Indisputably, the definition of a formal discussion more closely aligns with the labor-management activities provided in *Local 2761*. Similar to the examples in *Local 2761*, formal discussions often include representatives from both the Union and the agency, and the Statute lists grievances as a proper topic of discussion for formal discussion. 5 U.S.C. § 7114(a)(2)(A). Accordingly, I find that the scheduling, amount, and allocation of official time for formal discussions are covered by § 7131(d) of the Statute and arise from the parties' negotiated agreement.[3]

In this case, the parties dispute the meaning of their negotiated agreement regarding the scheduling of official time for formal meetings. The interpretation of contract language is usually reserved for arbitrators. However, the Authority, in evaluating a contractual defense to a ULP charge, will interpret an agreement and apply the same standards and principles utilized by arbitrators and the federal courts. *IRS*, 47 FLRA at 1111.

When construing the terms of a contract, the intent of the parties must be given controlling weight. *Id.* at 1110. The text of the agreement is presumed to be the most reliable indicator of the parties' intent because it is the language chosen by the parties. If the contract's language is not ambiguous, extrinsic evidence cannot be used to interpret and discern the intent. *AFGE, Local 2924 v. FLRA*, 470 F.3d 375, 383 (D.C. Cir. 2006) (*Local 2924*).

After carefully reviewing the contract's pertinent provisions and the parties' arguments, I conclude that the parties' CBA unambiguously requires Union representatives to request and obtain official time prior to representing the Union during formal meetings. Article 30 of the parties' agreement is entitled "Official Time." (Jt. Ex. 5). Section 5 of Article 30 ("Provisions for Official Time") lists the activities for which Union representatives will be granted official

[3] In light of this conclusion, I reject the GC's claim that OPM's "broad" definition of official time controls the outcome of this case. Instead, I find that the parties' agreement controls the "amount, allocation and scheduling" of official time for the representational activities covered under § 7131(d) of the Statute. Even if the parties' agreement was not controlling, the Authority, in *NTEU, Chapter 65*, 25 FLRA 373, 376 (1987), stated that: "if management scheduled a two-hour labor-management meeting during the employee's basic work requirement, the employee's participation in the meeting as a union representative on official time would count toward fulfillment of that work requirement." Clearly, the Authority has already determined that official time is properly granted for representational conduct occurring in conjunction with assigned duties.

time. *Id.* at 30-3. Section 5(A)(4) specifically states, under "General Labor-Management Relations," that "[U]nion representatives will be granted official time" for "[U]nion participation *in formal meetings* . . . ." *Id.* at 30-3 & 30-4 (emphasis added); (Stip. ¶19).

Article 30 also provides the requirements for the scheduling of official time. Section 7, entitled "Official Time Requests and Reporting Procedures," explicitly mandates that Union representatives must obtain "approval from the authorizing official . . . prior to engaging in official time" "[u]nless an authorizing official is not available[.]" *Id.* at 30-7. Section 7 unequivocally requires Union representatives to request and obtain approval for official time prior to performing the representational activities enumerated in § 5. Because § 5 includes "formal meetings," the parties' contract requires Union representatives to request and obtain official time prior to representing the Union in formal meetings.

I will not consider the extrinsic evidence or conflicting inferences because the contract is clear and the meaning is plain. *See Local 2924*, 470 F.3d at 377 (holding that the Authority erred by weighing extrinsic evidence of the parties' intent, because the language of the parties' agreement was unambiguous). However, the fact that the parties' agreement unambiguously addresses the matter is not conclusive if it is shown that the parties engaged in a practice that modified the terms of the CBA. *See, e.g., U.S. Dep't of the Navy, Naval Avionics Ctr., Indianapolis, Ind.*, 36 FLRA 567, 570 (1990) (*Navy*) (past practice established a condition of employment that differed from the negotiated agreement). If this showing is made, the past practice was a condition of employment that the Respondent could not have unilaterally changed. *Id.* The burden is on the GC to prove that: (1) the practice was known to management, (2) responsible management consented or knowingly acquiesced to the practice, and (3) the practice continued for an extended period of time. *See e.g. HEW*, 4 FLRA at 746.

In this case, the GC contends that a mutually accepted past practice existed, which permitted all Union representatives to attend formal meetings without first requesting official time. According to the stipulated record, Skwierczynski, the Union's chief negotiator, would testify that most of the Respondent's facilities do not require Union representatives to take official time to represent the Union at formal meetings. (Stip. ¶22). The GC failed to provide any evidence corroborating the Union negotiator's statement. Therefore, I find that statement unreliable. However, I also hold that the Respondent was aware that Caveda had attended formal meetings without first obtaining official time. The Respondent concedes that Caveda attended three formal meetings prior to the February 28th meeting, that he was not required to request or obtain official time beforehand, and that he was introduced by the Respondent as the Union's representative. (Stip. ¶24).

Turning to the second factor, I find that the Respondent did not consent to Caveda representing the Union without first requesting official time. In fact, the stipulated record indicates that the Respondent repeatedly rejected Caveda's conduct. *Dep't of Health & Human Serv., SSA*, 17 FLRA 126, 140 (1985) (agency's prompt efforts to terminate a potential past practice demonstrated that the agency did not knowingly consent). On February 5, 2013,

Lanham informed Caveda that he was not permitted to represent the Union during a meeting because he had not attained official time. (Stip. ¶25). Shortly thereafter, on February 7th, Lanham sent Caveda an email quoting the official time provisions of the parties' CBA. (Jt. Ex. 3). Weeks later, on February 26th and 27th, Partin notified Caveda that he was required to request official time pursuant to Article 30 in order to represent the Union at the February 28th meeting. (Jt. Ex. 2). The Respondent's actions establish that it did not consent to or acquiesce to the alleged past practice.

As for the factor that the practice continue for a significant period of time, "the Authority has found that a period of 'several years' suffices for purposes of establishing a past practice." *U.S. Dep't of the Air Force, U.S. Air Force Academy, Colo.*, 65 FLRA 756, 758 (2011). Caveda's attendance at three formal meetings over half a year can hardly be described as a longstanding procedure. *See Navy*, 36 FLRA at 570 (Authority found a past practice, inconsistent with the CBA, regarding the scheduling of official time, where the practice existed from six months to four years, and was followed with regularity). The GC failed to provide any precedent where the Authority found a past practice under similar circumstances over an analogous period of time.

Accordingly, I agree with Respondent that the General Counsel failed to prove by a preponderance of the evidence the existence of an established past practice. I also agree with the Respondent that Partin's statements to Caveda are better classified as a reaffirmation of the parties' contract, rather than a unilateral change from an established past practice. *See HEW*, 4 FLRA at 736 (agency's insistence upon compliance with the parties' agreement governing official time was not a ULP in the absence of an established past practice).

Now that I have interpreted the meaning of the parties' CBA, I must determine whether the Respondent committed the alleged ULP. Section 7116(a)(1) of the Statute provides that it shall be a ULP for an agency to interfere with, restrain, or coerce any employee in the exercise of any right provided by the Statute, including the right to form, join, or assist a labor organization. 5 U.S.C. § 7116(a)(1); 5 U.S.C. § 7102. The test is whether, under the circumstances, the statements tend to coerce or intimidate employees. *See e.g. Marine Corps Logistics Base, Barstow, Cal.*, 33 FLRA 626, 637 (1988). A statement will be deemed coercive if, despite the intent of the agency, the individual employee could reasonably infer coercion. *Id.* Objective, rather than subjective, standards are utilized in making the determination. *Id.*

Here, there is no dispute that Caveda was attempting to exercise his right to assist the Union, at the formal meeting. The joint record clearly demonstrates that Caveda sought to attend the meeting in a representative capacity. In the email exchange between Caveda and Partin, Caveda made the following statements: "I will be acting as [U]nion representative during the meeting," and "I will . . . be there as the Union [r]epresentaive, and speak as such as well." (Jt. Ex. 2 at 3).

The primary dispute is whether Partin's statements during the email exchange could reasonably tend to interfere with, restrain, and coerce Caveda or other employees in seeking to represent the Union at formal meetings. When viewing the email exchange objectively, I conclude that Partin's statements do not constitute interference. As stated above, Union representatives may not perform representational duties for matters covered by § 7131(d), unless the representatives adhere to the parties' negotiated agreement concerning the use of official time. I have already determined that the parties' CBA unambiguously obligates Union representatives to request and attain official time prior to representing the Union during formal meetings. Therefore, Partin's statements to Caveda – that he needed to request official time *if* he planned on representing the Union – were merely a reiteration of the parties' CBA.

It is evident that Partin's emphasis was on informing Caveda that he needed to adhere to the parties' agreement. Partin was not seeking to prevent Caveda from representing the Union; rather, Partin was seeking to ensure that Caveda's representation was done pursuant to the agreement. Consequently, Caveda could not have reasonably concluded that he would incur management's disapproval, or possible discipline, for engaging in protected activity at the February 28th meeting. The only reasonable conclusion, given the context, is that Caveda could have incurred possible discipline for violating the agreement. Thus, there is no basis to conclude that Partin's statements would tend to coerce or restrain a reasonable employee in the exercise of the right to act as the Union's representative.

In arguing that the Respondent committed a violation of § 7116(a)(1) of the Statute, the GC relies on *Treasury*, where the Authority held that an employee need not be on official time in order to engage in protected activity. 58 FLRA at 718. The GC's reliance on that case is misplaced because, unlike the case at hand, the parties in *Treasury* did not agree to a contract provision mandating Union representatives to request and attain official time prior to engaging in certain representational activities. Under § 7131(d) of the Statute, parties, in negotiating contract provisions for official time, agree that their process for scheduling official time is "reasonable" and "necessary." 5 U.S.C. § 7131(d). Therefore, the Union agreed that the scheduling of official time for formal discussions, as transcribed in Article 30, was "necessary" and "reasonable" under the Statute. It cannot now claim that conduct in conformity with that provision interferes with, restrains, or coerces employees from exercising Statutory rights.

I also find the GC's reliance on *Air Force Flight Test Ctr., Edwards AFB, Cal.*, 53 FLRA 1455 (1998) (*AFT*) misplaced. In that case, the Authority found that a Union representative's statements were made in the course of protected activity and did not constitute flagrant misconduct, despite the representative raising issues personal to him as an employee. *Id.* at 1463. The Authority noted that it would be an "extreme measure" to prevent a Union representative from expressing certain issues "by erecting a figurative iron curtain between strictly union-oriented statements and those relating more specifically to the employee's individual status, holding all conduct arising during the latter parts of a meeting to be outside the course of protected activities." *Id.* The reasoning in *AFT* is inapplicable to this case because this case does not concern flagrant misconduct on the part of an employee.

While I agree with the GC that an agency cannot restrain protected activity by determining when an employee is acting as a Union representative or as an employee, that is not the case here. The Union, as the exclusive representative, and the Respondent, together agreed to provisions obligating Union representatives to attend formal meetings as employees, or as Union representatives on official time. (Jt. Ex. 5). Just as an agency cannot deny a Union representative the use of official time to which that employee is entitled under the parties' agreement, a Union cannot attempt to engage in representational activities without abiding by the terms of the parties' agreement. Here, Article 30 of the parties' CBA binds both the Respondent and the Union. (Jt. Ex. 5). If an "iron curtain" was erected in this case, it was done by the Union and the Respondent together pursuant to § 7131(d) of the Statute.

The GC also disparages Partin's statements for unnecessarily reducing Caveda's allotment of official time, causing him to engage in Union activities on his personal time, and jeopardizing his ability to engage in future representational activities. The GC's criticism would be better directed at Caveda and the Union.

As discussed above, the Respondent did not force Caveda to exhaust his official time any more than the Union did. The Respondent merely enforced provisions of the parties' negotiated agreement. Furthermore, Caveda's time mismanagement and apparent unfamiliarity with the CBA do not translate into interference on the part of the Respondent. Caveda had thirty hours of official time remaining from his original ninety hour allotment. (Stip. ¶18). Under the contract, he also had the ability to receive an additional 430 hours from the Union. (Stip. ¶17). Despite this, he performed Union duties on his personal time and, at least once, elected not to attend a formal meeting as the Union's representative. (Stip. at ¶18, 24). The record indicates that he never requested additional time or inquired whether AFGE had used its 250,000 hours of Bank time. (Stip. ¶18).

Lastly, the GC's argument that Partin's statements inhibited Caveda's ability to represent the Union at some indeterminate time in the future is assumptive and ignores the fact that the Union was unencumbered to allot Caveda an additional 430 hours of official time, at any time, for any reason. (Stip. ¶15); (Jt. Ex. 5). I will not find the Respondent accountable for the Union's failure to provide Caveda with sufficient official time.

Therefore, I find that the General Counsel failed to prove a violation of the Statute, and I recommend that the Authority adopt the following Order:

ORDER

It is hereby ordered that the Complaint be, and is, dismissed.

Issued, Washington, D.C., February 4, 2015

Susan E. Jelen

SUSAN E. JELEN
Administrative Law Judge