70 FLRA No. 113

SPORT AIR TRAFFIC CONTROLLERS ORGANIZATION
(Respondent/Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
EDWARDS AIR FORCE BASE, CALIFORNIA
(Charging Party/Agency)

SF-CO-16-0481

_____

DECISION AND ORDER

May 9, 2018

_____

Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member DuBester concurring)

Decision by Member Abbott for the Authority

I. Statement of the Case

In this case, the parties initiated the process to negotiate ground rules for the renegotiation of a new collective-bargaining agreement. The process stalled because the Union refused to accept the delegation of authority as presented by any of the management officials designated to serve on the management team by the installation commander. The Agency then filed a charge, alleging an unfair labor practice (ULP).

In the attached decision, Federal Labor Relations Authority (FLRA) Administrative Law Judge Charles R. Center (the Judge) found that the Union violated § 7116(b)(5) of the Federal Service Labor-Management Relations Statute (the Statute).[1]

The Union has filed exceptions to the Judge's decision, arguing, as relevant here, that: (1) the Judge erred in his findings of fact, (2) the complaint did not adequately allege that the Union was "stalling negotiations,"[2] and (3) the Judge erred in his conclusions of law, specifically, in his application of Authority precedent and interpretation of Air Force Instruction (AFI) 36-701. The record evidence supports the Judge's findings and conclusions. We also find that the complaint adequately notified the Union that whether its actions were in good faith was at issue, and that issue was fully litigated. Accordingly, we deny the Union's exceptions.

II. Background and Judge's Decision

As the Judge's decision sets forth the relevant facts in detail, we will only briefly summarize them here.

A. Background

In December 2015, the Agency's Labor Relations Officer (LRO) contacted the Union about renegotiating the parties' 1994 collective-bargaining agreement, which would otherwise renew for a one-year term in March 2016. On January 6, 2016, the LRO notified the Union's designated negotiator that the LRO had further designated another Agency management official to serve as the Agency's chief negotiator, and she herself would serve as the alternate chief negotiator. The next day, the Union vice president contacted the LRO and stated that consistent with AFI 36-701, any Agency bargaining representatives should have designation letters signed by the installation commander. The day after that, the LRO responded and stated that she had been designated as the LRO in 2013, that she and the other management official had been negotiating with the Union during the prior year, and that they had the power to bind the Agency.

The parties soon met to discuss ground rules. The Union presented proposals, one of which was that all members of the Agency's negotiating team have letters signed by the installation commander designating them as the Agency's negotiating team. The LRO and the management official asked whether the Union was refusing to recognize their authority, and the LRO ended the meeting. Later that day, the LRO sent the Union a letter from her superior, the Civilian Personnel Officer (CPO), stating that the LRO or her designees were authorized to enter into agreements on behalf of the Agency, as well as a memorandum asserting that the Union's position that the Union "determines Agency authority to designate its representatives was either misguided or a blatant and purposeful violation of the Union's obligation to bargain in good faith."[3]

Between January and March 2016, the parties, via email and memoranda, continued to dispute whether the Agency representatives were properly designated. The Union stated that until the Agency complied with

[1] 5 U.S.C. § 7116(b)(5).
[2] Exceptions at 4.
[3] Judge's Decision at 6.

AFI 36-701, "any future meetings regarding contract negotiations would be an exercise in futility."[4] The Agency responded that as it had provided the Union with its designation, it was compliant with AFI 36-701, and the Union was violating the parties' past practice.

The Agency notified the Union that it intended to contact the Federal Mediation and Conciliation Service (FMCS) as the parties were at impasse, and further, that the Agency planned to file a ULP charge as the Union refused to recognize the Agency's proper designations. The Union stated that mediation was premature, and as there was no mutual agreement, the FMCS mediator declined to take the case.

The Union president contacted the installation commander directly, explaining the Union's position that AFI 36-701 required that he "sign a letter designating [the Agency's] negotiating team."[5] The installation commander responded directly to the Union and stated that the designations provided by the LRO on January 13, 2016 were valid. In March 2016, he also provided new designation letters, similar to the 2013 letters, designating the CPO and stating that the CPO was "authorized to designate an LRO, that the LRO was authorized to act as the Agency's chief negotiator, and that the LRO may designate a management team member to be the Agency's chief negotiator."[6] The Union stated that this was "still not what [it was] asking for."[7]

The Agency filed a ULP charge on May 12, 2016 alleging that the Union violated § 7116(b)(5) and (8) of the Statute when it refused to recognize the Agency's valid designations. On February 24, 2017, the Office of the General Counsel issued an amended complaint charging the Union with violating § 7116(b)(5) of the Statute, and notifying the parties that a hearing would be held on June 14, 2017.

B. Judge's Decision

After the hearing, the Judge found that the Union violated § 7116(b)(5) of the Statute by failing and refusing to recognize the Agency's duly authorized representatives. He examined the Union's two defenses: that (1) the LRO and the management official were not duly authorized representatives of the Agency, and (2) it did not refuse to recognize the LRO or management official.

The Judge found that, under AFI 36-701, the installation commander can authorize subordinates, including management officials, to negotiate collective-bargaining agreements, and this could include "delegating his authority to designate Agency bargaining representatives to authorized subordinates."[8] Further, he found that it comported with Authority precedent that the choice of a representative is within an agency's discretion. He found that, in 2013, the CPO was properly designated, that she, in turn, properly designated the LRO, and that the Agency reiterated these designations with the letters it sent in March 2016. The Judge found this conclusion was also supported by the number of prior negotiations and agreements between the Union and both the LRO and the same management official. He found the testimony of the Agency's representatives to be more credible than the testimony of the Union's representatives. Further, he distinguished the commander's appointment authority from his ability to designate bargaining representatives for the Agency.

Additionally, the Judge found that the Union failed and refused to recognize the LRO and the management official as duly authorized representatives of the Agency. He agreed with the LRO that "by requiring a designation that wasn't required" the Union refused to properly recognize the designated Agency representatives.[9] For support, the Judge pointed to the Union's conduct from January to March 2016. He also found that the Union vice president failed to provide a credible reason for his behavior, and concluded that he was stalling negotiations for an agreement that could reduce the amount of official time available to the Union rather than being "truly concerned about whether the Agency was failing to follow AFI 36-701."[10] He did not credit the Union vice president's defense that he was recognizing and negotiating with the LRO during this time period. The Judge concluded that the Union had violated the Statute and engaged in bad faith bargaining by refusing to recognize the Agency's duly authorized representatives.

[4] *Id.* at 7.
[5] *Id.* at 8.
[6] *Id.*
[7] *Id.* at 10.
[8] *Id.* at 14.
[9] *Id.* at 16.
[10] *Id.*

The Union filed exceptions to the Judge's decision on October 23, 2017.[11] No party filed cross-exceptions or an opposition.

III. Analysis and Conclusions

A. The Judge did not err in his factual findings.

The Union argues that the Judge erred in his factual findings when he found that (1) the Union failed and refused to recognize the LRO and the management official as duly authorized representatives of the Agency, and (2) the Union vice president was stalling negotiations to avoid a reduction in official time.[12] More specifically, the Union contends that the preponderance of the record evidence indicates that the parties were engaged in collective bargaining between January and March 2016, given that they communicated during that time frame and the Union vice president "repeatedly told [the LRO] he was not refusing to recognize Agency [r]epresentatives."[13]

In assessing challenges to a judge's factual findings, the Authority determines whether the preponderance of the record evidence supports those findings.[14] The record evidence supports the Judge's findings.[15]

As mentioned above, the Judge found that the Union's conduct from January to March 2016 did not constitute recognizing the Agency's representatives, and this conclusion is supported by the preponderance of the record evidence. The Union repeatedly rejected the Agency's attempts to demonstrate that its representatives were properly designated to negotiate the agreement by: (1) refusing to recognize Agency representatives it had previously negotiated and signed agreements with; (2) declining FMCS assistance; (3) rejecting the Agency's March 2016 designation letters and assurances from the installation commander; and (4) stating that negotiations would be "an exercise in futility."[16] As the preponderance of the record evidence supports the Judge's factual findings, the Union does not demonstrate that the Judge erred in this regard.

B. The complaint adequately notified the Union that whether its actions were in good faith was at issue and that issue was fully litigated.

The Union also argues that the Judge erred in finding that the Union vice president was "stalling negotiations" to avoid a reduction in official

[11] The Union argues that the Judge failed to provide a fair hearing. Exceptions at 1-2. Under § 2429.5 of the Authority's Regulations, the Authority will not consider any evidence, factual assertions, or arguments that could have been, but were not, presented in the proceedings before the Administrative Law Judge. 5 C.F.R. § 2429.5; *Mich. Army Nat'l Guard*, 69 FLRA 393, 394 (2016), *enforced*, *FLRA v. Mich. Army Nat'l Guard*, 878 F.3d 171 (6th Cir. 2017); *see also* 5 C.F.R. § 2423.30(d) ("Objections are oral or written complaints concerning the conduct of a hearing. Any objection not raised to the Administrative Law Judge shall be deemed waived."). As the Union did not raise its objections to the Judge, we dismiss this argument. Similarly, the Union now objects to questions posed by the Judge to an Agency witness. Exceptions at 3-4. However, the Union neither objected to those questions nor chose to cross-examine the witness on the matter at the hearing. Tr. at 106-10. Accordingly, we dismiss this argument. 5 C.F.R. §§ 2423.30(d), 2429.5.

[12] Exceptions at 2-4.

[13] *Id.* at 3.

[14] *SSA*, 68 FLRA 693, 694 (2015).

[15] Member Abbott believes that the Authority should take this opportunity to review and clarify how it evaluates an administrative law judge's factual findings—a substantial evidence standard rather than a preponderance of the evidence standard. The rationale for applying the substantial evidence standard when the Authority reviews a decision of an administrative law judge was eloquently set forth in separate opinions of Members Pizzella and Beck. However, it is not necessary to resolve that question in this case because the Judge's findings are well-supported under either standard. *See U.S. Dep't of VA, William Jennings Bryan Dorn VA Med Ctr., Columbia, S.C.*, 69 FLRA 644, 649 (2016) (Dissenting Opinion of Member Pizzella); *SSA*, 64 FLRA 199, 207 (2009) (Dissenting Opinion of Member Beck); *U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirtland Air Force Base, N.M.*, 64 FLRA 166, 179-80 (2009) (Concurring Opinion of Member Beck); *U.S. Dep't of the Air Force, 12th Flying Training Wing, Randolph Air Force Base, San Antonio, Tex.*, 63 FLRA 256, 262-63 (2009) (Separate Opinion of Member Beck).

[16] *See* Tr. at 59, 113-14, 142-43 (Union had previously negotiated with Agency representatives without issue); *id.* at 156 (Union vice president declines mediation stating that it was premature); *id.* at 157 (Union rejects March 2016 designation letters and communication from the installation commander); GC's Ex. 15 (Union vice president states negotiations would be "an exercise in futility").

time.[17] It argues that the complaint did not allege that the Union "stall[ed]" and so it was denied due process.[18]

The Authority will dismiss a complaint when a respondent was not adequately notified of the allegations against it; the notice must afford the respondent with a meaningful opportunity to litigate the issues.[19] Where a complaint is silent or ambiguous about specific issues that are later raised at the hearing, the Authority may still consider and dispose of those issues if the record shows that they were fully and fairly litigated.[20] The Authority has interpreted "fully and fairly litigated," to "mean that all parties understood (or objectively should have understood) the issues in dispute and had a reasonable opportunity to present relevant evidence."[21]

The amended complaint alleged that the Union "failed and refused to recognize the [Agency's] designated representatives for the purpose of negotiating a successor collective[-]bargaining agreement" and by doing so, refused to negotiate in good faith, in violation of § 7116(b)(5) of the Statute.[22] While the complaint does not specifically include "stalling," it clearly outlines the violation of good-faith bargaining by failing and refusing to recognize the Agency's representatives.[23] Our review of the record finds that the Union understood the issues in dispute to include whether or not it recognized the Agency's representatives for the purpose of negotiating a successor collective-bargaining agreement and that at issue were the sequence and substance of its communications with the Agency during the early months of 2016. This understanding was evidenced by the Union's full participation in the hearing during which it presented relevant testimony and other evidence. In particular, the Union had the opportunity to object to the Judge's questions regarding "stalling" motivations, though it did not do so,[24] and to explain, through witnesses, the reasons for its behavior.[25] We find the Union was afforded adequate notice and it was not denied "due process." Accordingly, we deny the Union's exception that it was denied due process.[26]

C. The Union has not demonstrated that the Judge erred in his conclusions of law.

The Authority recently upheld "the basic tenet of labor law that parties have a nearly unfettered prerogative to determine the organization of, and delegation of duties within, their respective negotiating teams."[27] Agencies and unions have the right to designate their respective representatives when fulfilling their responsibilities under the Statute.[28] A party's failure or refusal to recognize the other party's duly authorized representative violates both § 7116(a) and (b)(1) and (5) of the Statute.[29]

The Union argues that the Judge erred in applying Authority precedent and interpreting AFI 36-701.[30] The Union argues that two cases cited by the Judge, *Federal Emergency Management Agency Headquarters, Washington, D.C.* (*FEMA*),[31] and *POPA*[32] are distinguishable, because it (1) never actually refused to deal, meet, or exchange and negotiate proposals with the Agency's representatives as evidenced by the many contacts between the officials prior to the charge being filed, (2) was never informed that the installation commander can delegate his authority under "Title V" to the LRO, and (3) did not dictate who the Agency's representatives should be.[33]

[17] Exceptions at 3-4.
[18] *Id.* at 4.
[19] *U.S. DOJ, Fed. BOP, Office of Internal Affairs, Wash., D.C.*, 55 FLRA 388, 393 (1999) (complaint adequately notified respondent of allegations); *AFGE, Local 2501, Memphis, Tenn.*, 51 FLRA 1657, 1660 (1996) (*Local 2501*) (holding that violation was neither properly alleged in the complaint nor fully and fairly litigated at the hearing, and dismissing the complaint).
[20] *Local 2501*, 51 FLRA at 1660.
[21] *Id.* at 1661.
[22] GC's Ex. 1(c) at 1.
[23] *See U.S. DOJ, Exec. Office for Immigration Review, N.Y.C., N.Y.*, 61 FLRA 460, 466 (2006) (*DOJ*) (noting judge's factual finding that agency took five months to provide dates for availability for bargaining supported statutory violation bad faith bargaining).
[24] Tr. at 106-10 (Union does not object to Judge's questions or cross-examine LRO who testifies that she thinks the Union may have been trying to avoid a reduction in the amount of available official time).
[25] *Id.* at 129-34, 154-57.
[26] *Local 2501*, 51 FLRA at 1661.
[27] *AFGE, Local 1547*, 70 FLRA 303, 304 (2017) (*Local 1547*) (Member DuBester concurring) (finding nonnegotiable proposal requiring agency to designate a chief negotiator as spokesperson).
[28] *Dep't of VA, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 57 FLRA 495, 498 (2001) (*Ralph H. Johnson*); *Fed. Emergency Mgmt. Agency Headquarters, Wash. D.C.*, 49 FLRA 1189, 1200-01 (1994) (*FEMA*).
[29] *U.S. Dep't of VA, N. Ariz. VA Health Care Sys., Prescott, Ariz.*, 66 FLRA 963, 965 (2012) (*Prescott*); *see also SPORT Air Traffic Controllers Org.*, 52 FLRA 339, *recons. denied*, 52 FLRA 561 (1996) (*SPORT*) (union violated the Statute and bargained in bad faith when it insisted to impasse over its desire to tape record the parties' collective-bargaining negotiations).
[30] Exceptions at 4-6.
[31] 49 FLRA at 1200-01.
[32] 21 FLRA 580, 586-87 (1986).
[33] Exceptions at 4-5.

As discussed above, we upheld the Judge's factual findings that supported his legal conclusion that the Union failed and refused to recognize the Agency's representatives. *FEMA* and *POPA* both state the proposition that "it is within the discretion of both agency management and labor organizations holding exclusive recognition to designate their respective representatives when fulfilling their responsibilities under the Statute."[34] Here, the Union repeatedly refused to accept the adequacy of the Agency's designation of its representatives, and has not demonstrated that the Judge erred in applying *FEMA* and *POPA* to the case at hand.[35] Accordingly, we deny the Union's exception.[36]

Finally, the Union also contends that the Judge's decision violates AFI 36-701.[37] The Union claims that this instruction requires the installation commander to sign a letter expressly designating the Agency's entire contract negotiating team, as the Union claimed it had received in prior negotiations.[38] However, after quoting one portion of the instruction, the Union provides no argument at all as to how the Judge's allegedly erroneous interpretation of the AFI mitigates against its violation of the Statute. Accordingly, this exception is unsupported and we will not consider it.[39]

IV. Order

Pursuant to § 2423.41(c) of the Authority's Regulations[40] and § 7118 of the Statute,[41] the Union shall:

1. Cease and desist from:

(a) Failing and refusing to recognize the duly authorized representatives of the U.S. Department of the Air Force, Edwards Air Force Base, California (Agency).

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Recognize the duly authorized representatives of the Agency.

(b) Post at its business office and normal meeting places, including all places where notices to bargaining unit members and employees are located, forms to be furnished by the FLRA. Upon receipt of such forms, they shall be signed by the President of the Union, and shall be posted and maintained for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(c) Disseminate a copy of the notice signed by the Union President through the Union's email system to all bargaining-unit employees.

(d) Pursuant to § 2423.41(e) of the Authority's Regulations,[42] provide the Regional Director, San Francisco Regional Office, within thirty (30) days from the date of this Order, a report regarding what compliance actions have been taken.

[34] 49 FLRA at 1200-01; 21 FLRA at 586-87.
[35] *See* Tr. at 59, 113-14, 142-43 (Union had previously negotiated with Agency representatives without issue); *id.* at 156 (Union vice president declines mediation stating that it was premature); *id.* at 157 (Union rejects March 2016 designation letters and communication from the installation commander); GC's Ex. 15 (Union vice president states negotiations would be "an exercise in futility").
[36] *See Local 1547*, 70 FLRA at 304; *Prescott*, 66 FLRA at 965; *Ralph H. Johnson*, 57 FLRA at 498; *SPORT*, 52 FLRA at 351.
[37] The Union also cites a version of AFI 36-701 that was revised in April 2017. Exceptions at 5-6. As this occurred after the Agency filed the ULP charge, it is irrelevant, and we do not consider it. *See DOJ*, 61 FLRA at 461.
[38] Exceptions at 5.
[39] *See* 5 C.F.R. § 2423.40(a)(2) (requiring exceptions to include "[s]upporting arguments, which shall set forth . . . all relevant facts with specific citations to the record"); *U.S. Dep't of the Interior, U.S. Geological Survey, Great Lakes Sci. Ctr., Ann Arbor, Mich.*, 68 FLRA 734, 740 (2015).
[40] 5 C.F.R. § 2423.41(c).
[41] 5 U.S.C. § 7118.
[42] 5 C.F.R. § 2423.41(e).

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

The Federal Labor Relations Authority (FLRA) has found that the SPORT Air Traffic Controllers Organization (SATCO), violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this notice.

WE HEREBY NOTIFY ALL MEMBERS AND EMPLOYEES THAT:

WE WILL NOT fail and refuse to recognize the duly authorized representatives of the U.S. Department of the Air Force, Edwards Air Force Base, California (Agency), including the Agency's Labor Relations Officer.

WE WILL NOT in any like or related manner, fail and refuse to bargain in good faith with the Agency's duly authorized representatives.

WE WILL recognize the Agency's duly authorized representatives, including the Agency's Labor Relations Officer, in future negotiations.

_____
SPORT Air Traffic Controllers Organization

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

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

If employees have any questions concerning this notice or compliance with any of its provisions, they may communicate directly with the Regional Director, San Francisco Regional Office, FLRA, whose address is: 901 Market Street, Suite 470, San Francisco, CA 94103, and whose telephone number is: (415) 356-5000.

Member DuBester, concurring:

I concur in the determination to deny the Union's exceptions to the Judge's recommended decision and order. The Judge found that the Union violated § 7116(b)(5) of the Statute by refusing to recognize the Agency's authorized bargaining representatives.

Office of Administrative Law Judges

SPORT AIR TRAFFIC CONTROLLERS ORGANIZATION
RESPONDENT

AND

DEPARTMENT OF THE AIR FORCE, EDWARDS AIR FORCE BASE, CALIFORNIA
CHARGING PARTY

Case No. SF-CO-16-0481

John F. Richter
For the General Counsel

Steven F. Oldebeken
For the Respondent

Major Taren Wellman
For the Charging Party

Before: CHARLES R. CENTER
Administrative Law Judge

DECISION

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (Statute), and the Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), part 2423.

On May 12, 2016, the Department of the Air Force, Edwards Air Force Base, California (Agency) filed an unfair labor practice (ULP) charge against the SPORT Air Traffic Controllers Organization (Respondent/Union/SATCO). GC Ex. 1(a). After conducting an investigation, the Regional Director of the San Francisco Region of the FLRA issued a Complaint and Notice of Hearing on February 22, 2017, and an Amended Complaint on February 24, 2017, alleging that the Respondent violated § 7116(b)(5) of the Statute by failing and refusing to recognize the Agency's designated representatives for the purpose of negotiating a new collective bargaining agreement (CBA). GC Exs. 1(b), 1(c). In its Answer to the Amended Complaint, dated March 2, 2017, the Respondent admitted some of the factual allegations, but denied that it violated the Statute. GC Ex. 1(d).

The General Counsel (GC) submitted a motion for summary judgment and after the Respondent filed an opposition to the GC's motion, the GC's motion was denied. A hearing in the matter was conducted on June 14, 2017, at Edwards Air Force Base, California. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The GC and Respondent filed post-hearing briefs, which I have fully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, I find that the Union violated § 7116(b)(5) of the Statute by failing and refusing to recognize the Agency's designated representatives for the purpose of negotiating a new CBA. In support of this determination, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Department of the Air Force is an agency within the meaning of § 7103(a)(3) of the Statute. The Respondent is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the certified exclusive representative of a unit of Edwards Air Force Base employees. Edwards Air Force Base is home of the 412th Test Wing.[1] The Union represents employees in the 412th Test Wing. Tr. 30. At all relevant times, the Agency and the Union were parties to a CBA that first went into effect in 1994. Tr. 133; R. Ex. 3.

This case involves a dispute about the Agency's ability to designate its representatives under Air Force Instruction (AFI) 36-701. AFI 36-701 provides that an installation commander is responsible for "[a]uthoriz[ing] subordinates to engage in collective bargaining with the duly elected representatives of the work force[]" and for "[d]esignat[ing] Civilian Personnel Officers (CPO[s]) to act on their behalf in formulating local labor-management relations policy." R. Ex. 13 at 1-2. AFI 36-701 further provides that a CPO is responsible for advising commanders on labor relations matters and designating a Labor Relations Officer (LRO) "as the principal point of contact in conducting labor relations matters with labor organization representatives," and that an LRO is also responsible for "[m]eet[ing] with labor organization representatives as necessary." *Id.* at 2. Finally, AFI 36-701 states at section 6.1 that management officials and supervisors "participate in contract negotiations with labor organization representatives when designated by the commander." *Id.* at 3.

Another Air Force regulation, AFI 36-102, states that Title 5 "appointing authority" is delegated to installation commanders. GC Ex. 30. Appointing authority includes the power to

[1] Edwards Air Force Base, Units, http://www.edwards.af.mil/Units/ (last visited Aug. 14, 2017); *see also* Tr. 168.

"appoint, promote, reassign, discipline, demote, detail, compensate, and separate employees paid from appropriated funds . . . ." GC Ex. 28. A commander's appointing authority cannot be delegated to others. R. Ex. 19 at 2.

Prior to 2013, the Agency's commander would send the Union a memorandum just prior to negotiations designating an Agency official or manager as the Agency's chief negotiator. For example, in 2010, Major General David Eichhorn, who was then the commander of the 412th Wing, issued a memorandum designating Rykki Swenson, the Agency's LRO, as the Agency's chief negotiator. R. Ex. 5; Tr. 29.

In 2013, the Agency modified this process, through two memorandums or "designation letters." (Hereinafter referred to as the 2013 designation letters). First, in January 2013, Brigadier General Michael Brewer, the commander of the 412th Test Wing at that time (Tr. 30), issued a memorandum designating Michelle Lovato as the CPO. General Brewer wrote:

> 1. In accordance with Title V authority, and AFI 36-701, the CPO, Ms. Michelle Lovato, or designee, is authorized to act on my behalf in formulating local labor-relations policy. . . .
>
> 2. This letter also authorizes the CPO to designate a[n] . . . [LRO] as the principal point of contact in conducting labor relations matters with labor organizations and representatives.

GC Ex. 2.

Next, in April 2013, Lovato issued a memorandum designating Swenson as the acting LRO. (Lovato did so, even though Swenson had served as LRO since 2010.) Tr. 29. Lovato wrote:

> In accordance with Title V authority and AFI 36-701, I hereby designate Ms. Rykki Swenson . . . as the management representative for labor relations matters . . . Ms. Swenson, or designee, has the authority to enter into agreements on behalf of the 412 Test Wing . . . .

GC Ex. 3.

The Respondent provided copies of the 2013 designation letters to the Union. Tr. 36.

Swenson has engaged in ten to fifteen negotiations with the Union since the issuance of the 2013 designation letters. Tr. 31-32. This includes negotiations over furloughs that Swenson conducted in 2013 with Steve Oldebeken, a Union official who became the Union's vice president in December 2015. Tr. 158-60. This also includes negotiations on suicide prevention training that Swenson conducted with John Gordanier, the Union's president at the time. These negotiations resulted in a memorandum of agreement (MOA) that Swenson and Gordanier signed in May 2015. In addition, Swenson and Gordanier engaged in negotiations over fire extinguisher training, which resulted in an MOA that Swenson and Gordanier signed in November 2015. GC Ex. 4(a) & (b). At least some of the bargaining over fire extinguisher training was conducted by email, and Oldebeken was included on at least some of those emails. GC Ex. 4; Tr. 148. Also in 2015, Swenson, Gordanier, and Oldebeken exchanged proposals for bargaining related to employee physicals. GC Ex. 4; Tr. 33.

Tim Bryant, who is the Chief, SPORT MRU Operations, has represented the Agency in negotiations with the Union as well. For example, from October 2015 through January 2016, Bryant negotiated an agreement with Gordanier over a chapter of the Air Force Base Instruction, referred to as the "13-100" or the "command control" letter. Prior to that, Bryant and Gordanier worked on an agreement over the placement of multi-function printers. Tr. 112-13, 116; 120-21; *see also* GC Ex. 4. Bryant represented the Agency in these matters, even though the Agency had not issued a memorandum expressly designating him as the Agency's representative. Tr. 114.

On December 7, 2015, Swenson sent Oldebeken and Gordanier a memorandum notifying them of the Agency's intent to renegotiate the CBA. (Absent such a request, the CBA would have automatically renewed for a one-year term in March 2016). R. Ex. 3 at 18; GC Ex. 5. Pursuant to the 1994 CBA, Swenson asked to meet on the matter within forty-five days of the Union's receipt of the memorandum. Tr. 34; GC Ex. 5; R. Ex. 3 at 18. Gordanier selected Oldebeken to be the Union's chief negotiator for these negotiations. Tr. 148.

On January 6, 2016,[2] Swenson informed Oldebeken that she had designated Bryant to be the Agency's chief negotiator, and that she would be the alternate chief negotiator. GC Ex. 6; Tr. 34.

On January 7, Oldebeken provided Swenson a proposed agenda for the meeting, which included an

[2] Hereafter, all dates are 2016, unless otherwise noted.

"[e]xchange [of] negotiating team designation letters." GC Ex. 7. As for Swenson's decision to designate Bryant as the Agency's chief negotiator, Oldebeken wrote:

> [I]t has been long standing past practice that the installation commander must designate the agency representatives with the authority to bind the agency to any agreements reached. This [is] consistent with [AFI] 36-701, paragraph 6.1 . . . . Please refer to the past designation[] letters. Please ensure any representatives have a proper designation letter signed by the installation commander.

Id.

Swenson responded by email to Oldebeken and Gordanier the next day. Swenson noted that designations of the parties' representatives "have been exchanged." GC Ex. 9. As for Oldebeken's broader point, she wrote:

> Your argument concerning designations is inconsistent with the record; consider the last 12 months alone. How many issues I have negotiated with SATCO. How many MOAs have I signed. How many proposals have I exchanged with both you and John. Clearly I have the authority to negotiate on behalf of and bind the Agency, and clearly SATCO has recognized my authority. . . . The Agency's representative, whom SATCO has recognized as having the authority to represent the Agency, has designated Mr. Bryant as the Agency's Chief Negotiator for the CBA negotiations. A party's refusal to recognize the other party's designated representative is bad faith.

Id.

The parties met to discuss CBA negotiations on the morning of January 13. Swenson, Bryant, and Mike Newman, a labor relations specialist, represented the Agency; Oldebeken, Gordanier, and Robert Piertz, a Union official, represented the Union. Tr. 39, 117. The parties began by acknowledging that the meeting was being held pursuant to the requirement in the CBA that a meeting take place within forty-five days of receipt of a request to engage in negotiations. Tr. 137. Bryant started to discuss articles in the CBA, but stopped when he was told that the parties were there to discuss ground rules only. Tr. 117. After that, Oldebeken provided Swenson a copy of the Union's proposed ground rules. Tr. 117, 137.

There was little to no discussion of the Union's first two proposals, the substance of which does not impact this decision. *See* Tr. 65-66, 123, 138-39, 152-53, 164. After that, the parties started to discuss Swenson's and Bryant's status as representatives of the Agency, an issue referenced in the Union's Proposal 3.[3]

Oldebeken started this discussion by asking the Agency's representatives if they had received memorandums from the commander, Brigadier General Carl Schaefer, designating them as the Agency's representatives. The Agency's representatives responded that Swenson already designated Bryant as the chief negotiator in her January 6 memorandum. *See* Tr. 52, 118. Oldebeken replied that he did not have a designation letter signed by General Schaefer. Bryant asked Oldebeken whether he was refusing to recognize him as the Agency's chief negotiator, and Oldebeken again stated that he did not have any designation letters from General Schaefer. Tr. 118.

Swenson asserted that Oldebeken was refusing to recognize her authority to designate Bryant as the chief negotiator and Bryant's status as chief negotiator. Tr. 39. Oldebeken responded, "[D]on't put words in my mouth." Tr. 153-54. Oldebeken acknowledged at the hearing, however, that he told Bryant at the meeting that Swenson "doesn't have the authority to designate you." Tr. 154.

---

[3] The Union's first three ground-rules proposals provided:

> 1. Management shall submit to SATCO a document which identifies all Articles of the CBA which management intends to open for negotiations together with the proposed amendments to those Articles. This submission shall include any new articles that management intends to propose for negotiations. Additionally, management shall submit the names of their negotiating team.
>
> 2. At [this] meeting Management shall also give SATCO a copy of their proposed ground rules.
>
> 3. All members of Management[']s negotiating team shall have a letter from the Installation Commander designating them as members of Management[']s contract negotiating team. If this authority has been delegated to someone else, a copy of that delegation letter.

GC Ex. 11.

In response, Swenson drafted a handwritten note in which she withdrew her designation of Bryant as chief negotiator. At the hearing, Swenson explained that she did this because the Union was "making an issue out of [Bryant's] authority and my authority and I wanted to remove [Bryant] out of that argument." Tr. 40. After providing the note to the Union's representatives, Swenson ended the meeting. Tr. 42.

After the meeting, Swenson and Bryant went to Bryant's office to discuss what had taken place. Both were surprised by the Union's actions. Swenson testified that she and Bryant were "astonished that [the Union was] continuing this argument of designations when we had a history of negotiating with them." Tr. 43. Bryant similarly testified that he was "just amazed" by the Union's objection, since he and Gordanier had reached an agreement on the Agency's "command control" letter the previous day. Tr. 120-21.

Hours after the meeting, Swenson provided Oldebeken a memorandum from Lovato, dated January 7, that was similar to the designation letter Lovato wrote for Swenson in 2013. It noted that "Swenson, or her designee" was authorized to enter into agreements on behalf of the Agency.[4] GC Ex. 8. Swenson testified that Lovato issued this memorandum to "clarif[y] to [the Union] that I have the authority to designate team members to negotiate on behalf of the Agency." Tr. 37.

Also on January 13, Swenson sent Oldebeken a memorandum asserting that Oldebeken's "position that SATCO determines Agency authority to designate its representatives" was either "misguided" or "a blatant and purposeful violation" of the Union's obligation to bargain in good faith. GC Ex. 11 at 3. Swenson also provided responses to the Union's ground-rules proposals and attached a copy of the Agency's ground-rules proposals. GC Ex. 11; Tr. 44. At the hearing, Swenson explained that she wrote this memorandum "[t]o reiterate" the Agency's position and "give [Oldebeken] another chance to [say] 'we recognize you; never mind.'" Tr. 43.

A long back-and-forth discussion between Swenson and Oldebeken, carried out by email and memorandum, ensued.

On January 14, Swenson emailed Oldebeken asserting that the Agency was entitled to designate Swenson and Bryant as its representatives and that there was "a recorded history" of Swenson and Bryant acting as the Agency's representatives. R. Ex. 16. Swenson added that the Agency had provided its "current designations for labor matters[]" to the Union and that the Agency was therefore "in compliance with AFI 36-701." *Id.*

About twenty minutes later, Swenson sent Oldebeken another email. Swenson argued that if the Union "insists on compliance with existing AFIs" then the parties should also comply with an Air Force regulation that would "effectively terminate[]" the parties' past practice of allowing Union officials to telework on official time. *Id.* Swenson continued, "You can't have it both ways. Which is it?" *Id.*

Oldebeken responded on January 22, dismissing Swenson's "threat[]" regarding telework and official time and asserting that the Agency was engaged in "continued violations of AFI 36-701." GC Ex. 13.

Several days later, Swenson sent a reply claiming that she had not intended to make a threat with respect to telework and official time. GC Ex. 14. Swenson also asserted that the Agency was complying with AFI 36-701 and that the Union was acting in bad faith by "[continuing] to refuse to recognize the Agency's current designation(s) . . . ." *Id.*

On January 29, Oldebeken wrote to Swenson: "Until compliance with AFI 36-701 paragraph 6.1 has been accomplished, any future meetings regarding contract negotiations would be an exercise in futility." GC Ex. 15.

Swenson responded later that day, asserting that the Union's "position conflicts with the parties' actions and the parties' past practice," and that the Agency "has provided SATCO its current designations" and was "in compliance with AFI 36-701." GC Ex. 16.

On February 2, Oldebeken wrote back, "I disagree with the conclusions set forth in your email of January 29 . . . ." GC Ex. 17. Oldebeken asserted that the Union's past discussions with Bryant constituted pre-decisional involvement rather than formal negotiations, and that such discussions did not

[4] Lovato wrote:

> In accordance with Title V authority and AFI 36-701, I designate Ms. Rykki Swenson, Labor Relations Officer, as the management representative for all labor relations matters that involve labor organizations in the 412 Test Wing. Ms. Swenson, or her designee, has the authority to enter into agreements on behalf of the 412 Test Wing . . . . Ms. Swenson also has the authority to designate alternate management/supervisory officials to enter into agreements on behalf of the 412 Test Wing.

GC Ex. 8.

"set a practice which allows Edwards AFB to violate AFI 36-701 [paragraph] 6.1." *Id.* In addition, Oldebeken stated that the Union "has only negotiated with members designated by the installation commander." *Id.*

Swenson responded the next day, asserting that the Agency had provided its "designation for these negotiations[]" and was complying with all AFIs. GC Ex. 18.

On February 4, Swenson informed Oldebeken that she believed the parties were at impasse and would thus contact the Federal Mediation and Conciliation Service (FMCS) to obtain a mediator. *Id.* at 2. Also that day, Swenson submitted a memorandum to Gordanier informing him that the Agency planned to file a ULP charge against the Union for its "refusal . . . to recognize the Agency's current and valid designations . . . ." GC Ex. 20 at 1-2.

Oldebeken replied on February 5, stating: "The [S]tatute provides exclusive representatives a right to negotiate with 'an agency' . . . SATCO does not elect to negotiate the CBA at a level lower than the agency level." GC Ex. 21.

Later that day, Swenson asked Oldebeken to clarify what he meant by "agency level." GC Ex. 22.

On February 8, Swenson emailed FMCS Commissioner Jimmy Valentine, and carbon copied Oldebeken and Gordanier, to request mediation assistance. Swenson wrote:

> The parties exchanged ground rules proposals a few weeks ago; however, in spite of receiving the Agency's valid designation, SATCO refuses to recognize me as the Agency's representative for the CBA negotiations. I declared impasse and advised SATCO that I would be contacting the FMCS for assistance.
>
> It would not surprise me if SATCO refuses to participate in mediation. Nevertheless, the Agency requests assistance in a good faith effort to resolve the ground rules impasse so that the parties can proceed with CBA negotiations.

GC Ex. 19 at 3-4.

Commissioner Valentine replied that he could provide assistance so long as both parties requested it. *Id.* at 3. On February 10, Oldebeken responded: "Ms. Swenson's statements are not correct. It appears to be pre-mature to mediate considering that in our one negotiating session we received no proposals from the agency and Ms. Swenson unilaterally terminated the negotiations . . . ." *Id.* at 1-2. About an hour later, Swenson wrote back that the Agency had submitted ground-rules proposals to the Union and that the meeting ended because the Union "refused to recognize the Agency's designation of Chief Negotiator." *Id.* at 1. Swenson argued that the Union's refusal to engage in mediation "shows a blatant strategy to stall/delay these negotiations." *Id.* In light of the Union's stance, Commissioner Valentine declined to mediate the parties' dispute. Tr. 49-50.

On February 19, at Oldebeken's request, Gordanier submitted a memorandum to General Schaefer. Gordanier asserted that AFI 36-701 required management officials participating in contract negotiations to be designated by the installation commander. R. Ex. 28; Tr. 157. In addition, Gordanier suggested that General Schaefer "sign a letter designating management's negotiating team." R. Ex. 28.

General Schaefer responded to Gordanier by email (and carbon copied Swenson) on February 25, stating: "The designations provided to SATCO by Ms. Swenson on [January 13] are valid (attached)." GC Ex. 23.

Swenson testified that General Schaefer's email was intended to reassure the Union. Tr. 53. But it did not have that effect. Rather, Oldebeken testified, "[I]t just appeared he was blowing us off, and just saying the letters are good." Tr. 157.

On or around March 3 the Agency sent the Union two new designation letters similar to the 2013 designation letters. In his letter, General Schaefer again designated Lovato as CPO. Further, General Schaefer stated that Lovato was authorized to designate an LRO, that the LRO was authorized to act as the Agency's chief negotiator, and that the LRO may designate a management team member to be the Agency's chief negotiator. GC Ex. 24. In her letter, Lovato again designated Swenson as LRO. In addition, Lovato stated that "Swenson, or her designee," was authorized to enter into agreements on behalf of the Agency, and that Swenson had the authority to designate alternate management/supervisory officials to enter into

such agreements.[5] Swenson testified that the purpose of these new designation letters was "[t]o get SATCO off this fence of we want something special from the commander." Tr. 53-54.

On March 18, Swenson sent Oldebeken an email reminding him that the Agency had submitted new designation letters and that the Agency intended to file ULP charges against the Union for failing to bargain in good faith. Swenson added that there was "no requirement for a letter from [the] Installation Commander designating team members." GC Ex. 25. Finally, Swenson asked the Union to submit any additional ground-rules proposals and stated that in the absence of such submissions, the Agency would assume that the Union accepted the Agency's proposed ground rules. *Id.*

Oldebeken responded on March 25 stating: "I do not agree with the conclusions set forth in your e-mail . . . The designation letters do not meet the requirements of SATCO's [Proposal 3]. . . . Title V authority cannot be delegated lower than the installation commander." Oldebeken closed with the following proposal:

> After receipt of the agency proposed amendments to the CBA and a letter signed by the installation commander (Title V Authority) designating the agency's negotiating team, pursuant to [Air Force] regulations, SATCO's negotiating team will have 20 hours official time on consecutive days . . . to prepare the union's ground rule proposals. Additional, official time will be addressed in the union's ground rule proposals.

GC Ex. 26.

Swenson testified that she viewed Oldebeken's memorandum as "essentially rejecting the new designation from the commander." Tr. 55. Oldebeken confirmed this, testifying that the Agency's new designation letters "were still not what we were asking for." Tr. 157.

On May 12 the Agency filed the ULP charge in this case. GC Ex. 1(a).

After the Respondent resisted, failed, and refused to recognize the Agency's duly appointed representatives and avoided negotiations upon a new CBA for over a year, the Agency provided the Respondent with a last, best offer CBA on February 22, 2017, that was implemented on May 1, 2017. Tr. 85, 103; GC Br. at 15; R. Br. at 9.

A number of issues were elaborated upon at the hearing. Asked whether he actually refused to recognize the Agency's representatives during the January 13 meeting, Oldebeken testified, "No, I didn't." Tr. 154. Swenson countered that while Oldebeken did not expressly state at the January 13 meeting that he was refusing to recognize Swenson, Oldebeken nevertheless made it clear that he "[did] not recognize my authority or . . . [my] authority to designate Mr. Bryant." Tr. 68. Swenson drew this conclusion in part because Oldebeken "required a designation that wasn't required and [stated] that [he wasn't] going to negotiate until [he] got it." *Id.* Swenson added, "If you're saying that you don't recognize my authority to designate a chief negotiator nor my authority to negotiate a CBA, that's not negotiations." *Id.*

[5] As relevant here, General Schaefer wrote:

> In accordance with Title V authority and AFI 36-701, the CPO, Ms. Michelle Lovato, or designee, is authorized to act on my behalf to formulate policy and manage local labor-relations matters. The CPO has the authority to designate a Labor Relations Officer (LRO) who will serve as the principal point of contact for all labor relations matters with labor organization representatives. As designated, the LRO has the authority to act as the Agency's Chief Negotiator for management-labor negotiations. The LRO also has the authority to designate management team members, to include designation of Chief Negotiator for any/all collective bargaining agreements and/or mid-term bargaining.

As relevant here, Lovato wrote:

> In accordance with Title V authority and AFI 36-701, I designate Ms. Rykki Swenson, Labor Relations Officer, as the management representative for all labor relations matters that involve labor organizations in the 412 Test Wing. Ms. Swenson, or her designee, has the authority to enter into agreements on behalf of the 412 Test Wing . . . . Ms. Swenson also has the authority to designate alternate management/supervisory officials to enter into agreements on behalf of the 412 Test Wing.

GC Ex. 24 at 1-2.

In addition, Swenson testified that Oldebeken never corrected Swenson when she asserted that Oldebeken was refusing to recognize her as the Agency's representative. Specifically, Swenson testified:

> I put it out there many times, the word "refusal." . . . At no time in all of this correspondence back and forth did they ever come back and say, no, Ms. Swenson, you're wrong; you are misreading and misinterpreting. We do recognize you; we do recognize your authority to designate [Bryant]. They never clarified that. That's why the discussion continued and they kept coming back with different reasons why they didn't have to.

Tr. 55.

Swenson testified that her authority to represent the Agency in negotiations flowed from the installation commander's authority to designate Lovato as the CPO and from Lovato's authority to designate Swenson as the LRO. Tr. 30-31. Swenson further testified that a letter from a commander directly designating an Agency representative is not required under AFI 36-701. Tr. 47. In addition, Swenson testified that she was authorized to designate Bryant as chief negotiator based on the 2013 designation letters. Tr. 57-58. Swenson acknowledged that she had not previously designated a chief negotiator with the Union, but she explained that she designated Bryant because she "had some previous success with designating a management official, versus [herself], to be the chief negotiator[]" in negotiations with other unions. *See* Tr. 35, 57. Swenson added that she's "negotiated in the past" with the Union and that her authority "hasn't been an issue." Tr. 59. Similarly, Bryant testified that the Union had not previously objected to his status as an Agency representative. Tr. 113-14, 116.

Rex Campbell, a Union official who served as the Union's chief negotiator prior to retiring from the Agency in 1998, (Tr. 129, 133-34), countered that in the past the installation commander issued memorandums directly designating the Agency's bargaining representatives. Tr. 132. Asked whether such direct designations were required under Air Force regulations, Campbell testified: "Yes, it was. It was not just my understanding. We didn't even have to prompt them for it, they did it. That was their understanding and their regulations." *Id.*

Gordanier acknowledged that he had engaged in bargaining with Swenson after the 2013 designation letters were issued, and that this included bargaining over fire extinguisher training. Tr. 141-42. Gordanier added that he recognized Swenson as the Agency's representative in that matter, based on the 2013 designation letters. Tr. 142-43. Gordanier argued, however, that his past negotiations with Swenson "didn't reach the level of bargaining a CBA. It was not – I don't consider it the same." Tr. 142.

Oldebeken similarly acknowledged that the Union "negotiated with Ms. Swenson[]" after the 2013 designation letters were issued. Tr. 158. Asked whether Swenson was operating under a designation letter signed by the installation commander for the furlough negotiations, Oldebeken stated that Swenson "had been prior designated in 2010," by General Eichhorn. Tr. 160. As for the 2013 designation letter in which Lovato designated Swenson as LRO, Oldebeken stated, "I didn't question this letter because I had a letter already" from General Eichhorn. Tr. 161. In addition, Oldebeken noted that the Union had not bargained over a CBA with Swenson or Bryant. Tr. 162.

With respect to Bryant, Gordanier testified that "most everything" he did with Bryant, including discussions on the Agency's "command control" letter, "was pre-decisional for something operationally that needed to be discussed . . . but as far as it being a negotiation, no." Tr. 143. And with respect to his discussions with Bryant about multi-function printers, Gordanier "didn't consider it a negotiation." Tr. 144. Oldebeken similarly testified that he had engaged only in "pre-decisional involvement" with Bryant. Tr. 160. Bryant countered that he had engaged in negotiations with the Union, and he and Swenson both testified that the Agency had not engaged in pre-decisional involvement discussions with the Union for at least the last two years. Tr. 112, 125, 182.

Oldebeken testified that he insisted on designation letters signed by the commander, based on past experiences. Specifically, he stated:

> [I]n the past, about ten years ago we ran into a problem with trying to negotiate with managers, and we reached an agreement with one manager, a captain, and [a] . . . Commander, two levels higher, repudiated that agreement or went ahead and did something, anyway. So I met with the installation commander[] and he agreed to start providing designation letters. And so, it was a very important issue for me to have a proper chain of designation.

Tr. 150.

Asked whether she had any opinions as to why the Union behaved as it did, Swenson testified that the Union "knew we were going to propose no 20 hours per week of official time," which the current CBA provided for the Union president, and that the Agency was going to propose "ad hoc[]" official time. Tr. 106; R. Ex. 3 at 1. In addition, Swenson testified that the Union "knew where we were going" in attempting to end the practice of allowing Union officials to telework on official time. Tr. 107. Swenson anticipated that the Union was "going to stall" to avoid any change on those subjects, but she still was surprised by the Union's "tactic" of refusing to recognize her authority to represent the Agency in negotiations. Tr. 107.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel argues that the Union violated the Statute by failing to recognize Swenson and Bryant as the Agency's designated representatives. GC Br. at 9. In this regard, the GC contends that the Statute requires agencies and unions to bargain in good faith, and that agencies and unions have the right to designate their representatives. GC Br. at 9 (citing 5 U.S.C. § 7114; *Dep't of VA, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 57 FLRA 495, 498 (2001) (*VA South Carolina*); *AFGE, Local 1738, AFL-CIO*, 29 FLRA 178, 188 (1987)). The GC further contends that an agency's failure to recognize a union's duly authorized representative violates § 7116(a)(1) and (5) of the Statute, and that a union's failure to recognize an agency's duly authorized representative likewise violates § 7116(b)(5) of the Statute. GC Br. at 9-10 (citing *VA South Carolina*, 57 FLRA at 498).

The GC asserts that the Agency properly designated Swenson as its representative for all labor relations matters, and that Swenson properly designated Bryant as the chief negotiator for negotiations over the new CBA. *Id.* at 11. The GC contends that the designations were proper, based on past practice and the commander's authority under AFI 36-701. *Id.* at 12-14. And while the GC acknowledges that AFI 36-701 refers to representatives "designated by the commander," the GC contends that the Agency's representatives were designated by the commander, even if the commander did not sign a memorandum directly designating Swenson and Bryant as the Agency's bargaining representatives. *Id.* at 13-14. In addition, the GC asserts that the Union received clear notification of the Agency's designations. *Id.* at 10.

The GC argues that the Union repeatedly refused to recognize Swenson and Bryant as the Agency's designated representatives. The GC contends that the Authority has previously found similar conduct, in which agency representatives refused to recognize union representatives, to be unlawful. *Id.* at 10-12 (citing *U.S. DOT, FAA, Wash., D.C.*, 20 FLRA 548 (1985); *DOD, Dep't of the Army, Headquarters, XVIII Airborne Corps, & Fort Bragg*, 15 FLRA 790 (1984)). In addition, the GC contends that a party's designation of its representatives is not a mandatory subject of bargaining. GC Br. at 9 (citing *Patent Office Prof'l Ass'n*, 21 FLRA 580, 587 (1986) (*POPA*)). As for the Union's reliance upon requests to negotiate made in the spring of 2017, the GC contends that such post-charge conduct is irrelevant in determining whether the Statute has been violated. *Id.* at 15 (citing *U.S. DOJ, Exec. Office for Immigration Review, N.Y., N.Y.*, 61 FLRA 460, 467 (2006) (*DOJ*).

Respondent

The Respondent argues that it did not violate the Statute. R. Br. at 12. In this regard, the Respondent contends that the Agency is "improperly attempting to use Title V Authority to move the delegation of management officials and supervisors to participate in contract negotiations from the commander down to the Labor Relations Officer."[6] *Id.* at 10.

In addition, the Respondent argues that the Union "did not refuse to recognize Swenson or Bryant" at the January 13 meeting, and that the Union never refused to recognize Swenson. *Id.* at 7. Moreover, the Respondent argues that Swenson's continued engagement shows that Swenson acted as if the Union was recognizing her. In this regard, the Respondent argues that: (1) Swenson responded to the Union's ground-rules proposals; (2) Swenson provided the Union with the Agency's ground-rules proposals; (3) Swenson contacted the FMCS to resolve a bargaining impasse between the parties; (4) Oldebeken submitted a Union proposal to Swenson on March 25; and (5) Swenson and Oldebeken "continued to exchange e-mails and letters regarding the Respondent's proposals." *Id.* at 7-8. Finally, the Respondent contends that Swenson did not ask the Respondent to recommence negotiations until February 2017, and the Respondent attempted to negotiate after it received a last, best CBA to be effectuated on May 1, 2017. *Id.* at 8-9.

ANALYSIS

It is well settled that agencies and unions have the right to designate their respective representatives when fulfilling their responsibilities under the Statute.

[6] In considering this argument, I did not consider Respondent's Exhibit 14, because the Air Force regulation was issued almost a year after the ULP charge in this case was filed.

VA South Carolina, 57 FLRA at 498; *see also FEMA Headquarters, Wash., D.C.*, 49 FLRA 1189, 1200-01 (1994) (*FEMA*) (noting that it is "within the discretion of . . . agency management" to designate its representatives). An agency's failure or refusal to recognize a union's duly authorized representative violates § 7116(a)(1) and (5) of the Statute. *U.S. Dep't of VA, N. Ariz. VA Health Care Sys., Prescott, Ariz.*, 66 FLRA 963, 965 (2012) (*VA Arizona*). Based on the parallel structure of the Statute, it follows that a union's failure or refusal to recognize an agency's duly authorized representative violates § 7116(b)(5) of the Statute. *Cf. AFGE, Local 3937, AFL-CIO*, 64 FLRA 17, 21 (2009) (union bargained in bad faith, in violation of § 7116(b)(5), by insisting to impasse on matters covered by the parties' national agreement).

The Respondent defends its actions by arguing that: (1) Swenson and Bryant were not duly authorized representatives of the Agency; and (2) it did not refuse to recognize Swenson or Bryant. I will address these arguments in turn.

Bryant and Swenson Were Duly Authorized Representatives of the Agency

As noted above, the choice of an agency's representative is "within the discretion" of the agency. Accordingly, it is proper to give deference to the agency's designation processes when considering whether its representatives were "duly authorized." *See FEMA*, 49 FLRA at 1200-01. Here, however, even a non-deferential approach would lead to the conclusion that Swenson and Bryant were both duly authorized representatives of the Agency.

It is undisputed that the installation commander has the authority under AFI 36-701 to authorize subordinates, including management officials and supervisors, to participate in contract negotiations. R. Ex. 13 at 2-3. A fair reading of AFI 36-701 indicates that the installation commander was authorized to delegate his authority and designate Agency representatives indirectly. In this regard, nothing in AFI 36-701 prohibits the installation commander from designating Agency bargaining representatives indirectly, through authorized subordinates. Indeed, AFI 36-701 specifically provides that the installation commander will designate a CPO to act on his behalf, and that the CPO in turn will designate an LRO to "meet[]," i.e., bargain with, union representatives. R. Ex. 13. Moreover, AFI 36-701 does not prohibit the installation commander from delegating his authority to designate Agency bargaining representatives to authorized subordinates. Nor does it prohibit the CPO from authorizing the LRO to designate Agency bargaining representatives, or the LRO from designating Agency bargaining representatives.

The Agency's designations of Swenson and Bryant were made in a manner that was consistent with AFI 36-701. Specifically, in 2013, General Brewer properly designated Lovato as the CPO, and Lovato in turn properly designated "Swenson, or designee" to "enter into agreements on behalf of the 412 Test Wing," a role that clearly encompassed representing the Agency in negotiations with the Union. GC Ex. 3. Swenson properly exercised her authority to name a designee by naming Bryant chief negotiator, on January 6.

The appropriateness of Swenson's status as the Agency's bargaining representative is confirmed by the fact that the Union had not previously objected to Swenson representing the Agency in ten to fifteen negotiations she participated in since the issuance of the 2013 designation letters. Indeed, Gordanier signed two MOAs with Swenson in 2015, and he recognized Swenson based solely on those designation letters. *See* Tr. 142-43. Moreover, Oldebeken and Gordanier bargained with Swenson over physicals in 2015, and neither Oldebeken nor Gordanier objected to Swenson's status as the Agency's bargaining representative. *See* GC Ex. 4; Tr. 33.

Similarly, the appropriateness of Bryant serving as chief negotiator is confirmed by the fact that the Union negotiated with him on agreements concerning the Agency's "command control" letter and the location of multi-function printers without ever objecting to Bryant's status as a representative of the Agency. Further, while Gordanier and Oldebeken assert that these talks constituted pre-decisional involvement rather than actual negotiations, their claims are vague and unsupported, especially when compared with Bryant's detailed and credible testimony. *See* Tr. 112-13, 121.

Finally, Swenson testified that the Agency's designations were made in accordance with AFI 36-701, and that the Agency's designations were consistent with Agency practice since 2013, and I credit her testimony over Campbell's claims, which appear to describe practices that existed decades before the Agency's 2013 designation letters were issued. Tr. 30-31, 57-58, 132-33; *see also* GC Ex. 25. Similarly, while Oldebeken claims that the installation commander directly designated Agency bargaining representatives in the past, Oldebeken has not provided any specific evidence indicating that new designations issued directly from the installation commander were required after the Agency issued the 2013 designation letters. *See* Tr. 150.

While the plain language of AFI 36-701 demonstrates that Swenson and Bryant were duly authorized representatives of the Agency, there is more. First, in her memorandum drafted January 7 and provided to the Union hours after the January 13 meeting, Lovato

made it clear that "Swenson, or her designee," was authorized to enter into agreements on behalf of the Agency and, thus, represent the Agency in negotiations with the Union. GC Ex. 8. Further, on February 25, General Schaefer informed Gordanier that Lovato's designation of Swenson as the Agency's representative in her January 7 memorandum was valid. GC Ex. 23. And in early March, the Agency sent the Union two new designation letters again indicating that Swenson was duly authorized to represent the Agency. GC Ex. 24. In sum, the Agency repeatedly demonstrated that it had exercised its discretion to designate Swenson and Bryant as the Agency's bargaining representatives, and the record shows that the Agency exercised this discretion in a manner that was consistent with AFI 36-701 and with practices that had existed since 2013.

Moreover, the Respondent has not provided a good reason for refusing to accept the validity of the Agency's designations. The Respondent argues that the installation commander's authority to designate Agency bargaining representatives is part of his appointing authority, which cannot be delegated. However, appointing authority pertains to matters of hiring and firing – specifically, the power to appoint, promote, reassign, discipline, demote, detail, compensate, and separate employees – and does not pertain to the installation commander's power to designate bargaining representatives for the Agency. Accordingly, the Respondent's argument is unfounded.

Based on the foregoing, I find that Swenson and Bryant were duly authorized representatives of the Agency.

The Union Failed and Refused to Recognize Bryant and Swenson as Duly Authorized Representatives of the Agency

Because Swenson and Bryant were duly authorized representatives of the Agency, and because the Agency repeatedly communicated this fact to the Union, the Union was required to recognize Swenson and Bryant as the Agency's bargaining representatives. *See VA Arizona*, 66 FLRA at 965. However, Oldebeken and the Union repeatedly failed and refused to do so.

Oldebeken first indicated that he would not recognize Swenson or Bryant as the Agency's duly authorized representatives in the days before the January 13 meeting, when he sent Swenson a memorandum asking that Swenson "ensure" that she and Bryant have "a proper designation letter" signed by the installation commander. GC Ex. 7.

At the January 13 meeting, Oldebeken made it clear that he would not recognize Bryant, and clearer that he would not recognize Swenson, as duly authorized Agency representatives. In this regard, Oldebeken repeatedly asked for designation letters from General Schaefer, even though Swenson had already provided Oldebeken with a letter designating Bryant as the Agency's chief negotiator. I agree with Swenson that by "requir[ing] a designation that wasn't required" for both Bryant and Swenson, (Tr. 68), Oldebeken made it clear that he did not accept either Bryant or Swenson as duly authorized representatives of the Agency. Oldebeken then made it clear that he did not recognize Bryant as the Agency's duly authorized representative when he told Bryant that Swenson "doesn't have the authority to designate you." Tr. 154.

After Swenson withdrew her designation of Bryant in an attempt to placate the Union, Oldebeken repeatedly failed and refused to recognize Swenson as the Agency's duly authorized representative. We see this: (1) on January 22, when Oldebeken rejected Swenson's claim that her designation as the Agency's representative complied with AFI 36-701; (2) on January 29, when Oldebeken advised Swenson that negotiations would be "an exercise in futility" absent a letter from the installation commander directly designating Swenson as the Agency's representative; (3) on February 2, when Oldebeken rejected Swenson's claim that she was properly designated as the Agency's representative; (4) on February 4, when Oldebeken responded to Swenson's claim that the Union was refusing to recognize the Agency's valid designations by stating only that the Union "does not elect to negotiate the CBA at a level lower than the agency level"; (5) on and after February 25, when Oldebeken refused to accept General Schaefer's assurances that Swenson's designation as the Agency's bargaining representative was valid; and (6) on March 25, when Oldebeken rejected Swenson's claim that she was validly designated as the Agency's representative and submitted a proposal that essentially conditioned further negotiations on the installation commander signing a letter designating the Agency's negotiating team. In sum, from January through March, Oldebeken repeatedly failed and refused to recognize Swenson as the duly authorized representative of the Agency.

It is troubling enough that Oldebeken repeatedly refused to acknowledge that the Agency had duly authorized Swenson to be its representative for this negotiation after the Union had recognized Swenson as a duly authorized representative in other negotiations. However, Oldebeken did so without providing any credible reason for his sudden cessation of recognition. *See* Tr. 158, 161. Oldebeken's stubbornness and his failure to provide a valid reason for refusing to recognize

Swenson bolsters the conclusion, supported by Swenson's testimony, that Oldebeken was not truly concerned about whether the Agency was failing to follow AFI 36-701. It is clear from his behavior that Oldebeken was doing whatever he could to stall negotiations that could result in a reduction in the amount of official time Union officials had enjoyed under the 1994 CBA. Tr. 106-07. Therefore, Oldebeken's repeated and unreasonable failure and refusal to recognize Swenson as the Respondent's representative and his unjustified obstinacy constituted bad faith bargaining.

The Respondent's argument to the contrary is unavailing. The Respondent claims that Swenson tried to engage Oldebeken and thus acted as if the Union was in fact recognizing her. This argument might be convincing if there was a point between January and March when Oldebeken actually recognized Swenson's authority. But Oldebeken rejected every overture made by the Agency, culminating in his determination in March that the Agency's newly issued designation letters were "still not what we were asking for." Tr. 157.

The Respondent also asserts that the Union submitted a proposal on March 25 and therefore recognized Swenson as the Agency's duly authorized representative. This argument might be plausible if the proposal was not a repeat of the Union's demand that the Agency provide a letter signed by the installation commander designating the Agency's negotiating team, a proposal which the Agency had no obligation to bargain over. *See POPA*, 21 FLRA at 586-87 (designation of individuals representing the agency at a mediation session not within the agency's duty to bargain). However, that proposal effectively continued the Union's refusal to recognize Swenson as the Agency's duly authorized representative. Submitting such a proposal while denying Swenson's authority to negotiate is not bargaining in good faith. As Swenson testified, "If you're saying that you don't recognize my authority to designate a chief negotiator nor my authority to negotiate a CBA, that's not negotiations." Tr. 68.

As for the Respondent's argument that it attempted to resume negotiations in the spring of 2017, this occurred long after the Agency filed the ULP charge and is therefore irrelevant in determining whether the Union violated the Statute. *DOJ*, 61 FLRA at 467 ("[P]post-charge conduct is irrelevant in determining whether or not the Statute has been violated.") (citation omitted).

Based on the foregoing, I find that Oldebeken and the Union failed and refused to recognize the Agency's duly authorized representatives.

CONCLUSION

By failing and refusing to recognize the Agency's duly authorized representatives, the Union violated § 7116(b)(5) of the Statute. Accordingly, I recommend that the Authority adopt the following order:

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the SPORT Air Traffic Controllers Organization (Union), shall:

1. Cease and desist from:

(a) Failing and refusing to recognize the duly authorized representatives of the U.S. Department of the Air Force, Edwards Air Force Base, California (Agency).

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Recognize the duly authorized representatives of the Agency.

(b) Post at its business office and normal meeting places, including all places where notices to bargaining union members and employees are located, 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 sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Disseminate a copy of the Notice signed by the Union President through the Union's email system to all bargaining unit employees.

(d) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, provide the Regional Director, San Francisco Region, within thirty (30) days from the date of this Order, a report regarding what compliance actions have been taken.

Issued, Washington, D.C., September 21, 2017

_____
CHARLES R. CENTER
Administrative Law Judge

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF
THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the SPORT Air Traffic Controllers Organization (SATCO), violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT fail and refuse to recognize the duly authorized representatives of the U.S. Department of the Air Force, Edwards Air Force Base, California (Agency), including the Agency's Labor Relations Officer.

WE WILL NOT in any like or related manner, fail and refuse to bargain in good faith with the Agency's duly authorized representatives.

WE WILL recognize the Agency's duly authorized representatives, including the Agency's Labor Relations Officer, in future negotiations.

_____
SPORT Air Traffic Controllers Organization

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

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, San Francisco Region, Federal Labor Relations Authority, whose address is: 901 Market Street, Suite 470, San Francisco, CA 94103, and whose telephone number is: (415) 356-5000.