70 FLRA No. 123

UNITED STATES
DEPARTMENT OF DEFENSE
MISSILE DEFENSE AGENCY
REDSTONE ARSENAL, ALABAMA
(Respondent/Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
AFL-CIO
LOCAL 1858
(Charging Party/Union)

AT-CA-15-0381

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DECISION AND ORDER

May 30, 2018

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

I. Statement of the Case

The Agency denied the Union's request to host events, specifically "lunch and learns,"[1] in a ground floor hallway of an Agency-controlled building. The Federal Labor Relations Authority's (FLRA's) General Counsel (GC) issued a complaint alleging that the Agency committed an unfair labor practice (ULP) under § 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute)[2] by denying the Union's request to access its building.

The parties each filed summary-judgment motions before FLRA Chief Administrative Law Judge Charles R. Center (Judge). In the attached decision, the Judge recommended granting the GC's motion, denying the Agency's motion, and finding that the Agency violated § 7116(a)(1) .

The main question before us is whether the Agency discriminated against the Union in violation of § 7116(a)(1) of the Statute by denying the Union's request to host lunch and learn events inside the Agency's building, specifically, in a hallway used as a thoroughfare and retail area where the Agency has granted access to some vendors. Upon consideration of the Judge's decision and the entire record, we find that there are material factual matters that must be resolved, including further development of the record. Therefore, the complaint must be remanded to the Judge for further proceedings.

II. Background and Judge's Decision

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

The Agency develops ballistic missile defense systems for the Department of Defense. The Agency is located near Huntsville, Alabama, within the Redstone Arsenal Army installation (Redstone), and occupies three of the four buildings in the installation's Von Braun Complex. All of the buildings are physically secured due to the highly classified nature of the Agency's mission, and access is controlled with badge entry.

The Union represents approximately 10,000 employees employed by other tenant agencies and commands located at Redstone. This includes some employees who work within the Agency's buildings. However, those represented employees are not employed by the Agency. The President of the Union is himself a federal employee who is employed by another tenant agency on Redstone.

No union currently represents any of the Agency's employees. In the past, the Union attempted to organize Agency employees by soliciting for signatures outside of Agency buildings but met with little or no success. In 2014, the Union asked the Agency to reserve, for a period of ten days, locations to "host daily lunch and learn[] events at all [Agency] [b]uildings."[3] The Agency denied the request and, in response, the Union filed a ULP charge, which the Union later withdrew.

One Agency building has a ground floor hallway, available for use by all building occupants as a thoroughfare, where private-sector vendors operate retail businesses, including "a snack shop, a coffee shop, a barbershop, and a dry cleaner."[4] In this hallway, the Agency also allows some outside vendors to set up tables to sell their merchandise, such as clothing, leather goods, jewelry, cotton candy, and popcorn, for a set period of time, such as one week or one month.

[1] Agency's Mot. for Summ. J., Attach. 1 (Union's first email) at 2.
[2] 5 U.S.C. § 7116(a)(1).
[3] Judge's Decision at 3.
[4] *Id.*

On February 10, 2015, the Union sent the Agency an email requesting permission to access Agency buildings to host lunch and learns with "the same privileges and[/]or opportunities as other vendors that visit your facilities to host events to sell their service[s], good[s], and[/]or products to the [Agency] workforce."[5]

The Agency denied the Union's request, asserting that:

> [t]he status of certain vendors has no impact on this matter. If [the Union] want[ed] to conduct "lunch and learns" to educate [its] bargaining unit members, [it] ha[s] the option of hosting an event at your local office . . . . In addition, [the Union] has a website which would serve well as a conduit for any information about the [U]nion.[6]

The Union filed another ULP charge, and, after an investigation, the FLRA's Atlanta Regional Director (RD) issued a complaint. The complaint alleged that the Agency violated § 7116(a)(1) of the Statute by denying the Union's request for access to an Agency building. The Agency answered the complaint, denied the allegation, and asserted in defense (1) that a request to conduct a lunch and learn was not the same situation as a vendor selling goods at a fixed location; (2) that because the Union president was a current federal employee, the Union's position was not that of a "non-employee organizer;" and (3) that the Union president had requested and was granted entry to the complex in 2011 to meet with the Agency's director.[7]

Before the Judge, the GC and the Agency agreed that there were no genuine disputes as to any material facts, though no stipulation of fact was agreed to or included in the record. Both parties filed summary-judgment motions.

The GC alleged that the "Agency improperly discriminated against the Union" under § 7116(a)(1) of the Statute "because the Agency permitted . . . vendors to set up tables in the retail area of [the Agency's building] to conduct commercial solicitation, but refused the Union's similar request" for access to that area to solicit new members.[8]

The Judge determined that the lunch and learns "constitute[d] an exercise of forming, joining, or assisting a labor organization within the meaning of § 7102 of the Statute, and [employee] attendance at such events is an exercise of the right protected under § 7102 to solicit membership."[9] The Judge found that the Agency discriminated against the Union in violation of § 7116(a)(1) by "denying [the Union's] request to engage in solicitation via lunch and learns while allowing visiting vendors to engage in commercial solicitation" in the same space.[10] The Judge further found that "[t]he Agency could have avoided ULP liability by establishing a non-discriminatory reason for the denial, but the Agency failed to do so."[11] Accordingly, the Judge recommended granting the GC's summary-judgment motion and denying the Agency's summary-judgment motion.

The Agency filed exceptions to the Judge's decision on July 20, 2016. The GC filed an opposition to the Agency's exceptions on August 9, 2016.

III. Analysis and Conclusion

The Agency claims the Judge made errors of fact and law such that his recommended grant of the GC's motion for summary judgment was in error.[12] We agree that summary judgment is not appropriate here as questions of material fact remain unresolved, and when material facts have not been determined, the appropriate law may not be applied.

Broadly, under § 7102 of the Statute, "employee[s] shall have the right to form, join, or assist any labor organization."[13] This right encompasses the right of employees to distribute literature or solicit membership on behalf of a union in non-work areas during non-work time.[14] Under § 7116(a)(1), it is a "[ULP] for an agency to interfere with, restrain, or coerce any employee in the exercise by the employee of" these § 7102 rights.[15]

In determining that the Agency committed a ULP, the Judge applied the Authority's interpretation of

[5] Union's first email at 2.
[6] Judge's Decision at 4.
[7] Agency Prehearing Disclosure, Attach. 3 at 4-5.
[8] Judge's Decision at 4.
[9] *Id.* at 5.
[10] *Id.* at 7.
[11] *Id.* at 6.
[12] Exceptions at 32-33.
[13] 5 U.S.C. § 7102.
[14] *Dep't of Commerce, Bureau of the Census*, 26 FLRA 311, 319 (1987).
[15] 5 U.S.C. § 7116(a)(1).

the U.S. Supreme Court's decision in *NLRB v. Babcock & Wilcox Co.* (*Babcock*).[16] Interpreting *Babcock*, the Authority has stated that an agency commits a ULP in violation of § 7102 of the Statute where the agency bars (non-employee) union organizers access to agency property and either: (1) the agency has a discriminatory access policy; or (2) there are no other reasonable means for the union to communicate its message to employees.[17] Here, the GC only alleged that the Agency had a discriminatory access policy, so we consider only that aspect of *Babcock* here.

In order to prove a discriminatory policy under *Babcock*, the GC has the burden[18] to demonstrate that the Agency treated like situations differently.[19] As it stands now, the record does not permit us to make that assessment. In this regard, there are no stipulations of fact, and the most fundamental, material questions remain unanswered.

First, the record does not contain a sufficient basis for us to determine the nature of the Union activities at issue. As alleged by the Agency in its exceptions, the Agency understood the Union's request to "host events" and to "conduct lunch and learns" to mean the Union wanted to hold "meetings." Indeed, in its 2014 original request, the Union informed the Agency that these events would be held daily for a week and would be conducted by various Union officials, to include "national" leaders.[20] The 2015 email response, which gave rise to the complaint at issue, references the earlier request. Yet the record before us contains insufficient evidence as to what the Union actually planned to do, if granted access.

While the Judge discussed at some length the significance of information for bargaining unit employees, the significance of solicitation in our case law, and the significance of unions providing information to potential bargaining unit employees, only at the conclusion of his legal discussion did he determine that the word "lunch" in lunch and learn referred to the time of the workday, and not to an event as such.[21] The Judge derived this finding not from any affidavits or transcripts, but from the GC's own response to the Agency's motion for summary judgment, which in turn cited to case law assuring us that "lunch and learn" is merely an "AFGE term to describe union solicitation activities."[22] This finding is unsupported by the paltry record of emails (which are at best unsworn statements) and the short affidavit of the Union president, who says no such thing.

Second, the record does not contain sufficient details regarding the vendors – the comparators, for *Babcock* purposes. The GC informed the Judge that it planned to call the facility manager as a witness and included in the record a handful of emails announcing certain vendors who would offer goods and services for set periods of time. Beyond that, the record contains no evidence regarding how the Agency screens the vendors, whether the Agency has turned away any vendor, and the criteria under which the Agency accepts a vendor.

The GC's motion for summary judgment, paired with a threadbare complaint that alleged no more than quotes from the email exchange and an allegation that the Union president was denied "access," prevent any application of *Babcock* at this juncture.

Without material factual findings on the above issues, and sufficient, undisputed record evidence to support them it was not appropriate to grant any party's summary-judgment motion.

For the reasons above, we find that the Judge erred in his determination that the Agency committed a ULP, and we set aside the Judge's recommended decision and order. We remand the complaint to the Judge for a hearing.[23]

IV. Order

We remand the complaint to the Judge for a hearing.

[16] 351 U.S. 105 (1956).
[17] *SSA*, 52 FLRA 1159, 1187 (1997).
[18] *Dep't of the Navy, Naval Facilities Eng'g Command, W. Div., San Bruno, Cal.*, 45 FLRA 138, 153-54 (1992).
[19] *Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 346 (D.C. Cir. 2003) (A showing of discrimination "requires differential treatment of nonemployee organizers and similarly situated solicitors and distributors. Absent evidence of differential treatment of union and nonunion solicitors, there can be no finding of discrimination."); *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 319 (7th Cir. 1995) ("A person making a claim of discrimination must identify another case that has been treated differently and explain why that case is 'the same' in the respects the law deems relevant."); *Farm Fresh, Inc. & United Food & Commercial Workers Int'l Union, Local 400, AFL-CIO, Farm Fresh Inc.*, 326 N.L.R.B. 997, 1000 (1998) (The National Labor Relations Board "shall find a violation only if the General Counsel shows that the employer refused nonemployee union organizations admittance while at the same time allowing other groups or organizers to engage in comparable conduct.").
[20] Agency Reply and Mot. for Summary Judgment, Attach. 5 at 5.
[21] Judge's Decision at 6.
[22] GC's Resp. to Respondent's Mot. for Summ. J. at 2 n.1.
[23] *U.S. Army Corps of Eng'rs, Waterways Experiment Station, ERDC, Vicksburg, Miss.*, 59 FLRA 835, 839 (2004).

Member DuBester, dissenting:

I disagree with the majority's decision to remand the case to the Judge for further findings. The record the parties compiled sufficiently supports the Judge's determination to grant the General Counsel's motion for summary judgment. Based on the record, the Judge found that the Agency committed a ULP by discriminating against the Union when the Agency permitted outside vendors to engage in commercial solicitation activities on Agency premises, but denied the Union's request for the same opportunity.

I agree with the Judge that "the record demonstrates that it is appropriate to resolve this case by summary judgment."[1] Summary judgment is appropriate when there is no "genuine dispute as to any material fact," and the moving party is entitled to judgment as a matter of law.[2] The majority fails to demonstrate the need for any additional "material" factual findings to support the Judge's recommended conclusion[3] that the GC is entitled to summary judgement as a matter of law.

Consistent with the Judge's determinations, I find that a preponderance of the evidence[4] establishes that the Union requested to host Lunch and Learns in the Agency's building to engage in solicitation activities protected by § 7102 of the Statute. The record shows that the Union requested access to the Agency's building as part of a continuing effort, over several years, to organize the Agency's employees.[5] Before the Union's request in this case for the "same" access to the Agency's building as that granted commercial vendors,[6] the Union attempted to "organize Agency employees" by trying to obtain signatures outside Agency buildings.[7] In another organizational effort, the Union asked the Agency to allow it to hold daily Lunch and Learn events in every Agency building during a ten-day period.[8] After the Agency denied the Union's request, the Union asked for access to a single location, a "high-traffic retail area,"[9] to hold the Lunch and Learns at issue here. The Agency permits a variety of non-employee commercial vendors to use this "high-traffic retail area."[10]

Further, as the record reflects, the Union made clear, when it requested access to the "high-traffic retail area," that it intended to solicit employees.[11] The Union requested the "same privileges and[/]or opportunities" as the outside vendors soliciting "the [A]gency workforce."[12] As the Union noted, these privileges and opportunities included setting up tables in the "high-traffic retail area" to sell "service[s], good[s] . . . or products."[13] The Union argued that its request to hold the Lunch and Learns was a request for a comparable opportunity to "sell" its "service[s]" to employees.[14]

Based on this record, the Judge reasonably determined that the Lunch and Learns the Union sought to conduct "constitute an exercise of forming, joining, or assisting a labor organization within the meaning of § 7102 of the Statute."[15] The Judge further determined, also reasonably, that "[employee] attendance at such events is an exercise of the right protected under § 7102 to solicit membership."[16]

Other evidence also supports the Judge's findings. For example, there is evidence that the term "Lunch and Learn" is a term of art adopted by the Union to describe a type of event used as an organizing tool; that is, Lunch and Learns are used to solicit employees to become Union members.[17] As the Judge found, in a determination the majority disregards, a Lunch and Learn, even though promoted as an update for current bargaining-unit employees, is also an opportunity to recruit non-dues-paying bargaining-unit members to become full Union members.[18] This finding is consistent with Authority precedent cited by the Judge.[19] In *Naval Air Station, Pensacola*,[20] the Authority ruled that a union, another local of the same national union here, had a statutory right to conduct Lunch and Learns to solicit union membership.[21] The Authority concluded that the agency in that case committed a ULP when it

[1] Judge's Decision at 2.
[2] Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see U.S. EEOC*, 51 FLRA 248, 252-53 (1995); *see also Dep't of VA, VA Med. Ctr., Nashville, Tenn.*, 50 FLRA 220, 222 (1995).
[3] Judge's Decision at 7.
[4] *See* 5 U.S.C. § 7118 (a)(7).
[5] Judge's Decision at 3.
[6] Agency's Mot. for Summ. J., Attach. 1 (Union's Request) at 2.
[7] Judge's Decision at 3.
[8] *Id.*
[9] *Id.* at 6.
[10] *Id.* at 3.
[11] *Id.* at 6.
[12] Union's Request at 2.
[13] *Id.*
[14] *Id.*
[15] Judge's Decision at 5.
[16] *Id.*
[17] *Id.* at 4-5.
[18] *Id.* at 7; *see U.S. Dep't of the Navy, Naval Air Station, Pensacola, Fla.*, 61 FLRA 562, 565 (2006).
[19] Judge's Decision at 5.
[20] 61 FLRA 562.
[21] *Id.* at 563-65.

"[r]efus[ed] to allow the [union] to conduct Lunch and Learn sessions."[22]

I also disagree with the majority's determination that a remand is needed to learn more "details" regarding other vendors given access to the Agency's property.[23] No such "details" are required to apply the *Babcock* framework.[24] The Supreme Court in *Babcock* is clear that an employer discriminates against a union when it grants *access* to one organization, but denies a union *comparable access*,[25] exactly what occurred here. There is no legal relevance, and the majority cites no authority to the contrary, to facts concerning how the Agency "screens" vendors.[26] In short, the evidence the majority seeks on remand is irrelevant to the *Babcock* analysis.

In sum, the record compiled by the parties supports finding that the Union, with a history of trying to organize employees, wanted to set up a communication point in a busy area of the Agency's building to obtain access to these employees. And the Union made the request so that it could "sell" its "services" to these employees.[27] The common sense conclusion is that the Lunch and Learns the Union wanted to conduct are a Union effort to solicit employees. Because the Agency discriminatorily refused to allow these statutorily-protected solicitation activities, the Agency committed a ULP. Because the majority fails to appropriately acknowledge these basic facts, and draw the legal conclusion that flows from them, I dissent.

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[22] *Id.* at 565.
[23] Majority at 5.
[24] *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 112-13 (1956) (*Babcock*); *SSA*, 55 FLRA 964, 967 (1999) (employer unlawfully discriminates against union when employer denies union access to its property while granting similar access to other organizations).
[25] *Babcock*, 351 U.S. at 112-13.
[26] Majority at 5.
[27] Union's Request at 2.

Office of Administrative Law Judges

DEPARTMENT OF DEFENSE
MISSILE DEFENSE AGENCY
REDSTONE ARSENAL, ALABAMA

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1858

CHARGING PARTY

Case No. AT-CA-15-0381

Brent S. Hudspeth
Mark D. Halverson
For the General Counsel

James J. Delduco
For the Respondent

Abner Merriweather
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

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 (FLRA/Authority), part 2423.

On April 2, 2015, the American Federation of Government Employees, AFL-CIO, Local 1858 (Union) filed an unfair labor practice (ULP) charge against the Department of Defense, Missile Defense Agency, Redstone Arsenal, Alabama (Respondent/Agency/MDA). GC Ex. 1(a). On October 23, 2015, the 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 denying the Union's request to host lunch and learns in an Agency building where outside vendors were permitted to operate on a regular basis. GC Ex. 1(b). The Respondent timely filed an Answer in which it admitted certain allegations but denied violating the Statute. GC Ex. 2.

The case was initially scheduled for a hearing on December 10, 2015. GC Ex. 1(b). On November 24, 2015, the Respondent filed a Motion to Postpone the Hearing, asserting that the parties agreed that there were no material facts in dispute and that a joint stipulation of facts and a motion for a decision on the record would be filed. On November 25, 2015, the hearing was indefinitely postponed, however, the hearing was subsequently rescheduled and a hearing date set for May 10, 2016, after neither a stipulation nor a motion were filed. During the interim, the General Counsel filed a Motion for Summary Judgment on January 15, 2016, and a Brief in Support of the Motion (GC Br.), attaching General Counsel Exhibits 1 through 3. (GC Ex. 1 -3). On January 26, 2016, a Reply and Cross-Motion for Summary Judgment (R. Br.), which included five attachments. (R. Attachs. 1-5).[1] On February 4, 2016, the General Counsel filed a Response to Respondent's Cross-Motion for Summary Judgment. (GC R esp. Br.). On February 17, 2016, the Respondent filed a Reply Brief to the General Counsel's Response. (R. Supp. Br.).

Motions for summary judgment filed under § 2423.27 of the Authority's Rules and Regulations are governed by the same principles as motions filed under Rule 56 of the Federal Rules of Civil Procedure. *Dep't of VA, VA Med. Ctr., Nashville, Tenn.*, 50 FLRA 220, 222 (1995). During a prehearing conference call on May 3, 2016, the parties agreed that despite their inability to agree upon a stipulation of facts, there was no genuine issue of material fact.

As the record demonstrates that it is appropriate to resolve this case by summary judgment, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. GC Ex. 1(b). The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of a bargaining unit of employees appropriate for collective bargaining employed by the Respondent. The Union is an agent of AFGE for the purpose of representing unit employees of the Respondent.

Redstone Arsenal (Redstone) is a Department of the Army installation near Huntsville, Alabama. Approximately 35,000 employees work at Redstone, of which approximately 19,500 are civilian federal employees. The other employees are either contractors or active duty military personnel. The Respondent is one of more than twenty organizations situated on the

[1] The Respondent referred to these documents as "attachments."

installation. Other organizations include the U.S. Army Aviation and Missile Command (AMCOM); the U.S. Army Aviation and Missile Research, Development, and Engineering Center; the U.S. Army Research, Development and Engineering Command (AMRDEC), and the U.S. Army Space and Missile Defense Command (SMDC). GC Ex. 3 at 1. The Respondent's mission is to develop a "layered ballistic missile defense system to protect the homeland, allies[,] and service members." R. Attach. 2 at 2. The Respondent is a Department of Defense Agency and is not a command or organization within the Department of the Army. *Id.*

The MDA is located in the "Von Braun Complex," which consists of four buildings: Von Braun I, II, III, and IV. *Id.* at 3. A parking lot surrounds the buildings, and the buildings form a circle around a courtyard. The Von Braun Complex is within half a mile of buildings occupied by AMCOM, AMRDEC, and SMDC. *Id.* at 2-3. The MDA "operates and occupies" Von Braun II, III, and IV. (Von Braun I is occupied by SMDC.) *Id.* at 3. About 4,125 Agency employees work at buildings in the Von Braun Complex. *Id.* These employees have telephone and internet access and can receive mail. *Id.* at 3-4.

The Agency buildings in the Von Braun Complex are "controlled access" facilities. *Id.* at 4. One cannot enter or exit an Agency building without an identification badge. A security clearance does not automatically entitle one to access the buildings. *Id.* Rather, access to the buildings is subject to Agency approval, which can be revoked at any time. *Id.*

On the first floor of Von Braun III is a hallway used by all building occupants. GC Ex. 3 at 1. In this area is a retail area with a snack shop, a coffee shop, a barbershop, and a dry cleaner. *Id.* The retail area also has space where visiting vendors set up tables and sell "novelty items of low value . . . ." *Id.*; R. Attach. 2 at 4. Visiting vendors have included "What's Popp'N," which sells cotton candy and seventy-five flavors of popcorn; "$5 Dollar Jewelry," which sells jewelry and clothing accessories; and MAC Enterprises, which sells boots, shoes, leather goods, and suits. GC Ex. 3 at 4, 5. Retailers must be screened and authorized by Agency security personnel to enter Von Braun III. R. Attach. 2 at 4. There are no offices or meeting rooms in the retail area, and generally lunch is not eaten in the hallway. *Id.*

The Union represents approximately 10,000 professional and non-professional employees at Redstone. GC Ex. 3 at 1. About 200 bargaining unit employees who work for AMCOM, AMRDEC, or SMDC work in Von Braun II, III, or IV. *Id.* at 2. MDA employees are not unionized. However, the Union has attempted to organize Agency employees in the past by "position[ing] employees outside [Agency] buildings in an effort to obtain signatures from [Agency] employees." R. Attach. 2 at 2-3; *see also* R. Supp. Br. at 5 n.5.

Abner Merriweather is the President of the Union. He is an electrical engineer at AMRDEC and does not work in Von Braun buildings II, III, or IV. He holds a security clearance of Secret. GC Ex. 3 at 1-2; R. Attach. 2 at 3. On at least one occasion, Merriweather has been permitted access to Von Braun III. R. Attach. 2 at 5. In his affidavit, Merriweather asserted that the Respondent has "never said or implied that they would grant me access to their facility [Von Braun III] if I submitted to and successfully passed any form of screening or background check." GC Ex. 3 at 2.

On March 18, 2014, Merriweather sent an email on behalf of the Union to Agency Director John James, Agency Human Resources Director Donna Davis, and others, asking the Agency to "reserve[] locations [for the Union] to host daily lunch and learn[] events at all [Agency] [b]uildings from 7-17 April 2014." R. Attach. 5 at 5. The Agency denied the request. In response, the Union filed a ULP charge, which was ultimately withdrawn. *Id.* at 6.

On February 10, 2015,[2] Merriweather sent an email to James, Davis, and others, in which he again asked for space to hold lunch and learns. Merriweather stated:

> AFGE Local 1858 is requesting to host lunch and learns at the [Agency] facilities for our matrix Bargaining Unit employees. The Union is requesting to have the same privileges and or opportunities as other vendors that visit your facilities to host events to sell their service[s], good[s], and or products to the [Agency] workforce. . . .

R. Attach. 1 at 1-2.

Davis replied by email on March 11. After summarizing Merriweather's request, and asserting that the request was similar to the previous request, Davis stated:

> The Agency again denies your request. The status of certain vendors has no impact on this matter. If you want to conduct "lunch and learns" to educate your bargaining unit members, you have the option of hosting an event

[2] Hereafter, all dates are 2015, unless otherwise noted.

> at your local office at Redstone Arsenal. You may also wish to contact the commands/agencies who employ your bargaining unit members. In addition, you have a website which would serve well as a conduit for any information about the union.

Id. at 1.

The Union filed the ULP charge in this case on April 2. GC Ex. 1(a). On September 15, Merriweather sent an email to Redstone officials criticizing the Agency's denial of the February 10 request. R. Attach. 4. Merriweather also indicated that the lunch and learns would be conducted "to update our [bargaining unit] employees on current workforce issues." *Id.*

POSITIONS OF THE PARTIES

General Counsel

The General Counsel contends that an agency that discriminatorily denies access to non-employee union representatives to conduct activities protected under § 7102 of the Statute will be found to have violated § 7116(a)(1) of the Statute. GC Br. at 3-4 (citing *Soc. Sec. Admin.*, 52 FLRA 1159, 1185 (1997) (*SSA I*), *remanded sub nom. NTEU v. FLRA*, 139 F.3d 214 (D.C. Cir. 1998), *decision & order on remand*, 55 FLRA 964 (1999) (*SSA II*)). The General Counsel argues that because the Agency permitted visiting vendors to set up tables in the retail area of Von Braun III to conduct commercial solicitation, but refused the Union's similar request to conduct lunch and learns in that area, the Agency improperly discriminated against the Union and thus violated § 7116(a)(1) of the Statute. GC Br. at 4-5.

Respondent

The Respondent argues that it did not violate § 7116(a)(1) of the Statute. Specifically, the Respondent asserts that *SSA* does not apply because the Union did not seek to engage in solicitation of bargaining unit employees or Agency employees. At the same time, the Respondent asserts that "[i]n all likelihood, [Merriweather's] request was not a genuine attempt to communicate with members. The Union has attempted to organize the Agency in the past by soliciting signatures from employees outside of Agency buildings." R. Supp. Br. at 5 n.5. The Respondent adds that "private meeting[s]" are not held in the hallway, and that "no one eats lunch in this hallway." R. Br. at 6. Finally, the Respondent asserts that it has a right to control "security procedures," and suggests that the lunch and learns would have interfered with these procedures. *Id.* at 7.

ANALYSIS AND CONCLUSIONS

Although Redstone is a missile facility, one does not need to be a rocket scientist to understand the Respondent has violated the Statute under the present facts. Section 7102 of the Statute protects employees in the exercise of the right to form, join, or assist a labor organization, or to refrain from any such activity, without fear of penalty or reprisal. Section 7116(a)(1) provides that it is a ULP for an agency to interfere with, restrain, or coerce any employee in the exercise of their § 7102 rights. Section 7102 gives employees the right to solicit membership on behalf of a union in non-work areas during non-work time. *U.S. Dep't of the Treasury, IRS, Ogden Serv. Ctr., Ogden, Utah*, 42 FLRA 1034, 1050 (1991); *see also Okla. City Air Logistics Ctr. (AFLC), Tinker AFB, Okla.*, 6 FLRA 159, 162 (1981). Lunch and learns conducted by a union constitute an exercise of forming, joining, or assisting a labor organization within the meaning of § 7102 of the Statute, and attendance at such events is an exercise of the right protected under § 7102 to solicit membership. *U.S. Dep't of the Navy, Naval Air Station, Pensacola, Fla.*, 61 FLRA 562 (2006). The Authority has held that employees have the right to distribute literature on behalf of a union in non-work areas during non-work time. *IRS, N. Atl. Serv. Ctr. (Andover, Mass.)*, 7 FLRA 596 (1982). In *Dep't of the Air Force, 3rd Combat Support Group, Clark Air Base, Rep. of the Phil.*, 29 FLRA 1044, 1048-50 (1987) (*Air Force*), the Authority held that the respondent, a component of the Department of Defense, violated § 7116(a)(1) when it denied a union's request to distribute handbills at a military base, even though the actor did not have a bargaining relationship with the union, which represented employees of another component of the Department of Defense at the installation, and even though the handbills would have been distributed on "quasi-public" areas of the base.

In addition, the Authority has concluded, that under certain circumstances, employees have a right to "learn the advantages" of labor organizations from non-employee organizers on agency property, pursuant to §§ 7102 and 7116(a)(1) of the Statute. *SSA I*, 52 FLRA at 1184. In addressing the question of rights relating to access to agency property and distribution of union literature by non-employee union representatives, the Authority considers whether the agency discriminated against the non-employee union and whether there were other reasonable methods the non-employee union could have used to communicate with employees. To establish a violation, the General Counsel must show *either* that the agency acted in a discriminatory manner *or* that there were no other reasonable methods of communicating with the employees. *Id.* at 1185. Applying this analysis, the Authority has held that an agency discriminated against a non-employee union, in violation of

§ 7116(a)(1) of the Statute, by denying it permission to distribute information on the agency's premises after having granted similar access to other organizations. *SSA II*, 55 FLRA at 967. Suffice it to say, this precedent is controlling to the facts in this case.

It is not disputed that Merriweather, though an ARMDEC employee at Redstone, is not an employee of the Agency. Further, it is not disputed that Merriweather's request sought to allow non-employee Union representatives such as himself to conduct lunch and learns, or that the lunch and learns would be conducted in non-work areas during non-work time. It is disputed, however, whether the lunch and learns would be used for solicitation.

As discussed above, lunch and learn activities are typically associated with union solicitation. Further, Merriweather indicated in his February 10 email that solicitation was one of the reasons for holding the lunch and learns. Specifically, Merriweather stated that he was requesting the lunch and learns so the Union could have "the same" privileges and opportunities as other vendors that "sell their service[s]," i.e., engage in solicitation. GC Ex. 2. In addition, Merriweather explained that the Union sought to act like vendors and solicit "the [Agency] workforce," a group that includes unrepresented Agency employees whom the Union had tried to organize in the past. GC Ex. 2; R. Attach. 2 at 3. Because Merriweather stated that the Union sought to act as a vendor and solicit unrepresented Agency employees as well as current bargaining unit employees who were not all dues paying members of the Union, it is clear that solicitation was one purpose of the lunch and learns. That Merriweather asked that the lunch and learns be held in a high-traffic retail area, rather than in a conference room, further supports the conclusion that solicitation was the intent.

The Agency could have avoided ULP liability by establishing a non-discriminatory reason for the denial, but the Agency failed to do so, even though it gave itself nearly a month to draft a response. Instead, the Agency asserted that the "status of certain vendors has no impact on this matter," and also asserted that the Union could hold a lunch and learn at its office, or through its website. GC Ex. 2. These assertions do not explain why the Union should be treated differently from other visiting vendors, and it is apparent that the Agency denied the request because it came from the Union and it believed the Union would solicit unrepresented employees. By discriminating against the Union in this way, the Agency violated § 7116(a)(1) of the Statute. *SSA II*, 55 FLRA at 967.

The Respondent's arguments to the contrary are not convincing. In its brief, the Respondent contends that it was appropriate to deny Merriweather's request because no one meets or eats in the hallway. But it is unlikely that Union lunch and learns would cause any more disruption than that caused by vendors selling food items like popcorn and cotton candy. Moreover, the Respondent made no mention of disruption on May 11, when it denied Merriweather's request. Instead, all the Respondent referenced was other locations and means available to the Union. Further, it is not clear that the Respondent bothered to ascertain that the "lunch" portion of a lunch and learn, references when the interaction takes place, i.e., during a non-duty lunch time break, rather than the service of a meal.

The Respondent's claim that the Union would use the lunch and learns to provide updates to bargaining unit employees rather than solicitation is belied by its own admission that Merriweather's request indicated that one purpose of the lunch and learns was to organize unrepresented Agency employees. R. Supp. Br. at 5 n.5. Moreover, the lunch and learns could also be used to solicit current bargaining unit employees working in that building to become dues paying Union members. As for the "updates," it is safe to assume that the Union would be presented in a positive light, thus furthering the Union's solicitation efforts. For these reasons, the Respondent's arguments are misguided and they are rejected. In short, the Union wanted to solicit and that is precisely what the Respondent wanted to preclude within its building. Apparently, plying its employees with healthy treats like cotton candy was preferable to having them informed of their rights under the Statute.

Finally, the Respondent contends that it has a right to control its security procedures. While that is generally true, the Respondent cited no security concern when it denied Merriweather's request. Thus, this argument is yet another disingenuous attempt to justify the Respondent's actions after the fact rather than a legitimate concern expressed at the time of denial. Moreover, Merriweather holds a Secret security clearance and has previously been granted access to Von Braun III. There is no indication that he (or any other Union representative) poses any more of a security risk to the Agency than non-federal employee vendors hawking cotton candy, popcorn and trinkets in the retail area. Further, while Von Braun III is not open to the public and while Merriweather is not an employee of the Agency, he is an AMRDEC employee at Redstone, and it would be absurd to permit the Agency to discriminatorily bar Merriweather from soliciting for the Union at Von Braun III solely because he works within a different component of the Department of Defense. *See Air Force*, 29 FLRA at 1048-50. For these reasons, I reject the Respondent's internal security argument.

CONCLUSION

By denying Merriweather's request to engage in solicitation via lunch and learns while allowing visiting vendors to engage in commercial solicitation, the Respondent discriminated against the Union, in violation of § 7116(a)(1) of the Statute.

Accordingly, I recommend that the Authority grant the General Counsel's Motion for Summary Judgment, and deny the Respondent's Motion for Summary Judgment.

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the Department of Defense, Missile Defense Agency, Redstone Arsenal, Alabama, shall:

1. Cease and desist from:

(a) Discriminatorily denying requests by the American Federation of Government Employees, AFL-CIO, Local 1858 (Union), to conduct lunch and learns in the retail area at Von Braun III.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of the rights assured by the Statute.

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

(a) Post at all facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of the Missile Defense Agency, Redstone Arsenal, Alabama, 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.

(b) In addition to physical posting of paper notices, Notices shall be distributed electronically, such as by email, posting on an intranet or internet site, or other electronic means, if such are customarily used to communicate with employees.

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

Issued, Washington, D.C., June 20, 2016

CHARLES R. CENTER
Chief Administrative Law Judge

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

The Federal Labor Relations Authority has found that the Department of Defense, Missile Defense Agency, Redstone Arsenal, Alabama, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discriminatorily deny requests by American Federation of Government Employees, AFL-CIO, Local 1858 (Union), to conduct lunch and learns in the retail area at Von Braun III.

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

_____
(Respondent/Agency)

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, Atlanta Region, Federal Labor Relations Authority, whose address is: 225 Peachtree Street, Suite 1950, Atlanta, GA 30303, and whose telephone number is: (404) 331-5300.