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

MEMORANDUM DATE: June 9, 2005

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF THE AIR FORCE
325TH MISSION SUPPORT GROUP SQUADRON
TYNDALL AIR FORCE BASE, FLORIDA

Respondent

and Case No. AT-CA-04-0176

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3240, AFL-CIO

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
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U.S. DEPARTMENT OF THE AIR FORCE 325TH MISSION SUPPORT GROUP SQUADRON TYNDALL AIR FORCE BASE, FLORIDA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3240, AFL-CIO Charging Party	Case No. AT-CA-04-0176

NOTICE OF TRANSMITTAL OF DECISION

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

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JULY 11, 2005**, and addressed to:

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

SUSAN E. JELEN
Administrative Law Judge

Dated: June 9, 2005
Washington, DC

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

U.S. DEPARTMENT OF THE AIR FORCE 325TH MISSION SUPPORT GROUP SQUADRON TYNDALL AIR FORCE BASE, FLORIDA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3240, AFL-CIO Charging Party	Case No. AT-CA-04-0176

Peter Hines, Esquire
For the General Counsel

Major Lawrence Lynch, Esquire
Major Robert N. Rushakoff, Esquire
For the Respondent

George White
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, *et seq.* (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (FLRA or Authority), 5 C.F.R. § 2411 *et seq.*

Based upon an unfair labor practice charge filed by the American Federation of Government Employees, Local 3240, AFL-CIO (Union or Charging Party), a complaint and notice of hearing was issued by the Regional Director of the Atlanta Regional Office of the Authority. The complaint alleges that the U.S. Department of the Air Force, 325th Mission Support Group Squadron, Tyndall Air Force Base, Florida (Respondent) violated section 7116(a)(1) and (5) of the Statute when it stopped granting employee representatives

access to unsworn witness statements included in internal Equal Employment Opportunity investigative files. Respondent timely filed an Answer, in which it denied certain allegations of the complaint. Respondent also affirmatively asserted that the charge in this matter was untimely. (G.C. Exs. 1(c) and 1(g)).

A hearing was held in Panama City, Florida, on July 29, 2004, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Both the General Counsel and the Respondent filed timely post-hearing briefs which have been fully considered.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

The U.S. Department of the Air Force is an agency under 5 U.S.C. § 7103(a)(3). Tyndall Air Force Base, 325th Mission Support Group Squadron is an activity of the U.S. Department of the Air Force. (G.C. Exs. 1(c) and 1(g))

The American Federation of Government Employees, Local 3240, AFL-CIO is a labor organization under 5 U.S.C. § 7103(a)(4) and is the exclusive representative of a unit of non-appropriated fund employees appropriate for collective bargaining. George White is President of Local 3240 and has held this position for approximately 18 years. (G.C. Exs. 1(c) and 1(g); Tr. 12)

Thomas Chatman has been the director of the Tyndall Air Force Base (Tyndall AFB) civilian Equal Employment Opportunity (EEO) program since 1997. His office is responsible for conducting the informal inquiry into allegations that the agency, or its representatives, have violated the prohibitions on employment discrimination under Title VII. (Tr. 48-49) This office has one other employee, Faye Owens, an EEO counselor, who has worked with Chatman since 1997. (Tr. 67) Chatman and Owens do an initial intake with all EEO complainants to be certain that the jurisdictional requirements of Title VII are met and that the complainant can state a *prima facie* case. (Tr. 48-49) Complainants are entitled to a representative, who may or

may not be affiliated with the Union.[1] Once the intake is accomplished, the case is assigned to Owens to perform an informal inquiry. During her inquiry, Owens compiles a list of potential witnesses based on information provided by the complainant. Owens then contacts the witnesses, either personally or through e-mail, and requests statements from them concerning the allegation. (Tr. 50-51) After the informal inquiry is completed, the EEO office attempts to settle the matter through various techniques. If the dispute is not resolved, the EEO office notifies the complainant, through their representative, that the inquiry is completed and that a "notice of final interview" will be issued. At that time, they give the complainant the paperwork to file a formal claim of discrimination. (Tr. 50-52)

If the complainant files a formal complaint of discrimination, Owens then compiles a counselor's report that is furnished to the complainant and his/her representative. The report contains the names of witnesses who were interviewed, the information regarding the basis of the charge, and a summary of the attempts at resolution. For several years, the unsworn witness statements gathered during the initial inquiry were included in the report; currently, the unsworn witness statements are not included although the report contains a summary of the witness statements. (Tr. 52, 54, 55; G.C. Exs. 4, 7 and 20)

White asserts that prior to January 2003, the complete unsworn witness statements were included in the counselor's report. (Tr. 15-16, 22; G.C. Ex. 2-7) On January 22, 2003, Patricia Perrine, her husband and White visited the EEO office to review the investigative file in a case involving Perrine's husband. (Tr. 22-23, 78-79) The unsworn witness statements had not been included in the report that was sent to them. (Tr. 23) White asked Chatman for photocopies of the unsworn witness statements. (Tr. 23, 82) Chatman told White that he could not have photocopies of the statements; but he allowed White to see the witness statements and take verbatim notes from them. (Tr. 23, 79, 82) According to

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[1] White estimated that he has represented more than ten bargaining unit employees in the EEO process since 1995. (Tr. 13-15) White has also filed 8-9 EEO complaints on his own behalf. (Tr 34)

Perrine, White reviewed the EEO file for about ten minutes. (Tr. 80)

In October 2003, White, in his capacity as an employee representative for bargaining unit employees, visited the EEO office to review a report, because he had received summaries of the unsworn witness statements instead of the actual witness statements. (Tr. 24) White asked Chatman to see the witness statements, and Chatman explained that he could no longer see them. (Tr. 24-25) White was not allowed to review the witness statements at that time. White visited the EEO office in January 2004 in his capacity as an employee representative to review three EEO files because the reports had only contained summaries of the witness statements and not the statements themselves. Again Chatman told White that he would not allow him to see the witness statements at all. (Tr. 26-27)

Both Chatman and Owens testified that since approximately March of 2001, it has been the policy of the EEO office not to attach witness statements to the final counselor's report. Further, the witness statements were not placed in the complainant's case file and such statements were not furnished for review, even when requested by the complainant and/or the representative. (Tr. 55-56, 69) In lieu of including the witness statements with the counselor's report, the EEO office began to provide a summary of what each witness said. It provided all the pertinent information that the witness gave, but protected their identity. (Tr. 66) Chatman did not give specific notice to the Union regarding this change, but testified that White was aware of the change and made inquiries regarding the change from 2001. (Tr. 56-57)

If an individual decides to file a formal complaint, the Air Force Office of Complaint Investigations (OCI) is tasked with conducting a formal investigation. All of the evidence gathered during the informal inquiry goes to the OCI investigator, including any witness statements. The OCI issues a final report, which also contains the original witness statements, as well as all other evidence gathered during the formal investigation. This report is furnished to the complainant and his/her representative. (Tr. 52-54)

White filed the unfair labor practice charge in this matter on January 20, 2004. (G.C. Ex. 1(a))[2]

ISSUE

Whether or not the Respondent violated section 7116(a)(1) and (5) of the Statute by changing the practice of allowing access to witness statements in internal Equal Employment Opportunity investigations to representatives of complainants without providing the Union with notice and the opportunity to bargain to the extent required by the Statute.

POSITIONS OF THE PARTIES

GENERAL COUNSEL

The General Counsel asserts that an agency is required to provide the exclusive bargaining representative with notice and an opportunity to bargain over the aspects of the change that are within the duty to bargain prior to implementing a change in conditions of employment of bargaining unit employees. *Federal Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas*, 55 FLRA 848, 852 (1999). In this matter, there is no dispute that the Respondent failed to provide the Union with notice and an opportunity to bargain over the change in the policy regarding access to witness statements in EEO investigations prior to making the change. Further, the record demonstrates that prior to the change, employee representatives of bargaining unit employees were allowed access to unsworn witness statements contained in the counselor's report of an EEO initial inquiry. These statements were used to evaluate the investigation and to determine if anything the witness may have said would support an amendment to the formal complaint. The witness summaries that are now provided in lieu of these statements are created by the Respondent that allow the Respondent to edit the statements as it sees fit. A witness statement may contain information that is not

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[2] White also filed another unfair labor practice charge in December 2003, alleging that the Respondent had made a unilateral change in January 2003 by failing to include the witness statements in the counselor's report without giving the Union notice and an opportunity to bargain. The Atlanta Regional Director dismissed that charge on the basis that it was untimely filed. (R. Ex. 1)

responsive to the original informal complaint, but may form the basis of an amended complaint at the formal stage. Furnishing of the witness statements after the formal investigation by OCI is completed may not allow this new information to be investigated. This clearly evidences a change in conditions of employment that has a foreseeable affect that is more than *de minimis*. Thus, the Respondent was obligated to bargain over the change in this matter. *Social Security Administration, Office of Hearings and Appeals, Charleston, South Carolina*, 59 FLRA 646 (2004).

With regard to the Respondent's argument that the underlying charge in this case is untimely, the General Counsel asserts that the six-month period set out in section 7118(a)(4)(A) of the Statute does not begin to run until the charging party discovers the unfair labor practice. *U.S. Department of the Air Force, Williams Air Force Base, Chandler, Arizona*, 38 FLRA 549, 560-61 (1990) (*Williams AFB*) (holding that the failure of the agency to provide the union with notice of change in working conditions warranted suspension of six month filing deadline for unfair labor practice charge.) *See also, Department of the Treasury, U.S. Customs Service, El Paso, Texas*, 55 FLRA 43, 46 (1998). Further the limitation period in the Statute is an affirmative defense, which, of course, shifts the burden to the Respondent to prove that the charge in this case was untimely. *U.S. Army Armament Research Development and Engineering Center, Picantinny Arsenal, New Jersey*, 52 FLRA 527, 534 (1996).

The General Counsel asserts that the testimony of his witnesses that they first learned of the change in October 2003 should be credited over the testimony of the

Respondent's witnesses, who testified that the change was made in approximately March 2001.[3]

Even if the documents are accepted, the General Counsel asserts that R. Exs. 2 and 3 are not dispositive of the timeliness issue in this case. Specifically, the General Counsel notes that the first pages of the exhibits are undated and unsigned, with no indication as to when they were created.[4] Further, they do not address squarely the issue in this case - when the Respondent stopped providing

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[3] The General Counsel renews its objections to Respondent's Exhibits 2 and 3, which were introduced during the cross-examination of the General Counsel's witness. These documents were not provided by the Respondent during the pre-hearing disclosure. The General Counsel cites to Section 2423.24(e) of the Authority's Rules and Regulations which permits an Administrative Law Judge to sanction a party that fails to comply with the prehearing procedures, by, among other things, prohibiting a party from introducing evidence that should have been disclosed in the prehearing disclosure. *See, Puerto Rico Air National Guard, 156th Airlift Wing (AMC), Carolina, Puerto Rico*, 56 FLRA 174, 177 (2000) (upholding ALJ's order limiting evidence by party who failed to participate in prehearing disclosure). The General Counsel argues that Respondent's failure to include these exhibits in its prehearing disclosure violates the letter and the spirit of the prehearing disclosure rules. Respondent's representative's excuse that he only discovered the documents on the day before the hearing should not be accepted. Further, even if discovered the day before the hearing, the Respondent never gave the General Counsel the opportunity to review these documents until the cross-examination of the General Counsel's witness. The General Counsel asserts that this was an intentional flouting of regulations regarding prehearing disclosure, and such conduct should not be condoned or sanctioned.

While I have concerns regarding the Respondent's failure to include these documents in his prehearing disclosure, I find that R. Exs. 2 and 3 are relevant to the disposition of the issues in this matter and are needed for the proper disposition of this case. Therefore, I am allowing them to remain as part of the record.

[4] In agreement with the General Counsel, I find that the first page of both R. Exs. 2 and 3 are merely cover sheets and of no probative value. The remaining pages, which are counselor's reports, are the relevant portions of the documents.

access to the witness statements. The issue is not when the Respondent stopped including the witness statements in the counselor's report, but rather when the Respondent stopped the representative from reviewing the actual witness statement.

Further G.C. Ex. 7 is a copy of a witness statement that was tendered by the Respondent to White as part of a counselor's report that was submitted on March 23, 2001. (G.C. Exs. 6 and 7). This document directly contradicts Respondent's assertion that the practice of providing access to witness statements ended in March 2001.

In conclusion, the General Counsel asserts that even if Chatman and Owens' testimony that they stopped including the witness statements in the counselor's report in 2001 is credited, it is clear from the evidence that the change was not communicated to White prior to October 2003, and it is also clear that White and Perrine were allowed to view the witness statements on January 22, 2003. It was not until October 2003 that White was not allowed to even review the witness statements. Thus October 2003 is the triggering point for the six month statute of limitations, and the underlying charge in this case was filed on January 20, 2004, which is well within the limitations period. Thus, the evidence establishes that the Respondent violated section 7116(a)(1) and (5) of the Statute when it changed its policy regarding employee representatives' access to unsworn witness statements in EEO investigations.

As a remedy, the General Counsel seeks a posting of an appropriate notice and *status quo ante* remedy.

RESPONDENT

Respondent asserts that the charge in this matter was untimely filed and should be dismissed. *Department of Labor and AFGE, Local 2513*, 20 FLRA 296, 297 (1985). The Respondent asserts that the evidence establishes that the change in policy at the Tyndall EEO office occurred nearly three years before the charge in this case. Both Chatman and Owens credibly testified that the change, no longer allowing access to witness statements, took place in approximately March 2001 and that White had been aware of this policy since 2001. (Tr. 58, 68) White had questioned Chatman about the change, shortly after it was made.

Further White had requested access to such witness statements several times in the past few years and had been denied access to them. (Tr. 68).

Respondent further asserts that the documentary evidence offered by the General Counsel actually supports and bolsters the Respondent's case. G.C. Exs. 2-4 concern a case from 2000 and G.C. Exs. 5-7 concern a case from March 2001; both show the same format in which the complainant received the actual witness statements with the counselor's report. G.C. Exs. 8-10, from 2003, show the new format in which summaries of witness statements are provided rather than witness statements. These exhibits are similar in format to R. Exs. 2 and 3.

In conclusion, the Respondent asserts that the evidence as a whole establishes that the change in policy occurred in 2001 and that the Union, through White, was aware of the change. Under these circumstances, the unfair labor practice charge in this matter was untimely filed and the current complaint should be dismissed on those grounds.

In the alternative, assuming that it was established that the complaint in this matter is timely, the Respondent asserts that the change of not providing access to witness statements does not affect the working conditions of bargaining unit employees. *United States Department of Labor, OSHA, Region 1, Boston, Massachusetts*, 58 FLRA 213, 215 (2002); *United States INS, NY, NY*, 52 FLRA 582, 585 (1996) A matter that is not a condition of employment does not become a condition of employment whether through practice or agreement. *Department of Labor and AFGE National Council of Field Labor Locals, Local 1748*, 38 FLRA 899, 908 (1990).

Respondent asserts that the only change made was in how the agency conducts its internal EEO inquiry. The rights of employees and their conditions of employment did not change. The complainants continued to receive all of the information that they had received regarding witness testimony before the change was made. The only thing that did change was that claimants and their representatives no longer received the actual statement itself.

And finally, the Respondent argues that even if it is determined that the change in this case involved a condition

of employment, the effect of the change was *de minimis*. When a change in conditions of employment involves the exercise of a management right under section 7106 of the Statute, an agency is obligated to bargain over the impact and implementation of the change only where the change has a more than *de minimis* effect on conditions of employment. *Pension Benefit Guaranty Corp.*, 59 FLRA 48, 50 (2003). In this matter, EEO complainants still receive all the pertinent information from the initial inquiry. The summary that is provided sets forth the position of each witness interviewed, although without the identity of the individual witness or a verbatim copy of the statement. Further, the complainant will eventually receive a copy of the unsworn statements if they file a formal complaint. Such a change can only be described as *de minimis* because it does not affect the rights of a complainant or their ability to pursue a complaint in any way.

Analysis and Conclusion

Section 7118(a)(4) of the Statute requires that a charge be filed within six months of the alleged unfair labor practice. The charge must be "based on events occurring within the six-month period preceding the original charge[.]" *U.S. Penitentiary, Florence, Colorado*, 53 FLRA 1393, 1402 (1998). At times, however, a charging party may not learn of an alleged unfair labor practice immediately, either due to a respondent's failure to perform a duty owed to the charging party or because of the respondent's concealment of the alleged unfair labor practice. In such circumstances, section 7118(a)(4)(B) of the Statute permits the General Counsel to issue a complaint when the charging party has filed an unfair labor practice charge within six months of discovery of the alleged unfair labor practice. *Williams AFB*, 38 FLRA 549, 560-61 (1990), cited with approval in *Air Force Accounting and Finance Center, Lowry Air Force Base, Denver, Colorado*, 42 FLRA 1226, 1237-38 (1991).

Here, the Respondent argues that it changed the practice of including unsworn witness statements in its counselor's report and no longer allowed access to those witness statements sometime in 2001. The Respondent asserts that since that time, it has kept the witness statements out of the complainant's file and has not allowed the complainant or their representative access to those

statements. While Chatman admits that he did not make this change in any written form, he asserts that White, in his various dealings with the EEO office both as a representative and as a claimant, was aware of the change in policy and had, in fact, questioned both Chatman and Owens about access to such statements. According to Chatman and Owens, since approximately March 2001, all of White's requests for access to witness statements have been denied. Therefore, the Respondent asserts that the instant unfair labor practice charge, filed in January 2004, is untimely filed and should be dismissed.

The General Counsel, however, asserts that White was unaware that the EEO office was no longer granting access to the witness statements until approximately October 2003. Until that time, the witness statements had either been included in the counselor's report or White had been allowed to review the witness statements in the EEO office. White asserts that it was not until January 2003 that the EEO office failed to include the witness statements in the actual counselor's report on a claimant's case. In response to this change, White, in the company of Perrine, examined the witness statements in one case at the EEO office. Access to these statements was allowed by Chatman. It was not until October 2003, that Chatman denied him access to other witness statements, even at the EEO office. Therefore, the General Counsel asserts that the change was not made until sometime after January 2003 and that the Union was not aware of the change in access to the statements until October 2003. Under these circumstances, the charge in this matter was filed in a timely manner.

Even assuming that the change in access was made sometime in 2001, the General Counsel asserts that the record evidence establishes that the Union was not aware of any such change until approximately October 2003. Further, since the Respondent had not given specific notice of the change, the Union was only aware of the change when it was denied access in October 2003 and then on a continuing basis since that time. Again, under these circumstances, the charge in this matter was filed in a timely manner.

The General Counsel presented three examples of EEO reports, two prior to April 2001, which included copies of the actual witness statements, and the third from December 2003, which did not include the witness statements. The

Respondent offered only two EEO reports, from December 2001 and 2002, which did not contain the witness statements.

I find it difficult to believe that there were not additional EEO reports between 2001 and December 2003 that could not have been made available during litigation, either by the General Counsel or the Respondent. However, in terms of the actual evidence produced at the hearing, I find that since at least December 2001 the Respondent has not included the actual witness statements in the EEO reports furnished at the conclusion of the initial investigation to the claimants and their representatives. In that regard I credit the testimony of the Respondent's witnesses regarding the termination of their previous practice.

The issue in this matter, however, goes beyond the inclusion of the witness statements as the General Counsel asserts a different change in that beginning in October 2003, the Union was no longer allowed access to such witness statements in reviewing the files in the EEO office. The General Counsel presents evidence of one incident, in January 2003, in which White and Perrine were allowed to review the statements in an EEO case. Since October 2003, their requests to review statements have been uniformly denied.

The Respondent denies that it has allowed access to witness statements since it changed its procedure of including the statements with the counselor's reports. Further it notes that the EEO office no longer keeps the witness statements in the individual claimant files. The Respondent argues that it would make no sense to separate the witness statements, not include them in the file, set forth the relevant information in the claimant's report, and then allow access to such statements in the office upon request. Since the entire purpose of the non-inclusion of the witness statements was allegedly the protection of such witnesses, access in another way would not be consistent with the EEO office policy.

Whether the current policy is appropriate is not the issue before me. In reviewing all of the evidence presented in this matter, I find that the unfair labor practice charge in this matter is untimely filed and recommend that the complaint in this matter be dismissed. In that regard, the evidence clearly shows that the EEO office changed its

policy with regard to including witness statements in counselor reports in 2001. The testimony of both of the Respondent's witnesses regarding access to the statements after 2001 was consistent and logical. I find the testimony of both Chatman and Owens to be the most complete and thorough, and I am more impressed with their demeanor and responsiveness than of the other witnesses. Owens testified that White was denied access to such witness statements after 2001, and I find White's testimony regarding the witness statements vague and incomplete. His overall testimony did not show a complete knowledge of the EEO process and his testimony regarding the dates involved in this matter was tentative at best. I did not find Perrine's testimony any more convincing with regard to the January 2003 review of the EEO file.

In conclusion, I find that the Union's unfair labor practice charge in this case was filed in an untimely manner. It is therefore recommended that the Authority adopt the following Order:

ORDER

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

Issued, Washington, DC, June 9, 2005.

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SUSAN E. JELEN
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. AT-CA-04-0176, were sent to the following parties:

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DATED: June 9, 2005
Washington, DC