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

DEPARTMENT OF THE AIR FORCE AIR FORCE MATERIEL COMMAND OGDEN AIR LOGISTICS CENTER HILL AIR FORCE BASE, UTAH Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1592, AFL-CIO Charging Party	Case No. DE-CA-00366

NOTICE OF TRANSMITTAL OF DECISION

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

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

Any such exceptions must be filed on or before **APRIL 2, 2001**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW., Suite 415
Washington, DC 20424-0001

SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

Dated: February 28, 2001
Washington, DC

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

MEMORANDUM DATE: February 28, 2001

TO: The Federal Labor Relations Authority

FROM: SAMUEL A. CHAITOVITZ
CHIEF ADMINISTRATIVE LAW JUDGE

SUBJECT: DEPARTMENT OF THE AIR FORCE
AIR FORCE MATERIEL COMMAND
OGDEN AIR LOGISTICS CENTER
HILL AIR FORCE BASE, UTAH

Respondent

and Case No. DE-CA-00366

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1592, 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.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ

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WASHINGTON, D.C. 20424-0001

DEPARTMENT OF THE AIR FORCE AIR FORCE MATERIEL COMMAND OGDEN AIR LOGISTICS CENTER HILL AIR FORCE BASE, UTAH Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1592, AFL-CIO Charging Party	Case No. DE-CA-00366

Kevin Cutler, Esquire
For the Respondent

Ayodele Labode, Esquire
Matthew Jarvinen, Esquire
For the General Counsel of the FLRA

Before: SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, *et seq.* (the Statute), and the revised Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), 5 C.F.R. § 2411 *et seq.*

This proceeding was initiated by an unfair labor practice charge filed by the American Federation of Government Employees (AFGE), Local 1592, AFL-CIO (Union/AFGE Local 1592) against the Department of the Air Force, Air

Force Materiel Command, Ogden Air Logistics Center, Hill Air Force Base, Utah (AFMC/Respondent). The Regional Director of the Denver Region of the FLRA, issued a Complaint and Notice of Hearing. The Complaint alleges that AFMC violated section 7116(a)(1) and (8) of the Statute when AFMC conducted two meetings with a member of the bargaining unit in violation of the requirements of section 7114(a)(2)(A) of the Statute and bypassed the Union in violation of section 7116(a)(1) and (5) of the Statute. AFMC filed an answer denying it violated the Statute.

A hearing was held in Ogden, Utah, 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. The GC of the FLRA and AFMC 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 of law, and recommended Order.

Findings of Fact

A. Background

AFMC is an agency under the Statute. AFGE, Council 214 (Council) is the exclusive representative of a nation-wide collective bargaining unit of employees. AFGE Local 1592 is an agent of the Council for the purpose of representing employees at the AFMC.

Thomas Vagenas is an employee of AFMC and is a member of the bargaining unit represented by AFGE Local 1592. Vagenas is a Parts Mechanic responsible for rebuilding airplane jack screws.

At all times material, Tyrone Aranda, EEO Counselor; Douglas Hamel, Division Chief, Landing Gear Division; David Bennion, Supervisor; and John Jepperson, Advisory Attorney,

were acting on behalf of AFMC.[1] At all times material, Douglas Hamel, David Bennion, and John Jepperson were supervisors and/or management officials.

B. Suspension Notification

On May 21, 1999, Vagenas was notified that his supervisor, David Bennion was proposing to suspend him for five days for damaging a cargo door. AFGE Local 1592 Steward Darryl Spires was present during the meeting in which Vagenas was given the letter of proposed suspension. Vagenas immediately contacted Council President Scott Blanch and requested that Blanch represent him in responding to the proposed suspension.

1. Congressional Correspondence

On May 23, 1999, Vagenas wrote letters to Senator Orrin Hatch and Congressman James Hansen to request a Congressional investigation of Hill Air Force Base to ascertain the seriousness of these problems of discrimination, disparate treatment and favoritism....” Vagenas’ letters to Senator Hatch and Congressman Hansen specifically raised the proposed suspension. Senator Hatch addressed Vagenas’ concerns in a letter to Major General Paul V. Hester on June 1, 1999, a copy of which was sent to Vagenas. Senator Hatch requested that the agency explore avenues in which Vagenas may pursue his grievance. Congressman Hansen replied to Vagenas’ letter on June 21, 1999, by assuring Vagenas that he would investigate the concerns raised by Vagenas.

2. AFGE Local 1592 Represents Vagenas

Pursuant to the rights outlined in the May 21, Notice of Proposed Suspension, Blanch replied to the proposed suspension by memorandum to Bennion dated June 10,

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[1] AFMC did not raise the issue as a defense that EEO Counselor, Tyrone Aranda was not acting on behalf of the Respondent in either the Answer or the Prehearing Disclosure. 5 C.F.R. § 2423.23(c). In *U.S. Department of Housing and Urban Development*, 56 FLRA 592 (2000) the Authority affirmed the Administrative Law Judge’s decision which prevented the respondent from using a defense which was raised for the first time after the hearing because it was untimely.

specifically identifying himself as Vagenas' designated Union representative for purposes of the proposed suspension. In his response, Blanch specifically wrote that "there should be no contact with Vagenas relative to the proposal unless his right to representation is provided." Blanch believed it was critical to include strong language instructing management not to discuss anything related to the proposed suspension without his presence as the Union representative because of his previous experience representing employees in similar situations in which the AFMC had attempted to resolve the issue directly with employees without his knowledge.

3. EEO Procedure Initiated

Independent of his Union representative, Vagenas contacted Equal Employment Opportunity (EEO) Counselor James Shelton on June 29, 1999. Vagenas explained that he sought Shelton's assistance in the EEO process to resolve what he believed to be the disparate treatment to which he was being subjected. Vagenas told Shelton about his current situation, including his receipt of the proposed suspension and that Blanch and the AFGE Local 1592 were representing him. Shelton was also made aware of the letters Vagenas had written to Senator Hatch and Congressman Hansen. Shelton took detailed notes of their conversation, and referred Vagenas to Aranda. A copy of Shelton's notes were placed in Aranda's file concerning Vagenas' EEO complaint.

As suggested by Shelton, Vagenas contacted Aranda. Aranda asked Vagenas to meet him in his office. On June 29, 1999, during their first meeting, Vagenas provided Aranda with numerous documents which, according to Vagenas, supported his assertion that he was the victim of discrimination based on the areas protected under EEO law. Among the documents Vagenas provided Aranda were copies of the letters to Senator Hatch and Congressman Hansen, and Blanch's response to the letter of proposed suspension. Vagenas advised Aranda that Blanch was representing him

concerning the proposed suspension.[2] The effect of Vagenas' conversation with Aranda was to initiate an informal EEO complaint.

Prior to arranging a second meeting with Vagenas, Aranda explored the possibility of moving Vagenas to a different work location with management officials. Aranda believed that it would be in Vagenas' best interest to be removed from his present work site, Building 507, where he was supervised by Bennion. Aranda contacted management representative Douglas Hamel and enlisted his support to transfer Vagenas to the new building.

According to Vagenas, Aranda initiated a second meeting the same day that he initially delivered documents to Aranda. In addition to Aranda and Vagenas, also present during this second meeting were Bennion, (Vagenas' first-line supervisor in Building 507) and Mike Southard and Steve Morlock (first- and second-line supervisors in Building 509, respectively). During this meeting, Vagenas was briefed about the duties he would perform in Building 509. He was also introduced to Southard as his new supervisor. The goal of the meeting was to provide Vagenas with a brief orientation to his new work site. Vagenas began working at Building 509 the following day. Although Aranda did not believe that Vagenas was transferred as quickly as the day after their initial meeting, Aranda did acknowledge that a meeting took place similar to the one described by Vagenas involving Southard and other management officials, at which

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[2] While Aranda denied that Vagenas told him that Scott Blanch was acting as his Union representative for purposes of the proposed suspension, Aranda admitted on cross-examination that he was aware that Vagenas had obtained Union representation in similar situations in the past. Moreover, Aranda was provided a copy of Blanch's June 10 response to the proposed suspension, a copy of which appears in Aranda's EEO file concerning Vagenas' case. Accordingly, I find Vagenas' recollection of these events is more reliable than Aranda's.

time Vagenas was introduced to his new supervisor and the type of work he would be preforming.[3]

Prior to the third meeting, Aranda called Vagenas to discuss the need for a settlement agreement. The agreement would be a way to finalize Vagenas' transfer to Building 509. Aranda explained that if there was no written agreement, Vagenas could be returned to his old assignment in Building 507 at any time because he was assigned to Building 509 on a temporary basis. Aranda also explained to Vagenas that management wanted a resolution of the congressional inquiries which resulted from the May 23, 1999 letters Vagenas sent to Senator Hatch and Congressman Hansen. When Vagenas asked what effect such an agreement would have on the disciplinary action he had going with Blanch, Aranda assured Vagenas that the disciplinary action was separate, "that's different."

4. Vagenas Receives Notice of Suspension and Designates Union

On July 28, 1999, Vagenas received notice from the Respondent that he would be suspended for five days. He was ordered to serve the suspension August 6-10. Immediately after he received notice that the agency had decided to suspend him, Vagenas went to the Union office and designated Local 1592 to act as his representative for filing a grievance. Blanch filed a grievance under the negotiated grievance procedure on August 11, 1999.

5. EEO Settlement

Shortly after receiving the suspension decision, Vagenas met with Aranda a third time to discuss a proposed

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[3] According to Aranda, this meeting occurred only after the settlement agreement had been signed on August 5, 1999. In contrast to Vagenas' consistent and specific recollection of his second meeting with Aranda, Aranda admitted that he did not maintain accurate records of his communications with Vagenas and did not know when Vagenas moved to Building 509. I find Vagenas recollection the more reliable and, accordingly, I credit Vagenas' version of these events. In this regard I note that Bennion, Southard and Morlock were not called as witnesses by AFMC to corroborate Aranda's version of events.

settlement agreement. According to Vagenas, Aranda requested that they meet at Aranda's office, approximately three miles from Vagenas' work site. Prior to their meeting, Aranda put considerable thought into drafting a settlement agreement that would satisfy Vagenas and address all of management's concerns. Aranda prepared the settlement agreement based on a standard form or template agreement. He instructed his administrative assistant to insert the appropriate information for the Vagenas case. Before showing Vagenas a draft of the settlement agreement, he took the agreement to Douglas Hamel, Chief of the Landing Gear Division, whose approval was essential for implementation of the agreement. In reaching a settlement with Vagenas, Aranda was conveying management's settlement offer. The critical language of the settlement agreement was a commitment that Vagenas agreed to withdraw his informal complaint of discrimination together with his Congressional and Senatorial inquiries. The agreement makes specific reference to the dates of Vagenas' May 23 letters to Senator Hatch and Congressman Hansen and to the corresponding responses dated June 1, and June 21, respectively. The agreement further states that Vagenas "agrees not to pursue the issue(s) addressed in those complaints/inquires under any other avenue of redress." This language was included at Hamel's request to ensure that Vagenas could not continue to file complaints.

The two met in Aranda's office behind closed doors with nobody else present and without notifying AFGE Local 1592. During this third meeting, Aranda gave Vagenas the proposed settlement agreement to review. Vagenas asked Aranda about the broad language used in the settlement agreement in which Vagenas' agreed not to pursue the complaints under any other avenue of redress, expressing concern about the effect it would have on his ability to pursue his potential grievance protesting his five day suspension. Aranda assured him that his signing the agreement would have no effect since the disciplinary action was a separate issue. Aranda encouraged Vagenas to pursue a grievance with Blanch over the disciplinary action. Vagenas did not sign the agreement that day because Aranda had not yet given it to management for final approval. The meeting lasted between 10 and 20 minutes. Although Vagenas did not consider the meeting to be mandatory, he did regard his attendance as in his best interests because he knew that if he did not attend, his reassignment to Building 509 might not be made permanent.

The fourth and final meeting between Aranda and Vagenas occurred on August 5. Aranda called Vagenas to his office and told him that management was agreeable to the language of the settlement agreement and all that was needed was Vagenas' signature. When Aranda presented Vagenas with the settlement agreement for signature, the agreement had already been signed by Hamel and Aranda.[4] Vagenas signed the agreement. Directly beneath the signature block for Vagenas was a signature block for the "Complainant's Representative." Vagenas asked Aranda what he should write in that signature block. Aranda advised Vagenas to write "no identified representative" followed by his initials. Vagenas did as he was instructed. This meeting lasted only about 10 minutes, but again, Vagenas felt that his attendance was required to avoid the risk of being returned to his former work location in Building 507. The third and fourth meeting with Aranda took place in Aranda's office.

6. Suspension is Served and Grievance is Filed

Vagenas served his five-day suspension August 6-10, 1999. On August 11, 1999, the AFGE Local 1592 filed a grievance on his behalf in accordance with the Master Labor Agreement. AFGE Local 1592 later invoked arbitration on the grievance; the AFMC and AFGE Local 1592 went before arbitrator Norman Brand on April 15, 2000. During the AFMC's presentation of its case, the agency entered into evidence the settlement agreement signed by Vagenas. At no time prior to the arbitration did the agency notify Blanch that such an agreement existed.[5]

As part of AFMC's Post-Hearing Arbitration Brief, the Respondent argued that the settlement agreement signed by Vagenas invalidated the Union's arguments at arbitration. According to the Respondent:

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[4] Vagenas believed that it had also been signed by Jepperson. Although the AFMC's Answer admits that it had also been signed by Jepperson, Aranda testified that the agreement was not signed by Jepperson until all other signatures had been obtained.

[5] Blanch testified that if he had been notified prior to the arbitration that the settlement agreement existed and had known the nature of the agreement, he would never have invoked arbitration on the grievance.

> [O]n 5 August 1999, in exchange for being moved to a new area, [Vagenas] signed a Settlement Agreement with management whereby [Vagenas] not only agreed to drop his discrimination complaint and Senatorial and Congressional Inquiries, but he also agreed not to pursue any of the issues addressed in those complaints/inquiries under any avenue of redress... [including the grievance.]

The Respondent further argued that

> [t]he language "any other avenue of redress" is intentionally broad, general, and all-encompassing so that the parties would not have to list every other possible avenue of redress that could be contemplated for fear of leaving one out. Therefore, the grievance process certainly qualifies as an "other avenue of redress." Consequently, [Vagenas] had waived his right to grieve the issues in question.

On April 15, 2000, Arbitrator Brand found in favor of the AFMC. The Arbitrator wrote:

> [Vagenas] alleged disparate treatment as a reason for overturning his five day suspension in this grievance procedure. He also alleged disparate treatment and discrimination in his EEO complaint. It appears that he pursued the discrimination/ disparate treatment claim to his satisfaction because he executed a Settlement Agreement in the EEO matter. Now [Vagenas] seeks further consideration of his claim to disparate treatment.... [Vagenas] has attempted to receive remedies for the same claim of disparate treatment in two forums. Within two days of receiving the "Propos[ed]" [suspension] he wrote a letter to Senator Hatch, objecting to the disparate treatment that this represented. He asserted that he was the "only employee being punished for hitting the door." Immediately after receiving his Decision to Suspend and appointing a union representative for his grievance, on 29 July 1999 [Vagenas] filed an EEO complaint. [Vagenas] settled his EEO complaint, with the remedy for

> alleged disparate treatment being a change of job location. [Vagenas] now seeks to have his discipline nullified because of this same alleged disparate treatment. The Agency argues that [Vagenas] was precluded from filing a grievance by his agreement "not to pursue...any other avenue of redress." I reach no conclusion about the propriety of pursuing this grievance. I simply note that [Vagenas] has not shown any entitlement to additional relief.

On August 8, 2000, the AFGE Local 1592 paid Arbitrator Brand one thousand nine hundred seventy-eight dollars ($1,978.00), half of the cost of the arbitration.

Discussion and Conclusions of Law

A. Section 7114(a)(2)(A) of the Statute

5 U.S.C. § 7114(a) of the Statute provides that

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at -

(2).1 any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment.

B. AFMC Failed To Comply With Section 7114(a)(2)(A) of the Statute

GC of the FLRA contends that AFMC's failure to provide AFGE Local 1592 with prior notice and an opportunity to be represented at the two formal discussions between Aranda and Vagenas in or about late July and on August 5 violated Section 7114(a)(2)(A), the formal discussion provision of the Statute.

It is well-settled that all four elements of section 7114(a)(2)(A) of the Statute must be satisfied in order to establish a Union's right to be represented at a formal discussion. There must be: (1) a discussion; (2) which is formal; (3) between one or more agency representatives and

one or more unit employees or their representatives; (4) concerning any grievance or personnel policy or practice or other general condition of employment. *Luke Air Force Base, Arizona*, 54 FLRA 716, 723 (1998)(*Luke AFB*). A Union has the right to be represented at a formal discussion in order to safeguard both its own interests and the interests of bargaining unit employees. *Marine Corps Logistics Base, Barstow, California*, 52 FLRA 1039 (1997)(*Barstow*).

The AFMC does not dispute that it failed to provide the AFGE Local 1592 with prior notice or an opportunity to be represented at the meetings at issue in this case.

1. Discussions Occurred During Late July and August 5

The Authority has consistently held that the term "discussion" as used in Section 7114(a)(2)(A) is the equivalent to "meeting" and that actual dialogue is not necessary. Following Vagenas' receipt of the AFMC's July 28 decision to suspend him for 5 days, Aranda met with Vagenas to present a draft of the settlement agreement. Both Vagenas and Aranda indicated that a follow-up meeting (i.e., the August 5 meeting) was required to finalize the agreement. This meeting following the July 28 notification occurred in late July or early August.

Vagenas did not sign the agreement when it was first presented, at the late July or early August meeting, because Aranda needed to obtain management's approval. Aranda also was required to revise the draft settlement, at Vagenas' request, to ensure that Vagenas' assignment to Building 509 would be permanent. This meeting was sometime near the end of July or the beginning of August separate and distinct from the August 5 meeting. There was another meeting between Vagenas and Aranda on August 5, 1999.

At both of these meetings Vagenas and Aranda discussed the settlement agreement in detail.

2. The Meetings Held in Late July (Or Early August) and on August 5 Were Formal in Nature.

The formality of a discussion or meeting under section 7114(a)(2)(A) is determined by the totality of the facts and

circumstances. *F.E. Warren Air Force Base, Cheyenne, Wyoming*, 52 FLRA 149, 157 (1996) (*F.E. Warren*). Among the factors, the Authority examines to determine whether a meeting is "formal" are: (1) whether the person who held the meeting is a first level supervisor or is higher in the management hierarchy; (2) whether any other management representatives attended; (3) where the meeting took place; (4) how long the meeting lasted; (5) how the meeting was called; (6) whether a formal agenda was established; (7) whether employee attendance was mandatory; and (8) the manner in which the meeting was conducted. *Luke AFB*, 54 FLRA 716, 724; *Marine Corps Logistics Base, Barstow, California*, 45 FLRA 1332, 1335 (1992) (*Barstow I*). These factors are illustrative, and other factors may be identified and applied as appropriate in particular cases. *F.E. Warren*, 52 FLRA 149, 157.

With regard to the location of the late July and August 5 meetings, both meetings took place in Aranda's office. Vagenas' work site is located approximately three miles from Aranda's office, the same building in which several managerial functions of the directorate are located. The FLRA has held that meetings held away from an employee's immediate work are associated with formality, while those held in the work area are not. *Luke AFB*, 54 FLRA 716, 726 (citing *Barstow I)*. Aranda initiated both meetings by contacting Vagenas via telephone. With respect to the voluntariness of the meetings, Vagenas conceded that his attendance at the meetings was not mandatory, but explained that he felt compelled to attend as a condition of making his transfer to Building 509 permanent.6

While there was no agenda or list of items to be discussed during the late July or August 5 meetings, the evidence demonstrates that Aranda placed considerable thought and effort into preparing the settlement agreement which the meetings were called to discuss. Thus, Aranda sought Hamel's support for moving Vagenas to Building 509 before approaching Vagenas with the draft settlement agreement in late July, and Aranda needed to discuss the

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6 Under similar circumstances in *Luke AFB*, the Authority found that although the bargaining unit employee's attendance was not mandatory in the sense that she could face discipline for refusing to attend, she could conclude that her interests could be adversely affected if she did not attend. *Id.*, at 728.

contents of any agreement with Hamel and Jepperson before meeting with Vagenas to discuss the agreement. That the meetings were planned, as opposed to spontaneous, suggests formality. *See Barstow I at 1336*. In the subject case, the meetings here were planned by Aranda well in advance. Based on the amount of preparation by Aranda and the sole purpose of the meetings, I conclude that an "agenda" was established for the meetings in this case.

While Aranda was the only "representative of the agency" attending the late July and August 5 meetings, he was effectively representing AFMC in conveying the AFMC's offer of settlement. Although the meetings lasted only approximately 10 to 20 minutes each, the subject of the meeting, resolution of an informal EEO complaint together with a pair of congressional inquiries, was of utmost importance and lends itself to a finding of formality.

I conclude that, in sum, the facts, when viewed in their totality, demonstrate that the late July and August 5 meetings between Aranda and bargaining unit employee Vagenas were formal in nature.

3. Aranda Was a Representative of the Agency

Nothing in section 7114(a)(2)(A) of the Statute requires that a representative of the agency be a supervisor. *See Luke AFB*, 54 FLRA at 730; and *Defense Logistics Agency, Defense Depot Tracy, Tracy, California*, 39 FLRA 999, 1013 (1991)(*Defense Depot Tracy)*. In *Defense Depot Tracy* the Authority held that a private sector independent contractor under contract with an agency to provide Employee Assistance Program services to bargaining unit employees was a "representative of the agency" because the contractor was doing the business of the agency.

AFMC's Answer concedes that Aranda acted on its behalf at all relevant times. Moreover, Aranda admitted that he was effectively conveying management's settlement offer when he met with Vagenas in late July and on August 5. Aranda was representing Hamel and Jepperson, whose approval and signature on the settlement agreement were necessary for its approval. Further, although Aranda was not Vagenas' direct supervisor, he represented high levels of AFMC management who had the authority to make Vagenas' transfer to Building 509 permanent.

AFMC argues that Aranda, as an EEO Counselor, was a "neutral" and therefore could not be considered a representative of management. However, Aranda was paid by AFMC and his conveyance of the settlement agreement to Vagenas furthered the desire of management to resolve the informal EEO complaint and all issues raised in the Congressional investigations, and ultimately the grievance filed by Vagenas. Furthermore, Aranda's settlement efforts would not have been successful without the support and approval of Jepperson and Hamel, two individuals who are admittedly management representatives.

4. The Subject Matter of the Meetings Was a "Grievance" Within the Meaning of Section 7114(a)(2)(A)

To be a formal discussion, the subject of the meeting must concern either (1) any grievance, or (2) any personnel policy or practice or other general condition of employment. An informal EEO complaint does not constitute a "grievance" within the meaning of Section 7114(a)(2)(A).

However, that the term "grievance" should be interpreted in accordance with the broad statutory definition in Section 7103(a)(9).[7] I do find however that "grievance" does encompass the potential grievance under consideration by Vagenas and AFGE Local 1592 concerning the decision to suspend Vagenas for 5 days. *See, Federal Correctional Institution, Bastrop, Texas*, 51 FLRA 1339, 1344-45 (1996)(*FCI Bastrop).*

AFMC, was aware that Vagenas had obtained Union representation with respect to Vagenas' receipt of the May 21 proposed 5-day suspension; indeed, Blanch had submitted the Union' response to the proposed suspension on June 10 specifically demanding that no discussions regarding the pending discipline be held without including the Union. The nature of Blanch's response to the proposed discipline served as clear notice that the AFGE Local 1592 planned to contest any discipline imposed on Vagenas. Moreover, when Aranda met with Vagenas after management made its July 28 decision to suspend Vagenas, Vagenas specifically asked Aranda what affect his signing of the settlement agreement would have on his plan to challenge the discipline. These meetings between Aranda and Vagenas were held before AFGE

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Section 7103(a)(9) defines "grievance" to include "any complaint by any employee concerning any matter relating to the employment of the employee."

Local 1592 could file its Step 1 grievance on August 11. That they concerned a "grievance" is confirmed by the use to which AFMC put the settlement agreement signed on August 5. AFMC argued at arbitration that the settlement agreement barred arbitration of the 5-day suspension.

AFMC and Aranda were put on notice on several occasions (by Blanch's June 10 response to the proposed suspension -- a copy of which was placed in Aranda's EEO file, and by Vagenas telling Aranda during the meetings at issue in this case) that the AFGE Local 1592 was representing Vagenas concerning the proposed suspension.

AFMC was on notice Vagenas was represented by the AFGE Local 1592 regarding the potential grievance, and in order to fulfill the intent and purpose of section 7114(a)(2)(A) to provide the Union with an opportunity to safeguard its interest and the interest of employees in the bargaining unit.

I conclude that, although Vagenas and Aranda were engaged in a meeting involving an EEO proceeding at the informal stage, does not insulate AFMC from complying with the requirements of section 7114(a)(2)(A) of the Statute with respect to Vagenas' potential grievance concerning his proposed suspension.

In light of all of the foregoing, I conclude that Vagenas protesting his proposed suspension and the potential grievance constituted a "grievance" within the meaning of section 7114(a)(2)(A).

Accordingly, I conclude that AFMC violated section 7116 (a)(1) and (8) of the Statute because it did not comply with the requirements of section 7114(a)(2)(A) of the Statute.

C. AFMC Bypassed AFGE Local 1592

Agencies unlawfully bypass an exclusive representative when they communicate directly with bargaining unit employees concerning grievances, disciplinary actions and other matters relating to the collective bargaining relationship. *Social Security Administration*, 55 FLRA 978 (1999), quoting *FCI Bastrop*, 51 FLRA 1339, 1346 (1996). When an employee has designated a union to represent him concerning a pending disciplinary matter, agency management is required to deal with the employee's designated union representative concerning that disciplinary matter. *Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California*, 35 FLRA 345

(1990); and *438th Air Base Group (MAC), McGuire Air Base, New Jersey*, 28 FLRA 1112 (1987).

In the present case, there is no dispute that at the time the AFMC was discussing and finalizing the settlement agreement with Vagenas, the AFGE Local 1592 was representing him concerning the suspension. Although no formal grievance had yet been filed, AFMC knew during this time that AFGE Local 1592 represented Vagenas concerning the suspension. AFGE Local 1592, through Blanch, notified AFMC on June 10, 1999, that it would serve as Vagenas' representative on the proposed suspension. Furthermore, Aranda was provided a copy of Blanch's notification. Thereafter, with full knowledge that AFGE Local 1592 represented Vagenas, AFMC's representatives began dealing with Vagenas and ultimately entered into a settlement agreement which resolved all of the matters addressed in his complaints, including the suspension.

AFMC never sought to convey the terms of this settlement to the Union - either while it was being discussed or even after it was signed. AFGE Local 1592 was not notified of the meetings during which the settlement agreement was discussed and finalized, and was not aware that AFMC had entered into a settlement agreement with Vagenas which resolved the suspension.

AFMC's objective during settlement negotiations was to resolve <u>all</u> of the concerns and allegations raised by Vagenas in his complaints, including his complaint about his suspension, and to prevent him from pursuing further complaints. *See Department of Veterans Affairs Medical Center, Denver, Colorado*, 44 FLRA 768, 770 (1992).

For the reasons discussed above for purposes of the formal discussion allegation, Aranda was a representative of AFMC, and not merely a neutral. Regardless of Aranda's status, the settlement agreement required the approval of Hamel and Jepperson, both of whom were undoubtedly management representatives. As noted above, it was Hamel who required that the settlement agreement dispose of all of Vagenas' concerns.

Further, the Authority has held an exclusive representative retains its representational rights when a matter is addressed in the EEO forum. *Luke Air Force Base*, 54 FLRA, 716, 733. In the present case, the arbitrator's decision leaves no doubt that, although the settlement concerned an EEO matter, it also disposed of the suspension. AFMC's actions effectively eliminated any representation benefits that AFGE Local 1592 had to offer Vagenas

concerning the suspension. Its actions effectively eliminated AFGE Local 1592's attempts to challenge the suspension through the grievance process and ultimately through arbitration.

AFMC failed to notify AFGE Local 1592 of the settlement agreement at any time during the processing of the grievance. AFMC answered the grievance over the suspension at Step 1 and did not raise the terms of the settlement agreement as a defense; AFMC responded to the grievance at Step 2 and likewise did not raise the terms of the settlement agreement; even after AFGE Local 1592 invoked arbitration, AFMC failed to inform AFGE Local 1592 of the existence of the settlement agreement. It was not until the arbitration hearing itself that AFMC revealed the terms of the agreement to AFGE Local 1592. Thus, AFMC's bypass of the AFGE Local 1592, and subsequent silence regarding the settlement agreement, caused AFGE Local 1592 to expend funds for an arbitration which it otherwise might not have pursued.

In light of the foregoing, I conclude that AFMC violated section 7116(a)(1) and (5) of the Statute because it bypassed AFGE Local 1592 by failing to include it in settlement discussions which were deliberately broad enough to encompass all issues being raised by Vagenas, including the proposed suspension.

REMEDY

In *F.E. Warren*, 52 FLRA 149 (1996) the Authority noted that it had developed several "traditional" remedies, including a cease-and-desist order accompanied by the posting of a notice to employees that meet the criteria of a remedy, and which are provided in most cases where a violation is found. The Authority determined that a remedy which is not normally granted (i.e., a nontraditional remedy) may be granted, but that it requires independent justification.

In the present case, GC of the FLRA seeks the traditional remedy of a posting of a notice to employees in which Respondent is ordered to cease-and-desist from violating the Statute. GC of the FLRA further requests that AFMC be ordered to reimburse the AFGE Local 1592 for the cost associated with the arbitration before Norman Brand, one thousand nine hundred seventy-eight dollars, ($1,978.00) half of the cost of the arbitration.

I conclude that this remedy is appropriate because the AFMC bypassed the AFGE Local 1592 and dealt directly with

Vagenas in the face of numerous communications in which the Union was identified as Vagenas' designated representative. As a result of this violation, which was compounded by AFMC's failure to notify AFGE Local 1592 of the existence of the settlement agreement at all stages of the grievance prior to arbitration, the Union incurred considerable expenses. Furthermore, had AFGE Local 1592 been notified of the existence of the settlement agreement with the broad language excluding any other form of redress, it is reasonable to conclude that it would not have proceeded with the grievance and invoked arbitration.

Applying the doctrine of sovereign immunity, the Authority requires the party requesting a monetary remedy to establish that there is a statutory authority (other than that provided in the Statute) for the expenditure of such funds. *Immigration and Naturalization Service, Los Angeles District, Los Angeles, California*, 52 FLRA 103, 104-06 (1996). However, simply because a remedy requires an agency to expend money does not automatically translate into a remedy requiring money damages. *U.S. Department of Transportation, Federal Aviation Administration, Northwest Mountain Region, Renton, Washington*, 55 FLRA 293, 298, 299 (1999) (*FAA*) petition for review filed *sub nom., Department of Transportation, Federal Aviation Administration, Northwest Mountain Region, Renton, Washington v. FLRA*, No. 99-1165 (D.C. Cir. April 29, 1999).

In the present case, assuming that the payment of money ($1978.00) to the Union would violate the doctrine of sovereign immunity, AFMC is ordered to cover the Union's expense in a future arbitration hearing in an amount equal to the one-thousand nine-hundred and seventy-eight dollars ($1978.00). *See, U.S. Department of Veterans Affairs*, 55 FLRA 1213, 1216 (2000); and *Ogden Air Logistics Center, Hill Air Force Base, Utah*, Case No. DE-CA-30268 (ALJD Rept. No. 119, May 12, 1995). Because AFMC has the authority to expend money to pay arbitrators and it has the authority to comply with such an order in this case.

Having concluded that AFMC violated section 7116(a)(1), (5) and (8) of the Statute, it is recommended that the Authority issue the following Order:

Order

Pursuant to section 2423.41(c) of the Authority's Regulations and Section 7118 of the Federal Service Labor-Management Relations Statute, Ogden Air Logistics Center, Hill Air Force Base, Utah shall:

1. Cease and desist from:

(a) Failing or refusing to provide the American Federation of Government Employees, Local 1592, advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning any grievance, potential grievance or any personnel policy or practices or other general conditions of employment.

(b) Bypassing the American Federation of Government Employees, Local 1592, the exclusive representative of certain of its employees, and dealing directly with bargaining unit employees concerning grievances, disciplinary actions and other matters relating to the collective bargaining relationship.

(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights assured to them by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative actions in order to effectuate the purposes and polices of the Federal Service Labor-Management Relations Statute:

(a) Provide the American Federation of Government Employees, Local 1592, advance notice and the opportunity to be represented at formal discussion with bargaining unit employees concerning settlement of potential grievances.

(b) Pay to the American Federation of Government Employees, Local 1592, the amount of $ 1,978.00 which represents the Union's cost to arbitrate (Case No. 03488-7) or in the alternative, at its discretion, pay the Union's expense in a future arbitration hearing in an amount equal to $1,978.00.

(c) Post at Hill Air Force Base, Utah copies of the attached Notice to All Employees on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of forms, they shall be signed by the Commander, Hill Air Force Base, and they shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be take to ensure that such Notices are not altered, defaced or covered.

(d) Pursuant to Section 2423.41(e) of the Authority's Regulations, notify the Regional Director of the

Denver Region, 1244 Speer Boulevard, Suite 100, Denver, Colorado 80204-3581, in writing within 30 days from the date of this Order, as to what steps have been take to comply.

Issued, Washington, DC, February 28, 2001

_____
SAMUEL A. CHAITOVITZ
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 the Air Force, Air Force Materiel Command, Ogden Air Logistics Center, Hill Air Force Base, Utah, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to provide the employees' exclusive representative, the American Federation of Government Employees, Local 1592 (the Union), advance notice and an opportunity to be represented at formal discussions with bargaining unit employees concerning any grievance or any personnel policy or practice or other general condition of employment, including, to the extent required by the Federal Service Labor-Management Relations Statute, meetings to settle EEO complaints filed by bargaining unit employees.

WE WILL NOT bypass the Union, the exclusive representative of our employees, and deal directly with unit employees who have designated the Union to represent them in proposed disciplinary actions.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL reimburse the Union one thousand nine hundred seventy-eight dollars ($1978.00), the cost associated with the Union's arbitration of case no. 03488-7 or, in the alternative, reimburse the Union for its expenses in a future arbitration case in an amount equal to $1,978.00.

(Respondent/Activity)

Date: By:

(Signature)

(Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority whose address is: 1244 Speer Boulevard, Suite 100, Denver, CO 80204, 303-844-5224.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by SAMUEL A. CHAITOVITZ, Chief Administrative Law Judge, in Case
No. DE-CA-00366, were sent to the following parties:

_____

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

Kevin Cutler, Esq. **P 855 724 090**
Office of the Staff Judge Advocate
OO-ALC/JAM
6026 Cedar Lane, Building 1278
Hill AFB, UT 84056-5911

Ayodele Labode, Esq. **P 855 724 091**
Matthew Jarvinen, Esq.
Counsel for the General Counsel
Federal Labor Relations Authority
1244 Speer Boulevard, Suite 100
Denver, CO 80204

REGULAR MAIL:

Scott Blanch, President
AFGE Council 214
7282 5th Street, Bldg. 179
Hill AFB, UT 84056

President
AFGE, AFL-CIO
80 F Street, NW.
Washington, DC 20001

Dated: February 28, 2001
Washington, DC