UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: May 12, 1999

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE NAVY
NAVAL WEAPONS STATION
YORKTOWN, VIRGINIA AND
DEPARTMENT OF THE NAVY
ATLANTIC ORDNANCE COMMAND
YORKTOWN, VIRGINIA

Respondents

and Case Nos. WA-CA-80545
WA-CA-80560

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R4-1

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

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FEDERAL LABOR RELATIONS AUTHORITY

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DEPARTMENT OF THE NAVY NAVAL WEAPONS STATION YORKTOWN, VIRGINIA AND DEPARTMENT OF THE NAVY ATLANTIC ORDNANCE COMMAND YORKTOWN, VIRGINIA Respondents	
and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R4-1 Charging Party	Case Nos. WA-CA-80545 WA-CA-80560

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 **JUNE 14, 1999**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

JESSE ETELSON
Administrative Law Judge

Dated: May 12, 1999
Washington, DC

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1 Respondent Department of the Navy, Atlantic Ordnance Command, Yorktown, Virginia, was formerly Department of the Navy, Weapons Support Facility, Yorktown, Virginia, and the consolidated complaint in these cases so named it. The complaint was amended at the hearing to reflect the new name, and the present case caption reflects that change. The complaint was also amended at the hearing to allege that the renamed Respondents are "activities" rather than "agencies." There was no objection to, or denial of, this amendment.

OALJ 99-29

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

DEPARTMENT OF THE NAVY NAVAL WEAPONS STATION YORKTOWN, VIRGINIA AND DEPARTMENT OF THE NAVY ATLANTIC ORDNANCE COMMAND YORKTOWN, VIRGINIA Respondents1	
and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R4-1 Charging Party	Case Nos. WA-CA-80545 WA-CA-80560

Thomas F. Bianco, Esq.
For the General Counsel

Joseph R. Barco, Agency Representative
For the Respondents

George L. Reaves, Jr., National Representative
For the Charging Party

Before: JESSE ETELSON
Administrative Law Judge

DECISION

Statement of the Case

The consolidated complaint alleges that the Respondents failed or refused to comply with section 7131(a) of the Federal Service Labor-Management Relations Statute (the

Statute), and thereby violated sections 7116(a)(1) and (8) of the Statute, by denying requests by the Charging Party (the Union) for official time for two employees. These employees, Judith Burton and Sharon Green, were designated as agents of the Union. The requests for official time were for the purpose of their participating in bargaining over proposed changes that would affect the conditions of employment of employees represented by the Union.2

Respondents' answer admits most of the jurisdictional and factual allegations of the complaint. It denies the allegation describing the Union as the exclusive representative of a single unit of employees appropriate for collective bargaining. The answer asserts that, as a result of a reorganization, the Union represented two separate appropriate units, and that a petition to establish a separate appropriate unit, reflecting the reorganization, was pending before the Authority.

The answer denies that the Union requested, and that the Respondent denied, official time for Sharon Green. The answer admits that both Sharon Green and Judith Burton, the Union's designated agents, are employees under section 7103 (a)(2) of the Statute, but asserts that both are not in the certified bargaining unit as a result of the reorganization and its effect on the unit. The answer also admits that the proposed changes over which the Union requested bargaining affected the conditions of employment of the employees in the certified bargaining unit. However, the official time having been requested to conduct bargaining pertaining to the conditions of employment of employees of activities by which the designated employee-representatives were not employed, the Respondents' answer denies that the designees were entitled to official time under section 7131(a).

A hearing on the complaint was held in Yorktown, Virginia, on February 9, 1999. The General Counsel presented evidence establishing the evidentiary basis for the complaint. The Respondents participated in certain stipulations placed in the record but otherwise presented no evidence. One of the stipulations established the truth of the previously disputed allegation that the Union requested official time for Sharon Green. It was stipulated that such request was denied "during the pendency of [representation proceedings concerning the effect of the reorganization on the bargaining unit]" (Tr. 21). Counsel for the General

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2 Shortly before the hearing, Counsel for the General Counsel moved to amend the complaint to add three substantive but noncontroversial allegations. The motion is granted.

Counsel and for the Respondents filed posthearing briefs.

Findings of Fact

Prior to October 1997, Respondent Department of the Navy, Naval Weapons Station, Yorktown, Virginia (Weapons Station) was an "activity" solely under the direction of the Department of the Navy, Naval Ordnance Center, Atlantic Division, located on the Yorktown, Virginia base.[3] Weapon Station's mission was the receipt, segregation, storage and issuance of ordnance, but also included base support functions such as housing and safety. The Union is the certified exclusive representative of a unit of employees of Weapons Station.

Naval Ordnance Center, Atlantic Division, was disestablished in October 1997. Weapons Station, although it continued to exist, was reorganized. The ordnance functions listed above, and the bargaining unit employees who performed those functions, were transferred to an organization called, briefly, Department of the Navy, Weapons Support Facility, Yorktown, Virginia (WSF), the original Co-respondent in this case. WSF ultimately became Respondent Department of the Navy, Atlantic Ordnance Command, Yorktown, Virginia (AOC). The commanding officers of both Weapons Station and AOC report to the commanding officer of the Naval Base, Norfolk, Virginia. So, presumably, did the commanding officer of WSF.

The bargaining unit employees who remained with Weapons Station continued to perform the same base support functions they had previously performed, at their previous locations and under their previous first-level supervisors. Similarly, the employees who were transferred to WSF/AOC remained at their existing locations, under their existing first-level supervisors.

The Union and the Department of the Navy, Human Resources Center East, on behalf of the Department of the Navy, filed a series of competing petitions with the Washington Regional Office of the Authority concerning the effect of the reorganization on the existing bargaining unit. The Union and the Department agreed that what was then WSF (and later became AOC) was a successor employer of

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[3] "*Activity*" means any facility, organizational entity, or geographical subdivision or combination thereof, of any agency. Federal Labor Relations Authority Rules and Regulations § 2421.4, 5 CFR 2421.4.

the former Weapons Station employees who had been transferred to WSF and that the Union should continue to represent them. The Department, in its petitions, asserted that the employees of WSF who were properly included in a bargaining unit constituted an appropriate unit that was separate from the Weapons Station bargaining unit. The Department requested the establishment of such a separate appropriate unit. The Union asserted that the existing unit survived the reorganization and remained a single appropriate unit.

These petitions were pending when the Union, having been duly notified by Weapons Station and WSF, respectively, that each of these activities proposed to implement an "instruction" that (as has been admitted) would affect the conditions of employment of their respective bargaining unit employees, requested bargaining over the "instruction's" proposed changes. The Union designated Sharon Green, its executive vice president, to negotiate with Weapons Station over that activity's proposed changes, and requested official time for her for that purpose. Green was one of the former Weapons Station employees who had been transferred to WSF/AOC and was no longer an employee of Weapons Station.[4] The request for official time was denied. Green did negotiate for the Union, but used three hours of annual leave to do so.

The Union designated Judith Burton, its president, to negotiate with WSF/AOC over that activity's proposed changes, and requested official time for her. Burton had been, and remained, an employee of Weapons Station.[5] The request for official time was denied.[6]

After these events, the representation proceeding initiated by the petitions mentioned above was transferred to the Regional Director for the Authority's San Francisco

[4] The record establishes that Green was not an employee of Weapons Station at the time of the hearing. I infer that, consistent with the parties' positions here, she was not an employee of Weapons Station at the time of the request.

[5] My observations concerning Green in n.4 apply also to Burton, in reverse, since she remained an employee of Weapons Station.

[6] While here, again, the positions of the parties suggest that the denials of both requests were based on the designee's being employed by the wrong activity or in the wrong bargaining unit, the record contains nothing about the reasons, if any, given when the requests were denied.

Region. On February 23, 1999, the Regional Director issued a Decision and Order granting the Department of the Navy's petition and recognizing the establishment of an appropriate unit of employees of WSF/AOC separate from the existing unit of Weapons Station employees. That decision is subject to review by the Authority pursuant to § 2422.31 of the Authority's Rules and Regulations.

Discussion and Conclusions

The issue here is whether the Respondents were obligated to authorize official time for Burton and Green as requested. Section 7131(a) of the Statute provides, in pertinent part:

> (a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding [sic], during the time the employee otherwise would be in a duty status.

The Respondents do not dispute Burton's or Green's status as employees representing the exclusive representative, or that the request for official time was for the purpose of their acting in that capacity in the negotiation of a collective bargaining agreement.[7] Therefore, the Respondents were obligated to authorize official time for these employees absent some reason that is not apparent from section 7131(a) on its face.

The Authority supplied such a reason early in its history, in *United States Air Force, 2750th Air Base Wing Headquarters, Air Force Logistics Command, Wright-Patterson AFB, Ohio*, 7 FLRA 738 (1982) (*2750th Air Base Wing*). It held that, although neither the language of section 7131(a) nor its legislative history indicates that Congress definitively addressed the matter, it would be inconsistent with the overall scheme of the Statute to mandate official time for employees to engage in collective bargaining negotiations involving a bargaining unit other than that in which the

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[7] As noted, the Respondents admitted that the proposed changes over which the Union requested to bargain would affect the conditions of employment of bargaining unit employees. The Respondents do not contend that any change in the number of bargaining units negates this admission or its implications concerning the nature of the requested negotiations.

employee-negotiators are employed. Therefore, the Authority concluded, even if the employee-negotiators are employed by a "subordinate element" of the same agency to which the employing entity of the bargaining unit for which the employee-negotiators intend to negotiate is also a "subordinate element," official time under section 7131(a) "accrues only to an employee . . . who is a member of the bargaining unit to which the right to negotiate the bargaining agreement applies." *Id.* at 741-42.[8]

Here, the Union designated Burton and Green, respectively, to negotiate on behalf of the employees in whose bargaining units they had undisputedly been employed before the reorganization. At the time official time was requested for them, however, each was employed by an "activity" other than the one in which the employees on whose behalf she was designated were employed. The Respondents had petitioned the Authority, asserting that a separate bargaining unit at WSF was now appropriate.

Under the Respondents' view of the appropriate bargaining units, a view later adopted by the San Francisco Regional Director, neither Burton nor Green was a member of the bargaining units the Union designated her to represent. Therefore, the Respondents argue, the requests for official time did not meet the requirements of section 7131(a).[9]

Counsel for the General Counsel, noting the absence of a final unit determination in favor of the Respondents' unit position, relies on § 2422.34(a) of the Authority's Rules and Regulations, subtitled, "*Existing recognitions, agreements, and obligations under the Statute.*" It provides that:

> During the pendency of any representation proceeding, parties are obligated to maintain existing recognitions, adhere to the terms and conditions of existing collective bargaining

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[8] Subsequently, the Authority took the opportunity to explain that its decisions about entitlement to official time should not be taken to preclude any employee from participating in negotiations other than on official time. *United States Department of Defense, Department of the Air Force, San Antonio Air Logistics Center, Kelly Air Force Base, Texas*, 15 FLRA 998, 1001 n.6 (1984).

[9] None of the parties here have commented on the significance, if any, of the absence of evidence as to what reason the Respondents gave at the time they denied the requests for official time.

> agreements, and fulfill all other representational and bargaining responsibilities under the Statute.

The General Counsel argues, and I agree, that among the Statutory obligations encompassed by § 2422.34(a) is an agency's (or activity's) obligation to authorize official time pursuant to section 7131(a) of the Statute. The Respondents argue that § 2422.34(a), so applied, is inconsistent with section 7131(a) and should not be followed. Questioning the regulation's consistency with the Statute is, of course, beyond my purview.

The Respondents also argue that their challenge to Burton's and Green's bargaining unit status falls within the exception to § 2422.34(a) that is found in § 2422.34(b), (as that subsection existed at the time the requests were denied):

> Notwithstanding paragraph (a) of this section and except as otherwise prohibited by law, a party may take action based on its position regarding the bargaining unit status of individual employees, pursuant to 5 U.S.C. 7103(a)(2), 7112 (b) and (c): *Provided, however*, that its actions may be challenged, reviewed, and remedied where appropriate.

Thus, the Respondents argue, they properly based their actions on their position that Burton and Green were not members of the bargaining units that they were designated to represent. Such actions, the Respondents assert, were taken at the Respondents' peril, but must stand unless and until their bargaining unit position is rejected at the conclusion of the representation proceeding.

This argument is not without its appeal. However, the devil is in the details. The Respondents' position regarding Burton's and Green's bargaining unit status is not based on 5 U.S.C. 7103(a)(2), 7112(b) or (c) (these provisions corresponding to the numbered sections of the Statute). Section 7103(a)(2) determines whether an individual is an "employee." The Respondents have admitted that Burton and Green are employees within the meaning of that section. Section 7103(a)(2) does not deal with the question of whether an individual employee, although qualifying as such, may be included in an appropriate bargaining unit. Such questions are left to sections 7112 (b) and (c).

Section 7112(b) provides that certain types of employees may not be included in a bargaining unit because of the nature of their work. Section 7112(c) provides that certain employees may not be represented by certain unions because the employees are "engaged in administering any provision of law relating to labor-management relations." The Respondents have made no claim that either Burton or Green must be excluded from a bargaining unit for either 7112(b) or 7112(c) reasons. Thus, the § 2422.34(b) exception to § 2422.34(a) does not save the Respondents here.

However, another of the Respondents' defenses is more difficult to dispel. The Authority has stated that an employer "activity" has no obligation "under section 7131(a) to grant official time or under section 7131(d) to negotiate concerning the authorization of official time for any of its employees to represent the union in collective bargaining on behalf of employees of a *separate and independent activity*." *Veterans Administration Central Office, Washington, D.C. and Veterans Administration Medical Center, Cincinnati, Ohio*, 23 FLRA 512, 515 n.2 (1986) (*Veterans Administration*).[10] Lest there be any mistake, the Authority recognized this principle as one that, while similar to the principle concerning official time for an employee to negotiate for a different *bargaining unit*, was separate and distinct from that principle and based on different precedent. *Id.* It is also clear that a "separate and independent activity" may be an activity that is a component of the same parent agency as the "activity" that had been requested to grant official time.

What, then, is a "separate and independent activity"? In *Dahlgren* (see n.10), the Authority rationalized its denial of an obligation to negotiate over official time for its employee(s) to negotiate with another activity by referring to the fact that such negotiations concerned only conditions of employment of the *other* activity's employees. 12 FLRA at 733-35. The *Dahlgren* decision cited above was the Authority's decision on reconsideration of its decision

[10] The Authority purported, in this statement, to describe its prior holding in *U.S. Naval Space Surveillance Systems, Dahlgren, Virginia,* 12 FLRA 731 (1983) (*Dahlgren*), *aff'd sub nom. American Federation of Government Employees, Local 2096 v. FLRA*, 738 F.2d 633 (4th Cir. 1984). While one might question whether that description of the holding in *Dahlgren* is accurate in every respect, the statement in *Veterans Administration* must be deemed to reflect the Authority's understanding of its own precedent. It is, therefore, entitled to my deference.

reported at 9 FLRA 193. The only description of the separateness or independence of the two activities involved in *Dahlgren* is found in a footnote to the earlier decision:

> 1/ USNSSS and the Weapons Center are separate activities within the Department of the Navy which report through separate chains of command to the Chief of Naval Operations. Both activities are subordinate elements of the Department of [the] Navy. USNSSS is a tenant activity of, and receives personnel and other support services from, the Weapons Center as set forth in a support agreement.

As so described, the relationship between those two activities appears to be at least as close as the relationship between Weapons Station and WSF/AOC in the instant case.[11] Therefore it is significant that the Authority applied to the *Dahlgren* parties a principle designed for situations where official time was requested to negotiate with a "separate and independent" activity.

I am led to conclude that the Authority intended its *Dahlgren* holding (as restated in *Veterans Administration*) to apply generally--allowing, perhaps, for exceptional circumstances--whenever official time is requested for negotiations with "another employer" or "a different activity" (terms that the Authority used elsewhere in its *Dahlgren* decision on reconsideration. 12 FLRA at 732, 734.) Thus I find that the words, "separate and independent," are, for the most part, mere surplusage. That is to say, like the word, "mere," in the last sentence and the words, "to say," earlier in this sentence, they serve no substantive purpose but reflect, in the latter examples, conventional speech patterns, and in the former, customary legal reticence.

Since it is undisputed that Sharon Green was not an employee of Weapons Station and that Judith Burton was not an employee of WSF/AOC, neither was entitled to official time under section 7131(a) to negotiate on behalf of the employees of those respective activities. This renders irrelevant the question of the appropriate bargaining unit or units and of the final disposition of the representation

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[11] *Dahlgren* was submitted to the Authority on a stipulation of facts. Therefore, there is little room for speculation about any facts other than those quoted above upon which the Authority might have relied.

petitions.[12] Accordingly, I recommend that the Authority issue the following order.

ORDER

The consolidated complaint is dismissed.

Issued, Washington, D.C., May 12, 1999

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JESSE ETELSON
Administrative Law Judge

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12 No party in this unfair labor practice proceeding has questioned the legitimacy of the reorganization or the resulting division of former Weapons Station employees between Weapons Station and WSF/AOC.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by JESSE ETELSON, Administrative Law Judge, in Case Nos. WA-CA-80545, WA-CA-80560, were sent to the following parties in the manner indicated:

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Dated: May 12, 1999
Washington, DC