MEMORANDUM DATE: January 2, 1996

TO: The Federal Labor Relations Authority

FROM: ELI NASH, JR.
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE AIR FORCE
MAXWELL AIR FORCE BASE
MAXWELL AIR FORCE BASE, ALABAMA

Respondent

and Case No. AT-CA-40902

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 997

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(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

DEPARTMENT OF THE AIR FORCE MAXWELL AIR FORCE BASE MAXWELL AIR FORCE BASE, ALABAMA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 997 Charging Party	Case No. AT-CA-40902

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. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **FEBRUARY 5, 1996**, and addressed to:

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

ELI NASH, JR.
Administrative Law Judge

Dated: January 2, 1996
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

DEPARTMENT OF THE AIR FORCE MAXWELL AIR FORCE BASE MAXWELL AIR FORCE BASE, ALABAMA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL Charging Party	Case No. AT-CA-40902

William R. Kraus, Esq.,
Phillip G. Tidmore, Esq. and
Wesley McAuley
For the Respondent

Richard S. Jones, Esq.
For the General Counsel

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

On August 10, 1994, the American Federation of Government Employees, Local 997 (herein called the Union) filed a charge against the Department of the Air Force, Maxwell Air Force Base, Maxwell Air Force Base, Alabama (herein called the Respondent). Thereafter, on January 30, 1995, the Atlanta Regional Director issued a Complaint and Notice of Hearing alleging that Respondent violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute, as amended (herein called the Statute) by conducting a formal meeting with certain bargaining unit employees without affording the Union notice and an opportunity to be represented.

A hearing on the Complaint was held in Montgomery, Alabama at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were timely filed by Respondent and the General Counsel and have been carefully considered.

Upon the entire record in this matter, my observation of the witnesses and their demeanor and from my evaluation of the evidence I make the following:

Findings of Fact

The Union is the exclusive representative of a unit of employees appropriate for collective bargaining at Respondent's facility. Lieutenant Donald S. Dunbar, Director of the Medical Resource Management, is the highest-ranking official in Building 754. Dunbar is responsible for the overall direction of this section of 16 people, including himself. There are five civilian employees, as well as a number of military personnel working under his direction. The section handles all the monies for the organization, cash and through finance. It also handles all manpower and other resources for the organization. In addition it does statistical data tracking and reporting to outside agencies and up line.

Sometime around March 29, 1994, Dunbar prepared a draft memorandum containing specific items that he intended to discuss with employees. Dunbar testified that the memorandum was an attempt to put the current practice in writing, because there were some generally accepted office practices and expectations that employees perhaps did not understand fully. After giving the matter careful thought, Dunbar wrote down the items in draft form and gave them to Sergeant Florence Nancarrow, also a supervisor, to type. After Dunbar finalized the document, he returned it to Nancarrow, who made final corrections. Along with the specific set of numbered topics to discuss, the names of employees who were to attend were typed on the document with a space for them to sign. Although the memorandum was entitled "New Office Procedures For Immediate Implementation," Dunbar denies that the items were new and that he considered it "just a routine-type thing."

Debbie Abbott, a civilian employee and bargaining unit member was employed in Building 754. Abbott, who was the General Counsel's sole witness, testified that on Tuesday, March 29, 1994 at about 7:00 in the morning she was told

that there was going to be a mandatory meeting at 7:30a.m.[1] According to Abbott's credited testimony, the meeting was held in the front office at the very front of the building because it is the only room large enough to accommodate everybody, although there are a couple of offices in the area which were not the work area of everyone who attended.

Abbott testified that the meeting lasted about 30 minutes. Abbott also says that Dunbar went through his prepared lists of topics in the memorandum, discussing each in order and that people would talk about how they felt about an item. Only the topics listed in the memorandum were discussed, according to Abbott. In addition, Abbott's uncontroverted testimony discloses that all of the enumerated items except item one and item six were changes in policy. Thus, she testified that item two requiring an employee explanation of his whereabouts when running errands did not exist prior to the memorandum; item three requiring that employees put down phone numbers did not exist; item four restricting employees as to when they could take lunch; and, item five, employees had never been denied overtime for working late was new.

Union representatives did not attend the meeting because they were not notified that it was going to take place. Shortly thereafter, possibly within a week, Respondent rescinded the memorandum announcing the foregoing policies on advice from Respondent's Employment Relations Office that "there was possibly some problems [sic] with some of the words in the document." The policies, according to Dunbar, are still the practice even after the letter was rescinded.

Dunbar's recollection of the meeting differs from Abbott. He recalled that there was discussion about personnel who were going to be out of the office the next week and that everyone had an opportunity to talk about what they were currently working on and what help might be needed within the office. While he did not recall whether other special topics were brought up, he does remember issuing the letter, asking everyone to take a look at it, going through

[1] Dunbar was uncertain as to the date of the meeting, however, he did not deny that it could have been held on March 29, 1994, but as a regularly scheduled Friday staff meeting which could have "slipped from the following Friday" because there were things that needed to be discussed so it was held on "Tuesday." Nancarrow, was firm in her belief that the meeting occurred on April 1. Moreover, contrary to Dunbar's testimony, Nancarrow said that staff meetings were held only on Fridays.

the points and asking if there were any questions. Finally, he recalled that there were no questions.2

Dunbar continued to assert the position that what was contained in the letter was strictly routine and that there was no real change to any expectations or practices within the office.

Discussion and Conclusions

Respondent protests that this is not a "formal discussion" case, but that the evidence indisputably shows nothing more than a weekly staff meeting held to disseminate information to employees occurred here. Also, Respondent asserts that even if the memorandum in this case amounted to a unilateral change, it still does not alter the fact that there was no "formal discussion."

The General Counsel insists that even assuming the meeting was informal to begin with, it can and did convert to a formal discussion and that after the memorandum was distributed by Dunbar and the changes were discussed with employees, the meeting became a formal discussion, no matter on what day it occurred. The General Counsel also claims that the memorandum contains items which involve negotiable conditions of employment such as breaks and lunch; overtime procedures; and a sign-in sign-out log, all of which were discussed at the March 29, 1994 meeting. Thus, it is asserted that the meeting was a formal discussion which was held without notifying the Union and allowing it an opportunity to be present when conditions of employment were discussed.

With regard to Respondent's defenses that the meeting was "nothing more than a weekly staff meeting" and its claim that the instant complaint should be dismissed, even assuming that the policy letter amounted to a unilateral change in procedures, because the other indicia of formal discussion are not present, the undersigned finds no merit. Thus, *Department of Veterans Affairs, VA Medical Center, Gainesville, Florida, 49 FLRA 1173 (1994)* is factually

2 Nancarrow's version of what occurred differs from the foregoing, making it clear that the two did not conspire on their testimony. Despite the variations regarding the length of the meeting, what day the meeting occurred and her certainty that the weekly staff meetings never deviate from Friday, neither can be discredited, as each was certain of their respective testimony. In light of the inconsistencies in their testimony, I find the testimony of Abbott more reliable and therefore I have credited her.

distinguishable. Likewise, *Defense Logistics Agency, Tracy, California, 14 FLRA 475 (1984)* is inapposite, since even where all the criteria are not met, all the circumstances of the matter must be considered before dismissal.

The Authority looks at four factors to determine whether an exclusive representative's right to representation attaches under section 7114(a)(2)(A) of the Statute. Each of the four elements must be present: (1) there must be a discussion; (2) which is formal; (3) between one or more representatives of the agency and one or more unit employees or their repre-sentatives; (4)concerning any grievance or personnel policy or practice or other general condition of employment. *See Veterans Administration Medical Center, Long Beach, California*, 41 FLRA 1370, 1379 (1991), enforced, 16 F.3d 1526 (9th Cir. 1994); *Veterans Administration, Washington, D.C. and VA Medical Center, Brockton Division, Brockton, Massachusetts*, 37 FLRA 747, 753 (1990). As discussed below, these factors have been satisfied in this case.

There is little question that a discussion between Dunbar and several employees under his supervision was held on March 29, 1994. Regarding whether any new personnel policies were discussed at the meeting, the March 29, 1994 memorandum disclosed several topics which clearly appear to be new. While Respondent asserts that Dunbar simply memorialized policies that were already in existence and were provided for by hospital regulations, Respondent offered no corroboration for this position nor did it offer any hospital regulation as evidence to show that any of the policies preexisted the March 29, 1994 memorandum. The Authority has said that such corroborating testimony or documentation is necessary to rebut clear evidence presented by the General Counsel. *Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah,* 35 FLRA 891 (1990). Here, one need only look at the topics contained in the memorandum to see that negotiable conditions of employment were indeed contained in the memorandum.[3] Absent some documentation, it must be assumed that those conditions of employment did not exist prior to Dunbar preparing the memorandum, otherwise Respondent could have offered the

[3] *Department of Health and Human Services, Social Security Administration, Baltimore, Maryland,* 19 FLRA 1085 (1985) (The time that breaks and lunch may be observed during the workday); *Department of Agriculture, Meat Grading and Certifi-cation Branch*, 22 FLRA 496 (1986) (Overtime procedures); *Department of Health and Human Services, Region II*, 26 FLRA 814 (1987) (Timekeeping procedures such as sign-in and sign-out log).

existing regulations to show that Dunbar was simply reaffirming those old policies.

In considering whether a meeting is formal, the Authority has identified eight factors to be studied, which are as follows: (1) whether the individual who held the discussion is merely a first-level supervisor or is higher in the management hierarchy; (2) whether any other management representative 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 for the meeting; (7) whether attendance was mandatory; and, (8) the manner in which the meeting was conducted (i.e., whether the employees' identities and comments were noted or transcribed). *Marine Corps Logistics Base, Barstow, California,* 45 FLRA 1332, 1335 (1992); *U.S. Department of Labor, Office of the Assistant Secretary for Administration and Management, Chicago, Illinois, 32 FLRA 465, 470 (1988); Department of Health and Human Services, Social Security Administration, Bureau of Field Operations,* 10 FLRA 115 (1982). The factors listed should not be applied in a mechanistic fashion by the initial fact finder for the Authority examines the totality of facts and circumstances in making its determination. *National Treasury Employees Union v. Federal Labor Relations Authority,* 774 F.2d 1181, 1189 (1985).

In examining the total record, it appears that the eight factors supporting formality are met. Thus, Dunbar, who conducted the meeting is a second-level supervisor to several employees attending the meeting and, not merely a first-line supervisor; other supervisors were present; the meeting was held in an area of the building where everyone could gather and not in a work area; the meeting lasted at least 30 minutes; the content of the meeting was carefully planned by Dunbar, who worked with Nancarrow to formulate the memorandum to be passed out at the meeting; the carefully planned memorandum enumerating six specific topics constituted the formal agenda for the meeting; attendance of employees whose names were typed on the memorandum was mandatory and those employees who were not required to attend the meeting did not have their names typed on the memorandum; and, finally each employee was required to sign the memorandum that was passed around, not only as acknowledgment of the new policies, but of their attendance at the meeting.

In the instant case, the General Counsel made a prima facie showing that a formal discussion did take place on March 29, 1994 and furthermore, that the Union was not notified or given an opportunity to be present at the

discussion. Even absent some of the above-mentioned factors, the Authority in considering the total circumstances of this case would find formality, particularly where conditions of employment such as those discussed at this meeting were addressed.

A key piece of evidence in the case is the March 29, 1994 memorandum that Respondent contends "did nothing more than memorialize the policies that had been in existence. . . ." Notwithstanding the fact that shortly after the memorandum issued, the Employment Relations Office required Dunbar to rescind the memorandum, which he did. The only explanation for this rescission was Dunbar's speculation that there was a problem with some of the words in the document. Respondent offered the testimony of two witnesses to support its theory that it was simply reaffirming existing policies. Dunbar was asked, ". . . to your knowledge, are there regulations or provisions in the hospital procedures that require each of these points?" His response was, "To my knowledge now, yes, sir. To my knowledge then, no, sir." A follow up question as to whether the ". . . issues are provided for in the general procedures or regulations of the hospital throws no light on whether any such regulations were in existence prior to March 29, 1994. This response does not, in my view, show that there were preexisting policies but to the contrary says there were no such policies, "then." The second witness, Nancarrow, was asked, whether there was anything new or a change in the practice as you understood it in that unit, when she prepared and went through the March 29, 1994 memorandum. She responded, "No. It was the same thing that had been going on since I arrived." This testimony is closer to Respondent's theory of the case, but again it creates a conflict in the testimony of the two witnesses and therefore, no matter which version one chooses, the testimony of the other is not corroborated. Hill Air Force Base, supra, plainly established the burden on an agency, where it is attempting to justify an action, to rebut clear evidence offered by the General Counsel with documentation or corroborating witnesses. Based on the evidence Respondent offered, it is my opinion, that it did not sustain its burden of showing that the March 29, 1994 memorandum was merely to memorialize existing policies. Consequently, in the absence of evidence supporting Respondent's claim that hospital regulation covering the topics in the memorandum existed, or disclosing that the memorandum was merely a reaffirmation of existing policies, it is concluded that the General Counsel has established by a preponderance of the evidence that the March 29, 1994 memorandum contained new conditions of employment.

Accordingly, it is found that the General Counsel has established by a preponderance of the evidence that a sufficient number of indicia of formality are present to support a finding that the March 29, 1994 meeting was a formal discussion. It is further found that the exclusive representative's right to representation attached under section 7114(a)(2)(A) and that it was entitled to notice and the opportunity to be represented at that meeting.

Based on all of the foregoing, it is found that Respondent, by conducting a formal meeting with certain bargaining unit employees without affording the exclusive representative notice and an opportunity to be represented, violated section 7116(a)(1) and (8) of the Statute.

I am also in agreement with the General Counsel that the notice in this case should be signed by the Commanding General, *see, Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah, 32 FLRA 244 (1988)* and posted bargaining unit wide. *U.S. Department of Treasury, Customs Service, Washington, D.C. and Customs Service Region IV, Miami, Florida,* 37 FLRA 603 (1990). Accordingly, it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, Department of the

Air Force, Maxwell Air Force Base, Maxwell Air Force Base,

Alabama, shall:

1. Cease and desist from:

(a) Conducting formal discussions with employees in the bargaining unit exclusively represented by the American Federation of Government Employees, Local 997, concerning personnel policies or general conditions of employment without first affording the American Federation of Government Employees, Local 997 prior notice and giving it an opportunity to be represented at such formal discussions.

(b) In any like or related manner interfere with, restrain, or coerce its employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

2. Shall take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Post at all locations within the Department of the Air Force, Maxwell Air Force Base, Maxwell Air Force Base, Alabama, where bargaining unit employees represented by the American Federation of Government Employees, Local 997, are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commanding General and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Atlanta Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, January 2, 1996

_____
ELI NASH, JR.
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT conduct formal discussions with employees in the bargaining unit exclusively represented by the American Federation of Government Employees, Local 997, concerning personnel policies or general conditions of employment without first affording the American Federation of Government Employees, Local 997 prior notice and giving it an opportunity to be represented at such formal discussions.

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

(Activity)

Date: By:

(Signature) (Title)

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 questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Atlanta Regional Office, Marquis Two Tower, Suite 701, 285 Peachtree Center Avenue, Atlanta, GA 30303-3102, and whose telephone number is: (404) 331-5212.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by ELI NASH, JR., Administrative Law Judge, in Case No. AT-CA-40902, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

William R. Kraus, Esq., and
Phillip G. Tidmore, Esq.
U.S. Air Force
Central Labor Law Office
1501 Wilson Boulevard, 7th Floor
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Mr. Wesley McAuley
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REGULAR MAIL:

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80 F Street, NW
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Dated: January 2, 1996
Washington, DC