

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

TINKER AIR FORCE BASE OKLAHOMA CITY AIR LOGISTICS CENTER OKLAHOMA CITY, OKLAHOMA Respondent and	 Case No. DA-CA-90328
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 916 Charging Party	

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 30, 2001**, and addressed to:

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

ELI NASH, JR.

Administrative Law Judge

Dated: March 27, 2001
Washington, DC

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

MEMORANDUM

DATE: March 27, 2001

TO: The Federal Labor Relations Authority

FROM: ELI NASH, JR.
Administrative Law Judge

SUBJECT: TINKER AIR FORCE BASE
OKLAHOMA CITY AIR LOGISTICS CENTER
OKLAHOMA CITY, OKLAHOMA

Respondent

and
CA-90328

Case No. DA-

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 916

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

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

OALJ

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WASHINGTON, D.C.

TINKER AIR FORCE BASE OKLAHOMA CITY AIR LOGISTICS CENTER OKLAHOMA CITY, OKLAHOMA Respondent and	 Case No. DA-CA-90328
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 916 Charging Party	

Maj. Telin Ozier, Esquire
For the Respondent

Ron Kisslinger, Representative
For the Charging Party

William D. Kirsner, Esquire
Melissa J. McIntosh, Esquire
For the General Counsel

Before: Eli Nash, Jr.
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint in this case alleges that the Respondent violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7116(a)(1) and (8), by holding formal discussions with bargaining unit employees concerning the investigation of two formal EEO complaints filed by other bargaining unit employees without providing

the Charging Party (the Union) with notice and an opportunity to be represented as required under section 7114 (a) (2) (A) of the Statute.

Respondent's answer denies any violation of the Statute, and more specifically alleges that the investigation at issue was conducted by an individual who was not under its control.

For the reasons explained below, I conclude that the Respondent violated the Statute as alleged in the complaint.

A hearing was held in Oklahoma City, Oklahoma. The parties were represented and afforded a full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs.¹ The Respondent, Charging Party, and the General Counsel filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

A. Background

1. the parties' relationship

Respondent Tinker Air Force Base is an activity within the United States Air Force, a primary national subdivision of the United States Department of Defense (DoD), the latter being the "agency" as defined in section 7103(a)(3) of the Statute. As applicable herein, the American Federation of Government Employees (AFGE), is the exclusive bargaining representative of a nationwide consolidated unit of certain Air Force employees, including the employees located at Tinker Air Force Base, and the Union is AFGE's agent for purposes of representing bargaining unit employees at Respondent's Oklahoma City facility. The parties have negotiated a collective bargaining agreement which provides in part, that any unit employee may use either the negotiated grievance procedure or the applicable statutory appeals (EEOC) procedure concerning a complaint of employment discrimination.

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¹/ At the hearing in this case, I denied without prejudice the General Counsel's motion for sanctions against the Respondent for having failed to exchange prehearing documents simultaneously with the General Counsel. In my view, the Respondent's failure was not shown to be willful and, in any event, the procedural defect in question did not prejudice the General Counsel's case in any respect. Accordingly, the Respondent was not limited in any manner in presenting witnesses' testimony or documentary evidence herein. The issue of sanctions was not renewed in the parties' post-hearing briefs.

2. the processing of EEO complaints at Respondent's Oklahoma City facility

The parties stipulated that on August 30, 1993, DoD, the agency, established its Civilian Personnel Management Service (CPMS); that the Office of Complaint Investigations (OCI) is a division within the CPMS; that Kathleen Toyoda is the Regional Director of OCI's San Antonio Regional Office; and that Thomas Mahoney is a Personnel Management Specialist within the CPMS under Toyoda's supervision. It is undisputed that DoD created the CPMS and its component OCI as an agency-wide investigative operation in order to save money and positions by eliminating the duplication caused by each branch of the armed forces doing its own investigations. As explained by Toyoda, the OCI (consisting of 13 offices in 5 regions) was created by transferring some employees from each branch's separate investigative office to the OCI for the purpose of conducting investigations (including EEO complaints) involving all three military branches in a standardized manner.

Ever since OCI was created to perform EEO investigations on an agency-wide basis, management representatives at Tinker Air Force Base such as Donna Frymire interact with designated OCI investigators like Thomas Mahoney in the following manner. When Frymire is notified that a formal EEO complaint has been filed by an employee at Tinker and that she has been assigned to the case, she conducts a preliminary investigation (with an attorney's assistance) during which she gathers all relevant documents and identifies witnesses to be interviewed by the OCI investigator. Frymire also writes a "management position paper" setting forth the activity's position that no unlawful discrimination occurred. All of this information is turned over to the OCI investigator upon his or her arrival at the activity to begin the investigation.² Frymire plays no further role in the investigation, but if the OCI investigator decides to engage in settlement discussions with the employee complainant, Frymire would attend those discussions.³

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^{2/} Frymire also prepares a report affectionately described as the "good, the bad and the ugly," containing both sides of the discrimination question, including material favorable to the EEO complainant. However, this report is not furnished to the OCI investigator.

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^{3/} Frymire further testified that, in the past, when she was interviewing bargaining unit employees at Tinker Air Force Base as a part of her investigation of formal EEO complaints, the Union had been permitted to attend the interviews. She acknowledged that OCI follows a different approach, but could not explain why.

When the OCI investigator arrives at Tinker Air Force Base to begin an EEO investigation, the activity provides logistical support such as a private meeting rooms, telephones, and other administrative assistance.⁴ The activity also is responsible for the travel, per diem, and miscellaneous expenses, but not the salary of the OCI investigator. The activity does not participate in deciding how the investigation is to be conducted, but does have input with respect to the content of the investigator's report.⁵

B. The EEO Investigation in this Case

Two bargaining unit employees Roy Shobert and Elmer Love, filed EEO complaints and thereafter designated the Union to be their representative at all phases of the EEO process. In turn, the Union notified James Coil, the Chief of Employee and Labor Relations at Tinker Air Force Base, of the specific individual designated in each case to be present whenever unit employees were to be "interviewed by Agency representatives (including OCI investigators)" ⁶ Coil never replied to the Union's letter.⁷ Respondent did accept both of the EEO complaints and requested that the OCI designate a complaints investigator to conduct investigations into the allegations of unlawful discrimination against the employees. An OCI investigator named Barbara Sudbury originally was assigned

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4/ Mahoney usually brings his own computer and printer to the EEO interviews he conducts.

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5/ Thus, an OCI report prepared at the conclusion of the EEO investigation could contain either an extensive analysis or a summary presentation of the facts, and might contain the OCI investigator's recommendations or not, depending upon what the activity requested. The activity also has the right to request changes in OCI's standard investigative and reporting procedures.

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6/ It is undisputed that the designated Union representative was present when the EEO complainants were interviewed as well as during settlement discussions. Accordingly, the complaint in this case does not allege a violation with respect to how the EEO complainants themselves were treated by management.

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7/ Coil testified that the Respondent's EEO Office, not he, had the responsibility to answer the Union. Coil further testified that the Authority, the EEOC, and the courts are in disagreement concerning a union's institutional right to be present during the EEO process, and that the Respondent has chosen to take the position that the Union has no such right. I conclude that the latter testimony explains why Coil failed to respond to the Union's letter concerning its right to be present during the interviews of unit employee witnesses in the EEO investigations, rather than any confusion over which of the Respondent's offices had the obligation to do so.

to conduct the investigations, but Thomas Mahoney subsequently was assigned to substitute for her.

Following his usual practice, Mahoney notified Respondent in advance of his arrival to begin the investigations. The unit employees who were on Mahoney's list of witnesses to be interviewed received notice from their supervisors a few days in advance of Mahoney's arrival as to when and where the interviews would take place. Thus, Steven Rolland was told by his supervisor two or three days in advance that he was to meet with Mahoney in the Administration building where the Personnel Office is located, an area of the activity where Rolland did not work and seldom went. Rolland was not advised that he could refuse to attend, and assumed his presence was mandatory.⁸ When Rolland appeared at the meeting room in his jeans and T-shirt, Mahoney, clad in a dark suit and tie, gave Rolland a look at his OCI investigator's badge and introduced himself, explaining that he was there to investigate the EEO complaints.⁹ Mahoney questioned Rolland alone for about an hour concerning the EEO complaints, and had Rolland sign an affidavit which included a statement that Rolland would be subject to disciplinary action if he failed to testify.

Lorenzo Vaden, another unit employee, similarly was told by his supervisor four days in advance that he was to meet with Mahoney in Building 3001 where Vaden did not work and had not visited previously. Mahoney, wearing a dark business suit and tie, questioned Vaden about Love's EEO complaint for about 12 minutes, after which Vaden, feeling pressured to give a statement and believing he could be disciplined for failing to do so, signed an affidavit prepared by Mahoney.¹⁰

The Union was never notified by Mahoney or the Respondent of the foregoing scheduled interviews with the

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8/ In this regard, I credit the testimony of Paula Cochnauer, the Respondent's Chief EEO Counselor (a position corresponding to the EEO Director at other Federal agencies), that employees can be disciplined for failing to cooperate by testifying in an EEO investigation.

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9/ I do not credit Rolland's testimony that Mahoney explained he was conducting the investigation because Respondent's staff was backlogged. OCI was the agency-wide EEO investigator at the time, and when OCI became backlogged, it used private contractors to perform the investigations. Respondent no longer did EEO investigations, although it had in the past.

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10/ Mahoney thereafter prepared and submitted to management at Tinker Air Force Base an investigative report on both EEO complaints in the manner previously requested by Respondent.

bargaining unit employees, and therefore had no opportunity to attend them.¹¹

Discussion and Conclusions

For the following reasons, and based on the Authority's decision in *Luke Air Force Base, Arizona*, 54 FLRA 716 (1998), *rev'd sub nom. Luke Air Force Base v. FLRA*, 208 F.3d 221 (9th Cir. 1999), *cert. denied* 121 S.Ct. 60 (2000) (*Luke AFB*),¹² I conclude that the interviews conducted with and the statements taken from bargaining unit employees Rolland and Vaden, by Thomas Mahoney the OCI investigator, in connection with the formal EEO complaints of unit employees Shobert and Love, constituted "formal discussions" concerning "grievances" within the meaning of section 7114 (a) (2) (A) of the Statute, and therefore the Respondent violated section 7116(a)(1) and (8) of the Statute by

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11/ By contrast, the Union did receive notice of, and attended, the scheduled interviews with the two unit employees who filed the EEO complaints, as well as meetings to explore settlement of their claims.

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12/ In *Luke AFB*, the Authority, applying the same decisional analysis that it uses for all alleged "formal discussion" violations, held that a mediation/investigation session to resolve a formal EEO complaint constituted a formal discussion under the Statute at which an exclusive bargaining representative had the right to be represented in order to safeguard its interests and the interests of employees in the bargaining unit. The Authority also reaffirmed its position that a grievance within the meaning of section 7114 (a)(2)(A)—as defined in section 7103(a)(9)—can encompass a formal EEO complaint filed under the EEOC's applicable statutory appeal procedure. The Authority's decision in *Luke AFB* was reversed by the Ninth Circuit in an unpublished opinion which was not remanded to the Authority for further action, and, therefore, the Authority had no opportunity to signal whether it intended to acquiesce in that court's interpretation and application of the law. The Authority is not obliged to, and does not always, adopt the reasoning of a single circuit. *See, e.g., Headquarters, National Aeronautics and Space Administration, Washington, DC and National Aeronautics and Space Administration, Office of the Inspector General, Washington, DC*, 50 FLRA 601, 612-14 (1995)(*NASA*), *enforced* 120 F.3d 1208 (11th Cir. 1997), *aff'd* 527 U.S. 229 (1999)(Authority declined to follow the D.C. Circuit's interpretation of section 7114(a)(2)(B) of the Statute as it pertained to representatives of an agency). In this instance, I conclude that the Authority has clearly signaled its intention to continue applying its *Luke AFB* view in this and future cases. Thus, in both its petition for rehearing and petition for rehearing *en banc* before the Ninth Circuit and its subsequent petition for *certiorari* to the United States Supreme Court, the Authority emphasized that the court's opinion in *Luke AFB* was not only inconsistent with other Ninth Circuit precedent, but also with the better result reached by the D.C. Circuit in *National Treasury Employees Union v. FLRA*, 774 F.2d 1181 (D.C. Cir. 1985) and the Tenth Circuit in its decision in *Department of Veterans Affairs v. FLRA*, 3 F.3d 1386 (10th Cir. 1993). Under these circumstances, I shall continue to apply the Authority's rationale and rulings in the *Luke AFB* decision until either the Authority or the Supreme Court reverses them.

failing to provide the Union with notice and an opportunity to be represented at those investigatory interviews.

A. Relevant Statutory Provisions

Section 7114(a)(2)(A) of the Statute provides:

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

(A) 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;

* * * *

Section 7116(a)(1) and (8) of the Statute provides:

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

* * * *

(8) to otherwise fail or refuse to comply with any provision of this chapter.

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

In order for a union as the exclusive representative to have the right to representation under section 7114(a)(2)(A), all elements of that section must exist. There must be:

(1) a discussion; (2) which is formal; (3) between one or more representatives of the agency and one or more unit employees or their representatives; and (4) concerning any grievance or any personnel policy or practice or other general condition of employment. *Luke AFB*, 54 FLRA at 723 (citing *General Services Administration, Region 9 and American Federation of Government Employees, Council 236*, 48 FLRA 1348, 1354 (1994) (GSA I)).

1. the investigative interviews of unit employees concerning the EEO complaints were discussions

In its comprehensive 30-page post-hearing brief, the Respondent presents many arguments in support of the position that the Union had no right to be represented at investigative interviews conducted by Thomas Mahoney with bargaining unit employees concerning the formal EEO complaints filed by unit employees Shobert and Love. However, Respondent never argued that the interviews in question were not discussions, and I conclude that they were. As the Authority has long held in *Veterans Administration, Washington, DC and VA Medical Center, Brockton Division, Brockton, Massachusetts*, 37 FLRA 747, 754 (1990), the term "discussion" is synonymous with "meeting," and there can be no doubt that the investigative sessions at issue in this case were meetings as commonly understood. _____

2. the discussions between Mahoney and the two unit employee witnesses were formal

In *Luke AFB*, 54 FLRA at 724, (quoting *GSA I*, 48 FLRA at 1355), the Authority stated as follows:

In determining whether a discussion is formal within the meaning of section 7114(a)(2)(A), [the Authority has] advised that the totality of the circumstances presented must be examined, but that a number of factors are relevant: (1) the status of the individual who held the discussions; (2) whether any other management representatives attended; (3) the site of the discussions; (4) how the meetings for the discussions were called; (5) how long the discussions lasted; (6) whether a formal agenda was established for the discussions; and (7) the manner in which the discussions were conducted. These factors are illustrative, and other factors may be identified and applied as appropriate in a particular case. See *F.E. Warren Air Force Base, Cheyenne, Wyoming*, 52 FLRA 149, 157 (1996) (*Warren*). Therefore, in determining formality, the Authority considers the totality of the facts and circumstances. *Id.*

The investigatory interviews in question were conducted by Thomas Mahoney, an OCI investigator from the Civilian Personnel Management Service's Regional Headquarters in San Antonio with authorization to investigate and report regarding EEO complaints throughout the entire Department of Defense. Mahoney was visiting the base at the written request of the Chief of Respondent's EEO Complaints Office,

to commence investigations into a number of EEO complaints filed by the Respondent's employees, including unit employees Shobert and Love. The meetings with unit employees Rolland and Vaden were sought by Mahoney well in advance of his arrival at Tinker Air Force Base for the express purpose of taking sworn statements from them as witnesses in the formal EEO process.¹³ The affected employees were told of the scheduled interviews by their respective supervisors several days in advance of the meetings and reasonably believed that their attendance and cooperation at the meetings were required if they wished to avoid discipline or other adverse consequences. The interviews were conducted by Mahoney in a private meeting room within the Administration building, away from where the employees work and in a location where the employees seldom if ever had ventured. Mahoney presented himself to the employees in a dark business suit and tie,¹⁴ formally displayed his OCI investigator's credentials to them, and followed his agenda of interviewing and taking sworn statements from them concerning the pending formal EEO complaints. The meetings lasted from about 15 minutes to one hour, and concluded when Mahoney prepared written statements for them to swear to and sign. Under these circumstances, I conclude that the meetings were formal in nature even though the Respondent had no other management representative present.

3. the formal discussions involved "one or more employees in the unit" and "one or more representatives of the agency"

There is no dispute, and I find, that the investigative interviews constituting formal discussions involved bargaining unit employees Rolland and Vaden. The question raised by the Respondent is whether OCI investigator Mahoney was a "representative of the agency" at the interviews within the meaning of section 7114(a)(2)(A) of the Statute, a matter which the Authority expressly found it unnecessary to decide in *Luke AFB*, 54 FLRA at 724-25 inasmuch as other management representatives were present at the meeting along with the OCI investigator in that case.

I conclude that Mahoney was a representative of the

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^{13/} Respondent's management representatives identified them as potential witnesses as part of the preliminary investigation and report which was sent from the Respondent to OCI with the request for investigation of the formal EEO complaints filed by unit employees Shobert and Love.

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^{14/} By contrast, the witnesses wore T-shirts and jeans.

agency for the following reasons. First, it is undisputed that Mahoney is an employee of the Department of Defense, the "agency" within the definition of that term as an "Executive agency" in section 7103(a)(3) the Statute. Ordinarily, when an exclusive bargaining relationship has been established at a sub-component level within an agency, such as the Air Force in this case, the rights created and the obligations imposed by the Statute are implemented at the level of exclusive recognition. Accordingly, in the past, Respondent Tinker Air Force Base conducted its own investigations of EEO complaints filed by bargaining unit employees and notified the Union as the employees' exclusive representative when interviews of unit employees as witnesses were to take place. The Union was then entitled to attend those investigative interviews which constituted formal discussions. Nevertheless, the agency--DoD in this case--had the responsibility to investigate EEO claims and could designate anyone it chose (including independent contractors outside the agency) to perform those functions.¹⁵ When DoD decided in 1993 to create the OCI within the Civilian Personnel Management Service to investigate EEO complaints agency-wide, as a way of eliminating duplication of personnel in its various components and thereby conserving its limited resources, that was its undeniable right. However, the agency could not thereby extinguish whatever rights the exclusive representative otherwise would have with respect to notice and opportunity to attend formal discussions simply because OCI rather than the Respondent was now delegated the authority to conduct EEO investigations. To decide otherwise would enable agencies to reorganize their way out of many duties imposed by Congress in the Statute and would

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^{15/} See, e.g., *Defense Logistics Agency, Defense Depot Tracy, Tracy, California*, 39 FLRA 999, 1013 (1991)(contractor holding employee orientation meetings with unit employees was a representative of the agency within the meaning of section 7114(a)(2) (A)).

be inconsistent with the purposes and policies of the Statute.¹⁶ See *NASA*, 527 U.S. at 234.

Moreover, in analogous circumstances, the Authority and the courts, including the United States Supreme Court, have held that a DoD-wide component with investigative authority was a "representative of the agency" under section 7114 of the Statute and therefore was required to honor the rights of unit employees and their exclusive bargaining representatives even though the investigative component had no duty to bargain with the union representing the employees at the activity who were being interviewed. *Id.* at n.12; *Department of Defense, Defense Criminal Investigative Service; Defense Logistics Agency and Defense Contract Administration Services Region, New York*, 28 FLRA 1145 (1987), *aff'd sub nom. DCIS v. FLRA*, 855 F.2d 93 (3rd Cir. 1988) (representatives of DoD's Inspector General were required to honor unit employees' section 7114(a)(2)(B) *Weingarten* requests for union representation at investigative interviews because the IG was a representative of the agency).

In this case, Mahoney was the Respondent's representative also because of the totality of circumstances. Thus, Mahoney received from Respondent's management representatives not only a list of unit employees to be interviewed but also a report of the preliminary investigation they conducted, which report presented management's reasons for concluding that no unlawful discrimination had occurred. When Mahoney concluded his own investigation, including the interviews of witnesses in the bargaining unit, his report on the investigation was turned over to the Respondent for further use in the EEO process,

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^{16/} For example, it has long been recognized that an agency may withhold authority from a component activity to bargain over an otherwise negotiable subject, but that if it does so, the duty to bargain is not extinguished. Rather, the agency is then obligated to send a representative to the bargaining table who is authorized to negotiate over that subject matter. See, e.g., *American Federation of Government Employees, AFL-CIO, Local 3525 and United States Department of Justice, Board of Immigration Appeals*, 10 FLRA 61, 64 (1982) (management does not have the "right to foreclose bargaining on an otherwise negotiable matter by delegating authority as to that matter only to an organizational level above the level of recognition and bargaining. Rather, under section 7114(b)(2) of the Statute, an agency has the obligation 'to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment.' . . . Thus, under the Statute, an agency, for the purpose of bargaining with the exclusive representative, is obligated to provide representatives who are empowered to negotiate and enter into agreement on all matters within the scope of negotiations.") See also *District No. 1, Pacific Coast District, Marine Engineers Beneficial Association and Panama Canal Commission*, 26 FLRA 390, 395 (1987).

and the report itself was prepared in accordance with Respondent's requests as to form and content.

I therefore conclude that Mahoney was a representative of the agency when he interviewed employees Steven Rolland and Lorenzo Vaden as witnesses in the formal EEO complaints of employees Roy Shobert and Elmer Love.

4. Mahoney's interviews of Rolland and Vaden concerned grievances

The Respondent contends that the EEO complaints are not grievances under the Statute for the reasons stated by the Ninth Circuit in *Luke AFB*, citing its earlier decision in *Internal Revenue Service, Fresno Service Center, Fresno, California v. FLRA*, 706 F.2d 1019 (9th Cir. 1983), and because of the confidentiality requirements in the EEOC's statutory appeals process and other laws including the Administrative Dispute Resolution (ADR) Act. As previously indicated, however, the Authority has not adopted the Ninth Circuit's narrow interpretation of the term "grievance," but instead has applied the broad definition of grievance found in section 7103(a)(9) of the Statute which both the D.C. and tenth Circuits have endorsed.¹⁷ The Authority also has held that a union's presence at formal discussions during the EEO process would not conflict with EEO regulations or the ADR Act. See *Luke AFB*, 54 FLRA at 730-33. See also *NASA*, 527 U.S. at 243-44, where the Supreme Court recognized that the need for confidentiality even in the context of an Inspector General's investigations was insufficiently substantial to justify a nontextual construction of section 7114(a)(2)(B) of the Statute rejected by the Authority. While this case involves section 7114(a)(2)(A) of the Statute, the same reasoning should apply.

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17/ The Court in *Luke AFB*, in finding that the EEO complaints were not "grievances," appears to rely in part on "[t]he fact that the collective bargaining agreement explicitly excludes discrimination claims from the grievance procedure" While I do not think that the foregoing is a factor to be considered, it should be noted that the parties in this case did include EEO complaints within the scope of their negotiated grievance and arbitration agreement, at the option of the employee in lieu of the EEO statutory appeal procedure.

It is concluded that by holding formal discussions with bargaining unit employees¹⁸ without providing the Union with notice and an opportunity to be represented at the discussions as required by section 7114(a)(2)(A), the Respondent violated section 7116(a)(1) and (8) of the Statute, as alleged.¹⁹

Based on the above findings and conclusions, including applicable Authority precedent to date, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that Tinker Air Force Base, Oklahoma City Air Logistics Center, Oklahoma City, Oklahoma, shall:

B.A Cease and desist from:

(a) Failing or refusing to provide the American Federation of Government Employees, Local 916, the employees' exclusive bargaining representative, advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning any

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^{18/} The Respondent has not argued and I do not find that there is any significance to the fact that unit employees other than the EEO complainants themselves were the ones being interviewed. That is, a union's right to be represented at a formal discussion concerning a grievance is sufficiently broad to encompass meetings between agency representative(s) and one or more employees in the unit, whether they are the EEO complainant(s) or not.

¹⁹

^{19/} I note that only Tinker Air Force Base has been named in the complaint as the Respondent. Had the agency (DoD) and its component OCI been named as Respondents, it would have been appropriate to charge both with ensuring that investigations such as those involved herein are conducted in compliance with the Statute. *See NASA*, 527 U.S. at 246. Where the complaint names only a subordinate activity as Respondent, the Authority has held that the purposes and policies of the Statute are effectuated by finding a violation against the subordinate activity since such a finding is not merely cumulative but is essential if the unfair labor practice committed is to be effectively remedied. A conclusion that the complaint against Tinker Air Force Base should be dismissed because neither DoD nor OCI was named as a Respondent would preclude a remedy for the violation of statutory rights which occurred here, a result which the Authority has concluded would be inconsistent with Congressional intent. *See United States Department of the Treasury, Internal Revenue Service and Internal Revenue Service, Austin District, and Internal Revenue Service, Houston District*, 23 FLRA 774, 779 (1986). *See also U.S. Department of Labor, Office of the Assistant Secretary for Administration and Management, San Francisco, California*, 33 FLRA 429, 432 (1988).

grievance or any personnel policy or practices or other general conditions of employment, including meetings to interview unit employees as witnesses in connection with formal EEO complaints.

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

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

(a) Provide the American Federation of Government Employees, Local 916, the employees' exclusive bargaining representative, advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning interviews of unit employees as witnesses in connection with formal EEO complaints.

(b) Post at its facilities at Tinker Air Force Base where bargaining unit employees 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 Commander, Tinker Air Force Base, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.41(e) of the Authority's Rules

and Regulations, notify the Regional Director, Dallas Regional Office, Federal Labor Relations Authority, in writing, within 30 days of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, March 27, 2001.

ELI

NASH, JR.

Administrative Law

Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that Tinker Air Force Base, Oklahoma City Air Logistics Center, Oklahoma City, Oklahoma, 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 American Federation of Government Employees, Local 916, the employees' exclusive bargaining representative, with advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning any grievance or any personnel policy or practices or other general conditions of employment, including meetings to interview unit employees as witnesses in connection with formal EEO complaints.

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

WE WILL provide the American Federation of Government Employees, Local 916, the employees' exclusive bargaining representative, with advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning interviews of unit employees as witnesses in connection with formal EEO complaints.

(Respondent/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, Dallas Regional Office, Federal Labor Relations Authority, whose address is: 525 Griffin Street, Suite 926, Dallas, TX 75202, and whose telephone number is: (214)767-4996.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by ELI NASH, JR., Administrative Law Judge, in Case No. DA-CA-90328, were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT

CERTIFIED

NOS:

William Kirsner, Esquire
Melissa McIntosh, Esquire
Federal Labor Relations Authority
525 S. Griffin Street, Suite 926
Dallas, TX 75202

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