DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER, PHOENIX, ARIZONA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2382, AFL-CIO Charging Party	Case No. SF-CA-30315

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 **JULY 31, 1995**, and addressed to:

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

GARVIN LEE OLIVER
Administrative Law Judge

Dated: June 28, 1995
Washington, DC

MEMORANDUM DATE: June 28, 1995

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER, PHOENIX, ARIZONA

Respondent

and Case No. SF-CA-30315

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2382, AFL-CIO

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

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

DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER, PHOENIX, ARIZONA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2382, AFL-CIO Charging Party	Case No. SF-CA-30315

Charles A. Latchem
Counsel for the Respondent

David Whattler
Representative of the Charging Party

Hazel E. Hanley
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that 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), in that Respondent failed to comply with section 7114(a)(2)(A) of the Statute by conducting formal discussions with unit employees prior to a Merit Systems Protection Board hearing, without giving the Charging Party (Union) notice or the opportunity to be represented.

Respondent's answer admitted the jurisdictional allegations as to the Respondent, the Union, and the charge, denied any violation of the Statute, offered the affirmative defense that Respondent and the Union had informally settled the matter, and requested that the complaint be dismissed.

A hearing was held in Phoenix, Arizona. The Respondent, Charging Party, and the General Counsel, FLRA were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel entered into a Stipulation of Facts consisting of 44 paragraphs and nine exhibits and stipulated to the admission of 25 additional exhibits (Joint Exhs. 20-35). Additional evidence was received, consisting of the testimony of three witnesses, solely on the issues raised by Respondent's affirmative defense. The Respondent and General Counsel filed helpful briefs, and the proposed findings have been adopted where found supported by the record as a whole. 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.

The July 1, 1993 Settlement

Findings of Fact

The parties stipulated to the following facts, and I so find:[1]

> 1. The American Federation of Government Employees, AFL-CIO, Local 2382 (Union) is a labor organization under 5 U.S.C. § 7103(a)(4).
>
> 2. The Department of Veterans Affairs Medical Center, Phoenix, Arizona (Respondent) is an agency under 5 U.S.C. § 7103(a)(3).
>
> 3. The original charge in Case No. SF-CA-30315 was filed by the Union with the San Francisco Regional Director on December 17, 1992. [Exhibit 1 to the Stipulation]
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> 4. A copy of the original charge in Case No. SF-CA-30315 was served on Respondent.
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> 5. On April 13, 1993, the Regional Director of the San Francisco Region approved a bilateral Settlement Agreement (Agency Respondent) in this case. [Exhibit 2 to the Stipulation]

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[1] The indented numbered paragraphs, consisting of the parties' stipulation, have been rearranged out of their numerical order for clarity, primarily to show the chronology of events, and interspersed with my own findings as necessary.

6. On May 9, 1993, the Respondent, by Medical Center Director John R. Fears, repudiated the Settlement Agreement described in paragraph 5. [Exhibit 3 to the Stipulation]

7. On May 20, 1993, the Regional Director of the San Francisco Region issued an Order that the Settlement Agreement, described in paragraph 5, in this case, be withdrawn. [Exhibit 4 to the Stipulation]

. . .

42. On or about July 1, 1993, the Union and the Respondent entered into a Settlement Agreement in consideration for which the Union agreed to withdraw "all pending unfair labor practice charges" (ULPs) it had filed against the Respondent. [Exhibit 8 to the Stipulation]

43. On or about July 1, 1993, a secretary at the Respondent prepared a list of what she believed constituted the then pending ULP charges filed with the Regional Director of the San Francisco Region. [Exhibit 9 to the Stipulation]

44. Both the Union and Respondent reviewed and initialed the list, described in paragraph 43, and the Respondent forwarded it along with the Settlement Agreement described in paragraph 42, to the Regional Director of the San Francisco Region.

With further reference to this second Settlement Agreement of July 1, 1993, the record reflects that shortly after the Regional Director for the San Francisco Region ordered the withdrawal of his April 13, 1993 approval of the first Settlement Agreement in this case, Rafael Martinez and the Union, through its chief negotiator Daniel Minahan, were at impasse with Respondent on several articles of the supple-mental agreement to the Master Labor Agreement between the Department of Veterans Affairs and the AFGE Council. The parties agreed to submit their dispute to the Federal Service Impasses Panel (FSIP), and the parties arranged for a representative from FSIP in Washington, D.C. to assist them in Phoenix on July 1, 1993. Daniel Minahan was present on behalf of the Union on July 1, 1993 for the meeting with the FSIP and management representatives, including Martinez. Prior to the arrival of the representative from FSIP, Martinez and Minahan, the Union's spokesperson in the negotiations on the supple-mental

agreement, informally resolved their dispute on the basis of the Union president receiving four hours of official time per day in exchange for the Union's acceptance of management's proposals on the articles at impasse and for its request to withdraw the unfair labor practice charges (ULPs) that Local 2382 had pending before the FLRA. (Tr. 13, 33, 43, 50.)

On July 1, 1993, Martin Lieberman, Labor Relations Officer, requested Wendy Clagg, Respondent's Employee Relations Assistant/Office Automation Clerk, to provide him a list of all Local 2382's pending ULPs. (Tr. 36.) Clagg used a computerized spreadsheet, listing ULP charges by number, filing date, and disposition. To distinguish dispositions of the various cases, there were columns to note the status of each case: whether it was still pending action, whether withdrawn, whether dismissed. Clagg defined "pending" as "just waiting for a decision." Clagg printed out the list of pending ULPs, and she generated a list of some 49 cases, 42 of which had already been withdrawn by Local 2382 or dismissed by the San Francisco Region.[2] The list did not include Case No. SF-CA-30315. Clagg explained the omission of Case No. SF-CA-30315: it "had a different kind of pending action on it than the others on the list." Clagg further explained that Case No. SF-CA-30315 had a settlement agreement pending on it, so it was in another category. (Tr. 27, 36, 37.)

Martinez presented both a settlement agreement and Clagg's list to Minahan and Whattler. Whattler reviewed the list of pending ULPs and discovered that it failed to include SF-CA-30315. Whattler further saw that 42 of the 49 cases appearing on the list had already been dismissed by the San Francisco Region. Martinez, on the other hand, admitted he did not "take a look at all the cases that were on the list," supplied it as a matter of convenience and intended it to be all the charges before the FLRA that were pending at that time. Mr. Martinez testified that he did not request SF-CA-30315 to be left off the list and it "was an administrative error, as far as I know. It just wasn't included." Nevertheless, on July 1, 1993, Martinez and other management representatives signed the parties' settlement agreement on the supplemental labor agreement, and Martinez placed his initials and the date, 7/1/93, on the list of pending ULPs prepared by Clagg. On July 1, 1993, Whattler and Minahan also signed the parties' settlement agreement, and Whattler placed his initials on

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Respondent's Counsel, Charles Latchem, stipulated that 42 of the 49 ULPs listed on Clagg's printout had already been withdrawn or dismissed prior to July 1, 1993, the date of the parties' Settlement Agreement concerning their supplemental labor agreement and the date they initialed Clagg's list of pending ULPs. (Tr. 25-27.)

the list of pending ULPs next to the date, 7/1/93. It is undisputed that on July 1, 1993, prior to both parties' signing of the settlement agreement and Clagg's list, they had no discussion of Case No. SF-CA-30315 whatsoever. (Tr. 14-16, 27, 31, 33, 40, 53-54. Joint Exhs. 8 and 9.)

The July 1, 1993 settlement agreement provided as follows:

> In consideration of the terms agreed to by the parties for the supplemental agreement between the Carl T. Hayden VA Medical Center, Phoenix, AZ, and AFGE L/2382, the parties agree that all unfair labor practice charges currently pending before the Federal Labor Relations Authority initiated by any officer and/or steward of AFGE L/2382 or their designated representatives are to be permanently withdrawn and cancelled. Further, the parties agree that a copy of this agreement be sent to the Federal Labor Relations Authority offices for the purpose of having such pending unfair labor practice charges withdrawn and cancelled.

According to Whattler, after signing the settlement agreement and initialing Clagg's list on July 1, 1993, and while the FSIP representative was still present, Martinez specifically mentioned that SF-CA-30315 was not on the list and Minahan affirmed to Martinez that SF-CA-30315 was not a part of the settlement, and that Martinez should direct any questions about that case to Whattler.

In August of 1993, the parties' settlement agreement was approved by the Chief Medical Director in Washington D.C., and a copy of the July 1 settlement agreement and the list was sent to the Regional Director. Martinez never received any communication from the Regional Director approving or disapproving the July 1, 1993 settlement agreement and list. (Tr. 14-15, 17.)

After the agreement was approved by the Chief Medical Director, Respondent began to grant Whattler fifty percent official time to conduct his representational activities. Whattler began withdrawing the seven cases on Clagg's list that were pending action by the San Francisco Region. For example, on July 12, 1993, the Acting Regional Director for the San Francisco Region approved Whattler's request to withdraw four cases on Clagg's list; on July 19, 1993, Whattler requested the withdrawal of two more cases on Clagg's list; and, on August 20, 1993, the Regional Director for the San Francisco Region approved Whattler's request to the withdrawal of those cases. On September 8, 1993,

Whattler, after discussing SF-CA-30361 with the affected employee locksmith, requested the withdrawal of that charge, and on September 22, 1993, the Regional Director of the San Francisco Region approved the withdrawal of the last of the seven pending cases on Clagg's list that accompanied the settlement agreement of July 1, 1993. (Tr. 14-15, 47-49; Joint Exhs. 28-31.)

Martinez was concerned about Whattler's delay in requesting withdrawal of charges, and his office asked the San Francisco Region about "trying to arrive at what period of time they had been withdrawn." The San Francisco Region informed Martinez' office that the Respondent could not request withdrawal of the charges, but it was the "Union [that] had to withdraw them." (Tr. 16, 32.) From September 13 to 15, 1993, Martinez was at a conference in Taquilla, Washington, and Ronald T. Smith, Regional Director of the San Francisco Region was an instructor in one of the seminars Martinez attended. Martinez asked Smith to inquire why all pending charges were not withdrawn, and Smith agreed to call his office. At lunchtime the following day, Smith allegedly assured Martinez, "[I]t's all been taken care of"[3] (Tr. 15-20.)

> 8. On December 3, 1993, the General Counsel of the Federal Labor Relations Authority (Authority) by the Regional Director of the San Francisco Region, acting pursuant to Section 7104(f) of the Statute, 5 U.S.C. § 7101, et seq., and Section 2423.12 of the Rules and Regulations of the Authority, issued a Complaint and Notice of Hearing, a copy of which was subsequently served on the parties. [Exhibit 5 to Stipulation]
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> 9. On December 17, 1993, the Respondent served an Answer to the Complaint on the Union and the Regional Director of the San Francisco Region. [Exhibit 6 to Stipulation]
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> 10. On March 23, 1994, the Acting Regional Director for the San Francisco Region

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[3] By September 13-15, 1993, Whattler's letter of September 8, 1993, requesting the withdrawal of SF-CA-30361, the last of the seven pending cases on Clagg's list had either been received in the San Francisco Region and was awaiting processing for Smith's approval on September 22 or the letter was still in the mail. In either event, Smith had checked, and Whattler, as of September 8, had "taken care of" requesting the withdrawal of the last ULP charge on the Clagg's list. (Joint Exhs. 31 and 32.)

ordered this case transferred to the Denver Region. [Exhibit 7 to the Stipulation]

From mid-September to December 1, 1993, even though Martinez knew that Whattler had not requested the withdrawal of Case No. SF-CA-30315, the one pending ULP charge not on Clagg's list, Martinez never discussed Whattler's refusal to request the withdrawal of this case until the Regional Director for the San Francisco Region issued the Complaint and Notice of Hearing. It was only when served with the Complaint in December of 1993, that Martinez accused Whattler that he "had reneged on a deal," that SF-CA-30315 was part of it, and that the agreement covered all pending ULPs. Whattler insisted that SF-CA-30315 was not part of the package which Respondent had presented to the Union. (Tr. 43-44.)

Discussion and Conclusions

Respondent contends that the complaint should be dismissed based upon the parties' settlement agreement, which, it contends, clearly covered all pending charges, and because of the Respondent's performance of its obligations under that agreement. Respondent claims that the Regional Director had an obligation under Marine Corps Logistics Base, 33 FLRA 626 (1988) (Marine Corps) to communicate his acceptance or rejection of a settlement, and where he did not do so in a timely fashion, the Respondent should not be required to defend itself against charges it reasonably believes have been settled. Respondent claims that the Regional Director appeared by his conduct to approve by dismissing all pending charges except the single case erroneously omitted from the list. Respondent contends that for the General Counsel to proceed with this case defies both the spirit and the letter of the policy encouraging informal resolution of unfair labor practice allegations.

The General Counsel claims that the Regional Director properly exercised his discretion by issuing the complaint in this case when Respondent failed to perform its obligations under the previous informal settlement agreement, and the Regional Director was under no obligation under the regula-tions to approve the parties' July 1, 1993 agreement.
The General Counsel states that this case is distinguishable from Marine Corps as nothing in the July 1, 1993 agreement addressed the allegations of formal discussion and nothing identified the allegations of the case by its case number. The General Counsel points out that Respondent was in control of the drafting of both the settlement agreement and

the list and, under contract law, a contract results on the terms understood by the party who is less at fault for the misunderstanding. The General Counsel also argues that the Authority is not bound to give effect to the settlement under the criteria set forth recently in United States Department of Agriculture, Food Safety and Inspection Service, Washington, D.C., 49 FLRA 431 (1994) (FSIS), involving a settlement presented to the Authority by the parties after issuance of an Administrative Law Judge decision.

Respondent's affirmative defense that this case must be dismissed pursuant to the July 1, 1993 written agreement between Respondent and the Union must be rejected. Based upon the role of the General Counsel set forth in section 7104(f)(2) of the Statute and the further delegation of duties as prescribed in 5 C.F.R. Appendix B to Ch. XIV, and 5 C.F.R. § 2423.9(a)(1) and (3) and § 2423.11 of the Authority regulations, the General Counsel, through the Regional Director, has the discretion to determine whether to issue a complaint, approve a request to withdraw a charge, or approve an informal settlement agreement, and if a respondent fails to perform its obligation under the informal settlement agreement, to institute further proceedings, typically by reinstating the original complaint. See Decision on Request for General Statement of Policy or Guidance, 23 FLRA 342 (1986); Federal Aviation Administration, Aviation Standards National Field Office, Mike Monroney Aeronautical Center, Oklahoma City, Oklahoma, 43 FLRA 1221 (1992) (FAA).

In this case, the Regional Director approved the first bilateral settlement agreement, but withdrew his approval when Respondent admittedly repudiated the agreement. The Regional Director never approved the July 1, 1993 settlement agreement and subsequently reinstituted the complaint. Since this action was within the discretion of the Regional Director under the Authority regulations, and the Regional Director never approved the second settlement agreement, the Respondent's contention that this case has already been settled is rejected. United States Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Washington, D.C. and Central Region, 16 FLRA 506 (1984); United States Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Washington, D.C. and Its Central Region, 16 FLRA 528, 544 (1984); U.S. Nuclear Regulatory Commission, 20 FLRA 324, 345 (1985). As the Authority stated in FAA, "Such a settlement agreement must conform to the requirements established by the Regional Director and, therefore, is not wholly a product of negotiations between the parties to the collective bargaining process." 43 FLRA at 1231.

I also do not agree with Respondent that the Regional Director must timely accept or reject an offered settlement or be estopped to deny it. I agree with the policy expressed by the National Labor Relations Board in Campbell Soup Company, 152 NLRB 1645, 1648 (1965):

> We also reject the Trial Examiner's conclusion that there are "any number of ways" in which the Regional Director can give his approval to a settlement agreement. In our opinion, it is necessary that the Regional Director expressly approve in writing the offered settlement in its totality after all disputed issues are resolved. Anything short of this position opens the door to possible confusion and misunderstanding as to whether or not a settlement has been effectuated, as in the instant case. Moreover, we do not interpret Section 101.7 of the Rules as requiring that the Regional Director reject an offered settlement within any period of time or be estopped to deny the settlement. In order to fully carry out his responsibility after a charge has been filed, the Regional Director has a duty to review each proposed settlement with a view toward assuring that the public interest as well as the private rights of the immediate litigants are served. . . .

It is also not apparent that Respondent was misled by the Regional Director's inaction in this instance. The Respondent was advised by a Union representative immediately after the agreement was signed that the Union did not consider this case to be included in the settlement. Respondent was also advised by the Regional Office that the Union must request the withdrawal of cases. Respondent took no action to obtain further clarification from the Regional Office about the status of the case from September 1993 until the complaint was reinstituted in December 1993. I agree with counsel for the General Counsel that this case in unlike that in Marine Corps where the Authority dismissed certain portions of a complaint because the respondent reasonably believed they had been withdrawn. In that case, the allegations were part of an informal settlement in another case which was approved by the Regional Director and the respondent had no notice that the settlement was meant to be a partial settlement and that other aspects of the complaint had been withdrawn. In the instant case, in addition to the above factors, nothing in the parties' July 1, 1993 settlement agreement addressed the allegations concerning formal discussions and nothing in the settlement

and list forwarded to the Regional Director identified the allegations of Case No. SF-CA-30315 by its case number.

The settlement at issue was presented to the Regional Director and came under the specific procedures set out in section 2423.11 of the Regulations. It does not qualify for examination under the criteria set forth by the Authority in FSIS for settlements first presented at the Authority level. In FSIS the Authority was asked by the parties to give effect to a private settlement agreement arrived at after the case came before the Authority on exceptions to the Administrative Law Judge's decision. The Authority noted at the outset that "section 2423.11 of the Rules and Regulations provides specific procedures for the formal or informal settlement of unfair labor practice charges at various stages prior to the issuance of a decision by an Administrative Law Judge." The Authority then set out the circumstances it would consider in deciding whether it would effectuate the purposes and policies of the Statute to give effect to such a settlement agreement reached by the parties and proposed to the Authority for approval.4

The Alleged Violations

Findings of Fact

The parties stipulated to the following facts, and I so find:

> 11. During the time period covered by this Stipulation of Facts, these persons occupied the positions opposite their names:
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> | | |
> |---|---|
> | Ray Bourne | Medical Center Director |
> | John R. Fears | Medical Center Director |
> | Rafael Martinez | Chief, Personnel Service |
> | Martin Lieberman | Labor Relations Officer |

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4 If it were deemed necessary to do so, I would agree with Counsel for the General Counsel that under the criteria set forth by the Authority in FSIS, it would not effectuate the purposes and policies of the Statute to find that this case was disposed of by the settlement in issue. First, the Union and the General Counsel claim that there was no settlement of this case, and that the Union never agreed to withdraw the case. There is a reasonable basis for their positions in the record. Second, it cannot be determined if the settlement is reasonable in light of the nature of the violations alleged in the complaint because the proferred settlement did not address the specific violations. Third, no fraud, coercion, or duress by any of the parties in reaching the settlement exists; however, the Respondent, who prepared the settlement and accompanying list, is most at fault for the misunderstanding regarding its effect. Fourth, the Respondent breached the earlier April 13, 1993, settlement agreement and it was within the Regional Director's discretion to reinstate the original complaint.

12. During the time period covered by this Stipulation of Facts, the persons named in paragraph 11 were supervisors or management officials under 5 U.S.C. §§ 7103(a)(10) and (11).

13. During the time period covered by this Stipulation of Facts, Charles Latchem occupied the position of Counsel, VA Office of District Counsel, Phoenix, Arizona.

14. During the time period covered by this Stipulation of Facts, the persons named in paragraphs 11 and 13 were acting on behalf of Respondent.

15. The American Federation of Government Employees, AFL-CIO, (AFGE) is the exclusive representative of a nationwide unit of employees appropriate for collective bargaining, including employees at Respondent's Phoenix, Arizona facility.

16. The Union, AFGE, Local 2382, is an agent of AFGE for purposes of representing employees at Respondent.

17. During the time period covered by this Stipulation of Facts these individuals were employees under 5 U.S.C. § 7103(a)(2) at Respondent: David Whattler, Robin Prunty, and Joseph Gomez.

18. In or around September 1992, the Respondent, by Bourne, Martinez, Lieberman and/or Latchem, conducted interviews of Robin [Prunty] and Joseph Gomez, who were employees in the unit described in paragraph 15.

19. The interviews described in paragraph 18 were in preparation for a Merit Systems Protection Board hearing on an appeal of termination Action involving a unit employee represented by the Union.

20. The interview of Robin Prunty was conducted by Charles Latchem, Counsel, VA Office of District Counsel, Phoenix, Arizona.

21. The interview of Robin Prunty, an employee in the Dietetics Service, was

conducted in the office of Catherine Austin, Assistant Chief of Dietetics Service.

22. During the interview of Robin Prunty, Latchem did not inform Prunty that she was not obligated to answer his questions and that she would suffer no reprisal if she chose not to answer his questions.

23. During the interview of Robin Prunty, Latchem asked Prunty to describe several incidents concerning the unit employee whose termination was the subject of the hearing of appeal before the Merit Systems Protection Board.

24. The interview of Robin Prunty was formal in nature.

25. During the interview of Robin Prunty, David Whattler, President of Local 2382, tried to enter the office and demanded that the Union be represented.

26. Latchem denied Whattler the opportunity to be represented at the Interview of Robin Prunty.

27. One interview of Joseph Gomez, an employee of the Dietetics Service, was conducted by Martinez, Chief of Personnel Service.

28. The interview of Joseph Gomez, described in paragraph 27, was conducted in an office in Fiscal Service.

29. During the interview of Joseph Gomez, described in paragraph 27, Martinez did not inform Gomez that he was not obligated to answer the questions and that he would suffer no reprisal if he chose not to answer the questions.

30. During the interview of Joseph Gomez, described in paragraph 27, Martinez asked Gomez to describe several incidents involving the employee whose termination was the subject of the hearing of appeal before the Merit Systems Protection Board.

31. The interview of Joseph Gomez, described in paragraph 27, lasted about eight to ten minutes.

32. The interview of Joseph Gomez, described in paragraph 27, was formal in nature.

33. At the interview of Joseph Gomez, described in paragraph 27, the Union was not given notice or an opportunity to be represented.

34. After Martinez left the office and the interview of Joseph Gomez, described in paragraph 27, Latchem entered the office in Fiscal Service and continued to interview Gomez.

35. During the second interview of Joseph Gomez, described in paragraph 34, Latchem did not inform Gomez that he was not obligated to answer the questions and that he would suffer no reprisal if he chose not to answer the questions.

36. During the second interview of Joseph Gomez, described in paragraph 34, Latchem asked Gomez to describe incidents Gomez had witnessed concerning the employee whose termination was the subject of the hearing of appeal before the Merit Systems Protection Board.

37. During the second interview of Joseph Gomez, described in paragraph 34, Latchem asked Gomez to opine whether or not the terminated employee’s acts were intentional.

38. During the second interview of Joseph Gomez, described in paragraph 34, Latchem asked Gomez to opine whether or not the terminated employee was a good worker who got along well with coworkers.

39. The second interview of Joseph Gomez, described in paragraph 34, lasted about ten minutes.

40. The second interview of Joseph Gomez, described in paragraph 34, was formal in nature.

41. At the second interview of Joseph Gomez, described in paragraph 34, the Union was not given notice or the opportunity to be represented.

Discussion and Conclusions

The stipulations reflect that each of the September 1992 interviews of unit employees Robin Prunty and Joseph Gomez was conducted by a representative of Respondent preparing for a MSPB hearing, was formal in nature, and in each instance the Union was not afforded an opportunity to be represented.[5] As the Authority has repeatedly held that interviews by agency representatives with bargaining unit employees in preparation for third-party proceedings, including MSPB proceedings, are formal discussions under section 7114(a)(2)(A), Respondent's conduct in failing to give the Union an opportunity to be represented constituted unfair labor practices in violation of section 7116(a)(1) and (8), as alleged.[6] Veterans Administra-tion Medical Center, Long Beach, California, 41 FLRA 1370, 1379 (1991), enforced sub nom. Department of Veterans Affairs Medical Center, Long Beach, California v. FLRA, 16 F.3d 1526 (9th Cir. 1994); Department of Veterans Affairs, Department of Veterans Affairs Medical Center, Denver, Colorado, 44 FLRA 408 (1992), enforced sub nom. Department of Veterans Affairs, Department of Veterans Affairs Medical Center, Denver, Colorado v. FLRA, 3 F.3d 1386 (10th Cir. 1993).

Based on the above findings and conclusions, the General Counsel's motion for summary judgment is granted, and it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118

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5 There is no indication that the interviews were conducted pursuant to any of the discovery methods in 5 C.F.R. § 1201.73(c) or the Federal Rules. Compare United States Immigration and Naturalization Service, United States Border Patrol, El Paso, Texas, 47 FLRA 170, 187 (1993) (Union was entitled to be given the opportunity to be represented at depositions taken in preparation for MSPB proceedings, but could not actively participate at the depositions under these provisions).

6 The complaint does not allege that Respondent violated section 7116 (a)(1) of the Statute by failing to provide the safeguards that are set forth in Internal Revenue Service and Brookhaven Service Center, 9 FLRA 930 (1982).

of the Statute, it is hereby ordered that the Department of Veterans Affairs, Medical Center, Phoenix, Arizona, shall:

1. Cease and desist from:

(a) Conducting formal discussions with its employees in the bargaining unit exclusively represented by the American Federation of Government Employees, Local 2382, AFL-CIO (the Union), concerning grievances or any personnel policies or practices or other general conditions of employment, including interviews in preparation for third-party hearings such as Merit Systems Protection Board proceedings, without first affording the Union prior notice and the opportunity to be represented at such formal discussions.

(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.

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

(a) Post at its facilities where bargaining unit employees represented by the American Federation of Government Employees, Local 2382, AFL-CIO 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 Director and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices 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, Denver 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, June 28, 1995

GARVIN LEE OLIVER
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 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 2382, AFL-CIO, concerning grievances or any personnel policies or practices or other general conditions of employment, including interviews of unit employee witnesses in preparation for third-party hearings such as Merit Systems Protection Board proceedings, without first affording the Union prior notice and the opportunity to be represented at such formal discussions.

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

WE WILL afford the American Federation of Government Employees, Local 2382, AFL-CIO prior notice and the opportunity to be represented at formal discussions with employees in the bargaining unit concerning grievances or any personnel policies or practices or other general conditions of employment, including interviews of unit employee witnesses in preparation for third-party hearings such as Merit Systems Protection Board proceedings.

_____

(Agency)

DATED: _____ 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, Denver Regional Office, whose address is: Denver Region, Federal Labor Relations Authority, 1244 Speer Boulevard, Suite 100, Denver, CO 80204-3581.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. SF-CA-30315, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Mr. Charles A. Latchem
Veterans Affairs Office of District Counsel
3225 North Center Avenue
Phoenix, AZ 85012

David Whattler, President
American Federation of Government
Employees, Local 2382
c/o Dept. of Veterans Affairs Medical Center
7th and Indian School Road
Phoenix, AZ 85012

Hazel E. Hanley, Esq.
Counsel for the General Counsel
Federal Labor Relations Authority
1244 Speer Boulevard, Suite 100
Denver, CO 80204

John R. Fears, Director
Department of Veterans Affairs
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