

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

DEPARTMENT OF THE AIR FORCE, 430 TH AIRLIFT WING, DOVER AIR FORCE BASE, DOVER, DELAWARE Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1709 Charging Party	Case No. WA-CA-00262

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 **JANUARY 22, 2001**, 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: December 22, 2000
Washington, DC

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

MEMORANDUM

DATE: December 22, 2000

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE AIR FORCE,
430TH AIRLIFT WING,
DOVER AIR FORCE BASE,
DOVER, DELAWARE

Respondent

and

Case No. WA-CA-00262

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1709

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

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

OALJ

01-11

DEPARTMENT OF THE AIR FORCE, 430 TH AIRLIFT WING, DOVER AIR FORCE BASE, DOVER, DELAWARE Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1709 Charging Party	Case No. WA-CA-00262

Steven E. Sherwood
Major Brad Bell
Counsel for the Respondent

Richard LaBrake
Representative of the Charging Party

Beth Ilana Landes
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), by holding a formal discussion with a bargaining unit employee concerning the mediation of a formal Equal Employment Opportunity (EEO) complaint without affording the Charging Party (Union) notice and an opportunity to be represented pursuant to section 7114(a)(2)(A) of the Statute.

Respondent's answer denied any violation of the Statute.

Among other things, the Respondent asserted that confidential mediation sessions conducted in relation to complaints of prohibited employment discrimination, brought under one of the statutes administered by the Equal Employment Opportunity Commission, are not formal discussions mandating that labor organizations be allowed to attend.

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

A hearing was held in Dover, Delaware. The parties 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 filed helpful briefs. Based on the entire record¹, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The Union is the exclusive representative of a unit of appropriated fund employees appropriate for collective bargaining at the Respondent. The Union and the Respondent have a collective bargaining agreement. Article 22 of the agreement contains a negotiated grievance procedure and Section 3.A.6 of that article provides that the procedure "will not cover/pertain to grievances or appeals concerning ... EEO complaints." (General Counsel Exhibit No. 2).

In 1999, Elzey F. Jones, Jr., a member of the bargaining unit, filed an EEO complaint, No. DM1L99008, which related to a seven day suspension Jones had received. The case first went through informal case processing. On November 19, 1999, Jones filed a formal complaint in the case, and in December 1999 and early January 2000, requested that Respondent initiate mediation of his formal complaint pursuant to the revised EEO regulations, 29 C.F.R. Part 1614, and Equal Employment Opportunity Commission (EEOC) Directive 110. Jones also requested that the mediation be held off-base at a neutral location, the Sheraton Hotel, about five miles from the Respondent.

The Respondent requested the Secretary of the Air Force General Counsel's Office in Washington, D.C. to assign a

1

The Respondent's unopposed motion to correct the July 25 and October 5, 2000 transcripts is granted; the transcripts are corrected as set forth therein.

mediator to the case. The General Counsel's office referred the request to the Resolution Group, a private firm, which has an annual contract with the Air Force to provide mediation and training services.

The Resolution Group is owned by Kathy Fragnoli, an attorney, who became the mediator in Jones' case. The Air Force pays the Resolution Group the same amount for each mediation plus travel expenses. Payment is not contingent upon achieving a certain result. By contract, the Resolution Group follows the Alternate Dispute Resolution Act (5 U.S.C. § 571, *et seq.*) (ADR Act) and Air Force procedures. The Air Force procedures do not dictate the outcome of the mediations.

The Resolution Group provided the Respondent's Chief EEO Officer a list of available dates. After coordinating with Mr. Jones and Respondent's legal representative, Captain Richard Rockenbach, January 18, 2000 was selected as the date for the mediation. The Chief EEO Officer also made arrangements for the Respondent to pay for the costs of a conference room for the mediation at the Sheraton Hotel, as requested by Mr. Jones.

Prior to the mediation, the Resolution Group sent Mr. Jones and Captain Rockenbach a package explaining that the mediator would be neutral and requesting that an agreement regarding the confidentiality of the proceedings be submitted by each participant. Mr. Jones and Captain Rockenbach signed such an agreement in this case.

The mediation of Mr. Jones' EEO complaint No. DM1L99008 was held as scheduled on January 18, 2000. The purpose was to settle Mr. Jones' complaint if possible. It was attended by Mr. Jones, Captain Rockenbach, and Mediator Fragnoli who was in charge.² Ms. Fragnoli explained mediation, her role, caucuses (her private sessions with one or the other of the parties), and allowed for opening statements. Ms. Fragnoli generally follows a format, but changes it as needed.³ She spent about 20% of the six hour session meeting jointly with both parties (1.2 hours) and about 80% meeting with just one party (about 4.8 hours). She spent

2

The Chief EEO Officer had requested permission from Mr. Jones to attend the mediation. Jones denied the request.

3

Mr. Jones testified that Ms. Fragnoli had a "laminated, written agenda" which was referred to throughout the proceedings. He later acknowledged that this was a booklet pertaining to mediations generally.

more time with Mr. Jones than with Captain Rockenbach. Various options for settlement were discussed.

Captain Rockenbach attended as the Agency's representative to represent the Agency's (Department of the Air Force's) interests. Rockenbach had no supervisory authority over Jones nor was he in Jones's management hierarchy. His purpose in attending was to see if it was possible to settle Mr. Jones' complaint and to try to prevent a spin-off complaint.⁴ As the legal representative, he had authority to settle provided he coordinated the terms with the responsible squadron commander. He coordinated by telephone with the commander concerning a number of options for settlement that were discussed during the mediation. No settlement was reached.

The Union was not notified of, nor given the opportunity to attend, the mediation.

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, Arizona v. FLRA*, 208 F.3d 221 (9th Cir. 1999), *cert. denied*

4

Captain Rockenbach described a "spin-off" complaint as one filed by persons who are unhappy with the manner in which an existing complaint has been processed. Captain Rockenbach testified that, in this regard, Jones had alleged in some of his earlier communications that the Respondent was in violation of EEO regulations by not providing him with ADR.

121 S.Ct. 60 (2000) (*Luke AFB*)⁵, I conclude that the January 18, 2000 mediation session of Mr. Jones' formal EEO complaint was a "formal discussion" within the meaning of section 7114(a)(2)(A) of the Statute and, therefore, that the Respondent violated section 7116(a)(1) and (8) of the Statute by failing to provide the Union notice and an opportunity to be represented at that mediation session.

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 conditions of employment;

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

(a) For the purpose of this chapter, it shall be 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;

5

In *Luke AFB*, the Authority, using the same decisional analysis that it uses for all formal discussion allegations, held that a mediation/investigation session to resolve a formal EEO complaint was a statutory formal discussion where an exclusive representative had the right to be represented 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) can encompass a statutory appeal, such as a formal EEO complaint. The Authority's decision in *Luke AFB* was reversed by the Ninth Circuit; however, 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, D.C. and National Aeronautics and Space Administration, Office of the Inspector General, Washington, D.C.*, 50 FLRA 601, 612-14 (1995), 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).

* * * *

with (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 to have the right to representation under section 7114(a)(2)(A), all the 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; (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 January 18 Mediation Session of the EEO Complaint Was a Discussion

Respondent concedes that, under Authority precedent, the mediation of the Jones' EEO complaint was a discussion. The Respondent contests all of the remaining elements.

2. The January 18 Mediation Session of the EEO Complaint Was Formal

In *Luke AFB*, the Authority, quoting *GSA I*, stated, 54 FLRA at 724:

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.

GSA I, 48 FLRA at 1355. 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.

Mediator Fragnoli held, or presided at, the mediation. Management was represented at the mediation by Captain Richard W. Rockenbach II, an Assistant Staff Judge Advocate.

The site of the mediation, the Sheraton Hotel, located about five miles from the employee's work place, was chosen by the employee, but paid for by the Respondent. The Authority in *Luke AFB* held that "[m]eetings held outside an employee's immediate work area are associated with formality, while those held in the work area are not."

The mediation was "called" by the employee, Mr. Jones. He requested mediation under the EEO ADR provisions. There is no indication that he had to participate in order to proceed further with his formal EEO complaint. Therefore, his attendance was voluntary.

The mediation lasted six hours, with both parties present with the mediator about 20% of the time (1.2 hours) and the mediator meeting with just one party about 80% (4.8 hours) of the time. The length of the mediation indicates that it was formal. *Luke AFB*, 54 FLRA at 727.

There was no agenda or list of things to be done at the meeting. However, there was a definite advance plan or purpose of the meeting established under EEO ADR procedures, i.e., to attempt to settle Jones' EEO complaint. The Air Force contractor, Resolution Group, had advised the parties in advance of the necessity of submitting confidentiality agreements concerning the proceedings and that the mediator would be neutral. Mediator Fragnoli took charge at the outset of the meeting to explain how the mediation process, including the caucuses, would be conducted. These are indications of a formal meeting, the planned adherence to established rules

or customs, as contrasted with an impromptu or spontaneous meeting or highly personal, informal counseling sessions.

The next factor concerns the manner in which the discussions were conducted. The Respondent points out the congenial, non-threatening nature of the mediation conference and that most of the day was spent in private sessions with the mediator with only a few brief joint sessions sprinkled throughout the day.

The Authority in *Luke AFB* took note of the nature of a mediation/investigation session. In that case, the Judge Advocate General attorney was not even present at the session in issue and the parties were communicating through the chief EEO counselor. Nevertheless, the Authority stated, 54 FLRA at 725-26:

[I]t is clear that both the employee and the Judge Advocate General attorney were engaged in responding to each other's settlement positions, and that they were no less engaged than if they had been speaking face-to-face -- as they had been speaking the previous day. A normal mediation technique is to have people in different rooms with someone going back and forth conducting the negotiation. The Union's interest and right to be represented at face-to-face negotiations of a grievance, see, e.g., *GSA I*, 48 FLRA at 1355-56, applies as well, in our view, to a negotiation conducted through a mediator. Under these circumstances, the Judge Advocate General attorney was effectively present at the January 19 mediation/investigation session. Thus, the nature of the communication during the mediation/investigation session on January 19 does not undermine the overall formality. (footnote omitted).

The Authority also stated in this respect, 54 FLRA at 729:

[T]o the extent that [*Social Security Administration and Social Security Administration, Field Operations, New York Region*, 16 FLRA 1021 (1984) (SSA)] SSA

implies that a facilitated discussion in general, or a mediated negotiation in particular, can never be "formal" under section 7114(a)(2)(A) of the Statute, we reject that conclusion. In our view, a union's statutory right to notice and an opportunity to be present during a discussion is not diminished when the discussion between employees and agency representatives is conducted in a nonconfrontational manner through a neutral third party. SSA will no longer be followed to the extent it implies that a discussion conducted in this way will never be found "formal" within the meaning of the Statute. We will continue to look at the totality of the circumstances in determining whether a discussion is formal.

Based on the totality of the facts and circumstances, I conclude that the January 18 mediation session of the EEO complaint was a "formal discussion" within the meaning of section 7114(a)(2)(A). *Luke AFB*, 54 FLRA at 729.

3. The January 18 Mediation Session of the EEO Complaints Was
Between _____ a Representative of the
Agency and _____
a Unit Employee

As in *Luke AFB*, it is unnecessary to address whether the mediator, Mediator Fragnoli, was a representative of the agency as management was represented at the mediation by Captain Richard W. Rockenbach II, an Assistant Staff Judge Advocate, who was a representative of the agency within the meaning of section 7114(a)(2)(A). And, as was the case in *Luke AFB*, although there is no doubt that the legal representative was not the employee's first level supervisor, it is clear that he represented a high level of management. Rockenbach represented the squadron commander for purposes of the settlement discussions. He had settlement authority and a number of settlement options were discussed. Thus, the January 18 mediation session of the EEO complaint was between a "representative" of the Agency and a unit employee within the meaning of section 7114(a)(2)(A) of the Statute.

4. The January 18 Mediation
Session _____ of the EEO Complaints
Concerned a _____ Grievance

The Respondent contends that EEO complaints are not grievances under the Statute where the parties have excluded EEO complaints from the coverage of their negotiated grievance procedure; EEO complaints raised under the statutory EEO appeal procedure are not grievances under the Statute; and that EEOC statements concerning its ADR program and the confidentiality provisions of the ADR Act and other statutes preclude a conclusion that the mediation session was a formal discussion.

These contentions were resolved by the Authority in *Luke AFB*. The Authority held that a formal EEO complaint filed by an employee constituted a "grievance" within the meaning of section 7114(a)(2)(A) and rejected the assertion that section 7114(a)(2)(A) cannot recognize as a "grievance" any matter that the parties have excluded from their own grievance procedure. The Authority also held that the presence of a union representative at a mediation session of an EEO complaint would not conflict with EEO regulations or the ADR Act. 54 FLRA at 730-33.

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

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 Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that shall:

1. Cease and desist from:

(a) Failing or refusing to provide the American Federation of Government Employees, Local 1709 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 mediate settlement negotiations pertaining to 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.

2. 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 1709, advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning mediation of formal EEO complaints.

(b) Post at its facilities at Dover Air Force Base 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, Dover 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 of the Washington Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, December 22, 2000

GARVIN LEE OLIVER
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of the Air Force, 436th Airlift Wing, Dover Air Force Base, Delaware violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

We hereby notify our employees that:

WE WILL NOT fail or refuse to provide the employees' exclusive representative, the American Federation of Government Employees, Local 1709 (the Union), 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 mediate settlement negotiations pertaining to formal EEO complaints filed by bargaining unit employees.

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 Union advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning mediation of formal EEO complaints.

(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, Washington Region, 800 K Street, N.W., Suite 910, Washington, DC 20001, and whose phone number is: (202)482-6700.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. WA-CA-00262, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Beth Ilana Landes, Esquire
Counsel for the General Counsel
Federal Labor Relations Authority
Tech World Plaza
800 K Street, NW, Suite 910
Washington, DC 20001
Certified Mail No. P 855 724 084

Steven Sherwood
Air Force Legal Services Agency
Central Labor Law Office
1501 Wilson Boulevard, 7th Floor
Arlington, VA 22209
Certified Mail No. P 855 724 085

Richard LaBrake, Chief Steward
American Federation of Government
Employees, AFL-CIO, Local 1709
1268 Bay Road
Dover, DE 19901
Certified Mail No. P 855 724 086

Dated: December 22, 2000
Washington, DC