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

LETTERKENNY army DEPOT Respondent and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1429 Charging Party	Case No. 2-CA-80076

Susan M. Roche, Esquire
For the General Counsel

James T. Abbott, Esquire
For the Respondent

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq. and the Rules and Regulations issued thereunder.

Pursuant to an amended charge first filed on November 27, 1987, by Local 1429, National Federation of Federal Employees, (hereinafter called the Union or Local 1429), a Complaint and Notice of Hearing was issued on February 9, 1988, by the Regional Director for Region II, Federal Labor Relations Authority, New York, New York. The Complaint

alleges in substance that Letterkenny Army Depot (hereinafter called the Respondent) violated Section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (hereinafter called the Statute), by terminating the past practice of permitting representatives of the Union to accompany bargaining unit employees, at their request, to meetings with selecting officials to discuss the reasons why an employee was not selected for a promotion, without first affording the Union prior notice and an opportunity to bargain over the change.

A hearing was held in the captioned matter on April 26, 1988, at Letterkenny Army Depot, Chambersburg, Pennsylvania. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The General Counsel and the Respondent submitted post-hearing briefs on June 9, 1986, which have been duly considered.1/

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

At all times material herein, the Union has been the exclusive representative of a bargaining unit consisting of all nonsupervisory Wage Grade employees at Letterkenny Army Depot, except those serving under temporary or excepted appointments.

The Union and the Respondent have signed four collective bargaining agreements, the latest effective May 24, 1985. The agreement provides in pertinent part as follows:

ARTICLE 16

PROMOTIONS

> Section 15. Questions or complaints about the promotion actions should be resolved informally if possible with immediate

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1/ In the absence of any objection, General Counsel's "Motion to Correct Transcript," should be, and hereby is, granted.

> supervisors and/or rating panel, personnel staffing specialists and Union representation if requested by the employee. The formal means for resolving complaints is through the appropriate grievance procedure.
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> Section 17. It is agreed that, upon request, the selecting supervisor will advise unsuccessful best qualified candidates of the reasons for the selection made.

Since 1978, there have been occasions, when an employee requested it, that Union representatives have accompanied employees to meetings with their supervisors to find out why they had not been selected. In this latter connection, Mr. Curtis Baker, a steward for 10 years, testified that he had attended six meetings in 1978, 1979, "six or seven years ago," and 1987, and met with both first and second level supervisors. In only one case was a grievance filed as a result of the meetings.

Mr. Estep testified that when he was chief steward, it was common for him to represent employees at non-selection meetings. In one instance, between 1977 and 1985, he attended meetings with five supervisors on behalf of one employee. In addition, according to Mr. Estep's testimony, 8 or 10 years ago he discussed meetings with Respondent's employee relations staff, including the branch chief. Mr. Estep also testified that the Union usually scheduled the meetings for employees, and that he was never told by Respondent's representatives that the meeting was held pursuant to any section of the collective bargaining agreement. Mr. Tony Rock, another steward, testified that he represented employees at several non-selection meetings in 1985 and 1986 where he met with both first and second level supervisors. Mr. Ray Hockenberry testified that in 1987 he represented an employee at a non-selection meeting with a first level supervisor. Although this was the second meeting that the employee had with his supervisor, the matter discussed was the same in both meetings, i.e. why he had not been promoted.

Respondent's witnesses testified that the Union was rarely present at non-selection meetings and, where they were present, it generally was because a complaint was involved under Article 16, Section 15, of the collective bargaining agreement. Mr. Robert Moore testified that in only one case did an employee request a non-selection meeting and he did not request union representation. In one of the instances discussed above by union steward Rock, he, Mr. Moore, did

meet with Mr. Rock at a second meeting, although he did not say anything other than to repeat what he said at the first meeting. Mr. Moore testified that under the contract, the first meeting should be one-on-one and if the employee is not satisfied, he then can choose to be represented by the Union. However, no section of the contract was cited by Mr. Rock when he came to the second meeting. Mr. Kenneth House testified that of the four promotions he made as a supervisor, only two employees sought a meeting, but neither requested or had union representatives at the meeting. Mr. Charles Moreland, a first line supervisor, testified that employees often request non-selection meetings, but in no instance had an employee requested or had union representation at the first meeting. The same was true of selections by his subordinate, Mr. Charles Jones. Mr. William McClure, Chief Supply Branch, Electronics Shops Division testified that he had 30 or 40 non-selection meetings and that in only one instance was an employee accompanied by a union steward. In that situation, Mr. McClure challenged the union steward's right to be there under the contract and told the union steward that he would allow only the employee to speak. In another instance, he saw a union steward with an employee when they came to his office, but the only person who entered the office was the employee.

There were 141 non-supervisory promotions at Respondent's facility in 1985, 65 in 1986 and 40 in 1987. In addition 20 supervisors were selected from bargaining unit employees in the 1985-87 period.

On October 6, 1987, Mr. James Dick called Mr. Curtis Baker and told him that he had a non-selection meeting scheduled with Mr. House on October 7 and asked Mr. Baker to accompany him. Mr. Baker called Mr. House requesting that the he be allowed to be present at the meeting. Because he believed that Section 17 of Article 16 of the Agreement barred Mr. Baker's presence, Mr. House called Respondent's employee relations office and asked for an interpretation. He talked to Mr. Robert Kirkner, Respondent's chief of that branch, who told him that, under Section 17 of Article 16, the union representative had no right to be there. Although he had not negotiated the contract, Mr. Kirkner based his interpretation on his reading of the contract and on consultation with Mr. James Reyhart, who did negotiate the contract.

Mr. House then returned Mr. Baker's call and informed him that he could not attend the meeting, based on the ruling by Mr. Kirkner. Mr. Baker then telephoned Mr. Kirkner.

Although there is some conflict in testimony as to the substance of the conversation, Mr. Baker's testimony, which I credit, was that Mr. Kirkner stated that he made the decision that Mr. Baker's attendance would be an inappropriate use of official time.

The meeting was held between Mr. Dick and Mr. House, who told Mr. Dick that the selectee was better qualified than Mr. Dick, and that he was satisfied with Mr. Dick's work. When Mr. Dick asked whether he was denied the promotion because he was a union steward, he was told that "they are setting you up for a slam."2/ Subsequently, Mr. Baker drafted a letter that was signed by Mr. Estep to Colonel Robert B. Szydlo, Commander of Letterkenny Army Depot, complaining of his exclusion. On November 20, Colonel Szydlo replied that the action was proper.

On December 21, 1987, Respondent filed several grievances with respect to the presence of two union representatives at a non-selection meeting held on September 24, 1987. Respondent took the position that union representatives is not authorized by Article 16, Section 17.

Discussion and Conclusions

The General Counsel takes the position that the practice of allowing a union representative to accompany unit employees to non-selection meetings had ripened into a condition of employment and that the Respondent violated Sections 7116(a)(1) and (5) of the Statute when it unilaterally terminated the practice without giving the Union prior notice and an opportunity to bargain over the substance of the change in a condition of employment.

Respondent, on the other hand, urges dismissal of the complaint on the grounds (1) that the language of the complaint did not track the language of the charge, (2) the matter involves a contractual dispute and/or interpretation which should be resolved through the grievance machinery set forth in the collective bargaining agreement, and (3) that the record evidence does not support a finding that the alleged practice had ripened into a condition of employment.

It is well settled that a complaint need not track the exact language of the charge. Thus, as long as the

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2/ This statement is not alleged as an independent 7116(a)(1) violation.

allegations of the complaint are related to the events complained of in the charge and otherwise comply with section 2423.12 of the Authority's Regulations the complaint is valid and will be duly considered by the Authority. Department of the Interior and Bureau of Indian Affairs, Washington, D.C., et al., 31 FLRA No. 27; 31 FLRA 267, 276; Bureau of Land Management, Richfield District Office, Richfield, Utah, 12 FLRA 686, 698.

Contrary to the position of the Respondent, I find that the instant dispute is properly before the Authority for resolution. Thus, as noted by the General Counsel, it is only those disputes which owe their existence to conflicting interpretations of the parties' collective bargaining that are to be resolved through the applicable contract grievance machinery. To the extent that the right in dispute owes its existence to a past practice as opposed to a contractual interpretation the proper forum for determining the existence of such right is the unfair labor practice procedure. This is true even where the established practice, i.e. Union officials attending non-selection meetings with the non-selected employee, is consistent with an arguable interpretation of the provisions of the collective bargaining agreement. Department of Defense Dependents Schools, 12 FLRA 43, 45.

Turning now to the final issue, i.e. whether there exists a past practice of allowing union stewards or other union representatives to accompany unit employees to non-selection meetings, I find, contrary to the contention of the General Counsel, that the preponderance of the record evidence falls short of establishing the existence of such a practice.

All parties are in agreement that in order to establish a past practice which has ripened into a condition of employment, it must be shown that the practice has continued for a considerable period of time, was known to management and that management had acquiesced in such practice. Norfolk Naval Shipyard, 25 FLRA 277, 286; Department of Health, Education and Welfare, Region V, Chicago, Illinois, 4 FLRA 736, 746.

In support of the complaint the General Counsel produced four union stewards who offered unspecific testimony concerning approximately 10 occasions during the period 1978-1987 when they, upon request, accompanied unit employees to non-selection meetings. Respondent, on the other hand offered the testimony of four supervisors who denied that, but for one occasion, having unit employees accompanied by

stewards or other union representatives at non-selection meetings. The record further reveals that since 1985 there have been approximately 246 wage grade, wage leader and wages supervisor selections made from the bargaining unit employees. The record does not indicate how many selections were made in the years 1978-1985.

Assuming that if there were 246 selections made in a three year period, at least an equal number of such selections would probably have been made in the preceding seven year period, then we have a situation where on only 10 occasions out of some 492 selections during a 10 year period, a steward, on request, would have accompanied unit employees to a non-selection meeting. In such circumstances, I find that the actions of the stewards and/or other union representatives in accompanying unit employees to a non-selection meeting to be of a more sporadic than a continuing nature. Accordingly, based upon the record as a whole, I find that the General Counsel had not established by a preponderance of the evidence that a past practice existed. In such circumstances, I further find that the Respondent did not violate the Statute when it prohibited a union steward from accompanying a unit employee to a non-selection meeting.

In view of the foregoing, it is recommended that the Authority adopt the following order dismissing the complaint in its entirety.

ORDER

It is hereby Ordered that the Complaint, in Case No. 2-CA-80076, should be, and hereby is, dismissed in its entirety.

Issued, Washington, D.C., September 21, 1988

BURTON S. STERNBURG
Administrative Law Judge