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

DEPARTMENT OF THE AIR FORCE, SACRAMENTO AIR LOGISTICS CENTER, McCLELLAN AIR FORCE BASE, CALIFORNIA Respondent	
and	Case Nos. 9-CA-80327 9-CA-80487
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1857, AFL-CIO Charging Party	

Stephanie Arthur, Esq.
For the General Counsel

John S. Gaffney, Esq.
For the Respondent

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This is a consolidated proceeding under the Federal Service Labor-Management Statute, 92 Stat. 1191, 5 U.S.C. section 7101 et seq., (herein called the Statute). It was instituted by the Regional Director of Region IX based upon unfair labor practice charges originally filed on May 3, 1988 and August 2, 1988 respectively, and first amended on January 4, 1989, by the American Federation of Government Employees, Local 1857, AFL-CIO (herein called the Union) against Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California (herein called Respondent). The Consolidated Complaint alleges that Respondent on or about April 5, 1988, and July 18, 1988, respectively directly provided employees

final decisions on proposed disciplinary matters in which matters the employees were being represented by the Union and thereby did bypass the Union in violation of section 7116(a)(1) and (5) of the Statute and that Respondent also independently violated section 7116(a)(1) of the Statute.

Respondent denied the commission of any unfair labor practices.

A hearing was held before the undersigned in Sacramento, California, at which time the parties were represented by counsel and afforded full opportunity to adduce evidence and to call, examine, and cross-examine witnesses and to argue orally. Timely briefs were filed by the parties and have been duly considered.

Upon consideration of the entire record in this case, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law and recommendations.

Findings of Fact

At all times material herein, the Union has been the exclusive representative of an appropriate unit of employees which included certain of Respondent's employees.

At all times material herein, the Union and Respondent have been parties to a collective bargaining agreement which includes Section 5.04. That section provides that notices of proposed disciplinary actions and final decisions will be given to employees in duplicate "so that they may give one copy to their representative or the Union if they desire." The agreement is silent, however, with respect to the Union's presence when final decisions are delivered to the employee.

The language of section 5.04 is identical to that contained in the prior three agreements and to that proposed by the Union during the last contract negotiations. At one point during impasse proceedings, one of the union negotiators indicated that Weingarten rights, i.e. the employees' rights under section 7114(a)(2)(B) of the Statute, could include having a representative present when the employee received a disciplinary decision, but the union never put forward, and consequently never withdrew, any proposal that its representatives be present on such occasions. Respondent's representative, Chief of Employee and Labor-Management Relations Gary Baddley asserted that

the Union advanced a position that it be present when disciplinary decisions were delivered, but a Union witness Dora Solorio denied that the union ever put forward such a proposal. Furthermore, Respondent's bargaining notes do not support that testimony. Solorio, who was a union negotiator throughout the year of negotiations testified that the union's initial proposal for section 5.04 is exactly what is contained in the collective bargaining agreement and that the union never expanded its proposal to include it being present when disciplinary decisions were delivered. According to Solorio, at impasse and in the context of a general discussion of Weingarten, one of the union's negotiators may have indicated his view that Weingarten rights include the right to be present when disciplinary decisions were issued. Finally, there was no evidence offered to show the circumstances under which the union purportedly withdrew its alleged proposal notwithstanding the existence and presence at the hearing of Respondent's bargaining notes. Thus, Solorio's testimony that no such proposal was made and that no such proposal was withdrawn is credited over Baddley's unsupported assertions to the contrary. Furthermore, Respondent's bargaining notes appear to corroborate this testimony. Accordingly, it is found that the union did not put forth any "proposal" concerning its presence when disciplinary decisions were given to employees.

On September 23, 1987, the Authority issued its decision in 438th Base Group (MAC), McGuire Air Force Base, New Jersey, 28 FLRA 1112 (1987). By letter dated April 6, 1988, John Salas, local union president advised Respondent that, pursuant to the above-named Authority decision the Union would demand its right to be present when employees represented by the Union were furnished decisions on disciplinary proceedings. Subsequently, on April 22, 1988, Respondent's Chief of Labor and Employee Management Relations Baddley, refused to acknowledge the Union's right to such representation. The consolidated cases in this matter were thus generated from the McGuire decision.

Case No. 9-CA-80327

Lindsey L. Butts is employed by Respondent as an aircraft painter worker, WG-07. Sometime around February 2, 1988, Butts received a Notice of Proposed Removal from general foreman James R. Polli. Butts immediately requested union representation and arrangements were made by management for him to meet with Frank Wilson, a union steward. Wilson prepared a reply to the Notice Of Proposed Removal,

personally delivered the reply to Polli on February 23 and made arrangements with Robert Schmitt, the deciding official, for an oral reply meeting. Wilson also represented Butts at the oral reply.

Subsequently, on April 5, 1988, Butts was notified of a meeting with Robert Schmitt. Although he was not told the purpose of the meeting, he assumed it was to give him the final decision on the proposal and so he contacted Wilson who knew nothing of the meeting. Butts and Wilson met briefly before the meeting. Wilson gave Butts a statement asserting the Union's right to be present at the issuance of the decision letter which he told Butts to give to Schmitt. Butts then went into his meeting with Schmitt. Schmitt handed him the decision letter, whereupon Butts handed Schmitt the statement and requested that they reschedule the meeting so his union representative could be present. Without reading the paper, Schmitt returned it to Butts stating that "this was a decision letter and that [his] union steward didn't need to be present." Butts repeated his request that the meeting be rescheduled so he could have his union steward present and Schmitt repeated that he did not need representation during a decision letter. Butts then signed the letter and Schmitt gave him two copies, noting that the original was for Butts' union steward. After Schmitt gave Butts the decision letter, Butts proceeded to ask Schmitt some questions about the AWOL and other matters which were referred to in the decision letter. Schmitt answered Butts' questions but did not otherwise comment about the disciplinary action.

Case No. 9-CA-80487

Stephen Seeboth is employed as a sandblaster at the base. Around June 13, 1988, Seeboth received a Notice of Proposed Suspension from his supervisor Edward Lutz. After receiving the proposal, Seeboth requested union representation and Lutz made arrangements for him to meet with union steward Ray Duclos. Duclos prepared a response dated June 29, 1988 to the Notice of Proposed Suspension, which he delivered to the deciding official, Charles Leslie. The response reiterates the Union's demand, previously noted, in Salas' April 6, 1988 letter to Baddley, that it be present during issuance of the decision letter to the employee.

On July 18, 1988, Seeboth's supervisor informed him that he was to meet with Leslie. When Seeboth arrived at Leslie's office, Leslie told him that a decision had been made to suspend him for one day. Seeboth requested that his

representative, Roy Duclos, be present. Leslie replied that the decision had been made and that it would be a waste of everyone's time to call the steward just to present the final decision. Leslie then had Seeboth sign the decision and he provided Seeboth with two copies, one of which was for Seeboth's union representative. Duclos received no notification of the July 18 meeting and, therefore did not attend.

Conclusions

These consolidated cases present the identical issues of whether Respondent bypassed the Union by delivering final decisions on disciplinary actions to employees it represented without inviting the Union to be present and whether or not the Union waived its right to be present during the delivery of disciplinary decisions to bargaining unit employees. Also at issue is whether Respondent's conduct constituted a separate section 7116(a)(1) violation.

The General Counsel maintains that these matters are controlled by McGuire Air Force Base, supra. Respondent contrariwise insists that Department of the Air Force, Headquarters 832d Combat Support Group, Luke Air Force Base, Arizona, Case No. 8-CA-50075, OALJ 85-138 (1985), should be followed. The Luke case supra is distinguishable. McGuire, decided after Luke clearly makes it a bypass violation when notwithstanding the fact that an exclusive representative is involved in all previous stages of a disciplinary proceeding, it is ignored when final decisions on the actions are delivered only to the employee. Such conduct, it was found constituted direct dealings with an employee who is represented and is violative of the Statute. McGuire also finds such conduct demeaning and an interference with the employees rights to designate and rely on the union for representation. Here, the Respondent consciously rejected Union demands to be present during the meetings where employees are given final decisions on disciplinary action. Furthermore, the deciding officials in the instant cases refused to honor specific employee requests to have union representatives present during the meetings in question. In Luke the administrative law judge's conclusion appears to be predicated solely on a determination that the one time conduct of the respondent was "innocent" of any purpose of disparagement. This case, quite the contrary, represents a conscious effort on the Respondent's part, on more than one occasion, to disparage the exclusive representative. I agree with the General Counsel that this case is on all fours with McGuire and that whereas here an employee is

represented by an exclusive representative the agency must deal with that representative at all stages of the proceeding and not with the employee. Failure to deal with the representative of an employee such as are found here, therefore constitutes a bypass of the representative and violates the Statute. It is also found that Respondent's conduct herein constituted an independent violation of section 7116(a)(1).

The defense that the Union through collective bargaining and past practice waived its right to be present when employees are delivered notices of final decision is also rejected. Respondent relies on the language of section 5.04(a) of the collective bargaining agreement where it provides that employees will receive two copies of the notice so that one copy could be given to their representative if the employee desired. While it is clear that the notices were discussed during the parties negotiations, such evidence does not establish that the Union clearly and unambiguously waived its statutory right to be present when the notices were delivered to employees. Even the testimony presented by Respondent does not establish a contract waiver since a matter will be considered waived by contract only where it can be determined that it was fully discussed and explored during negotiations. Internal Revenue Service, 29 FLRA 162 (1987). While there was, without question, some discussion of delivery of notices of proposed decisions and notices of final decisions during negotiations those discussions do not rise to a level which would establish that one party unmistakably relinquished an interest or acceded to the position of the other party. See, Internal Revenue Service, 19 FLRA 401, 409-410 (1985); Internal Revenue Service, 17 FLRA 731, 746 (1985).

The law is also well established that a statutory right will be found only where the exclusive representative has clearly and unmistakably waived the statutory right involved. Department of the Air Force, Scott Air Force Base, Illinois, 5 FLRA 9 (1981). The contract is relevant only insofar as it might constitute a waiver or modification of the union's statutory rights. McGuire, supra, at 1123. Again as the General Counsel notes, this case involves statutory rights articulated by the Authority for the first time in McGuire, i.e. the section 7114 application to represent employees during all stages of a proposed disciplinary action. Clearly the parties could not have waived this right during 1986 contract negotiations which took place well before the decision issued in McGuire since such a right was first expressed by the Authority only after

those negotiations took place. Therefore, it cannot be found that the Union knowingly waived its right to receive those notices in the instant case. Office of Program Operations, Field Operations, Social Security Administration, San Francisco Region, 10 FLRA 172, 178 (1982).

Accordingly, it is found that Respondent bypassed the Union on April 5, 1988 and July 18, 1988, respectively when it held meetings to present decisions on disciplinary actions to employees Butts and Seeboth, who were being represented by the Union, without allowing the Union the opportunity to be present at the respective meetings in violation of section 7116(a)(1) and (5) of the Statute. It is also found that Respondent violated section 7116(a)(1) of the Statute by refusing to permit the Union to attend the above meetings and thereby demeaned it and interfered with employee rights to designate the Union and rely on it to represent bargaining unit members throughout such disciplinary proceedings.

Having found that the Union did not waive its statutory right to receive copies of disciplinary decisions; that Respondent bypassed the Union in violation of section 7115(a)(1) and (5) of the Statute; and, finally that Respondent violated section 7116(a)(1) of the Statute by interfering with employee rights to designate the union to represent them, it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California, shall:

1. Cease and desist from:

(a) Failing and refusing to bargain in good faith with the American Federation of Government Employees, Local 1857, AFL-CIO, the exclusive bargaining representative of its employees, by bypassing designated union representatives of its employees and furnishing or delivering disciplinary decisions or other responses only to the disciplined employees.

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

Relations Statute by furnishing or delivering decisions or other responses involving disciplinary proceedings directly to employees while failing to furnish same to the American Federation of Government Employees, Local 1857, AFL-CIO, the designated representative of such employees.

(c) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights assured by the Statute.

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

(a) Furnish or deliver all decisions or other responses involving disciplinary proceedings to designated union representatives of employees at the same time as they are furnished or delivered to employees.

(b) Post at its McClellan Air Force Base, California facilities where employees in the bargaining unit are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commanding Officer 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 insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region 9, Federal Labor Relations Authority, 901 Market Street, Suite 220, San Francisco, CA 94103, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., February 1, 1990.

ELI NASH, JR.
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to bargain in good faith with the American Federation of Government Employees, Local 1857, AFL-CIO, the exclusive bargaining representative of our employees, by bypassing designated union representatives of our employees and furnishing or delivering disciplinary decisions or other responses only to the disciplined employees.

WE WILL NOT in any like or related manner interfer with, restrain or coerce our employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute by furnishing or delivering decisions or other responses involving disciplinary proceedings directly to employees while failing to furnish same to the American Federation of Government Employees, Local 1857, AFL-CIO, the designated representative of such employees.

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

WE WILL furnish or deliver all decisions or other responses involving disciplinary proceedings to designated union representatives of employees at the same time as they are furnished or delivered to employees.

_____

(Activity)

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, Region 9, whose address is: 901 Market Street, Suite 220, San Francisco, CA 94103, and whose telephone number is: (415) 995-5000.