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 AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1857, AFL-CIO Charging Party	Case Nos. 9-CA-70343 9-CA-70376

Mark F. Commerford, Esq.
For the Respondent

Stefanie Arthur, Esq.
For the General Counsel

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on October 30, 1987 by the Acting Regional Director, Federal Labor Relations Authority, Region IX, a hearing was held by the undersigned on January 11, 1987 at Sacramento, California.

These cases arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 et seq. (herein called the Statute). They are based on a first amended charge in Case No. 9-CA-70343 filed on October 26, 1987, and a charge in Case No. 9-CA-70376 filed on August 13, 1987, by 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 alleged, in substance, that since on or about both July 24, 1987 and July 28, 1987 respectively Respondent conducted a separate meeting with a particular bargaining unit employee concerning each employee's testimony as a Union witness for a scheduled arbitration hearing; that such meetings, which constituted formal discussions, were conducted without providing the Union with prior notice and/or an opportunity to be represented thereat as required by section 7114(a)(2)(A) of the Statute - all in violation of section 7116(a)(1) and (8) of the Statute.1/

Respondent's Answer dated November 24, 1987, denied the aforesaid allegations as well as the commission of any unfair labor practices.

All parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, briefs were filed with the undersigned which have been duly considered.

Upon the entire record, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. At all times material herein the American Federation of Government Employees, AFL-CIO (AFGE) has been certified as the exclusive bargaining representative of a nationwide consolidated unit of nonsupervisory, nonprofessional employees of the Air Force Logistics Center, including Respondent's employees, with specified exclusions from the appropriate unit.

2. At all times material herein the Union has been affiliated with AFGE and acted as an agent of AFGE for the purposes of collective bargaining and representing an appropriate unit of Respondent's nonsupervisory and nonprofessional employees.

1/ Case No. 9-CA-70343 concerns an alleged formal discussion by management via telephone on July 24, 1987 with employee Ricardo Slade. Case No. 9-CA-70376 concerns an alleged formal discussion by management by was of a meeting held on July 28, 1987 with employee Roger Riley.

3. Prior to July 28, 1987[2/] James Potter, a unit employee, allegedly reported to work one day in an intoxicated condition. Management sent him for a breathalizer test which Potter refused to take, and then the employee was sent home based on his being intoxicated. Respondent placed Potter on AWOL.

4. As a result of a grievance filed by the employee, an arbitration hearing was accordingly scheduled for July 28. Chief steward Margaret O'Keeffe, who represented Potter, called management official Jeannie Eurine on July 23 to give the latter the names of the witnesses whom O'Keeffe would call to testify at the hearing. One of the witnesses so named was Ricardo Slade, an employee of Respondents who had supposedly seen Potter on the day he reported for work and was sent home. The name of the witness was given to Union representative O'Keeffe by Potter.

5. On July 24 Slade telephoned Captain Drenan, Respondent's representative, upon receiving a message from his supervisor directing him to do so. Drenan informed the employee that he was an Air Force attorney who was prosecuting the case against Potter. Drenan stated he had Slade's name as a potential witness at the arbitration hearing, and he wanted to ask him a few questions. Drenan told Slade that he didn't have to talk to him; that nothing would happened to the employee whether or not he talked to Drenan.[3/] Whereupon the Captain proceeded to ask Slade questions re Potter <u>on the phone</u>.

6. In respect to the Potter incident, Drenan then made several inquiries of Slade. He asked the employee where he worked, where he was on the day of the occurrence, and whether Slade would know if Potter was intoxicated. Slade replied that Potter seemed all right to him. Upon being asked if he talked to Potter personally, Slade said he told Potter that the supervisor was kind of irritable. Drenan also asked if Slade was going to be a witness. The employee said he would not be a witness although the Union had asked

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2/ Unless otherwise indicated, all dates hereinafter mentioned occur in 1987.

3/ At the hearing Drenan testified that he called Slade to verify that the employee would be a witness and to find out what Slade knew re the incident.

him several times.4/ Slade advised Drenan he didn't want to have anything to do with the situation; that he didn't want to be a witness, especially since he felt Potter should have asked him to be a witness rather than the Union.

7. Record facts show Drenan did not prepare a list of questions to ask Slade; that he took no notes during the interview, and did not write anything as a report thereafter.5/

8. On July 27 Drenan phoned O'Keeffe and informed her that he had spoken to Slade. Drenan did not contact her previously nor was the Union notified of his intention to speak with Slade.

9. As a result of a reprimand given employee David Burrows charging him with unsafe conduct for climbing into an attic without a helmet, a grievance was filed with Respondent. The arbitration hearing in respect thereto was scheduled for July 29. About a week before, Dora M. Solorio, the Union official who represented Burrows in the proceeding, called management representative Jeannie Eurine and gave her the names of the prospective witnesses for the Union. One such witness was Roger Riley who worked in the same section with Burrows, and whom the grievant asked to testify at the arbitration hearing.

10. On the day prior to the arbitration, at the request of Major Norman Nivens of the Judge Advocate's Staff, Riley met with Nivens in the Judge Advocate's office. Nivens decided to meet with the employee because it was not clear to him what conditions were like at Burrow's work place, and he wanted to verify instructions that were given to employees re the proper safety equipment to wear in the area. Prior to the meeting Nivens spoke to Riley, whom he knew would be a witness for Burrows, and explained why he wanted to meet with the employee.

11. At the start of the interview Nivens told Riley that the employee was under no obligation to confer with

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4/ Although the arbitration hearing commenced, the Union withdrew the case after opening statements were made.

5/ While the two participants vary somewhat as to how long the meeting lasted, based on the nature of the discussion and the topics covered I find that the discussion did last between 15 and 25 minutes.

him; that nothing would happen to Riley whether or not he did answer questions regarding Burrows.6/ Nivens asked Riley what briefings were given re proper wear of safety equipment. He inquired as to briefings held on bump/hard hats and safety shoes; and the Major asked what the lighting was like in the building where Burrows was hurt. Respondent's representative also asked whether Burrows had many accidents in the past and how safely did the latter perform, and he inquired if Riley saw his co-worker do anything improper in the past. Riley informed Nivens that the lighting was not very good in the building where the incident occurred.7/

12. Nivens took no notes of the meeting, nor did he write out the questions in advance of the discussion.

Conclusions

The ultimate issue to be determined in both cases is whether the separate and individual interviews of an employee by management constituted a formal discussion which required that Respondent afford the Union an opportunity to be present.

Underlying such final determination is section 7114(a)(2)(A) of the Statute which provides:

> "§ 7114. Representation rights and duties
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> "(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at -
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> "(A) any formal discussion between one or more representatives of the agency and one or more

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6/ The witnesses disagree as to the duration of the meeting. Riley testified it lasted about an hour, while Nivens testified it was about 15 minutes. Based on the subject covered thereat, the nature of the discussion, and the summary made by Riley on July 31 stating the duration of the interview. I find it lasted nearly an hour.

7/ The record does not contain responses by Riley to other questions which were posed to him by Nivens.

> employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment[.]

Substantially the same language appeared in Section 10(e) of Executive Order 11491, as amended.[8/] Several cases also arose under that Order dealing with situations where an agency conducted interviews of employees preparatory to an arbitration hearing. In those instances where the interviews were held in management's office, and the grievant requested that an employee be a witness for him, they were held to be formal discussions under § 10(e) of the Order. See Internal Revenue Service, South Carolina District, A/SLMR No. 1172, McClellan Air Force Base, A/SLMR No. 830.

As heretofore set forth in the applicable statutory provision, a formal discussion must take place with an employee so as to entitle the union representative to be present thereat. Differences of opinion may arise as to what constitutes a discussion between management and an employee. Apart from the particular dialogue occurring between them, the Authority has held that Congress intended the term "discussion" to be synonymous with "meeting." Thus, where management holds a formal meeting with employees to discuss grievances, personnel policies or practices, or other general conditions of employment, it must afford the bargaining representative an opportunity to be present under section 7114(a)(2)(A) of the Statute. Department of Defense, National Guard Bureau, Texas Adjutant General's Department, 149th TAC Fighter Group (ANG) (TAC), Kelly Air Force Base, 15 FLRA 529.

While the question as to whether a "discussion" occurred between management and an employee may be relatively easy to determine, a more difficult issue for resolution is whether the same was "formal" in nature. In Department of Health and Human Services, Social Security Administration, Bureau of Field Operations, San Francisco, California, 10 FLRA 115,

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8/ ". . . the labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit." (Underscoring supplied).

the Authority mentioned several factors in deemed relevant in making such determination. These indicia were: (1) whether the person who held the discussion was merely a first-level supervisor or higher in the management hierarchy; (2) whether other management representatives were present; (3) where the meetings took place; (4) how long they lasted; (5) how meetings were called (advance written notice or spontaneously); (6) whether a formal agenda was established; (7) whether attendance was mandatory; (8) the manner in which meetings were conducted. In connection with listing these indicia, the Authority has also declared that the list was not intended to be exhaustive; that other factors may be controlling, and the totality of the facts and circumstances will be considered. Defense Logistics Agency, Defense Depot Tracy, Tracy, California, 14 FLRA 465.

Subsequent decisions reveal no especial uniformity in reliance upon particular factors or indicia set forth by the Authority in the Defense Logistics case, supra. Thus, in Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California, 29 FLRA 594, an interview of our employee by that Respondent's Labor Counsel was held to be a formal meeting even though it did not appear whether any of the three management officials in attendance was the employee's supervisor.9/ In Department of the Air Force, F.E. Warren Air Force Base, Cheyenne, Wyoming, 31 FLRA 541, the Authority relied upon the factors reflecting that (1) the meeting took place in a private room in the civilian personnel office in the presence of an Air Force attorney and the Chief of labor relations; (2) the employee and the union were notified in advance. Accordingly, the meeting was deemed to be formal in nature.

In considering whether a discussion was formal or not, the Courts have not embraced some of the indicia which the Authority has mentioned in its decisions. Thus, in National Treasury Employees Union v. FLRA, 774 F.2d 1181 (1985) the U.S. Court of Appeals, District of Columbia Circuit stated that ". . . lack of notice and formal agenda, therefore, offer negligible evidence of informality. . . ." In the cited case the court emphasized that it was not an impromptu gathering. It also concluded that the lack of a clear

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9/ The Authority relied on the fact that the employee was requested to attend in advance; that the meeting was held in the Counsel's office, that questions were asked and notes were taken by management.

finding that the presence of the employee at the interview was mandatory was not controlling; that the fact that the management's representatives were not in an employee's direct chain of supervision was not determinative.10/

With respect to whether a discussion or meeting concerns a grievance under section 7114(a)(2)(A) of the Statute, decisional law in the public sector is more precise and definitive. The Authority has concluded that an interview by management of an employee who is scheduled to be a witness in a forthcoming arbitration hearing does concern a grievance under the Statute. Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, supra. A failure and refusal to afford the exclusive representative an opportunity to be present at such interview - providing it meets the test of a formal discussion - would be violative of sections 7116(a)(1) and (5) of the Statute. See also Bureau of Government Financial Operations, Headquarters, 21 FLRA 51 (involving an interview of a unit employee in preparation for a hearing before the Merit Systems Protection Board).

Case No. 9-CA-70343

Apart from other considerations, it seems quite clear that the interview conducted via telephone by Captain Drenan of employer Ricardo Slade on July 24, 1987 was a "discussion" within the meaning of § 7114(a)(2)(A) of the Statute. As attorney for the Air Force, Drenan asked Slade various questions re employee Potter's being intoxicated - all in preparation for the scheduled arbitration hearing - as well as questions re Slade's whereabouts at the time of Potter's condition. Those queries were responded to by Slade and details were given by him to the attorney. Moreover, in line with the Authority's determination in McClellan Air Force Base, California, supra, the interview, which was conducted by management in preparation for the arbitration hearing involving Potter who was sent home for being intoxicated, concerned a grievance within the meaning of § 7114(a)(2)(A).

More difficult of determination is whether the discussion was a formal one within the meaning of that section of the

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10/ In reversing the Authority the Court of Appeals dwelt on the facts indicating the discussion occurred away from the employee's work station, lasted from 20-30 minutes, and was marked by the taking of notes.

Statute. While the Authority has enumerated the factors which it deems significant in determining whether a discussion or meeting is formal, it is also clear that not all of said indicia must be present. Nevertheless, it would seem that such factors as are present must outweigh the importance of those which are absent. In such instances the conclusion may well be mandated that a formal meeting occurred.

In respect to the telephone discussion with Slade on July 24, upon careful deliberation I feel constrained to conclude that it was not formal within the meaning and intent of section 7114(a)(2)(A) of the Statute. Very few, if any, of the criteria are present which the Authority relied upon and set forth in the Defense Logistics case, supra. The discussion occurred on the telephone and not in management's office; no agenda was established although, it is true, that Captain Drenan indicated the purpose for which he planned to phone Slade; no notes or transcription was taken of the conversation; notification to the employee interviewed was not scheduled with him in advance and was initiated by an unexpected telephone call to Slade.

The precise question as to whether a formal discussion under the Statute may occur in the context of a telephone conversation between management and an employee has not been decided by the Authority.[11/] While I recognize that the Union may have an interest in the discussion as the bargaining representative of a unit including this employee, the statutory provision - as interpreted by the Authority - would seem to envisage more formality than a mere telephone conversations. Cases wherein a formal discussion was found to have taken place have involved a summoning of an employee by management to a meeting. Such meetings were held in an official's office. These two factors, if none other, lend an aura of formality to any discussion between management and an employee. Management representative Captain Drenan

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11/ In National Archives, 20 FLRA 131 the Authority found no formal discussion occurred when management representatives initiated telephone conversations with two unit employees which advised them of an opportunity to apply for Competitive Service positions. Such contacts, it held, did not concern a grievance or condition of employment. The Authority also stated it was unnecessary to decide whether phone calls initiated by management representatives with unit employees may constitute "discussions."

did not summon Slade to his office nor were any arrangements made to do so. In view of the foregoing, and the fact that the indicia relied upon by the Authority to establish a "formal" discussion are not present. I conclude that the telephone conversation between Captain Drenan and employee Ricardo Slade on July 24, 1987 was not a formal one within the meaning of § 7114(a)(2)(A) of the Statute. Further, that Respondent's refusal and failure to provide an opportunity to the Union to participate therein was not a violation of sections 7116(a)(1) and (5) of the Statute.

Case No. 9-CA-70376

Respondent makes several arguments in its insistence that the interview by Major Nivens of employee Roger Riley on July 23 or 24 was not a formal discussion under the Statute. It contends that (a) interviewing unit employees to prepare for third party proceedings does not constitute a formal discussion; (b) Nivens is not in the supervisory chain over Riley; (c) no other management representatives attended; (d) the meeting did not occur in an office of Riley's supervisor; (e) no formal advance notice of the meeting was given and no agenda was prepared; (f) Riley's attendance was not mandatory; (g) notifying or written statement of the interview was made by management.

With respect to its first contention, the Authority has concluded otherwise. In the Sacramento Air Logistics Center (McClellan Air Force Base, California) case, supra, it adhered to the decisions under Executive Order 11491, as amended, that management's interview of an employee scheduled to be a witness in an arbitration hearing was a formal discussion. If it meets the other criteria, therefore, the bargaining representative has a right to be represented at such an interview based on its legitimate interests on behalf of the unit.

Although all of the criteria delineated by the Authority in determining whether a formal discussion exists are not present herein, I am persuaded that record facts support the conclusion that the meeting with employee Riley was formal in nature. Similar arguments were made by the employer in the above cited case concerning the fact that the employee's supervisor did not conduct the meeting and that no formal agenda was prepared. Other indicia of formality were sufficient to characterize the meeting with the employee as formal. Further, the Circuit Court in the NTEU case, supra, emphasized that the Authority had not required a showing that an interviewer was within the employee's chain of

supervisors. In addition, the interviewer in F.E. Warren Air Force Base, supra, was an attorney and his interview of an employee in preparation for an unfair labor practice hearing was deemed by the Authority to be a formal discussion within section 7114(a)(2)(A).

In the instant case certain factors tend to buttress the conclusion that the meeting between Major Nivens and employee Riley exceeded the bounds of a casual encounter in much the same fashion as in Social Security Administration, 18 FLRA 249. It is noted particularly that (a) management was provided in advance with a list of the Union witnesses for the scheduled arbitration hearing; (b) Major Nivens made arrangements or plans for the meeting in advance with Riley, who was one of the proposed witnesses; (c) employee Riley was summoned to the meeting by management; (d) the meeting was conducted by an attorney with the Judge Advocate's office; (e) it was held in the legal office away from Riley's desk or worksite; (f) it lasted nearly an hour; (g) the discussion concerned the grievance of fellow employee Burrows, the equipment used and its safety features, as well as other conditions present at the building or worksite.

While the meeting was not conducted by especial levels of supervision, the fact that the interview was undertaken by a representative of the Judge Advocate's Office has significance. It tends to become even more formalistic in nature. Despite assurances given to Riley that he was not required to answer questions and need feel no refusals if he did not, such safeguards are for the employee. The Union still has a vested interest in being present as the bargaining unit representative.

In sum, I conclude that the meeting held by Respondent with employee Roger Riley on July 23 or July 24, 1987 was a formal discussion within the meaning of section 7114(a)(2)(A) of the Statute. The failure and refusal to provide the Union with an opportunity to be present thereat was a violation of sections 7116(a)(1) and (5) of the Statute.

Accordingly, and in view of the foregoing, it is recommended that the allegation in the Consolidated Complaint in Case No. 9-CA-70343 with respect to Respondent's agent, Captain Michael Drenan, conducting a formal discussion with an employee on or about July 24, 1987, without affording the Union an opportunity to be present - all in violation of sections 7116(a)(1) and (5) of the Statute - be dismissed.

It is also recommended, in view of the foregoing that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Labor-Management Relations Statute, the Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California, 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, AFL-CIO (AFGE) concerning grievances or any personnel policy or practices or other general conditions of employment, including interviews conducted in preparation for arbitration hearings, without affording AFGE prior notice of and the opportunity to be represented at the formal discussions.

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights assured them 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) Notify the American Federation of Government Employees, AFL-CIO of, and afford it the opportunity to be represented at, formal discussions with its employees exclusively represented by AFGE concerning grievances or any personnel policy or practices or other general conditions of employment, including interviews conducted in preparation for arbitration hearings.

(b) Post at its facilities at its Sacramento, California facility 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 ensure 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 XI, Federal Labor Relations Authority, 901 Market Street, Suite 220, San Francisco, California 90071, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., October 13, 1988

WILLIAM NAIMARK
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDER BY THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT conduct formal discussion with our employees in the bargaining unit exclusively represented by the American Federation of Government Employees, AFL-CIO (AFGE) concerning grievances or any personnel policy or practices or other general conditions of employment, including interviews conducted in preparation for arbitration hearings, without affording AFGE prior notice of an the opportunity to be represented at the formal discussion.

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

WE WILL, notify the American Federation of Government Employees, AFL-CIO of, and afford it the opportunity to be represented at, formal discussion with our employees exclusively represented by AFGE concerning grievances or any personnel policy or practices or other general conditions of employment, including interviews conducted in preparation for arbitration hearings.

_____

(Agency or Activity)

Dated: _____ By: _____

(Signature)

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 XI, whose address is: 901 Market Street, Suite 220, San Francisco, California 90071, and whose telephone number is: (415) 995-5000.