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 COMMAND, McCLELLAN AIR FORCE BASE, CALIFORNIA Respondent	
and	Case No. 9-CA-90071
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1857, AFL-CIO Charging Party	

Stefanie Arthur, Esq.
For the General Counsel

Mark Commerford, Esq.
For the Respondent

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This is a 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 an unfair labor practice charge filed on November 8, 1988, 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 Complaint alleges that Respondent by a labor attorney in its Staff Judge Advocate Office and an employee Relations Specialist conducted two separate formal discussions with a bargaining unit employee relative to her possible testimony at a scheduled arbitration hearing without providing the

Union with prior notice and/or the opportunity to be represented at the above meetings.

Respondent's Answer 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 a negotiated grievance procedure providing for the arbitration of certain bargaining unit employee grievances.

Linda Roy is employed as a Distribution Specialist in Respondent's Directorate of Distribution. From October 1987 until May 1988, Roy worked in the Shipment Planning Address Labeling System (SPALS) unit; since June 1988, Roy has worked in the Routing and Consolidation unit. Carla Schuette is the chief of the SPALS unit, and was Roy's immediate supervisor when she worked there. By letter dated January 25, 1988, Schuette designated Roy to act as alternate supervisor during her absences. Alternate supervisors are considered bargaining unit employees covered by the parties' collective bargaining agreement thus, they may be on dues withholding if they are members of the union and file grievances under the negotiated grievance procedure. Alternate supervisors retain their same position and grade and do not receive a temporary promotion.

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*/ The General Counsel's uncontested motion to correct the transcript is granted.

The local supplemental provides that the alternate supervisor is selected by the supervisor from among the highest graded employees "for the purpose of insuring continuity of functions while the supervisor is absent." The negotiated operating instruction, DSTOI 40-1, sets forth the duties and responsibilities of the alternate supervisor which Schuette restated in her January 25 designation letter where, she said in the performance of alternate supervisor duties, you will be guided as follows:

> a. During this period you will not be required or authorized to perform any supervisory function when I am present for duty.
>
> b. During my absence (TDY, annual leave, sick leave, attending meetings, etc.), your primary duty is the performance of supervisory functions as follows:
>
> (1) Act for me to insure the productivity and timeliness goals of the unit are met.
>
> (2) Receive requests for leave and/or leave scheduling and coordinate approval/ disapproval with the section/branch chief.
>
> (3) Approve or disapprove authorized absences from the work area while employees are in duty status.

Roy was alternate supervisor from January 26 until she left the SPALS unit at the end of May 1988. During that time, she acted as alternate each afternoon when Schuette left for the day and part of the day on Saturday. Her primary function as alternate supervisor was to insure that the work continued to get out. Roy never assigned employees work that was not in their regular routine. Although authorized to receive sick or annual leave requests and/or to schedule such leave with approval of higher authority, in fact, during her four months as alternate, Roy did not handle any leave requests. Similarly, although authorized to approve or disapprove absences from the work area, such as an employee going to the infirmary or to a meeting away from the work area, Roy never had occasion to exercise this authority. Roy did not prepare or have any input into the appraisals of the employees in her unit; she did not prepare reports about the employees' performance during the periods while she was acting supervisor.

On or about February 16, after Schuette left work for the day, and while Roy was acting as supervisor, three employees in the SPALS unit left the work area, basically taking 45 minutes for their regular 10 minute break. The employees did not ask Roy's permission to leave the shop. On their return, the employees were stopped by the Duty Officer and subsequently charged AWOL and received letters of reprimand from Schuette. Roy's involvement in the incident was to prepare a memorandum to Schuette reporting what had occurred. Roy was not consulted and had no input into Schuette's decision to issue the letters of reprimand.

Two of the employees filed grievances over the AWOLS and their reprimands and the grievances were subsequently set for arbitration in August 1988. Several weeks prior to that date, Roy was informed by her supervisor in the Routing and Consolidation Unit that a meeting had been scheduled for her to attend in the Staff Judge Advocate Office. At this time, Roy was working graveyard shift. The supervisor called Roy at home a few days in advance to inform her of the meeting which was scheduled for 8:30 or 9:00 in the morning. Arrangements were made for Roy to come in at 4:00 a.m. and leave at 12:00 noon on the day of the meeting instead of working her regular 10:00 p.m. to 6:00 a.m. shift. Roy was not informed in advance of the purpose of the meeting.

The meeting was held at about the end of July 1988 at the office of the Staff Judge Advocate. The office is located at the opposite end of the base from where Linda Roy works; it took Roy about one-half hour each way on the base bus to get to the meeting and to return to work afterwards. The first meeting was held in the office of Attorney Dennis Sommese. Debbie Smith, an Employee Relations Specialist for the Directorate of Distribution was also present at the meeting. At the commencement of the meeting, Sommese informed Roy that the meeting was voluntary and that if she did not wish to participate, no reprisal would be taken against her. Roy was also asked if she desired a union representative which she declined. Sommese and Smith both told Roy that she would be a management witness at the arbitration on the reprimand and Sommese then proceeded to ask Roy questions regarding the February 16 incident: the events prior to the employees' leaving for their break; how long they were gone; how Roy knew how long they were gone and other questions about her knowledge of the events. The meeting lasted approximately 45 minutes.

Sometime after the July 1988 meeting, Roy's supervisor advised her that the arbitration was set for August 12. Since Roy had leave previously scheduled for that date, arrangements were made for her to give a deposition on August 11, 1988. Sommese examined and Dora Soloria, the Union's representative, cross-examined Roy at the deposition. Subsequently, the arbitration was postponed until September 29, 1988. Prior to that date, however, Solorio designated Linda Roy as a union witness. When Roy was advised of the rescheduled arbitration, she was informed by her supervisor that it was the Union who had requested her as a witness.

Shortly before September 29, Sommese held another meeting with Roy in order to review her deposition and refresh her memory regarding the subject events. The meeting was scheduled two days in advance by Sommese's secretary. As before, the meeting was conducted in the Staff Judge Advocate Office and as, before, it was conducted by attorney Sommese and Employee Relations Specialist Debbie Smith. Sommese again informed Roy that her participation was voluntary and asked her if she wanted a union representative which she refused. During this meeting, Roy reread her deposition and again answered questions regarding the February 16 incident. Roy asked Sommese some questions regarding how the arbitration would be conducted which he answered. This meeting lasted approximately 45 minutes.

It is uncontroverted that Roy was not acting as an alternate supervisor at the time either meeting was held. It is also uncontroverted that the Union did not receive notice of or attend either meeting.

Conclusions

Counsel for the General Counsel submits that this case is controlled by Department of the Air Force, Sacramento, Air Logistics Center, McClellan Air Force Base, California, 29 FLRA 594 (1987) where the Authority held that an interview conducted by Respondent's labor counsel with a bargaining unit employee who had been named to be a union witness at a scheduled arbitration, was a formal discussion within the meaning of section 7114(a)(2)(A) of the Statute and that Respondent committed an unfair labor practice by failing to give the Union prior notice and the opportunity to be represented at the meeting.

Respondent does not dispute the fact that the Union was not given notice of the 2 meetings with Roy but maintains

that the meetings did not constitute formal discussions since Roy was interviewed solely on the basis of her role as an alternate supervisor and that the attorney work product privilege is involved in this case. These very same issues were raised before Administrative Law Judge Samuel A. Chaitovitz in Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California, Case No. 9-CA-80498, (OALJ 90-060) issued October 26, 1989. Judge Chaitovitz found that the meeting in question constituted a "formal discussion" within the meaning of section 7114(a)(2) of the Statue; that the Union while it was not entitled to look at the attorney's written work was entitled to be present at the formal discussion concerning the grievance without violating the attorney work product privilege; and, finally that the record evidence failed to remove the employee alleged to be an alternate supervisor from the unit as a bargaining unit employee.

In agreement with Judge Chaitovitz the undersigned rejects Respondent's contention that the attorney work product privilege is applicable in this case. While the Union is not entitled to look at the attorney's written work it does have a statutory right to be present at a formal discussion involving conditions of employment and Respondent has not established that the exercise of that right encroaches on the work product of those who interviewed Roy. Although Respondent recognizes that a union's right to representation at fact gathering interviews conducted in preparation for third-party hearings under section 7114(a)(2)(B) and a union's right to be present during a section 7114(a)(2)(A) formal discussion are different, it continues to insist that an exclusive representative's presence is not required, during formal discussions such as found in this matter, if other appropriate safeguards are followed. In McClellan, 29 FLRA at 600, the Authority clearly distinguished an exclusive representative's right to be present at fact gathering interviews conducted in preparation for third-party hearings from formal discussions held under the provisions of section 7114(a)(2)(A) of the Statute. The Authority also studied that question in Department of the Air Force, F.E. Warren Air Force Base Cheyenne, Wyoming, 31 FLRA 541, 545-546 (1988). There, the Authority found that apart from Brookhaven safeguards designed to protect employee rights, the exclusive representative has to be provided with an opportunity to attend formal discussions and that "if an interview of a unit employee constitutes a formal discussion, an agency has obligations under the Statute in addition to its obligations to assure that the interview is not coercive." Those

additional obligations include giving the union notice and an opportunity to attend the formal discussion. The case involved a similar prehearing meeting conducted by Air Force Counsel. As already noted, the Union's right to be present during the formal discussion in this case has already been established and Respondent's attorney work product privilege argument again falls short of establishing that the Union's presence impinges on the attorney's work product in the matter.

The argument that Roy was interviewed on the basis of her role as an alternate supervisor also misses the mark. The record evidence is clear that Roy does not possess the indicia of supervisory status contained in section 7103(a)(10) of the Statute. Roy had no authority to discipline employees, to approve sick or annual leave or even to assign work. Her actions appear routine in nature and did not require the use of independent judgment. Roy's testimony established that as an alternate supervisor she never exercised the limited authority granted to her regarding leave or employee absences from the work place. Roy's role as an alternate supervisor appeared limited to insuring that the employees were performing their regularly assigned jobs. In these circumstances, it is found that Roy was a bargaining unit employee and the Union was thereby entitled to be present during Respondent's interview of her in July and September 1988.

Finally, Respondent's arguments in this case supply no reason to depart from the two McClellan cases cited above. The two interviews of Roy are virtually identical to the interviews conducted in the previously cited McClellan and Warren cases and Respondent points to no evidence which would require a different finding here. Based on existing Authority precedent and Respondent's inability to distinguish the instant matter from the cases cited above, it is found that the meetings in this case constituted formal discussions within the meaning of section 7114(a)(2)(A) of the Statute and that Respondent's failure to give notice and opportunity for the Union to be present violates section 7116(a)(1), and (8) of the Statute.

Accordingly, I conclude that the July and September 1988 meetings were formal discussions between one or more representatives of Respondent with a unit employee concerning a grievance, all within the meaning of section 7114(a)(2) of the Statute. Therefore the Union had a right to be notified of the discussion and to be present. See McClellan, supra. Respondent's failure to notify the Union and to afford it an

opportunity to be present at both the July and September 1988 meetings therefore, constituted a violation of section 7116(a)(1) and (8) of the Statute.

Having concluded that McClellan Air Force Base violated sections 7116(a)(1) and (8) of the Statute I recommend 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 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) Conducting formal discussions with its employees in the bargaining unit exclusively represented by the American Federation of Government Employees, Local 1857, AFL-CIO, concerning grievances or any personnel policy or practices or other general conditions of employment, including interviews conducted in preparation for arbitration hearings, without affording American Federation of Government Employees, Local 1857, AFL-CIO, 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 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 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 there-after, 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.

(b) 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., December 19, 1989.

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 conduct formal discussions with our employees in the bargaining unit exclusively represented by the American Federation of Government Employees, Local 1857, AFL-CIO, concerning grievances or any personnel policy or practices or other general conditions of employment, including interviews conducted in preparation for arbitrator hearings, without affording American Federation of Government Employees, Local 1857, AFL-CIO, prior notice of and the opportunity to be represented at the formal discussions.

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.

_____
(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.