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

MARINE CORPS LOGISTICS BASE BARSTOW, CALIFORNIA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1482, AFL-CIO Charging Party	Case No. 98-CA-10371

Raymond T. Lee, Esq.
For the Respondent

Lisa C. Lerner, Esq.
For the General Counsel

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, as amended, 5 U.S.C. § 7101 et seq., (herein called the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (herein called Authority), 5 C.F.R., Chapter XIV, Part 2423.

Pursuant to an unfair labor practice charge filed on May 22, 1991 and first amended on May 31, 1991 by the American Federation of Government Employees, Local 1482, AFL-CIO (herein called the Union) the Regional Director of the San Francisco Region of the Authority, issued a Complaint and Notice of Hearing on August 26, 1991 alleging that on January 22, 1991, Respondent held a formal discussion with unit employees without first notifying the Union and affording it the opportunity to be represented.

A hearing was held before the undersigned in Barstow, California. All parties were represented and afforded the full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Briefs which were timely filed by the parties have been fully considered.

Based upon the entire record in this matter, my observation of the witnesses and their demeanor and my evaluation of the evidence, I make the following:

Findings of Fact

1. On January 22, 1991, Supervisor Darryl Jones in Cost Work Center 725 (CWC 725) held two meetings. The first meeting was a safety meeting. The second meeting, which is the subject of the instant complaint, involved overtime on the production line for the M109 Project. Following the first meeting Jones told CWC 725 work leader Ernie Wysinger he had learned earlier that morning, the M109 line work had been put on a priority operation schedule. Because of this, Jones asked Wysinger to get a list of volunteers for overtime work. Wysinger complied, but was able to obtain only one employee on the M109 line to volunteer for overtime. Upon being informed of Wysinger's lack of success, Jones told Wysinger to gather the employees working on the M109 line together so that he, Jones, could talk to them. Somewhere between 5 and 10 minutes after they talked, the employees on the M109 line met with Jones.

2. The parties stipulated that Jones did not provide advance notice to the Union regarding the second meeting of January 22, 1991 to discuss overtime, and that attendance at the meeting, for the employees involved was mandatory. The meeting lasted somewhere between 10 and 20 minutes. Jones, of course, was there on behalf of management. Wysinger and essentially all of the employees working the M109 line were there.

3. At the meeting in question, Jones informed the employees that the status of the M109 line had been upgraded, which was expected to involve overtime. The employees on the M109 line were for the most part already aware that overtime would be required since Wysinger, only minutes earlier, had solicited, without much success, volunteers for overtime. Jones told the M109 line employees that their names would be entered on the overtime roster. He also informed them that if they did not work the overtime as volunteers, he would then initiate mandatory overtime.

4. Although on the day of the meeting, employee Alex O'Laughlin was artillery repairman on the M109 line, as well as a union steward, he received no special or advance notice of the meeting regarding overtime work from Respondent or from the Union. Thus, his attendance at the meeting was in his capacity as an employee and not as a union representative. O'Laughlin, therefore, did not receive any official time for his attendance at the meeting.

5. Both O'Laughlin and Wysinger testified that an M109 employee asked Jones about procedures for an employee to be released from the overtime. Jones responded to that question by stating that the procedure for an employee to be released from overtime was for the employee to discuss the situation individually with Jones.

6. Jones confirmed that he received the telephone call regarding the overtime changes for the M109 line and that he asked Wysinger to solicit overtime volunteers from the employees individually. Since this failed to produce the sort of response that he needed, he then asked Wysinger to gather the M109 employees together. Jones then left for the work-site, and Wysinger gathered the employees together.

7. Jones recalled that during the meeting he addressed the priority conversion of the M109 project requiring overtime. He also recalled discussing, that to meet the new schedule requirements, overtime would be required. Jones went over the "specifics" of the situation with the M109 unit employees informing them that the new schedule to meet the priority needs would require that unit employees work every day, three hours a day and eight hours a day or longer on weekends. Further, Jones remembered telling them that if any of the employees had difficulties, they should bring the problem directly to him. He indicated that he would be evaluating these situations on case-by-case basis.1/

Conclusions

In this rather routine formal discussion case, Respondent appeals to the Authority for reexamination of its application of section 7114(a)(2)(A) of the Statute. However, a substantial body of case law covering the issue

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1/ Jones also testified that the job requirements had been keeping employees very busy. The relevance of this probably is that employees were already being heavily worked.

exists and Respondent offered no cogent reason why the undersigned should ignore that law or recommend to the Authority that it rethink its policy concerning formal discussions. Accordingly, it is my view that under existing case law, the meeting of January 22, 1991 was a formal meeting under section 7114(a)(2)(A) and that failure to provide the Union with advance notice of the formal meeting violated section 7116(a)(1) and (8) of the Statute.

The law now requires that an exclusive representative has a right to notice of a meeting under section 7114(a)(2)(A) of the Statute, if the following elements are present: (1) a discussion, meeting, or gathering; (2) which is formal; (3) between or among one or more representatives of the Agency and one or more unit employees; (4) concerning any personnel policy or practice or other general condition of employment. Department of Veterans Affairs Medical Center, Denver Colorado, 44 FLRA No. 35 (1992); Veterans Administration Medical Center, Long Beach, California, 41 FLRA 1370 (1991), petition for review filed sub nom. Department of Veterans Affairs Medical Center, Long Beach California v. FLRA, No. 91-70640 (9th Cir. October 23, 1991); U.S. Department of the Army, New Cumberland Army Depot, New Cumberland, Pennsylvania, 38 FLRA 671 (1990); relying on, inter alia, Veterans Administration, Washington, D.C. and V.A. Medical Center, Brockton Division, Brockton, Massachusetts, 37 FLRA 747 (1990); U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution, (Ray Brook, New York), 29 FLRA 584, 588-589 (1980).

The determination as to whether a meeting is formal under the Statute requires consideration of the totality of the circumstances. U.S. Department of Labor, Office of the Assistant Secretary for Administration and Management, Chicago, Illinois, 32 FLRA 465, 470 (1988). Several factors are relevant, including the impact and purpose of section 7114(a)(2)(A), which is to provide the exclusive representative with an opportunity to protect its interests and to ensure that same protection to bargaining unit employees. This interest is consistent with the full range of representational rights and responsibilities.

Respondent questions the Authority interpretation of both "formal" and "discussion". The Authority presently seems satisfied that actual discussion or dialogue is not necessary for an encounter to qualify as a formal discussion within the meaning of section 7114(a)(2)(A). Veterans

Administration Medical Center, supra; Department of Defense, National Guard Bureau, Texas Adjutant General's Department 149th TAC Fighter Group, (ANG) (TAC), Kelly Air Force Base, 15 FLRA 529, 532-533 (1984). In Kelly, supra, the meeting was called in order to outline a change in hours of the workweek to unit employees. The Authority found that attaching the ordinary meaning to "discussion" would not be consistent with the purposes and policies of the Statute. The Authority also concluded that where conditions of employment are being discussed, the exclusive representative needs adequate advance notice and an opportunity to be present at the meeting, to place it in a position to safeguard the interests of unit employees. The fact that the meeting is called for the purpose of making an announcement, rather than engendering dialogue was considered to be of no consequence. Thus, actual debate or argument is not necessary to make the meeting formal since it could not be ascertained until after the meeting had taken place whether argument or debate had occurred. Seemingly the Authority in Kelly, opted to protect unit employee rights by not allowing any evisceration of the exclusive representative's right to be present at these meetings under 7114(a)(2)(A) by permitting an agency merely to refuse to entertain questions at the meeting.

Respondent view of the "formality" attached to the meeting of January 22, 1991 must also be rejected. Formality is not a rigid paradigm, but is rather a consideration of the totality of the facts. U.S. Department of Labor, supra. Jones' testimony indicated that he planned the meeting in advance. He testified that he received a telephone call indicating a change to employees' conditions of employment. Then he asked Wysinger to solicit volunteers for overtime. When the solicitation failed to produce enough volunteers, Jones decided to put all employees on the roster for overtime work. Jones' actions, undoubtedly, were based on his determination to require overtime work and thereby, to alter the conditions of employment of M109 line employees. He learned of this need to effect changes to conditions of employment prior to contacting Wysinger. The record indicates that Jones thought through his plans for the meeting in advance. Thus, his announcement to M109 line employees that they were to work overtime and that they would not be excused from such work without his permission, was not spontaneous. According, it is found that this meeting contained elements of a formal discussion under the Statute.

The evidence shows that Jones who is a representative of Respondent, and all affected unit employees attended the

January 22, 1991 meeting which lasted about 10 minutes. Jones testified that he called the meeting for the purpose of discussing with employees the overtime roster and potential changes to overtime procedures. He also indicated that potentially a need might exist to discuss these changes when difficulties arose in the future. The subject matter of overtime, changes to overtime procedures, and procedures for excuse from the overtime work unquestionably concerned a general condition of employment.

The record evidence persuades me that the January 22, 1991 meeting was a formal discussion within the meaning of section 7114(a)(2)(A). Thus, all four elements set out in present case law are satisfied. Elements one and two are clearly complied with and the meeting was a formal discussion. With respect to element three, the meeting was between an agency representative and unit employees; and, the subject matter of the meeting, overtime concerned a condition of employment, thereby conforming to element four.

Finally, Respondent persists that, where there is actual representation at a meeting, a violation of the Statute is precluded. Here a union steward was present, but only because he was working on the line and not because he was a union representative. Respondent's position has been rejected in several cases such as Department of the Treasury, U.S. Customs Service, Miami, Florida, 29 FLRA 610 (1987) , construing Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California, 29 FLRA 594 (1987). Indeed, McClellan, supra, specifically held that the mere presence of a union steward at the meeting is not sufficient to comply with section 7114(a)(2)(A). Case law is clear that such presence does not relieve an agency of its statutory obligation to provide notice in advance to allow union participation, if required. Therefore, it is not difficult to reject the argument that the Union here was represented since there was a union steward present, since he was there only in his capacity of an employee. Furthermore, case law reveals that an exclusive representative must have the right and ability to designate its own representative to attend any formal discussion. McClellan Air Force Base, supra; Department of the Air Force, 63rd Civil Engineers Squadron, Norton Air Force Base, California, 22 FLRA 843 (1986); and Internal Revenue Service, Washington, D.C. and Fresno Service Center, Fresno, California, 16 FLRA 98 (1984). This ability of the exclusive representative to choose its own representative is ensured by the requirement that the exclusive representative receive prior notice of the meeting. U.S. Customs Service,

at 614. Not only did Respondent stipulate that it failed to provide advance notice of the meeting to the Union as required, but the short notice given to all employees that a meeting was to be held effectively prevented a Union presence. Accordingly, it is found that the Union was not represented at this formal discussion.

Considering the totality of the circumstances, the January 22, 1991 meeting in CWC 725 was, in my view, a formal discussion under section 7114(a)(2)(A). Consequently, it is found that Respondent's failure to provide the Union with advance notice of this formal meeting constituted a violation of section 7116(a)(1) and (8) of the Statute.2/

Based on the foregoing, it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 7118(a)(7)(a) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. section 7118(a)(7)(A), and section 2423.29(b)(1) of the Rules and Regulations of the Federal Labor Relations Authority, the Authority hereby orders that the Marine Corps Logistics Base, Barstow California, shall:

1. Cease and desist from:

(a) Conducting formal discussions with employees in the bargaining unit exclusively represented by the American Federation of Government Employees, Local 1482, AFL-CIO, concerning grievances or any personnel policies or practices or other general conditions of employment, without first affording it 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:

2/ The General Counsel's uncontested Motion to Correct Transcript is granted.

(a) Post at its facilities 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.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the San Francisco Regional Office, 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, March 24, 1992

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 employees in the bargaining unit exclusively represented by the American Federation of Government Employees, Local 1482, AFL-CIO, concerning grievances or any personnel policies or practices or other general conditions of employment, without first affording it the 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, San Francisco Regional Office, whose address is: 901 Market Street, Suite 220, San Francisco, California 94103, and whose telephone number is: (415) 744-4000.