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

DEFENSE DISTRIBUTION REGION WEST, LATHROP, CALIFORNIA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1546, AFL-CIO Charging Party	Case No. 9-CA-10523

Nancy C. Rusch, Esq.
For the Respondent

Gary J. Lieberman, Esq.
For the General Counsel

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq. (herein the Statute).

Upon an unfair labor practice charge having been filed by the captioned Charging Party (herein the Union) against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for the San Francisco Regional Office, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute by unilaterally changing conditions of employment by prohibiting the playing of radios and use of other audio devices throughout its facility while a question concerning representation (herein called QCR) was pending, in violation of section 7116(a)(1) and (5) of the Statute; by holding a formal discussion without notifying the Union in violation of section 7116(a)(1) and (8) of the Statute;

and, by answering employee "Hotline" complaints in a manner suggesting that the Union had agreed to the prohibition of radio playing in violation of section 7116(a)(1) of the Statute.1/

A hearing was conducted in San Francisco, California at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by Respondent and the General Counsel and have been carefully considered.

Upon the entire record in this case, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

A. The 1990 consolidation by the Department of Defense.

Respondent was created on June 24, 1990, following a consolidation of several supply functions in the San Francisco Bay Area. As a result of the consolidation, Sharpe Army Depot became a part of Respondent. During the material times herein, the work load at Sharpe increased due to Desert Storm, but this increase can in no fashion be argued to be a permanent increase. Also, the Sharpe site became the primary distribution point for eleven sites within Respondent. Despite the consolidation there is no evidence that the mission of the agency or the work performed by its employees changed as a result of the consolidation. For about 20 years prior to this consolidation employees of Sharpe Army Depot were represented by the Union.

Following the consolidation, a Memorandum of Understanding was executed between Defense Logistics Agency, the Laborers' International Union, and the Union. The Memorandum of Understanding provided, in part, that the current collective bargaining agreements at the sites would govern until supplemental agreements were negotiated.

On March 19, 1991, Respondent filed a Representative Status (RA) petition with the San Francisco Regional Office

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1/ The Complaint was amended at the hearing by the General Counsel to reflect that the Respondent had responded to employee "Hotline" complaints on two separate dates, July 25, 1991, and August 12, 1991.

of the Authority, asserting that after the consolidation, the unit represented by the Union, among others, was no longer appropriate. On October 8, 1991, the Regional Director of the San Francisco Region concluded that existing units encompassing Respondent's employees were no longer appropriate and directed an election to be held. See, U.S. Department of Defense, Defense Distribution Region West, Tracy, California, 43 FLRA 990 (1992). The election had not been held at the time the instant hearing was held.

B. **The past practice of radio playing in the Directorate of Distribution.**

It is undisputed that prior to July 1991, employees at Respondent's Sharpe Site were permitted to play radios, and wear headphones, with certain narrow limitations. The only restriction on radio playing in the Directorate of Distribution had been to prohibit forklift operators from wearing headphones while driving material handling vehicles, a restriction which is not at issue here. Also, supervisors and management officials were aware of the practice of employees playing radios and listening to radios through headphones at the worksite. Respondent's Chief of Receiving, Ned Hartley, in confirming that a policy existed testified, that Respondent changed a past practice when it prohibited radio playing. Similarity, Respondent's, Deputy Director of Distribution, Eudith Hendrix stated that he had visited some of the areas when employees had personal radios playing.

Article V, Section 11 of the parties' collective bargaining agreement which concerns radios provides as follows:

> Use of Personal Audio Devices. Employees, with the approval of the supervisor, may play radios on the worksite so long as the use does not disturb the productivity of safety of employees or others. The Employer shall not be responsible for the security of personal property or loss thereof.

C. **Respondent changes past practice by prohibiting radio playing in the Directorate of Distribution.**

Sometime around March 29, 1991, Kathleen Tuskes, Chief, Labor-Management Employee Relations informed Union President Frank Payan, in writing, that Respondent intended to change the past practice of allowing radio playing in the Directorate of Distribution at Respondent's Sharpe Site. While acknowledging that radios had a beneficial effect on

the morale of employees Tuskes, proposed the elimination of radio playing at Sharpe.

The letter referred to an environmental survey conducted "last year" indicating that both radios and headsets subjected an individual to noise levels up to and above safe levels.2/ On June 13, 1990, nine months before Respondent notified the Union that it was instituting a policy of prohibiting radios in the Directorate of Distribution, and over a year before Respondent actually prohibited radios, radio sound levels were tested in Building 330. The survey in Building 330 indicated that only the headset radio sound level was above what is considered dangerous, not the portable radio sound level.3/

Tuskes further stated that the use of radios constituted a distraction for some employees and a hazard by obstructing communications. In addition, Tuskes said that by prohibiting radios, extraneous noise would be reduced and supervisors would be able to avoid problems which arose from their use, such as those associated with each employee's personal music preference. Tuskes further stated that the elimination of radios had further support because of the confusion created if Respondent continued to apply a different radio policy at Sharpe compared to its other locations, Tracy and Oakland (where there was no practice of radio playing). Tuskes concluded by stating that since it was impractical to enforce a policy work location by work location, a standard policy was necessary. There is no evidence of disruption or discipline for any reasons related

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2/ Respondent's reliance on this study in asserting that the change was for the necessary functioning of the agency is suspect for several reasons. First, the test was only conducted in one building, Building 330, while the policy was changed in all buildings. Second, although not as important, the study was conducted almost a year before the change was made, thereby raising a question of timing.

3/ No explanation was provided for the one year gap between the environmental study in June 1990, and the implementation of the policy that banned radio playing in July 1991. The Respondent did offer two other internal documents, dated January 30, 1990, and February 2, 1990 recommending the termination of radio playing. The documents however, provide no explanation for the aforementioned delay in implementing the change.

to the playing of radios, either for playing a radio too loud, or for creating a disturbance because of radio station preferences. Employee, Hilda Jackson, testified that the employees in her work area were able to reach an understanding among themselves when there had been a disagreement over radio station selection. Radio playing in Jackson's section continued until the practice was ended by Respondent in July 1991.

D. **Union learns of change of past practice through employee.**

On June 18 and 19, 1991, Payan sought to negotiate for all five of Respondent's Directorate locations, Sharpe, Tracy, Oakland, McClellan and Sacramento at two negotiation sessions concerning radio playing. Respondent's representatives at these sessions rejected that offer and informed Payan that they were not empowered to negotiate beyond the Directorate of Distribution Sharpe location.

Around June 19, 1991, Payan sent Hartley the Union's final position on Respondent's decision to prohibit radio playing, and asserted that the provisions of the collective bargaining agreement remained in effect and was binding on both Respondent and the Union.

Thereafter on July 2, 1991, Hendrix issued a policy memorandum to all supervisors in the Directorate of Distribution stating that effective July 8, 1991, the use of radios, tape players, headphones and radio headsets, would be prohibited. Tuskes notified the Union of the implementation of the prohibition on radio playing on July 8, 1991. Payan was informed of the change even before the Union obtained a copy of the memorandum covering the policy. He learned about the change through employee Donna Yost, who was irate, and accused the Union of giving away the radios.

Since July 8, 1991, employees in the Directorate of Distribution have been prohibited from playing radios or listening to headphones.

E. **Employees are informed of prohibition of radio playing at a meeting.**

In July 1991, El-Don Graves, a temporary supervisor, was directed by Branch Chief, Jerry Manerers to tell the employees located in Buildings 613, 647, 649, and 655 of the policy prohibiting radio playing. Thus, on July 11, 1991,

Graves informed employees some 5 to 30 minutes in advance that a mandatory meeting would occur in the breakroom in Building 649. In some instances Graves gave employees a copy of Hendrix's July 8, 1991, policy memorandum prohibiting the playing of radios. The Union was never notified about this meeting."

The aforementioned meeting was attended by about twenty employees from the four separate buildings. It required some employees to leave their building and worksite to attend the meeting in Building 649. Graves, was the only supervisor at the meeting where he read the Hendrix memorandum to these employees. Some employees raised questions about what they should do. Graves responded that according to the memorandum, they were to turn their radios off. Employee Dave Rubianes, asked if the Union was aware of the prohibition. Graves responded that the Union knew about the prohibition. Although Miguel Mata, corroborates Rubianes' recollection, Graves could not recall any questions at the meeting regarding the Union's involvement in the matter.

F. **Colonel Imhof responds to employee "Hotline" complaints.**

Respondent provides an employee telephone "Hotline" number where employees call when they have a complaint or a question about a working condition. The call is responded to by the Commander, who answers the calling employee directly.

On July 25, 1991, and again on August 12, 1991, Respondent's Acting Commander, Colonel Imhof, responded to two "Hotline" complaints from employees concerning the prohibition of radio playing. In each response to the employee complaints Imhof concluded:

> Prior to implementation of this policy, the union (AFGE, Local 1546) was provided the opportunity to negotiate the Impact and Implementation of this change in working conditions. The Union maintains Article V, Section 11 of the negotiated agreement adequately covers the use of personal audio devices, and should management decide their use disturbs the productivity or safety of employees or others, their use may be prohibited.

Since the policy change, and after the "Hotline" letters were distributed to the employees, at least three employees dropped out of the Union because they believed that the Union could not prevent Respondent from instituting the

policy, and one employee, who received a "Hotline" letter told Payan that she would never join the Union because of its ineffectiveness in halting the policy change in radio playing.

G. **Respondent contends that radio playing is a safety hazard and that it interferes with productivity.**

Hendrix testified that the banning of radio playing was necessary in order to maintain productivity and to eliminate the possibility of serious safety problems. Hendrix, however stated that he was unaware of any medical documentation of employees being injured because of radio playing. Although Hendrix says that an employee was injured when a tow line pushed someone over and pulled him along, there was no showing that the accident was related to radio playing. Furthermore, it was not shown that the employee who was injured had been wearing, or even listening, to a radio at the time of the accident. The accident could have occurred for any number of reasons. Hartley also testified he is unaware of accidents or injuries occurring as a result of radio playing.

Concerning productivity, Hendrix testified that serious disagreements occur over what type music was being played, thereby interfering with productivity. He also testified, however, that currently radio playing is allowed in certain "controlled environments" such as government vehicles, where the same alleged disagreements could occur.

In what appeared to be an effort to prove that the banning of radios was precipitated by changes in Respondent's productivity, Hendrix says there were significant changes in the mechanization of Building 330, and work load level as a result of an increased production level during Desert Storm. Hartley, when asked about changes in Building 330 testified:

> There's been some changes in the manner in which we do business. There has been some removal of racks. There's been, I think, some--but not a great deal in terms of the way it operates. There's a different system in terms of the computer, but the building is primarily as it was.

Hartley also said that the rationale for banning radio playing was the noise level testing of radios in

Building 330. In addition, Hartley explained that Building 330 was much noisier than the other buildings in the Directorate, and that the testing was only conducted in Building 330.

H. **Respondent asserts an agreement on a radio playing policy was reached with the Union.**

Hendrix testified that in October 1991, three months after the ban on radios was implemented, and the unfair labor practice was filed, a verbal agreement was reached with Payan, but that he refused to sign the Memorandum of Agreement Respondent drafted. Hendrix asserted that this "agreement" would accommodate the requirement for the necessary functioning of the agency. Payan denies any verbal agreement with Hendrix on radio playing was reached in October 1991.

Conclusions

Requirement that agency remain neutral during the pendency of a QCR is a question for the unfair labor practice forum.

That an agency maintain conditions of employment to the maximum extent possible during the pendency of a QCR understandably grows out of the necessity of providing an atmosphere conducive to any potential election. The Authority rationale for requiring an agency to remain neutral, by maintaining existing conditions of employment during a QCR, unless the changes are necessary for the functioning of the agency, are analogous to restrictions on preelection activity under the National Labor Relations Act. Both the NLRB and the Authority have indicated that they have a "function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." General Shoe Corp., 77 NLRB 124, 21 LRRM 1337 (1948); See also Hahn Property Management Corp., 263 NLRB 586, (1982). Permitting unnecessary changes in conditions of employment during the pendency of an agency sought election provides an open invitation for the agency to interfere with its employees' rights to a free and untrammeled election, which after all is the objective of the RA petition. Department of the Interior, Bureau of

Reclamation, Yuma Projects Office, Yuma, Arizona, 4 FLRC 484, 489, FLRC No. 74A-52 (1976). (Department of the Interior).

The evidence that Respondent's implementation of the prohibition of radio playing not only had the potential to shape employee perceptions of the Union in any future election, but that its policy change had begun to work, is uncontroverted. In fact, since the policy change, and the "Hotline" letters, some bargaining unit employees dropped their Union membership as a direct result of Respondent's actions. The Authority's requirement that an agency maintain conditions of employment to the maximum extent possible during a QCR, except those changes required consistent with the necessary functioning of the agency, is specifically designed to ensure fairness in any future election and prevent an agency from influencing negatively employee perceptions, such as occurred here, during the critical preelection period. Where a change made during the pendency of a QCR is not consistent with the necessary functioning of the agency a violation of section 7116(a)(1) and (5) of the Statute should be found.

Here Respondent does not challenge the General Counsel's position that radio playing is a working condition or that there was an established past practice of radio playing at Sharpe. Accordingly, it is found that a past practice of radio use which was known, and acquiesced in by Respondent's supervisors clearly established a condition of employment giving rise to an obligation to bargain.

Respondent contends that the collective bargaining agreement contains specific language in Article V, Section 11, regarding the use of radios which permits it to disallow radios where there is a safety hazard or where the radio playing interferes with productivity. Its position is that the action herein simply involves a different and arguable interpretation of the negotiated agreement and is not an unfair labor practice. Defense Logistics Agency, Defense Depot Tracy and Laborer's International Union Local 1276, 16 FLRA 1083 (1984). The General Counsel contends that since the change was implemented during the QCR period, Respondent consistent with present law is required to maintain conditions of employment to the maximum extent possible. Since the objective behind the Authority's requirement that the agency remain neutral is to ensure that employees' perceptions of the Union are not influenced during the critical QCR period, it seems to the undersigned that, where it is essential to determine whether the change was necessary, the appropriate

process is the unfair labor practice forum rather than the collective bargaining agreement. See Department of Interior, 4 FLRC at 492. Furthermore, Respondent's assertion that the matter is more appropriate for the grievance arbitration process, is merely rephrasing a contract waiver argument. See Marine Corps Logistics Base, Barstow, California, 39 FLRA 1126 (1991). This argument, in my view, is in error since there was no clear and unequivocal waiver or any agreement by the Union to change the radio policy. U.S. Department of the Treasury, Customs Service, Washington, D.C. and Customs Service, Northeast Region, Boston, Massachusetts, 38 FLRA 770, 784 (1990).

Accordingly, Respondent's argument that the matter involves a different and arguable interpretation of the negotiated agreement, is rejected.

Whether Respondent violated section 7116(a)(1) and (5) of the Statute by changing conditions of employment which were not necessary for its functioning while a QCR was pending.

As previously noted, in the Federal sector an agency is required to maintain existing conditions of employment to the maximum extent possible during the pendency of a QCR, unless changes in those conditions of employment are required consistent with the necessary functioning of the agency. United States Department of Justice, United States Immigration and Naturalization Service, 9 FLRA 253 (1982), rev'd as to other matters sub nom., United States Department of Justice, United States Immigration and Naturalization Service v. FLRA, 727 F.2d 481 (5th Cir. 1984) (Immigration and Naturalization Service); Department of Justice, United States Immigration and Naturalization Service, Unites States Border Patrol, Laredo, Texas, 23 FLRA 90 (1986) (INS, Border Patrol). INS, Border Patrol discloses the type changes envisioned by the Authority as consistent with the necessary functioning of the agency. There it was found that changes in shift and rotation schedules involved the exercise of section 7106 management right which enabled the agency to effectively police the border and perform its duties most effectively. The instant case is readily distinguishable since no management right is involved and Respondent's offering that the change permitted it to "perform its duties most effectively" does not raise the case to that level.

Although in a letter of March 29, 1991, Tuskes offered the Union the opportunity to request "Impact and Implementation Bargaining", and there were some negotiation sessions between the parties in June 1991, the facts

surrounding these bargaining sessions, or arguments that the Union waived its right to bargain are really not relevant to the issues in this case. The complaint alleged that the Respondent changed conditions of employment during the pendency of a QCR. Even assuming the Union agreed to a change or waived its right to negotiate the subject of radio playing (which it did not), Respondent nevertheless had no right to change existing conditions of employment while the QCR was pending, unless such a change was necessary for the functioning of the agency.

There is no question that Respondent eliminated the playing of radios and listening to headphones and thereby, changed a condition of employment during the pendency of a QCR raised by its filing an RA petition. Respondent believes that the elimination was consistent with the necessary functioning of the agency and argues three reasons why the elimination was for the necessary functioning of the agency. Those reasons are safety, productivity, and to establish a consistent policy for radio playing throughout its facilities. Each is discussed separately below.

1. **Safety**

It was asserted that the noise levels in a highly mechanized environment required the banning of radios. Record evidence regarding whether safety concerns involved with radio playing are legitimate does not, in my view, reveal a safety hazard so threatening as to require its change as necessary for the functioning of the Respondent.

Respondent points to the increase in automation and mechanization at Sharpe, where radios are played in a large building, requiring a louder volume to be heard. The volume, it was suggested was at noise levels higher than safe levels recommended by the Occupational Safety and Health Administration (OSHA). The noise also allegedly interfered with the audible warning signals of equipment when stopping or starting, thereby creating an intolerable potential for mishap.

This argument became suspect when it was disclosed that there had never been an accident, or an injury, as a result of radio playing in Respondent's Directorate. Also offered to prove the claim that radio playing causes hazards are internal recommendations made on January 30, 1990, and February 2, 1990, and a June 1990 internal study on the

decibel levels conducted in only one of the buildings, Building 330 in which the ban was effective. Respondent's reliance on these documents to prove that the banning of radio playing was necessary for the functioning of the agency raises further doubt. The latter of the three studies relied on (June 1990), concludes that the sound exposure level of headsets (not portable radios), in one of the buildings in the Directorate is above a hazardous level, certainly does not support an overall position that radio playing created a potential for accidents at the Sharpe Site as a whole. Furthermore, the absence of any explanation for the delay between the three recommendations (January 1990, February 1990, and June 1990), and the decision to implement the policy in late March 1991, or the actual implementation of the policy in July 1991 raises more doubt as to the necessity of the change at that time. Thus, it is found that the documents, do not establish the total elimination of radio playing as necessary for the functioning of the agency. Moreover, Respondent's stated position that the elimination on radio playing was essential for the functioning of the agency is undermined by its own witness, Hendrix, who did not consider a total ban on radio playing necessary for the functioning of the agency.

Accordingly, it is found that Respondent did not establish, through the evidence submitted, that safety considerations for the elimination of radios and headsets because of potential for accidents or danger levels for employees' hearing, was necessary for the functioning of the agency.

2. **Productivity.**

Concerning productivity, Respondent alleges that as a result of mechanization of the facility, along with an increase in work load as a result of Desert Storm, radios had an adverse affect on productivity. Here it was suggested that disagreements arise among employees about musical or station preferences. As a result, too much time allegedly was spent arguing over what was being played on the radios rather than performing work. Respondent contends that in the circumstances, it could not afford the luxury of allowing time away from duties to settle disputes concerning radios.

There is little real evidence to support the position that productivity is adversely affected by individual employee's musical preferences. The only evidence in the record of a disagreement over radio selection at a worksite at Respondent's Sharpe Site was apparently resolved

informally by the employees involved. Even after the ban on radios was implemented in July 1991, radio playing was still permitted in "controlled environments", such as government vehicles. Obviously, the same disagreements over radio station selection that Respondent was so concerned about could just as easily occur between two employees in a government vehicle. Yet, no action was taken to control those radios. Finally, the unexecuted Memorandum of Agreement, that Hendrix asserts would accommodate the requirement for the necessary functioning of the agency, allows the playing of personal radios, and would not eliminate "disagreements" over station selections considered to be so unproductive. The inconsistency in its policy of continuing to allow radio playing in vehicles under the unexecuted Memorandum of Agreement certainly weakens its position that the ban on radios was necessary for the functioning of the agency.

Respondent's assertion that change in the mechanization of the facility, and an increase in work load requiring the prohibition of radios, is also inconsistent. Again Respondent's own witness, Hartley, weakened its position by concluding although there has been some change in the operation of only Building 330, including the removal of some racks, and a different computer system, the building remained primarily the same. Respondent also suggests that since Desert Storm, the work load has increased, and the prohibition of radios is required for the necessary functioning of the agency. Although the work load may have increased, Desert Storm was of short duration, so short as to make it suspect as a reason for the banning of radios permanently as has been done herein. Here Respondent offered no records to show substantial or permanent increases. In sum, the evidence produced falls short of showing how productivity suffered because of radio playing, so as to require its banning for the necessary functioning of the agency.

Based on the foregoing, it is found that the instant record offers no basis to conclude that radio playing had an adverse affect on productivity or that the prohibition of radio playing was essential to the functioning of the agency.

3. **Respondent seeks a consistent policy among its sites.**

The final reason asserted by Tuskes for the prohibition of radio playing to the Union was that it created confusion, if Respondent continued to apply a different policy at Sharpe, compared to its other locations, and that it was

impractical to enforce a different policy at each location. While Tuskes' rationale for the prohibition of radios, a standard policy at various locations, can not legitimately be considered essential to the functioning of the agency, the fact that Hendrix testified that this reason was not a reason for prohibiting radios, demonstrates that Respondent never had a sound basis for implementing the policy. Hendrix testified, however, that eliminating the confusion by having a standard policy at the Respondent's locations was not a reason for prohibiting radios. Thus, it appears that Respondent merely shifted its defense to substantiate its position, revamping its rationale in response to the demands dictated by the case law. Tuskes did not testify at the hearing.

In summary, the necessity that the Authority contemplates in allowing an agency to change conditions of employment during the pendency of a QCR, is not what is envisioned by the Respondent. In INS, Border Patrol, the change in shift and rotation schedules was necessary for the functioning of the agency to stop the maximum number of illegal aliens. In Health Care Financing Administration, 17 FLRA 650 (1985), affirmed American Federation of Government Employees, AFL-CIO v. FLRA, 796 F.2d 530 (1986) the Authority held that an agency was not obligated to maintain during the pendency of a QCR a practice of retroactive promotions, a practice that had become unlawful. The Respondent's position that the banning of radios was necessary for the functioning of the agency, meets neither the requirements of necessity found by the Authority in INS, Border Patrol or in Health Care Financing Administration. While it may have been convenient to have a uniform policy, there is no offering to establish the necessity of such policy.

Accordingly, it is concluded that Respondent did not establish that the prohibition of radio playing was necessary for the functioning of the agency.

Whether Respondent violated section 7116(a)(1) of the Statute when it sent employees "Hotline" letters on July 25, 1991 and August 12, 1991.

The standard for determining whether a management statement or conduct violates section 7116(a)(1) of the Statute is an objective one. The question considered is whether, under the circumstances, the statement or conduct tends to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive influence

from the statement. Marine Corps Logistics Base, Barstow, California, 33 FLRA 626 (1988). The standard is not based on the subjective perceptions of the employee or the intent of the employer. Department of the Army Headquarters, Washington, D.C., 29 FLRA 1110 (1987). Statements made by management officials that disparage the Union, violate section 7116(a)(1) of the Statute.

It was urged that in the responses to "Hotline" inquiries the Union was offered the opportunity to bargain on the use of radios but that the Union maintained that the use of radios was already covered by the collective bargaining agreement, is merely an accurate summary of the negotiations which took place and are not threats, reprisals or coercion. Department of Transportation FAA and Western Region, PATCO, 14 FLRA No. 42 (1984); U.S. Department of Defense, Department of the Air Force, 13 FLRA 661 (1984).

Respondent's reply to employee "Hotline" complaints on July 25, 1991, and again on August 12, 1991, suggesting that the Union agreed to the change in radio playing, when in fact the Union had not agreed was a violation of section 7116(a)(1) of the Statute. Colonel Imhof had written letters implying that the Union had acquiesced in the radio prohibition during the QCR period, a time when the Union's status as representative is most vulnerable.

By falsely asserting to the employees that the Union acquiesced in an unfavorable policy decision, the prohibition of radio playing, Respondent disparaged the Union in the eyes of the unit employees, and made a statement that had the reasonably foreseeable effect of "chilling" bargaining unit employee exercise of protected activity. Employees who received Imhof's hotline letters would certainly question the Union's effectiveness in representing their interests and potentially reconsider their support for the Union in any election as a result of the QCR. Thus, Imhof's "Hotline" letters were in violation of section 7116(a)(1) of the Statute.

Whether Respondent violated section 7116(a)(1) and (8) of the Statute when it conducted a formal discussion in July 1991, announcing the implementation of the radio playing policy.

A formal discussion will be found if all the elements of section 7114(a)(2)(A) exist: (1) there must be a discussion; (2) which is formal; (3) between one or more representatives

of the agency and one or more unit employees or their representatives; (4) concerning any grievance or personnel policy or practices or other general conditions of employment. Defense Logistics Agency, Defense Depot Tracy, Tracy, California, 39 FLRA 999 (1991) (Defense Logistics Agency).

In deciding whether a discussion or meeting is formal within the meaning of section 7114(a)(2)(A), the Authority considers the totality of the facts and circumstances of the case. Marine Corps Logistics Base, Barstow, California, 45 FLRA No. 133 (1992); see also, National Treasury Employees Union v. FLRA, 774 F. 2d 1181, 1189-91 (D.C. Cir. 1985 (NTEU v. FLRA). The factors examined by the Authority are as follows: (1) whether the individual who held the discussions is a first-level supervisor or is higher in the management hierarchy; (2) whether any other management representative attended; (3) where the meeting took place; (4) how long the meeting lasted; (5) how the meeting was called; (6) whether a formal agenda was established; (7) whether employee attendance was mandatory; and (8) the manner in which the meeting was conducted. For Example, U.S. Department of Labor, Office of the Assistant Secretary for Administration and Management, Chicago, Illinois, 32 FLRA 465 (1988) (Department of Labor). Respondent maintains that if all the circumstances are considered the meeting can not be found to be a formal discussion.

Dialogue between management and employees in attendance is not essential to a finding that a meeting constituted a "discussion" under the Statute. In this case, however, there is testimony from employees that after reading the new policy written by Hendrix, there was dialogue between Graves and the employees about what the employees should do after the new policy began, and whether the Union was aware of the change. Therefore, there is no dispute, that the meeting was a "discussion" within the meaning of section 7114(a)(2)(A). Furthermore, the meeting involved one or more representatives of Respondent and one or more employees in the unit. The only elements of section 7114(a)(2)(A) at issue are whether the meeting conducted by Graves in July 1991 was formal and whether the meeting concerned a condition of employment.

The formality criteria enumerated by the Authority in Department of Labor is met herein. Although Graves conducted the meeting while he was a temporary supervisor, he was directed by Jerry Manerers, the Branch Chief, to tell the employees located in Buildings 613, 647, 649 and 655 of

the change in the radio playing policy. Graves called the meeting in advance, by handing some employees Hendrix's July 8, 1991 memorandum indicating that there was a formal agenda established prior to the meeting.

Aspects of the meeting itself, coupled with the purpose behind section 7114(a)(2)(A) of the Statute, indicate that the July 1991 meeting was a formal discussion. The evidence showed the meeting was mandatory, attended by about twenty employees, and required some of the employees to leave their building to attend the meeting in Building 649. These facts refute any idea that the meeting was "spontaneous" or informal. Graves, in addition to telling the employees of the new radio policy, responded to an employee's inquiry about what the employee should do following the memorandum, and whether the Union was aware of the prohibition. Graves responded that the Union was aware of the policy. Although the meeting lasted only a few minutes, its length is not dispositive on the issue of whether the meeting was formal in nature under the Statute. See Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California, 35 FLRA 594, 604 (1990) holding that a telephone conversation which lasted between 15 and 25 minutes was not a spontaneous conversation and was found to be a formal discussion within the meaning of the Statute.

Consideration of the intent behind section 7114(a)(2)(A), and the interests which the Union's attendance at the July meeting would safeguard is further evidence that the meeting was formal in nature. Section 7114(a)(2)(A) of the Statute is designed to provide the Union with an opportunity to safeguard its interests of bargaining unit employees. Department of Justice, supra. In this case, where a QCR was pending, and a potential election would follow, the Union had an even greater need to protect its interests, and to prevent employees perceptions of its effectiveness in representing the bargaining unit. Graves' response to an employee's question at the meeting that the Union was aware of the policy implementation, when in fact it was not, certainly could leave employees with the perception that the Union was ineffective in representing the unit and in preserving a benefit that they enjoyed. The Union's presence at the meeting would have enabled it to respond to Respondent's allegations of the Union's involvement in implementing the policy. Thus, the totality of the facts and circumstances establish this meeting as a formal meeting at which the Union's presence was necessary.

It is found that the Union did not receive prior notification of the meeting held in July 1991. Therefore, based on the above, Respondent violated section 7116(a)(1) and (8) of the Statute when it held a formal discussion on July 11, 1991, without giving the Union notification of the discussion.

Having concluded Respondent has violated section 7116(a)(1)(5) and (8) of the Statute it is recommended the Authority issue the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, the Defense Distribution Region West, Lathrop, California, shall:

1. Cease and desist from:

(a) Unilaterally implementing changes in working conditions of bargaining unit employees exclusively represented by the American Federation of Government Employees, Local 1546, AFL-CIO, by banning the playing of radios in the Directorate of Distribution, San Joaquin Site, Sharpe, while a question concerning representation for the bargaining unit is pending before the Federal Labor Relations Authority.

(b) Making statements to employees which interfere with, restrain, or coerce employees in the exercise of their rights under the Federal Service Labor-Management Relations Statute by implying that the American Federation of Government Employees, Local 1546, AFL-CIO, has agreed to change working conditions, such as banning of radios, when, in fact the American Federation of Government Employees, Local 1546, AFL-CIO, had not agreed to the change.

(c) Conducting formal discussions with our employees exclusively represented by the American Federation of Government Employees, Local 1546, AFL-CIO, concerning any grievance or any personnel policy or practices or other general conditions of employment, including meetings held to announce and discuss the banning of playing radios in the Directorate of Distribution, San Joaquin Site, Sharpe.

(d) 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) Rescind the policy implemented on July 8, 1991, which banned the playing of radios in the Directorate of Distribution, San Joaquin Site, Sharpe and restore the prior practice.

(b) Rescind the July 25, 1991, and August 12, 1991, letters written to bargaining unit employees which implied that the American Federation of Government Employees Local 1546, AFL-CIO, had agreed to the banning of radios in the Directorate of Distribution, San Joaquin Site, Sharpe.

(c) Post at its facilities at Directorate of Distribution, San Joaquin Site, Sharpe 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 Commander of the Directorate of Distribution 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.

(d) 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, December 2, 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 unilaterally implement changes in working conditions of bargaining unit employees exclusively represented by the American Federation of Government Employees, Local 1546, AFL-CIO, by banning the playing of radios in the Directorate of Distribution, San Joaquin Site, Sharpe while a question concerning representation for the bargaining unit is pending before the Federal Labor Relations Authority.

WE WILL NOT make statements to employees which interfere with, restrain, or coerce employees in the exercise of their rights under the Federal Service Labor-Management Relations Statute by implying that the American Federation of Government Employees, Local 1546, AFL-CIO, has agreed to change working conditions, such as the banning of radios, when, in fact, the American Federation of Government Employees, Local 1546, AFL-CIO, had not agreed to the change.

WE WILL NOT conduct formal discussions with our employees exclusively represented by the American Federation of Government Employees, Local 1546, AFL-CIO, concerning any grievance or any personal policy or practices or other general conditions of employment, including meetings held to announce and discuss the banning of playing radios in the Directorate of Distribution, San Joaquin Site, Sharpe.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL rescind the policy implemented on July 8, 1991, which banned the playing of radios in the Directorate of Distribution, San Joaquin Site, Sharpe and restore the prior practice.

WE WILL rescind the July 25, 1991, and August 12, 1991, letters, written to bargaining unit employees, which implied

that the American Federation of Government Employees, Local 1546, AFL-CIO had agreed to the banning of radios in the Directorate of Distribution, San Joaquin Site, Sharpe.

_____
(Agency)

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 its provisions, they may communicate directly with the Regional Director, San Francisco Region, Federal Labor Relations Authority, whose address is: 901 Market Street, Suite 220, San Francisco, California, 94103, and whose telephone number is: (415) 744-4000.