FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C.

DEPARTMENT OF HOMELAND SECURITY BORDER AND TRANSPORTATION SECURITY DIRECTORATE U.S. CUSTOMS AND BORDER PROTECTION EL PASO, TEXAS Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1929 Charging Party	Case Nos. DA-CA-04-0533 DA-CA-04-0576

Nora E. Hinojosa, Esquire
For the General Counsel

Christopher Ryan, Esquire
Robert H. Humphries, Esquire
For the Respondent

James A. Stack
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

Statement of the Case

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §§7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. Chapter XIV, Part 2423. The case was submitted in accordance with section 2423.26(a) of the Rules and Regulations, based on a waiver of a hearing and a stipulation of facts by the parties.

On June 10, 2004, the American Federation of Government Employees, Local 1929 (Charging Party or Local 1929) filed an unfair labor practice charge in Case No. DA-CA-04-0533 against the Department of Homeland Security, Border and Transportation Security Directorate, U.S. Customs and Border Protection, El Paso, Texas (Respondent or Agency). On September 29, 2004, the Acting Regional Director of the Dallas Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing in which it was alleged that, on May 26, 2004, the Respondent held a formal discussion with a member of the bargaining unit represented by the Union. It was further alleged that the discussion concerned a grievance filed by the Charging Party and that the Respondent failed to allow the Union's chosen representative to attend the meeting. The Respondent therefore failed to comply with the section 7114(a)(2)(A) of the Federal Service Labor-Management Relations Statute (Statute) and thereby committed unfair labor practices in violation of section 7116(a)(1) and (8) of the Statute.[1/]

On July 16, 2004, the Charging Party filed an unfair labor practice charge in Case No. DA-CA-04-0576 against the Respondent. On October 29, 2004, the Regional Director of the Dallas Region of the Authority issued a Consolidated Complaint and Notice of Hearing in which it was alleged that, on June 14, 2004, the Respondent held a formal discussion with a member of the bargaining unit represented by the Union. It was further alleged that the discussion concerned a grievance filed by the Charging Party and that the Respondent failed to afford the Charging Party notice or the opportunity to attend the meeting. The Respondent therefore failed to comply with the section 7114(a)(2)(A) of the Statute and thereby committed unfair labor practices in violation of section 7116(a)(1) and (8) of the Statute.

On October 15, 2004 and November 17, 2004, the Respondent filed its Answers to the respective complaints, in which it admitted certain allegations while denying the substantive allegations of the complaint.

1/ On January 18, 2005, the Counsel for the General Counsel filed a Motion to Amend Complaint in Case No. DA-CA-04-0533. The Respondent has not objected to the motion. Therefore, as the motion is consistent with the language of the parties' Stipulation, the General Counsel's Motion to Amend Complaint is hereby granted.

A hearing on these consolidated cases was originally scheduled for December 7, 2004, at a place to be determined in El Paso, Texas. The scheduled hearing was postponed until February 22, 2005 and then March 8, 2005, while the parties attempted to produce a stipulation of facts.

On March 2, 2005, the Respondent, the Charging Party and the General Counsel entered into a Joint Stipulation of Undisputed Facts, pursuant to section 2423.26 of the Authority's Rules and Regulations. The parties agreed that the Charges, the Complaints and Notices of Hearing, Respondent's Answers, and all Pleadings and Orders in this matter (Jt. Exs. 1(a)-(z)), the Stipulation and its attached exhibits (Jt. Exs. 2-7), and the parties' post-stipulation briefs constitute the entire record in this case and that no oral testimony is necessary or desired by any party as no material issue of fact exists. Since the parties waived their right to a hearing before the Administrative Law Judge, no hearing has been held and this decision is based on the formal papers, the stipulation of facts and attached exhibits.

Findings of Fact

The parties agreed to the following stipulation of facts:

1. The Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Customs and Border Protection, El Paso, Texas (Respondent), is an Agency under 5 U.S.C. §7103(a)(3).

2. The American Federation of Government Employees, AFL-CIO, National Border Patrol Council (Council) is a labor organization under 5 U.S.C. §7103(a)(4) and is the exclusive representative of a unit of employees appropriate for collective bargaining at Respondent.

3. The American Federation of Government Employees, National Border Patrol Council, Local 1929 (Local 1929 or Charging Party) is an agent of the Council for the purpose of representing employees of Respondent within the unit described in paragraph 2.

4. During the time period covered by the Stipulation, the persons listed below occupied the positions opposite their names:

Joseph Maurer	Labor Relations Specialist
Irene Ramirez	Labor Relations Specialist
Christine A. Dixon	Attorney, Office of Assistant Chief Counsel
Christopher C. Smith	Attorney, Office of Assistant Chief Counsel
Robert H. Humphries	Assistant Chief Counsel

5. During the time period covered by the Stipulation, Joseph Maurer and Irene Ramirez were advisors for supervisors and/or management officials under 5 U.S.C. §7103(a)(10) and (11) at the Respondent.

6. During the time period covered by the Stipulation, Christine A. Dixon, Christopher C. Smith, and Robert H. Humphries, were advisors and advocates for supervisors and/or management officials under 5 U.S.C. §7103(a)(10) and (11) at the Respondent.

7. During the time period covered by the Stipulation, Mr. Maurer, Ms. Ramirez, Ms. Dixon, Mr. Smith and Mr. Humphries were acting on behalf of Respondent.

8. During the time period covered by the Stipulation, the persons listed below were employees under 5 U.S.C. §7103(a)(2) and were in the bargaining unit represented by Local 1929:

Jackson Lara	Border Patrol Agent
Omar Ortiz	Border Patrol Agent
Joseph Todd	Firearms Training Specialist

Robert Arnold	Senior Border Patrol Agent
Bryan Garnsey	Senior Border Patrol Agent
James Stack	Senior Border Patrol Agent and Local 1929 President

9. In June 2004, Local 1929 presented two employee grievances for arbitration: Jackson Lara, set for hearing on June 15, 2004 (hereafter referred to as the Lara Arbitration) and Omar Ortiz, set for hearing on June 17, 2004 (hereafter referred to as the Ortiz Arbitration).

The Lara Arbitration

10. On Friday, May 21, 2004, Joseph Maurer notified Local 1929 President Stack by telephone that Christine Dixon wanted to interview bargaining unit employees Garnsey and Todd, on May 25 and 26, 2004, respectively. Maurer also notified Stack at this time that Local 1929 would be permitted to send a representative to attend the meeting, but that the representative could not be any representative of Local 1929 that would be representing Local 1929 at the upcoming arbitration (hereafter referred to as the Arbitration Representative) concerning the disciplinary actions taken against Jackson Lara. The basis Maurer gave Stack for this exclusion was "attorney work product privilege."

11. By e-mail dated May 21, 2004, Stack notified Humphries that Maurer had contacted him regarding Dixon's desire to interview bargaining unit employees Garnsey and Todd. Stack requested that the dates and times of the interviews be rescheduled, as he was unavailable on those dates, since he was already scheduled to be representing the Union on other matters on those dates and times. With regard to the "attorney work product privilege" exclusion, Stack stated that such an exclusion was inconsistent with

the collective bargaining agreement and the Statute. (Joint Exhibit 2)

12. By e-mail dated May 24, 2004, Humphries responded to Stack's e-mail, indicating that any scheduling decisions would be left up to the attorney handling the arbitration. With regard to the "attorney work product privilege" exclusion, Humphries stated that having the Arbitration Representative or the Technical Assistant who would be representing Local 1929 at the Lara Arbitration at the interviews with the employees would preclude the Respondent from adequately preparing its case, by requiring the government counsel to either disclose attorney work product or to do an inadequate job of interviewing witnesses. (Joint Exhibit 3)

13. By letter dated May 24, 2004, Humphries formally notified Stack that Respondent would be meeting with Garnsey on May 25, 2004, and with Todd, on May 26, 2004. Mr. Humphries' letter further provided:

> The Union is entitled to have a representative present during these interviews. However, since the compilation of questions and the mode in which they will be asked constitutes attorney work product, Union Representatives who will represent the Union at the arbitration hearing will not be allowed to attend the interviews described above. This includes the Union Representative presenting the case and any Technical Assistant(s). (Joint Exhibit 4a and 4b)

14. On May 26, 2004, Maurer and Dixon met with Todd to discuss the facts related to the Lara Arbitration, including his training and experience as a Firearms Training Specialist and Armorer and Gun Smith; how to properly clear a Beretta pistol; how Border Patrol Agents were taught to clear a Beretta pistol; whether a Border Patrol Agent could tell the

difference between a snap-cap round (used during dry firing) and a live round of ammunition and, if so, how an Agent could distinguish between the two; and the different weights and textures which differentiate a snap-cap round and a live round.

15. The May 26, 2004, meeting between Respondent's representatives Maurer and Dixon and bargaining unit employee Todd was called by Christine Dixon, an agent of Respondent outside of Todd's supervisory hierarchy; Maurer was present as a representative of the Labor Relations Office and Dixon was present as a representative of the Chief Counsel's office; the meeting took place at the El Paso Sector Headquarters Conference Room; the meeting lasted approximately one hour; Todd was notified of the meeting by telephone call from Maurer prior to the date of the meeting; and notes were made of Todd's answers to Maurer's and Dixon's questions.

16. Local 1929 President Stack appeared at the May 26, 2004, interview to represent Local 1929, but Maurer and Dixon would not permit Stack to represent Local 1929 during Todd's interview because Stack was going to be the Arbitration Representative for Local 1929 in the Lara Arbitration. No other representative of Local 1929 was present during the interview of Todd because Local 1929 was not permitted to designate its representative for the meeting. (Joint Exhibit 5)

The Ortiz Arbitration

17. Bargaining unit employee Robert Arnold was listed as a witness for Local 1929 in the Ortiz Arbitration set for hearing on June 17, 2004.

18. On June 14, 2004, Ramirez and Smith held a meeting with bargaining unit employee Arnold to discuss the Ortiz Arbitration. During this meeting, Arnold discussed his

recollection of events related to July 9, 2000, on which date Ortiz had called Arnold and requested sick leave from Arnold as an Acting Supervisory Border Patrol Agent. Subsequent to approving the leave, Arnold had created a document which, although contemporaneous to the events, was not used or relied upon in the decision to discipline Ortiz. All questions posed by Ramirez and Smith related to Arnold's actions while he was serving as an acting supervisor on July 9, 2000. (Joint Exhibits 6 and 7)

19. The June 14, 2004, meeting between Respondent's representatives Ramirez and Smith and bargaining unit employee Arnold was called by Ramirez, an agent of Respondent outside of Arnold's supervisory hierarchy; Ramirez was present as a representative of the Labor Relations Office and Smith was present as a representative of the Chief Counsel's office; the meeting took place at the Labor Relations Office; the meeting lasted approximately one hour; Arnold was notified of the meeting by telephone call from Ramirez prior to the date of the meeting; and notes were made of Arnold's answers to Ramirez' and Smith's questions.

20. Local 1929 was given no notice or an opportunity to attend the June 14, 2004, meeting held between Respondent's representatives Ramirez and Smith, and bargaining unit employee Arnold.

The Lara Arbitration

Issues

Whether the Respondent violated section 7116(a)(1) and (8) of the Statute by holding a formal discussion with bargaining unit employee Todd concerning a grievance without affording Local 1929 an opportunity to be represented at the discussion, as required by section 7114(a)(2)(A) of the Statute?

Whether the Respondent's defense that the "attorney work product privilege" should permit the Respondent to

exclude those representatives of Local 1929 who will represent Local 1929 at the arbitration hearing from being the representative at the formal meeting, while permitting any other Local 1929 representative to attend the formal meeting, is a reasonable exception to section 7114(a)(2)(A)?

Positions of the Parties

General Counsel

The General Counsel asserts that by interviewing Todd without providing Local 1929 with the right to designate its representatives and to be represented at the formal discussion, the Respondent deprived Local 1929 of its Statutory right to represent bargaining unit members. The Respondent refused to allow James Stack, the President of Local 1929 and the Arbitration Representative for the Lara Arbitration, to attend the meeting. The General Counsel notes that the Authority has consistently held that a union has the right to choose its own representative at formal discussions. *General Services Administration, Region 9, Los Angeles, California*, 56 FLRA 683, 685 (2000). Section 7114(a)(2)(A) of the Statute requires prior notification so that the union may have the opportunity to choose its representatives and prepare for the formal meeting. *National Labor Relations Board*, 46 FLRA 107 (1992). *See, also, U.S. Department of Defense, Defense Logistics Agency, Defense Depot Tracy, Tracy, California*, 37 FLRA 952, 961 (1990).

The General Counsel further argues that the Respondent's defense that the "attorney work product privilege" should permit it to exclude those representatives of the union who would represent the union at the arbitration hearing from being the representative at the formal meeting, while permitting any other Local 1929 representative to attend the formal meeting, is not a reasonable exception to section 7114(a)(2)(A). The General Counsel asserts that the Authority has specifically rejected this privilege, citing *Department of Veterans Affairs, Medical Center, Denver, Colorado*, 44 FLRA 768, 770 (1992); *Department of the Air Force, Sacramento Air Logistics Command, McClellan Air Force Base, California*, 38 FLRA 732, 733-34 (1990) (*McClellan III*); *Department of the Air Force, Sacramento Air Logistics Command, McClellan Air Force Base, California*, 35 FLRA 594, 607 (1990) (*McClellan II*).

The General Counsel cites to *McClellan II*, noting that after finding the interviews at issue constituted formal meetings, the Authority then rejected the "attorney work product privilege", noting that the union has the right to safeguard its representational interest of ensuring its witnesses are not coerced or intimidated prior to appearing at third-party proceedings. *Id.* at 607. The Authority further stated that finding that the union has a right to be represented during a management attorney's interview of an employee, does not interfere with the attorney's ability to create documents reflecting the attorney's thought or impressions resulting from the interview, nor requires the attorney to disclosure to the union his thoughts or impressions resulting from the interview. *Id.* at 607-608.

The General Counsel asserts that Stack's attendance at the Lara Arbitration pre-arbitration interview of Todd would not have interfered with the Respondent questioning the employees and preparing its defense since Respondent was not required to disclose its thoughts, impressions, legal theories or litigation strategy before, during or after the interview with Todd.

Respondent

The Respondent asserts that it fully recognized the rights of Local 1929 under section 7114(a)(2)(A) and appropriately gave Local 1929 notice and an opportunity to have a representative present at the meeting with Todd. The Respondent admits, however, that it did not allow the Union's arbitration representative, James Stack, in the Lara Arbitration, to function as the Union representative during the witness preparation interview of Todd, a bargaining unit employees and a witness for the Respondent. The Respondent was willing for any other Local 1929 representatives to be present during the interview, as long as they were not representatives for Local 1929 at the Lara Arbitration. The Respondent based this preclusion on the theory that to allow a Local 1929 arbitration representative to be present would force the disclosure of attorney work product and trial strategy to the opposing arbitration representative prior to the hearing.

The Respondent admits that it placed a minimal restriction on the Union's right to designate its representative, but argues that the Authority, the National Labor Relations Board and the Merit Systems Protection Board have all recognized that the union right to designate a

representative is not an unfettered right. Further, the Authority has recognized situations in which the preclusion of a specific representative was found not to violate the Statute. *See Federal Bureau of Prisons, Office of Internal Affairs, Washington, D.C., et al.*, 54 FLRA 1502 (1998) (union's right to designate its representative was only a presumptive right that an agency can rebut by demonstrating "special circumstances" that warrant precluding a particular individual from serving in this capacity.)

The Respondent asserted in its defense that recognizing such a restriction simply means that the Union's rights are ensured by the presence of a representative other than the union's third-party hearing representatives. Since no familiarity with the facts or the applicable law in a grievance is needed to protect witnesses from intimidation and coercion, the Union loses nothing by having an unrelated representative attend the witness interviews, other than an improper opportunity to gain insight into the Agency's case preparation. On the other hand, a failure to recognize this limitation forces Agency counsel into revealing attorney work product to his/her opposing representative or inadequately prepared its witnesses.

Analysis and Conclusion

Under section 7114(a)(2)(A) of the Statute, a union has the right to be represented at a formal discussion between one or more agency representatives and one or more unit employees or their representatives concerning a grievance, personnel policy or practices, or other general condition of employment. *United States Department of Justice, Immigration and Naturalization Service, New York Office of Asylum, Rosedale, New York*, 55 FLRA 1032, 1034 (1999). For the section 7114(a)(2)(A) right to attach, there must be: (1) a discussion; (2) that is formal; (3) between an agency representative and a unit employee or the employee's representative; (4) concerning any grievance or any personnel policy or practice or other general condition of employment. *General Services Administration*, 48 FLRA 1348, 1354 (1994) (*GSA*).

The Authority has previously found that preparing a witness for an arbitration, or other third-party proceeding, constitutes a discussion, within the meaning of section 7114(a)(2)(A) of the Statute. *McClellan II*, 35 FLRA 594. *See also General Services Administration, Region 2, New York, New York*, 54 FLRA 864 (1998) (*GSA New York*). It is

not disputed in this matter that the Respondent did, in fact, give Local 1929 notice of the scheduled meeting.

As stated above, the Respondent did not allow the Union's designated representative, Robert Stack, to attend the meeting, since Stack was also the designated representative for Local 1929 in the upcoming Lara Arbitration, which was the subject of the meeting with Todd. The Respondent asserts that, by allowing any other Union representative to be present during the meeting, it has complied with the meaning of section 7114(a)(2)(A), and therefore has not violated the Statute. The Respondent argues that allowing the designated arbitration representative to attend the meeting on behalf of Local 1929 circumvents the "attorney work product privilege" and constitutes "special circumstances" which warrant preclusion of the arbitration representative from acting as the Union's designated representative at said witness interviews.

While acknowledging the Authority decision in *McClellan II*, 35 FLRA 607-608, and subsequent affirming case law, *Veterans Administration Medical Center, Long Beach, California*, 41 FLRA 1370 (1991) (*VA Long Beach*), the Respondent asserts that *McClellan II* recognized the need to protect attorney work product, but did not address the specific issue presented in this case. Further, *McClellan II* addressed the preclusion of all union representatives from the witness interviews, not the preclusion of one specific representative.

The Respondent disagrees with an interpretation of *McClellan II* and other related cases as holding that allowing a union's arbitration (or third-party hearing) representative to attend the agency's preparation of its own witnesses does not force an agency counsel to disclose his/her work product. The Respondent argues that allowing a union's representative from attending the meeting forces the agency counsel to choose between disclosing his/her thoughts or impressions, whether written or otherwise, resulting from the interview or violating his/her ethical obligation by inadequately preparing for the arbitration hearing. In essence the Respondent argues that it has a justifiable need to preclude the union's arbitration representative from attending the agency counsel's interviews of agency witnesses.

In *McClellan II*, the Authority specifically dealt with the issue of attorney work product in relation to management