

CHAPTER 6

UNFAIR LABOR PRACTICES

6-1. Procedures (5 U.S.C. § 7116; 5 C.F.R. § 2423).

An unfair labor practice is a means by which either management, a labor organization, or an employee can effect compliance with the FSLMRS, and is a means to obtain a remedy against a violator of the statute. If one party acts in a manner inconsistent with the statute, the other party may file an unfair labor practice charge with the Regional Director, who will investigate and file a complaint if the allegation has substance. The Regional Director, acting for the General Counsel, will prosecute the complaint before an administrative law judge (ALJ). If the ALJ sustains the ULP, his report and recommendation, with exceptions by the parties, will be forwarded to the Authority who will issue an order requiring the wrongdoer to cease and desist from the complained of acts. It will be posted in the work area of the employees for 60 days. Failure to comply with the order may result in Federal court involvement and harsher sanctions.

Section 7116, FSLMRS, lists the unfair labor practices. The statute incorporates the unfair labor practice provisions of Executive Order 11491, with a few additional ones. The unfair labor practice procedures are located at Title 5, Code of Federal Regulations 2423.

One major change to the regulation is in its organization. Part 2423 of the CFR is now divided into four subparts which reflect the chronological flow of the ULP process. In addition, the ULP subpoena and appeal procedures have been moved from Part 2429 of the CFR into Part 2423 with the rest of the ULP procedures.

Informal Procedures. The Authority encourages the parties to resolve disputes informally. 5 C.F.R. Part 2423.7 attempts to effectuate this policy by delaying the investigation of a ULP complaint for fifteen days after filing of the charge, to allow the parties to attempt to informally resolve the complaint. The Authority also encourages the parties to include informal procedures in the collective bargaining agreement.

The Charge. The charge is an allegation of an unfair labor practice filed directly with the appropriate Authority regional office within six months of the wrong. The rules set forth the procedural requirements for filing an ULP charge. The charge is an informal allegation, as opposed to a complaint which is akin to a formal, legal indictment. Any "person" (an individual, labor organization or agency) may file a charge against an activity, agency, or labor organization.

Unfair labor practice charges must be submitted on forms supplied by the regional office. Aside from the required identifying information (e.g., name, address, telephone number, etc.), the form must contain a clear and concise statement of the facts constituting the alleged ULP, including the date and place of the occurrence. The

charging party must submit any supporting evidence and documents along with the charge.

The Investigation. When the charge is received in the regional office, it will be docketed, assigned a case number, and investigated to the extent deemed necessary by the Regional Director. All involved parties will have an opportunity to present evidence. All persons are expected to cooperate. Statements and information supplied to the regional office will be held in confidence.

Extent of Investigation. The regional office will conduct some form of investigation for almost every charge received. It may range from as little as a telephone conversation to an extensive, on-site search for information. Both the charging party and the Respondent may recommend that the regional office look into certain matters. The Regional Director will have the final say in this regard. Experience to date demonstrates that the parties can expect an on-site investigation only if the Authority has adequate funds. In the recent past these funds were not always available.

Role of the Regional Office. During the investigative stage, it is the General Counsel's policy for the regional office to assume an impartial fact-finder role. The objective is to gather the facts and arguments on both sides of the issue so that a decision as to the merits of the charge may be made by the Regional Director. Some managers have expressed displeasure with the approach taken by some investigators from regional offices, feeling that the investigators are biased in favor of the charging party.

Regional Director's Options. After the regional office receives and investigates an ULP charge, it has some options as to what to do with it. It may refuse to issue a complaint, may request the charging party withdraw or to amend it, or it may issue a complaint and notice of hearing.

Withdrawals. Only the charging party may withdraw a charge, and then only with the approval of the Regional Director. ULP charges are matters dealing with public rights, as opposed to private rights, and the General Counsel is responsible for enforcing these rights. Hence the requirement for the Regional Director's approval. The only time a Regional Director's approval may be difficult to obtain is when individual employee's rights are involved and the agreed-upon settlement does not serve to remedy violations which affect employees.

Withdrawals arise under a number of different circumstances. First, the charging party may decide unilaterally to withdraw the charge for reasons unknown. More often, the regional office will complete its investigation, find no merit in the ULP charge, and suggest to the charging party that it withdraw the charge or face dismissal. Finally, management and the union, with or without the regional office's assistance, may agree to a settlement which is conditioned upon the union's withdrawal of the charge.

Dismissals. A dismissal by the Regional Director is disposition of an ULP charge with prejudice and without the concurrence of the charging party. The dismissal letter

from the Regional Director will state the reason(s) for the action and is subject to review on appeal within 25 days to the General Counsel's office in Washington, DC. The decision of the General Counsel is final and not subject to further review. Turgeon v. FLRA, 677 F.2d 937 (D.C. Cir. 1982).

Dismissals may occur for a number of reasons. If the regional office investigates and finds no merit, and the charging party refuses to withdraw, the Regional Director may dismiss the charge. Dismissals may also occur for procedural or jurisdictional reasons. For instance, if the charge is untimely filed or the Regional Director determines that the issue has been raised under a grievance or appeals procedure pursuant to Section 7116(d) of the statute, the charge should be dismissed. It is also possible for the Respondent and the Regional Director to enter into a settlement of the charge without concurrence of the charging party. In this case, the Regional Director will dismiss the charge.

Timeliness of the Charge. The Authority's regulations provide that a charge must be filed within six months of the occurrence of the unfair labor practice (with some exceptions). When a charge is filed more than six months after the event in question, the respondent should assert that the charge is not timely filed.

Defects in the Charge. If there has been a failure to follow the regulations with respect to the contents, service, or filing of the charge, such should be asserted. The failure to follow filing procedures constitutes prejudice to the respondent if it is more than a mere technical defect. The Authority will permit the defect to be corrected by the charging party if it is a mere technical defect.

Wrong Appeal Route. Section 7116(d) provides that issues "which can properly be raised under an appeals procedure may not be raised as an unfair labor practice." When grievants raised the issue of non-production of requested information in connection with disciplinary actions taken against them, thus exercising their option to raise the issue under a grievance procedure or by unfair labor practice complaint under section 7116(d) of the Statute, the union could not thereafter independently raise the same issue in an unfair labor practice complaint. IRS, Chicago, Illinois and NTEU, NTEU Chapter 10, 3 FLRA 478 (1980).

Amendments to Charges. The rules state that the charging party may amend the charge at any time prior to issuance of a complaint. Oftentimes, the regional office, upon completion of its investigation, will recommend to the charging party that it amend the charge. The charge will then accurately cite the alleged incident(s) and violations so that any complaint (which is issued later) will not contain surprises for the parties.

Issuance of Complaints. The Regional Director will issue a complaint if there appears to be merit in the ULP charge and the case remains unsettled. The General Counsel has also expressed an interest in issuing complaints in those cases he categorizes as "elucidating," i.e., cases which raise issues under a statute that have not been tested before the Authority. The issuance of a complaint by a Regional Director

cannot be appealed by the Respondent to the General Counsel for review. (Refusal to issue a complaint may be appealed to the General Counsel.)

Answer. The Respondent has twenty days after service of the complaint to answer it. He serves the answer on the Chief Administrative Law Judge and on all parties.

Settlements. If there is some substance to the allegation, the Regional Director will exert considerable pressure upon the parties to reach a settlement agreement. Management will settle when it is advantageous. For instance, if it is clear an unfair labor practice has been committed, a settlement will result in termination of the proceedings and a saving in the use of resources. Often management will settle those cases in which a "nonadmission of guilt" is part of the settlement agreement. ("It is understood that this does not constitute an admission of a violation of the statute.")

NOTE: Prior settlement offers are not admissible at ALJ hearings on unfair labor practices. See 56th CSG, MacDill AFB and NFFE Local 153, 44 FLRA 1098 (1992).

The Hearing. The date, time, and place of the hearing are contained in the complaint. Typically, the hearing will be conducted at or near the activity involved in the case. An administrative law judge will preside at the hearing. The Federal Rules of Civil Procedure do not apply to ULP hearings; rather the proceedings are generally governed by the Administrative Procedures Act contained in Chapter 5 of Title 5 of the U.S. Code. These rules assure that the basic tenets of due process will apply to ULP hearings. The ALJ is empowered to make rulings on motions, objections, and to otherwise control and conduct the hearing. Either party may call witnesses and has the right to examine or cross-examine all witnesses. The General Counsel has the burden of proving the allegations of the complaint by a preponderance of the evidence.

Motions. Motions may be made in writing prior to the hearing, or in writing or orally after the hearing opens. Responses to motions must be made within five days after service of the motion. Interlocutory appeals are not permitted for motion rulings. Rather, motion rulings are considered by the Authority if the case is appealed.

ALJ Decision and Exceptions. Upon receipt of briefs, if any, the ALJ will prepare his decision expeditiously and transmit it to the FLRA while serving copies on the parties. Any party may file exceptions to the Authority decision, in writing, with the Authority. The rules set forth a 25-day time limit from the date of service of the ALJ decision in which to file exceptions.

FLRA Decision and Order. The rules outline the Authority's role in making the final ULP decision and in fashioning a remedy. If exceptions to the ALJ decision are filed with the Authority, it will provide a decision complete with discussion and its rationale for affirming, reversing, or modifying the ALJ's decision. If exceptions have not been filed, the Authority simply adopts the ALJ's decision without discussion. In either case, the Authority ruling serves as the final administrative decision on the matter.

These decisions are published by the Authority and may be obtained from the Government Printing Office.

The Federal Labor Relations Authority has broad remedial power in ULP cases. The most common remedy is for the losing party to sign a notice promising not to engage in violative conduct in the future (Cease and Desist Order). If the circumstances of the case warrant, the Authority may award back pay to affected employees or order the losing party to revert to the status quo ante by taking any other affirmative action which is deemed appropriate.

Judicial Review. Within 60 days of the date of the Authority's decision and order, any aggrieved party may initiate an action for judicial review in the appropriate U.S. Circuit Court of Appeals. Section 7123 of the statute sets forth the requirements and procedures for judicial review. To file a petition for judicial review of an Authority decision, Federal agencies must work through the appellate division of the Department of Justice. The Justice Department has the final say as to whether or not court action will be initiated.

Strikes. There is a special provision in Title VII governing enforcement of the "no strike" provision for unions (Federal employees and their unions are not allowed to engage in work slowdowns or strikes). If the Authority should find the exclusive representative violated Section 7116(b)(7), FSLMRS, the following sanctions may be taken:

- (1) Revoke the exclusive recognition status of the labor organization (decertification), and
- (2) Take any other appropriate disciplinary action.

See PATCO v. FLRA, 685 F.2d 547 (D.C. Cir. 1982).

Temporary Relief. Section 7123(d), FSLMRS, sets forth a procedure through which the Authority may seek temporary relief in an unfair labor practice case. Upon issuance of an unfair labor practice complaint, the Authority may petition a District Court for appropriate temporary relief, to include a restraining order. This is used in those cases where the unfair labor practice continues, in spite of the filing of a charge and issuance of a complaint.

Unfair Labor Practices: Section 7116, FSLMRS defines the unfair labor practices:

- (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--
 - (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this Title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) (A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

(c) For the purpose of this chapter it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure--

(1) to meet reasonable occupational standards uniformly required for admission, or

(2) to tender dues uniformly required as a condition of acquiring and retaining membership.

This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter.

Most ULPs have been filed by unions against management. The remainder of the chapter discusses the specific unfair labor practices and includes illustrative cases of different types of unfair labor practices.

6-2. Interference with Employee Rights.

Section 7116(a)(1) provides it shall be an unfair labor practice for an agency:

to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

Title VII sets forth employee rights in § 7102 as follows:

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right--

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

When management interferes with, restrains, or coerces an employee in the exercise of these rights, it violates §7116(a)(1).

**FORT BRAGG SCHOOLS and
N.C. FEDERATION OF TEACHERS**

3 FLRA 363 (1980)

(Extract)

* * *

Surveillance

The next issue is whether the attendance of school principals at several union informational meetings held for the teachers constituted a violation of 5 U.S.C. §7116(a)(1).

During the first few months of 1979, Virginia D. Ryan, State Director of the North Carolina Federation of Teachers, AFT, AFL-CIO, ("AFT") contacted Dr. Haywood Davis, the Superintendent of the Fort Bragg Schools. Her purpose was to get permission to use school mailboxes, bulletin boards, and rooms in order to organize a new AFT chapter and solicit membership among the teachers.⁶ On April 19, Davis granted her request and told her that meetings could be held in the various schools at 3:30 p.m..⁷

⁶ The Fort Bragg Federation of Teachers, Local 3976, was chartered on July 1, 1979.

⁷ Children were expected to be off school grounds by that time and the teachers' "normal" duty day was over at 3:45 p.m. (G.C. Ex. 4, p. 32-33).

On April 24, 1979, Ryan contacted Davis H. Orr, principal of the Irwin Junior High School. She scheduled a meeting with the Irwin teachers for May 2 and told Orr that he should not attend union informational meetings. She explained the history and objectives of AFT to Orr at an informal gathering on April 24.

Ryan met with Superintendent Davis on May 2 and requested that he ask the school principals not to attend AFT informational meetings. Davis immediately got a legal opinion on the matter by telephone and informed her that he could not prevent their attendance. Subsequently, at 3:30 p.m., Ryan held the scheduled meeting at Irwin School with about 12 teachers. Principal Orr and his assistant were in attendance. Ryan discussed the history of AFT and some of the benefits, goals and objectives of the organization; she also discussed the rights granted to employees and explained how AFT could help the Fort Bragg teachers in this regard. AFT literature and membership applications were made available to the teachers at the meeting. The meeting included a question and answer period.

Subsequently, Ryan held identical meetings with seven to 10 teachers at the McNair Elementary School (May 3), Bowley Elementary School (May 8), and Butner Elementary School (May 10). The May 3 meeting was attended by Principal Richard M. Ensley, the May 8 meeting by Principal Forrest H. Deshields, and the May 10 meeting by Principal Stahle H. Leonard, Jr. In each case the principal was sitting in full view of all teachers attending. Deshields attended in spite of Ryan's specific request to him just before the May 8 meeting that he not attend and her warning that she might have to file a charge against him if he did.

Counsel for the General Counsel argues that the presence of the principals at the four above-mentioned informational and organizational meetings constituted a violation of 5 U.S.C. §7116(a)(1) because, in each case, it interfered with, restrained, or coerced the employees in the exercise of their §7102 rights to form, join, or assist a labor organization. It is well settled in the private sector that overt surveillance by management supervisors of employees while the latter are attending union organizational meetings is prohibited by §8(a)(1) of the National Labor Relations Act, 29 U.S.C. §158(a)(1) because it interferes with comparable protected rights. National Labor Relations Board v. Collins & Aikman Corp., 146 F.2d 454 (4th Cir. 1944); N.L.R.B. v. M & B Headwear Co., 349 F.2d 170, 172 (4th Cir. 1965).

Respondents argue that the employees in the instant case were not shown to be affected by the presence of the school principals. However, this is not a necessary element of proof to sustain a violation. The test is whether the action by the supervisors "tended" to have a chilling effect on

the exercise by the employees of their protected rights. N.L.R.B. v. Huntsville Manufacturing Co., 514 F.2d 723, 724 (5th Cir. 1975). In the instant case the teachers were aware that their immediate supervisor was watching them and, for example, was in a position to take note of any indication during the question and answer period of an employee's interest in how working conditions could be improved by means of collective bargaining. It is reasonable to infer that some employees might have felt inhibited by the presence of their supervisor from showing an interest and asking questions. Some may have been concerned that their supervisor even knew that they attended the meeting for fear of subsequent reprisal.⁸

The meetings in question were designed and advertised for teachers, not principals; therefore, the awkward presence of the principals tended to highlight their anxiety about union organization.⁹ Accordingly, it is held that the presence of the principals tended to interfere with, restrain, or coerce the teachers in the exercise of their rights to form, join, or assist a labor organization.

The Superintendent's Statement

The final issue is whether Respondent violated section 7116(a)(1) of the statute when the Superintendent of Fort Bragg Schools made a statement to a group of employee teachers.

On May 14, 1979, the North Carolina Association of Educators ("NCAE") held a meeting at the Irwin School for the purpose of enlightening the teachers at Fort Bragg about collective bargaining. The speaker was a representative from the state office of NCAE. The meeting was attended by about 50 or 60 teachers and the Superintendent of the Fort Bragg Schools, Dr. Haywood Davis.

At one point during the question and answer period after the lecture, the speaker was in the process of explaining the process by which the teachers could obtain collective bargaining. He noted that it would be necessary for a certain number of teachers to request it. At this point Superintendent Davis walked up to the podium and made a statement to the audience. The intent and effect of Davis' statement was to discourage the teachers from filing a petition with the Authority for collective bargaining. He told the teachers that although he supported the right of any teacher to join any labor organization, he did not want to see collective bargaining in his school system because it would put

⁸ In an analogous case it was held that management cannot interrogate an employee concerning the names and number of employees who had signed a representation petition. Federal Energy Administration, Region IV, Atlanta, Georgia, A/SLMR No. 541, 5 A/SLMR 509 (1975).

⁹ Respondent argues that the principals had a right to attend the meetings since they were on federal property. However, management authorized the use of certain rooms for the meetings and there is no evidence that any appropriate function of management was served by the attendance of principals.

administrators and teachers "on opposite sides of the table." He prefaced his remarks by acknowledging that it might be improper for him to make such a statement, but that he wished all of his teachers were there to hear it.¹⁰

The General Counsel and the Charging Party both argue that the above statement violated 5 U.S.C. §7116(a)(1) because it interferes with, restrained, or coerced the employee teachers in the exercise of their rights under the statute. Section 7102 gives each employee the right to form, join, or assist any labor organization freely and without fear of penalty or reprisal. This right specifically includes the right to engage in collective bargaining with respect to conditions of employment through chosen representatives. 5 U.S.C. §7102(2). The Superintendent's statement at the May 14 meeting clearly interfered with and restrained the Fort Bragg teachers from exercising their protected right to engage in collective bargaining. The charging party, AFT, only a few days earlier, had conducted several meetings with the teachers to explain collective bargaining and solicit membership. Davis' statement had the effect of discouraging this effort. Moreover, Davis' remarks were particularly coercive since he was in charge of the entire Fort Bragg school system, including the discipline and annual rehiring of the teachers. It is irrelevant that Davis did not specifically threaten the employees with reprisal if they did not act in accordance with his wishes.¹¹ Accordingly, it is held that Respondent violated section 7116(a)(1) of the statute.

* * *

The wearing of union insignia generally may not be prohibited unless there is a legitimate business reason such as it interferes with work or creates a safety hazard. The activity did not violate Section 7116(a)(1) of the Statute when it prohibited two hotel service employees from wearing union stewards' badges while dealing with the public, particularly in view of the size and conspicuous nature of the badges, where (1) restriction is pursuant to and consistent with activity's long-standing policy of enforcing its prescribed uniform requirement, (2) there is no evidence of a discriminatory purpose, and (3) uniformed employees are allowed to wear union stewards' badges when they are not serving the public. United States Army Support Command, Fort Shafter, Hawaii and Service Employees International Union, Local 556, AFL-CIO, 3 FLRA 795 (1980).

¹⁰ Findings with respect to Davis' statement are based on the credible testimony of three teachers; I do not credit Davis' testimony that he was merely trying to say that it is possible to have exclusive representation without collective bargaining.

¹¹ A contrary result may have been obtained under one unenacted bill which provided that the expression of any personal views would not constitute an unfair labor practice if it did not contain a "threat of reprisal or force or promise of benefit or undue coercive conditions." S. 2640, 95th Cong., 2d Sess., § 7216(g). This subsection was ultimately modified to provide for limited freedom of expression in three instances not applicable herein. 5 U.S.C. § 7116(e).

See also DOJ v. FLRA, 955 F.2d 998 (5th Cir. 1992) (INS policy banning on-duty employees from wearing union pins on their uniforms did not violate FSLMRS or First Amendment).

**AIR FORCE PLANT REPRESENTATIVE OFFICE
and NFFE**

5 FLRA 492 (1981)

(Extract)

. . . Upon consideration of the entire record in the subject cases, including the Regional Director's Report and Findings on Objections in Case No. 6-RO-7 and the parties' stipulation and respective briefs in Case No. 6-CA-233, the Authority finds:

In May 1979, the National Federation of Federal Employees, Local 1958 (NFFE) filed a petition seeking to represent a unit consisting of all the Activity's General Schedule professional and nonprofessional employees, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors as defined in the Federal Service Labor-Management Relations Statute (5 U.S.C. §§ 7101-7135). The American Federation of Government Employees, AFL-CIO, Local 1361 (AFGE) became an Intervenor in that proceeding. In June 1979, the parties entered into an approved Agreement for Consent or Directed Election pursuant to which a representation election was scheduled to be conducted on July 12, 1979. A few days before the election, on or about July 10, 1979, the Activity published a newsletter entitled "Talley-Ho ! Gram," dated July 10, 1979 signed by the Activity's chief management official. The newsletter was published in the Activity's eleven divisions by being posted on bulletin board located approximately 90 feet from the voting booth in the prospective election and in a direction from which the majority of the employees would pass on their way to vote. The "Talley-Ho ! Gram," which remained posted on the bulletin boards through July 12, 1979, the date of the election, stated as follows:

10 July 1979

POST ON ALL BULLETIN BOARDS

1. NOTICES HAVE BEEN POSTED AND DISTRIBUTED ON THE UNION ELECTION TO BE HELD THURSDAY, 12 JULY, BETWEEN 1345 AND 1545. EMPLOYEES ON THE PAYROLL AS OF CLOSE OF BUSINESS 2 JUNE 1979 WILL BE ELIGIBLE TO CAST THEIR VOTE FOR:

* NO UNION

- * AFGE
- * NFFE

YOUR DECISION WILL BE BINDING OVER THE YEARS TO COME SHOULD YOU VOTE FOR A UNION TO REPRESENT YOU.

2. YOU ALL HAVE REPRESENTATIVES IN CONGRESS. A 15 CENT STAMP WILL ALLOW YOU TO COMMUNICATE WITH THEM. WHEN WRITING TO YOUR CONGRESSMAN, I SUGGEST ONLY ONE TOPIC OR SUBJECT TO A LETTER.
3. THE UPCOMING ELECTION WILL BE MONITORED BY THE FEDERAL LABOR RELATIONS AUTHORITY. ALL PARTIES CONCERNED WILL HAVE AN OBSERVER PRESENT AT THE VOTING LOCATION (MIC). VOTES WILL BE TALLIED BY THE OBSERVER AND CERTIFIED TO BY THE FEDERAL LABOR RELATIONS AUTHORITY.
4. BETWEEN NOW AND THURSDAY AFGE AND NFFE WILL HAVE REPRESENTATIVES IN THE AFPRO BETWEEN 1100 AND 1300. VIRGINIA SCHMIDT, CPR, HAS SENT OUT NOTICES CITING WHERE THESE REPRESENTATIVES WILL MEET WITH EMPLOYEES. BE CANDID WITH THESE REPRESENTATIVES. ASK THEM WHAT THEY CAN DO FOR YOU THAT YOUR CONGRESSMAN CANNOT DO. I HAVE TALKED TO EACH REPRESENTATIVE. - NOW IT IS YOUR TURN. VOTE ACCORDINGLY.

DORSEY J. TALLEY, COLONEL, USAF
COMMANDER

In the secret ballot election conducted on July 12, 1980, a majority of the valid votes counted (50 of 90 nonprofessionals and 10 of 18 professionals) were cast against exclusive recognition.

AFGE thereafter filed timely objections to conduct alleged to have improperly affected the results of the election (Case No. 6-RO-7), contending that the contents of the "Talley-Ho ! Gram" posted by the Activity a few days before the election interfered with the free choice of eligible voters in the election. Additionally, AFGE later filed an unfair labor practice charge alleging that, by such conduct, the Activity also violated section 7116(a)(1) of the Statute (Case No. 6-CA-233).¹

¹ On March 27, 1980, the General Counsel issued a Complaint and Notice of Hearing in 6-CA-233 based upon AFGE's unfair labor practice charge. Thereafter, on July 28, 1980, pursuant to the terms of a

In Case No. 6-RO-7, the Regional Director issued his Report and Findings on Objections in which he found, based upon an investigation and the positions of the parties, that no question of fact existed with regard to the content of the Activity's newsletter and that portions of the newsletter violated the Activity's duty of neutrality and/or contained misrepresentations of fact. More specifically, the Regional Director found that the last sentence of item 1 in the "Talley-Ho ! Gram," i.e., "Your decision will be binding over the years to come should you vote for a union to represent you," was factually incorrect and violated the statutory requirement of agency neutrality by clearly implying the employees would be "burdened with the union for many years if they voted for exclusive recognition. He further found that item 4 of the "Tally-Ho ! Gram," which advises employees to question both labor organizations on the ballot regarding what union representation could do for them that their Congressman could not do, clearly implied that the unit employees did not need a union at all and therefore constituted a violation of agency neutrality. In so finding, the Regional Director rejected the Activity's contention that the message contained in the newsletter was factual and neutral and was an expression protected by section 7116(e) of the Statute. Accordingly, he concluded that improper conduct occurred which affected the results of the election and required the election to be set aside and rerun as soon as possible after resolution of the issues in the related unfair labor practice case (6-CA-233). The Activity thereafter filed a request for review seeking reversal of the Regional Director's Report and Findings on Objections, contending that the "Talley-Ho ! Gram" did not violate agency neutrality and, in any event, was an expression protected by section 7116(e) of the Statute.

In Case No. 6-CA-233, the Activity essentially restated the foregoing arguments in its brief to the Authority, arguing that the issues in both cases were the same. AFGE and the General Counsel, in their respective briefs, contended in effect that the statements contained in the "Talley-Ho ! Gram" were not an expression of "personal views" but contained an implied anti-union attitude on the part of management and therefore were unprotected by section 7116(e) of the Statute.

As previously stated, the questions before the Authority are (1) whether certain statements contained in the "Talley-Ho ! Gram" constitute sufficient basis for setting aside the election in Case No. 6-RO-7, and (2) whether such statements further constitute a violation of section 7116(a)(1) of the Statute as alleged in Case No. 6-CA-233. For the

stipulation reached by the parties therein and section 2429.1 of the Authority's rules, the Regional Director ordered the case transferred directly to the Authority for decision.

Some footnotes deleted.

reasons set forth below, the Authority concludes that both questions must be answered in the affirmative.

Section 7116(e) of the Statute, as finally enacted and signed into law, incorporates a number of amendments which were added by the Senate-House Conference Committee to the provision contained in the bill passed by the Senate. The Joint Explanatory Statement of the Committee on Conference indicates the following with respect thereto:

EXPRESSION OF PERSONAL VIEWS

Senate section 7216(g) states that the expression of

* * * any personal views, argument, opinion, or the making of any statement shall not constitute an unfair labor practice or invalidate an election if the expression contains no threat of reprisal or force or promise of benefit or undue coercive conditions.

The House bill contains no comparable provision.

The House recedes to the Senate with an amendment specifying in greater detail the types of statements that may be made under this section. The provision authorizes statements encouraging employees to vote in elections, to correct the record where false or misleading statements are made, or to convey the Government's view on labor-management relations. The wording of the conference report is intended to reflect the current policy of the Civil Service Commission when advising agencies on what statements they may make during an election, and to codify case law under Executive Order 11491, as amended, on the use of statements in any unfair labor practice proceeding. [Emphasis added.]

Thus, section 7116(e) provides that:

The expression of any personal view, argument, opinion . . . shall not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions . . . constitute an unfair labor practice. . . .

As to representation elections, section 7116(e) provides that:

[T]he making of any statement which--

- (1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,

- (2) corrects the record with respect to any false or misleading statement made by any person, or
- (3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions . . . constitute an unfair labor practice . . . or . . . constitute grounds for the setting aside of any election. . . .

Accordingly, while section 7216(g) of the Senate bill permitted the expressing of personal view during an election campaign, section 7116(e) of the Statute specifies those statements which are authorized--i.e., statements encouraging employees to vote in elections, correcting the record where false or misleading statements are made, or conveying the Government's views on labor-management relations.

While Executive Order 11491, as amended, did not contain a specific provision such as section 7116(e) of the Statute, a policy was established thereunder that agency management was required to maintain a posture of neutrality in any representation election campaign.⁵ Where management deviated from its required posture of neutrality and thereby interfered with the free and untrammelled expression of the employees' choice in the election, such election would be set aside and a new election ordered.⁶ Moreover, management's breach of neutrality during an election campaign was also found to violate section 19(a)(1) of Executive Order 11491, as amended,⁷ by interfering with, restraining and coercing employees in the exercise of their protected rights to determine whether to choose or reject union representation.⁸ We now turn to the application of the foregoing policy and case law to the facts and circumstances of the

⁵ See, e.g., Charleston Naval Shipyard, A/SLMR No. 1, 1 A/SLMR 27 (1970), at n.17; and Antilles Consolidated Schools, Roosevelt Roads, Ceiba, Puerto Rico, A/SLMR No. 349, 4 A/SLMR 114 (1974). See also Robert E. Hampton, Chairman, United States Civil Service Commission, "Federal Labor-Management Relations: A Program in Evolution," 21 Catholic University Law Review 493, 502 (1972).

⁶ See, e.g., Antilles Consolidated Schools, 4 A/SLMR 114, *supra* n.5.

⁷ Section 19(a)(1) provided as follows:

Section 19. Unfair labor practices. Agency management shall not--

- (1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order. . . .

⁸ See, e.g., Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, A/SLMR No. 523, 5 A/SLMR 377 (1975), review denied by the Federal Labor Relations Council, 5 FLRC 75 (1977).

subject cases, in accordance with the stated intent of Congress in enacting section 7116(e) of the Statute (*supra* n.2).

In Case No. 6-RO-7, as previously stated, the Regional Director found that portions of the "Talley-Ho! Gram," as posted on the Activity's bulletin boards and distributed to the employees shortly before the election, violated the requirements of neutrality and/or contained misrepresentations of fact which required the election to be set aside. The Authority concludes, in agreement with the Regional Director, that those statements in the "Talley-Ho ! Gram" to the effect that the employees' "decision will be binding over the years to come should you vote for a union to represent you" and urging the employees to "[a]sk [the unions] what they can do for you that your Congressman cannot do" violated the requirements of management neutrality during an election campaign. Such statements clearly could be interpreted by the unit employees as implying that they did not need and would not benefit from union representation, and would be unable to rid themselves of union representation for years to come if they were to vote in favor of exclusive recognition in the forthcoming election. In the Authority's view, such statements interfered with the employee's freedom of choice in the election and therefore the election to be set aside.

In so concluding, the Authority rejects the Activity's contention that the foregoing statements contained in the "Talley-Ho ! Gram" were protected by section 7116(e) of the Statute. At the outset, the Authority rejects the Activity's assertion that the "Talley-Ho ! Gram" was merely the "expression of [a] personal view, argument, [or] opinion within the meaning of section 7116(e) of the Statute. Rather, where (as here) written statements by the head of an Activity are posted on all bulletin boards and circulated to unit employees, they are not merely the expression of personal views but may reasonably be interpreted as the Activity's official position with regard to the matters addressed in such statements. In addition, as previously stated (*supra* p. 6), section 7116(e) authorizes statements encouraging employees to vote in elections, correcting the record where false or misleading statements are made, or conveying the Government's views on labor-management relations. While the "Talley-Ho ! Gram," in part, publicized the forthcoming representation election and encouraged employees to vote in such election, and to that extent fell within the protection of section 7116(e), other portions of the "Talley-Ho ! Gram" set forth above went beyond the scope of permissible statements thereunder and did not require protected status merely because they were contained in the same document which properly publicized and encouraged employees to vote in the election. Moreover, as found by the Regional Director, "there was no evidence that the publication was intended to correct the record with respect to any false or misleading statements made by the party." Finally, such statements did not "convey the Government's views on labor-management relations." As indicated

above, the Government's views are that employees should be free to choose or reject union representation while management maintains a posture of neutrality, and, as further stated by Congress in section 7101 of the Statute, that "labor organizations and collective bargaining are in the public interest."⁹ To the extent that the "Tally-Ho ! Gram" implied that union representation was unnecessary and undesirable, therefore, such statements were directly contrary to the Government's views on labor-management relations.

Turning next to the question raised in Case No. 6-CA-233, the Authority concludes that, in the circumstances presented, the same statements which caused the election to be set aside in Case No. 6-RO-7 also constitute a violation of section 7116(a)(1) of the Statute which provides that "it shall be an unfair labor practice for an agency to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter." Consistent with the findings and purpose of Congress as set forth in section 7101 (*supra* n.9), section 7102 of the Statute (entitled "Employees' rights") provides in part that "[e]ach employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right." Under Executive Order 11491, as amended, which established and protected identical employee rights,¹⁰ management's breach of neutrality during an election campaign was found to constitute unlawful interference with such protected rights in violation of section 19(a)(1) of the Order (*supra* n. 7).¹¹ Consistent with the stated intent of

⁹ Section 7101(a) of the Statute provides:

§ 7101. Findings and Purpose.

(a) The Congress finds that –

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them - -

(A) safeguards the public interest,

(B) contributes to the effective conduct of public business,

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

¹⁰ Section 1(a) of Executive Order 11491, as amended, provided, in pertinent part, as follows:

Section 1. Policy. (a) Each employee of the executive branch of the Federal government has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in this right.

¹¹ *Supra* n.8.

Congress, the Authority concludes that management's breach of neutrality during an election campaign similarly interferes with the same protected rights of employees under the Statute and therefore violates section 7116(a)(1) of the Statute.

In the instant case, as found above with respect to Case No. 6-RO-7, the Activity breached its obligation to remain neutral during the election campaign by posting on all bulletin boards and distributing to unit employees--shortly before the scheduled election--a message signed by the head of the Activity which strongly implied that unions were unnecessary, undesirable, and difficult to remove once the employees voted in favor of exclusive recognition. Such violation of neutrality interfered with the employees' protected right under section 7102 of the Statute to "form, join, or assist any labor organization, or to refrain from any such activity," and therefore violated section 7116(a)(1) of the Statute in the circumstances of this case.

In view of the foregoing, the Respondent in Case No. 6-CA-233 shall take the action set forth in the following Order; and the election conducted on July 12, 1979, in Case No. 6-RO-7, is hereby set aside and a second election shall be conducted as directed below.

* * *

In light of subsequent cases, Colonel Talley's statements seem less dangerous. In Arizona Air National Guard, Tucson and AFGE, 18 FLRA 583 (1985), the Authority confirmed the propriety of commanders and their staffs speaking out on union representation matters, so long as it is within the bounds of the law. The agency issued a memorandum to all employees containing a series of questions and answers concerning the implications of a pending election. Although the union argued that the memo, "by inference, suggested the negative aspects of unionism and interfered with the employee's freedom of choice in a representation election," the Authority held the agency had not violated 7116(a)(1). It reasoned that, as the memo was correct as to law and Government policy, and did not promise benefits to or threaten employees, it did not interfere with their freedom of choice.

In IRS, Louisville, 20 FLRA 660 (1985), the Authority found that a supervisor's threat to sue a bargaining unit employee and the union did not constitute an ULP. The libel suit was threatened by the supervisor personally, not the agency, and was in response to the employee's rash allegations made in conjunction with a grievance, not in retaliation for her filing the grievance. Therefore, there was no violation of § 7116(a)(1), FSLMRS.

The Authority found that the agency committed an unfair labor practice when an employee was told that there is no union representation on weekends and when the agency imposed overly broad rules prohibiting any union activity on weekends. Naval Air Station Alameda and IAMAW, Lodge 739, 38 FLRA 567 (1990).

What right does a union have to disparage supervisors and managers? In IRS and NTEU, 7 FLRA 596 (1981), the union printed a leaflet in which a supervisor was awarded the "Holiday Turkey" award. It enumerated working practices with which the union was unhappy. The leaflet was distributed at a cafeteria table which was generally used for distribution of union literature. An unfair labor practice was sustained against management when it confiscated the literature. The Authority stated that employees may distribute union literature in nonwork areas during nonworking time, provided there is not a personal attack on management's officers. Epithets such as "scab," "liar," and "unfair" have been an insufficient basis for removal.

6-2A Robust Communication VS. Flagrant Misconduct

Frequently supervisors and employees engage in "robust communication" including heated language. The Federal sector has generally followed the private sector's moderate response to such problems: "The employee's right to engage in concerted activity may permit some leeway for impulsive behavior," e.g., calling a superintendent a "horse's ass" at a grievance hearing. N.L.R.B. v. Thor Power Tool Co., 351 F.2d 584, 586-87 (7th Cir. 1965). Moreover, when there is unplanned, spontaneous physical contact between a supervisor and a union steward during a heated exchange, no ULP lies against management even if the supervisor initiated the assault. DOL and AFGE, 20 FLRA 568 (1985). The use of racial slurs by a union representative has been held to be beyond the protection of "robust debate." AFGE v. FLRA, 878 F.2d 460 (D.C. Cir. 1989).

Moreover, a union representative has the right to use "intemperate, abusive, or insulting language without fear of restraint or penalty" if he or she believes such rhetoric to be an effective manner of making the union's point. Dep't of the Air Force, Grissom Air Force Base and American Federation of Gov't Employees, 51 FLRA 7 (1995)(holding that the union representatives profane and insulting remarks to the management representative was not flagrant misconduct). See *also*, Air Force Flight Test Center Edwards Air Force Base and American Federation of Government Employees, Local 1406, AFL-CIO, 53 FLRA 1455 (1998)(union representative leaning over the supervisor's desk and pointing finger at his supervisor was not "beyond the limits of acceptable behavior"). However, an Agency has the right to discipline an employee who is engaged in otherwise protected activity for actions that "exceed the boundaries of protected activity such as flagrant misconduct." Dep't. of Agriculture Food Safety and Inspection Service and Nat'l Joint Council of Food Inspection Locals, 55 FLRA 877 (1999).

Management violates § 7116(a)(1) derivatively whenever it violates any of the other provisions of section 7116. The rationale is that when management violates any of the other ULP provisions it violates the employee's rights as enunciated in section 7102. The authority of the union and its reasons for existence are undermined. See DLA, 5 FLRA 126 (1981).

A supervisor recommended to an employee that she drop a grievance. The supervisor explained that even if she should succeed in having her evaluation changed she would not gain anything in the long run. The Authority adopted the ALJ's finding that this is a coercive or intimidating statement implying adverse consequences and an implied threat, and thus constituted a violation of § 7116(a)(1). Further, the statement was so phrased that it implied that the career of any employee who complained of management action by processing grievances would suffer. United States Dept. of Treasury Bureau of Alcohol, Tobacco and Firearms, Chicago IL, and NTEU Chapter 94, 3 FLRA 723 (1980).

In Navy Resale System Commissary, 5 FLRA 311 (1981), the Authority adopted the ALJ's finding that a statement by an employee's supervisor angrily reminding the employee that he was the boss, that things would go more smoothly if problems were brought to him, and that the union president should be left out of such matters is a violation of § 7116(a)(1) as it is coercive of the statutory right of employees to request their union's representation.

When an Agency's Area Director said he would keep a list of employees who "fought him" by going to a union and there would be adverse consequences for them, the FLRA found the statements to be unlawful. The Authority found the standard to be an objective one, not based on the subjective perception of the employees or the intent of the supervisor. The issue was whether, under the circumstances, the statement tends to coerce or intimidate the employees, or whether the employees could reasonably have drawn a coercive inference from the statement. EEOC, San Diego and AFGE, 48 FLRA 1098 (1993).

6-3. Discrimination to Encourage or Discourage Union Membership.

Section 7116(a)(2) provides that it is an unfair labor practice for an agency:

to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment; . . .

This ULP often can arise when management improperly treats a union representative differently from other employees. The following case illustrates a legitimate basis for treating a union member differently.

**Warner Robbins Air Force Base
And
American Federation of Government Employees,
Local 987**

**52 FLRA 602 (1996)
(Extract)**

**OPINION:
DECISION AND ORDER**

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached decision of the Administrative Law Judge filed by the Respondent. The General Counsel filed an opposition to the exceptions.

The complaint alleges that the Respondent violated section 7116(a) (1) and (2) of the Federal Service Labor-Management Relations Statute (the Statute) by denying a temporary promotion to the Union President because he was on 100 percent official time for Union business.

Upon consideration of the Judge's decision and the entire record, we conclude for the reasons discussed below that the Respondent did not commit the unfair labor practices alleged in the complaint. Accordingly, we dismiss the complaint.

II. Background and Judge's Decision

In November 1992, Jim Davis, a WG-8 sheet metal mechanic, was elected President of the Union for a 3-year term and designated himself as a full-time [*2] representative. Since then, Davis has been on 100 percent official time and has not worked, or been available to work, for the Respondent.

In February 1994, in order to meet increased workload, the Respondent hired about 550 temporary WG-8 aircraft workers, and received permission to temporarily promote 96 WG-8 mechanics to WG-10, journeyman-level mechanic, for 1 year to oversee the temporary WG-8s. The personnel office supplied a list of about 105 employees, including Davis, who met the qualifications for temporary promotion to WG-10. The Respondent selected 96 employees for temporary promotion, including four Union stewards, but not Davis. The Judge made a credibility determination that the manager who made the selections told Davis that he "would have selected him if he had been available." Judge's Decision at 7.

The Judge found that: (1) Davis was not selected because he was not available to perform agency work; (2) Davis was engaged in protected activity, but this activity was not a motivating factor "unless it is to be inferred as the inherent result of absence on official time for a promotion broadly granted to members of the qualified group" (id. at 9); (3) the record was devoid of union animus; (4) the Respondent promoted no employee who was not available to work; and (5) the Respondent's justification for not promoting Davis was not pretextual.

Relying on Social Security Administration, Inland Empire Area, 46 FLRA 161 (1992) (Inland Empire), the Judge stated that "the Authority has rejected an agency's showing of a legitimate justification and that it would have taken the same action in the absence of protected activity and has inferred that protected activity was a motivating factor where a benefit broadly granted is denied an employee solely because of absence on official time." Judge's Decision at 9. The Judge stated that Inland Empire "teaches that 'official time' is equivalent to work time" and concluded that by denying Davis a temporary promotion to WG-10, the Respondent discriminated against him because of his protected activity. Id. at 11. The Judge further found that Davis was entitled to a retroactive promotion with backpay.

III. Exceptions

A. Respondent's Contentions

Relying on Letterkenny Army Depot, 35 FLRA 113,118 (1990) (Letterkenny), the Respondent argues that the General Counsel has not met its threshold burden of proof and that the Judge found that Davis's protected activity was not a motivating factor in his nonselection for temporary promotion. The Respondent asserts that it did not promote Davis because he was not available to work, but that if he had been available, he would have been temporarily promoted. The Respondent also argues that the temporary promotion of four Union stewards demonstrates the Respondent's lack of animus.

The Respondent also contends that the application of Inland Empire to the facts of this case is erroneous, because that case involved a situation where all employees in an organization shared a group bonus, without regard to individual contribution to the effort. The Respondent argues that individual qualifications and, in particular, availability to serve, controlled the selection of the 96 employees for temporary promotion, and that this was not a group promotion for all the WG-8 mechanics.

B. General Counsel's Opposition

The General Counsel argues that the facts in this case are similar to those in Inland Empire. The General Counsel contends that the Judge found

that the mass promotion action in this case was unrelated to any individual's specific work effort or linkage to agency benefit. The General Counsel argues that the mass promotion action in this case "was more along the lines of a reward for good performance (as was the case in Inland Empire) rather than the filling of job openings to perform specific tasks." Opposition at 5.

The General Counsel also argues that the Respondent's asserted reasons for not promoting Davis are pretextual. In this regard, the General Counsel contrasts the Respondent's failure to temporarily promote Davis with its actions regarding other employees. According to the General Counsel, the Respondent allowed a few employees who were restricted to light duty work or on maternity leave to return to work and obtain medical clearances and then gave them temporary promotions, even though, like Davis, they were not immediately available to work. In addition, noting that the Respondent did not replace one employee who was selected for, but declined, a promotion and another employee who was selected for a promotion but was found to have a disability that prevented him from performing the work, the General Counsel disputes the Respondent's claim that it did not offer Davis a temporary promotion because it needed to fill the WG-10 positions.

IV. Analysis and Conclusions

Under the Authority's analytical framework for resolving complaints of alleged discrimination under section 7116(a) (2) of the Statute, the General Counsel has, at all times, the overall burden to establish by a preponderance of the evidence that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment. Letterkenny, 35 FLRA at 118. See *also* Federal Emergency Management Agency, 52 FLRA No. 47, slip op. at 5 n.2. As a threshold matter, the General Counsel must offer sufficient evidence on these two elements to withstand a motion to dismiss. Letterkenny, 35 FLRA at 118. However, satisfying this threshold burden also establishes a violation of the Statute only if the respondent offers no evidence that it took the disputed action for legitimate reasons. See *id.* The respondent has the burden to establish, by a preponderance of the evidence, as an affirmative defense that: (1) there was a legitimate justification for its action; and (2) the same action would have been taken even in the absence of protected activity.

In this case, even assuming, without deciding, that the General Counsel satisfied the threshold burden, we find that the Respondent established an affirmative defense for its actions. The Respondent had a legitimate justification for its action--it needed WG-10 mechanics to oversee the work of the temporary WG-8s that had been hired, and Davis was not available to perform that work. The Respondent also demonstrated that it

would have taken the same action even in the absence of protected activity--the record establishes that the Respondent gave temporary promotions to four Union stewards who were available to work and would have given Davis a temporary promotion if he had been available to work. As the Judge found, there was no foreseeable chance that Davis would have been available to work at least until November 1995. The Respondent's reasons for its actions towards other employees do not demonstrate that the Respondent's asserted reason for not promoting Davis--that he was not available to work--was pretextual

The Respondent waited a short time for a few employees on light duty to receive medical clearances, and it waited about 1 month for one employee to return from maternity leave before giving her the temporary promotion. By contrast, Davis would not have been available during the entire year-long period the temporary promotion was to be in effect. None of the examples relied on by the General Counsel involve employees unavailable to perform work during the entire year. In addition, we reject the General Counsel's contention that the Respondent's decision not to replace one employee who was selected for, but declined, a promotion and another employee who was selected for a promotion but was found to have a disability that prevented him from performing the work demonstrates that the Respondent's asserted reason for not promoting Davis was pretextual. The Respondent's action regarding these two selections, out of a total of 96 positions, does not establish that the Respondent did not have a need to have WG-10 Mechanics oversee the temporarily hired WG-8 employees. Therefore, the Respondent has established the affirmative defense that it had a legitimate justification for its action and it would have taken the same action even in the absence of an exercise of protected activity.

In addition, this case is distinguishable from Inland Empire. In Inland Empire, the Authority found that an agency committed an unfair labor practice when it denied two union representatives a full share of a group monetary award, based on the composite results of the group's work, and reduced their share based on the amount of time spent on protected activities. By contrast, this case deals with a temporary promotion for only some, not all, qualified employees for work to be performed over a 1-year period, rather than an award for past group efforts. Moreover, in this case, four stewards were given temporary promotions and the Judge found that Davis's protected activity was not a motivating factor in his nonselection for temporary promotion. For these reasons, the Judge's reliance on Inland Empire is misplaced.

Consistent with the foregoing, there is no basis on which to conclude that the Respondent violated section 7116(a) (1) and (2) of the Statute, as alleged, and the complaint must be dismissed.

V. Decision

The complaint is dismissed.

The Statute does not offer any protection to employees participating in concerted activities unrelated to membership in, or activities on behalf of, a labor organization. VA, 4 FLRA 76 (1980).

IRS, Washington, D.C. and NTEU, 6 FLRA 96 (1981). The FLRA reversed the ALJ who, in finding a violation of 5 U.S.C. § 7116(a)(1) and (2), held that it is sufficient to establish that the union or protected activity played a part in management's decision not to promote. In cases involving an allegation of discrimination for engaging in protected activity, the test to be applied is as follows:

[T]he burden is on the General Counsel to make a *prima facie* showing that the employee had engaged in protected activity and that this conduct was a motivating factor in agency management's decision not to promote. Once this is established, the agency must show by a preponderance of the evidence that it would have reached the same decision as to the promotion even in the absence of the protected conduct.

Finding that the agency established by a preponderance of the evidence that the employee would not have been selected even if she had not engaged in protected activity, the Authority dismissed the complaint. See *also* SSA, San Francisco and AFGE, 9 FLRA 73 (1982).

6-4. Assistance to Labor Organizations.

Section 7116(a)(3) provides that it is an unfair labor practice for an agency:

to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status; . . .

The provision is intended to prevent "company" unions. It is rarely violated. When this ULP is sustained, it is usually because management, either intentionally or inadvertently, has aided one union to the detriment of another.

**UNITED STATES ARMY AIR DEFENSE CENTER
FORT BLISS TEXAS
and NFFE**

29 FLRA 362 (1987)

(Extract)

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions filed by the Respondent and the National Association of Government Employees, Local R14-89 (NAGE) to the attached decision of the Administrative Law Judge. The General Counsel filed an opposition to the exceptions. The issue is whether the Respondent violated section 7116(a)(2) and (3) of the Federal Service Labor-Management Relations Statute (the Statute) by refusing to provide the Charging Party, National Federation of Federal Employees, Local 2068, Independent (NFFE) with a building for NFFE's use during a representation election campaign. For the reasons stated below, we find, contrary to the Administrative Law Judge, that the Respondent was not required to provide NFFE with a building similar to the one used by NAGE and that the Respondent satisfied the requirements of section 7116(a)(3) of the Statute by offering NFFE the use of customary and routine facilities for use in the campaign.

II. Background

On May 25, 1984, NFFE filed a petition for an election in a bargaining unit of certain employees of the Respondent. At that time, the unit was represented by NAGE. Until on or about October 16, 1984, the Respondent and NAGE were parties to a collective bargaining agreement. After October 16, 1984, and during the pendency of the representation case, the Respondent and NAGE continued to give effect to their agreement. On February 28, 1985, the Regional Director of the Authority approved an agreement for a consent election. On May 8 and 9, 1985, an election was conducted. The results of that election were inconclusive because neither NAGE nor NFFE received a majority of the valid votes cast in the election. The petition for election is presently pending the outcome of a run-off election to determine the exclusive bargaining representative.

Under the collective bargaining agreement between the Respondent and NAGE, the Respondent agreed to provide a building to NAGE for use as a "Union Hall." The building provided for NAGE's use was a one-story, wooden, barracks-type building in the middle of a heavily populated part of the Base. Beginning on or about April 17, 1985, NFFE representatives observed NAGE using the building in connection with its

election campaign efforts. In that regard, about 2 weeks before the election, a large banner which read "VOTE NAGE" was placed on the side of the building.

The matter of NAGE's use of the building for campaign purposes was initially raised by NFFE at the consent election meeting in February 1985. Subsequently, and prior to the election, NFFE asked the Respondent to provide it with a building for its campaign. NFFE also asked the Respondent to stop NAGE from using the building in question for campaign activities. The Respondent denied both requests. The Respondent advised NFFE that NAGE had obtained the use of the building through negotiations and that the building was provided by the collective bargaining agreement. The Respondent maintained that it could not restrict NAGE's use of the building for campaign purposes. Additionally, the Respondent advised NFFE that it would not provide NFFE with a building because a building "is not in keeping with what the Statute defines as customary and routine services and facilities." The Respondent did, however, offer NFFE the use of various meeting facilities, including a theater and conference rooms, to use in its campaign effort. NFFE did not avail itself of the offered facilities. NFFE rented an office off Base for its campaign headquarters.

III. Administrative Law Judge's Decision

The Judge concluded that the Respondent violated section 7116(a)(1) and (3) of the Statute when it refused to provide NFFE with a building to use during the election campaign. In reaching that conclusion, the Judge found that NFFE acquired "equivalent status" within the meaning of section 7116(a)(3) of the Statute when it filed its representation petition and, therefore, that it was entitled to the same "customary and routine services and facilities" the Respondent had furnished NAGE. The Judge noted that the legislative history of section 7116(a)(3) described as an example of customary and routine services and facilities, "providing equal bulletin board space to two labor organizations which will be on the ballot in an exclusive representation election." He concluded that if both unions would be equally entitled to bulletin board space, they were both equally entitled to a building for campaign purposes. The Judge reasoned that the Respondent's contract obligation to provide NAGE with a building was in accordance with its section 7116(a)(3) permission to provide customary and routine services and facilities and that 7116(a)(3) required that NFFE receive the same facilities and services.

The Judge concluded that the Respondent's refusal to provide NFFE with a building violated section 7116(a)(1) and (3) of the Statute. Further in that regard, the Judge rejected the Respondent's contention

that the Authority's Regional Office was responsible for any violation because the Region was responsible for supervising the election.

IV. Positions of the Parties

In its exceptions, the Respondent essentially contends that an agency does not have a duty under section 7116(a)(3) of the Statute to provide an equivalent status union the same facilities that an incumbent exclusive representative has acquired through collective bargaining. The Respondent maintains that its obligation was only to provide "customary and routine" facilities. The Respondent argues that the building in dispute in this case was obtained by NAGE through negotiation as the exclusive representative and was provided for under the collective bargaining agreement between itself and NAGE. The Respondent argues that it did not provide NFFE with a building because it did not consider a building a "customary and routine" facility under section 7116(a)(3). The Respondent further contends that it offered NFFE the use of numerous meeting places, but that NFFE never availed itself of any of the offered facilities.

In its exceptions, NAGE also contends that its use of a building as a union hall was obtained through negotiations and maintains that there is no basis in section 7116(a)(3) for giving an intervenor the same rights that an incumbent exclusive representative has gained through bargaining. NAGE also argues that NFFE was not disadvantaged in this case because the Respondent gave or offered NFFE extensive access to various facilities on the Base and that NFFE had vans with campaign signs displayed riding around the Base 8 to 10 hours a day.

In its exceptions, the General Counsel contends that the Judge correctly found that the Respondent violated the Statute.

V. Discussion

The significant part of the complaint in this case is that the Respondent committed an unfair labor practice by failing to (1) provide NFFE with a building similar to the one used by NAGE or (2) to stop NAGE from using its building for other than representational purposes. The Judge decided this narrow issue, as do we. We find, contrary to the Judge and the General Counsel, that the Respondent did not violate section 7116(a)(1) and (3) of the Statute as alleged in the complaint.

Section 7116(a)(3) provides that an agency may, upon request, furnish a labor organization with customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status. Thus, under section 7116(a)(3), if an agency grants a union's request for customary

and routine services or facilities in a representation proceeding, the agency must, upon request, provide such services or facilities to another union having equivalent status.

We agree with the Judge that NFFE had equivalent status with NAGE in the representation proceeding. However, NAGE did not request and the Respondent did not grant NAGE the use of a building as a "customary and routine" facility during that proceeding. Rather, the Respondent provided NAGE with the building through the give and take of negotiations with NAGE as the exclusive representative of the unit involved before NFFE filed its representation petition. NAGE's right to use the building as a "Union Hall" was expressly established in NAGE's collective bargaining agreement with the Respondent before NFFE became a union "having equivalent status."

We can find no compelling indication in the plain language or legislative history of section 7116(a)(3) that an agency is required to furnish a labor organization that has achieved equivalent status with an incumbent union in a representation proceeding with the exact same services and facilities that the incumbent obtained through collective bargaining before the proceeding. On the contrary, it is reasonable to expect that an incumbent labor organization will have acquired some advantages in agency services and facilities over a rival union through collective bargaining. The Statute does not require that an agency equalize their positions upon request of the rival.

The example from the legislative history of section 7116(a)(3) cited by the Judge does not compel a different conclusion. That example, "providing equal bulletin board space to two labor organizations which will be on the ballot in an exclusive representation election[.]" was used to illustrate the kind of customary and routine services and facilities an agency may furnish "when the services and facilities are furnished, if requested, on an impartial basis to organizations having equivalent status[.]" H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 49 (1978), reprinted in Committee on Post Office and Civil Service, House of Representatives, 96th Cong., 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, Committee Print No. 96-7, at 695 (1979).

We do not believe that a building is the kind of "customary and routine" facility contemplated by Congress in fashioning section 7116(a)(3). But even assuming that a barracks-type building is a customary and routine facility at Fort Bliss, we reemphasize that NAGE did not request and the Respondent did not gratuitously provide NAGE with the building in question during the representation proceeding. NAGE's right to sue the building was established by the previously negotiated agreement. Therefore, the Respondent was under no duty to

grant NFFE's request for a similar building. Additionally, we note that the Respondent specifically advised NFFE that it was prepared to provide, upon request, NFFE and NAGE with various meeting facilities for use in their election campaigns.

Accordingly, we conclude that the Respondent did not violate section 7116(a)(1) and (3) of the Statute as alleged in the complaint.

Unions frequently allege violations of the neutrality doctrine as ULPs under § 7116(a)(3). See Fort Sill, Oklahoma, 29 FLRA 1110 (1987); Barksdale Air Force Base and NFFE, 45 FLRA 659 (1992).

6-5. Discrimination Against an Employee Because of His Filing a Complaint or Giving Information.

Section 7116(a)(4) provides that it is an unfair labor practice for an agency:

to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter; . . .

In Naval Air Station Alameda and IAMAW, Lodge 739, 38 FLRA 567 (1990), the Authority found an unfair labor practice where an employee was disciplined shortly after a ULP was filed.

6-6. Refusal to Bargain.

Under Section 7116(a)(5), it is an unfair labor practice for an agency:

"to refuse to consult or negotiate in good faith with a labor organization as required by this chapter; . . .

This is the most violated ULP. Usually it is because management did not realize it had a duty to negotiate, or refused to concede that the exclusive representative could usurp what the commander/manager felt was his traditional decision-making powers as a commander/manager.

**FEDERAL AVIATION ADMINISTRATION NORTHWEST
MOUNTAIN REGION and
NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION
51 FLRA 35 (1995)**

(Extract)

I. Statement of the Case

The Administrative Law Judge issued the attached decision, finding that the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by selecting and installing certain interior design features at the Denver International Airport's Terminal Radar Approach Control (TRACON) and Tower facilities without providing the Union notice or the opportunity to bargain over the substance, impact or implementation of the matters insofar as they constituted changes in bargaining unit employees' conditions of employment.

The General Counsel filed exceptions to the Judge's recommended remedy. The Respondent did not file an opposition to the General Counsel's exceptions.

Upon consideration of the Judge's decision and the entire record, we adopt the Judge's findings, conclusions, and recommended Order.

II. Judge's Decision and Recommended Order

The facts are fully set forth in the Judge's decision and are only briefly summarized here. The Judge concluded that the Respondent violated the Statute by not providing the Union appropriate notice and an opportunity to bargain over the selection and installation of certain interior design features of the TRACON and Tower facilities. The Judge rejected the General Counsel's request for a status quo ante remedy, which would require the Respondent to remove the various design features and bargain over the selection and installation of those items. In so doing, the Judge relied on testimony of Union representative Gary Molen who, according to the Judge, "described the new building as 'very pretty, beautiful.'" Judge's Decision at 4. The Judge ordered the Respondent to bargain over the selection and installation of the design features and to do so "without regard to the present conditions." *Id.* at 5. As the Judge explained this remedy, "if the collective bargaining process results in an agreement on selections that are different from the existing ones, they should be installed upon request." *Id.*

III. Positions of the Parties

The General Counsel argues that the Judge erred by failing to apply the standard set forth in Department of Health and Human Services, Region IV, Office of Civil Rights, Atlanta, Georgia, 46 FLRA 396 (1992), to remedy the unfair labor practice. According to the General Counsel, that standard requires "that any appropriate bargaining remedy must place the parties on equal footing." Exceptions at 5. The General Counsel asserts that in order to guarantee the Union's right to bargain without regard to the present conditions at the TRACON and Tower facilities, the Authority should order the Respondent not to present before the Federal Mediation and Conciliation Service (FMCS) any proposal related to design features currently in place. The General Counsel also asks the Authority to order the Federal Service Impasses Panel (Panel) to disregard any of the Respondent's proposals related to existing design features as well as any aesthetics and economic waste arguments and to accept "any and all of NATCA's proposals" without regard to current conditions. *Id.* at 8. Finally, the General Counsel requests the Authority to attach strict time frames to the bargaining order to produce a negotiated agreement prior to the projected opening of the new airport.

* * *

IV. Analysis and Conclusions

We agree with the Judge that, to remedy the violation, the Respondent should be required to bargain, at the request of the Union, and, if requested and necessary to implement the results of any agreement reached, to replace the existing design features.¹ Essentially, this constitutes a retroactive bargaining order, a remedy that is within the Authority's broad remedial discretion. See *generally National Treasury Employees Union v. FLRA*, 910 F.2d 964 (D.C. Cir. 1990) (en banc). This remedy is appropriate where a respondent's unlawful conduct has deprived the exclusive representative of an opportunity to bargain in a timely manner over negotiable conditions of employment affecting bargaining unit employees. U.S. Department of Energy, Western Area Power Administration, Golden, Colorado, 22 FLRA 758 (1986), *rev'd on other grounds*, 880 F.2d 1163 (10th Cir. 1989). In this case, the bargaining order recommended by the Judge will effectuate the purposes and policies of the Statute by ensuring the substitution of any design features negotiated by the parties or imposed by the Panel, thereby approximating the situation that would have existed had the Respondent fulfilled its statutory obligations.

¹ Generally, when management changes a condition of employment without fulfilling its obligation to bargain over the decision to make the change, the Authority orders a status quo ante remedy, in the absence of special circumstances. For example, *Federal Deposit Insurance Corporation*, 41 FLRA 272, 279 (1991) enforced, 977 F.2d 1493 (D.C. Cir. 1992). However, in this case the Judge did not recommend a status quo remedy and there are no exceptions to that determination.

We reject the General Counsel's request that the Authority limit the arguments the Respondent may make during the collective bargaining process, including during any mediation efforts by the FMCS. We leave it to the parties to bargain in good faith to the fullest extent consonant with law and regulation. Any assertion that either party failed to meet its duty to bargain would be appropriately raised at the compliance stage of this proceeding.

We also reject the General Counsel's request for additional modifications to the remedy. With regard to the request for the imposition of time limits on the various stages of bargaining, we note that the TRACON and Tower are now open and, therefore, that the expressed reason for the General Counsel's request no longer exists. We also note the difficulty in imposing effective time limits on collective bargaining in the Federal sector. *Cf. U.S. Department of Transportation and Federal Aviation Administration*, 48 FLRA 1211, 1215 (1993), *petition for review denied*, No. 94-1136 (D.C. Cir. Apr. 5, 1995) (negotiability disputes and impasse resolution proceedings could significantly lengthen any imposed time limits on bargaining). In addition, there is nothing in this record to indicate that the Respondent is unwilling to bargain expeditiously. With regard to the General Counsel's request that we direct the Panel to disregard the Respondent's arguments regarding aesthetic and economic waste and all of its proposals related to the design features currently in place, such direction would intrude on the Panel's discretion under section 7119(c)(5)(B)(iii) of the Statute to take whatever action is necessary and not inconsistent with the Statute to resolve impasses. See *National Treasury Employees Union, Chapter 83 and Department of the Treasury, Internal Revenue Service*, 35 FLRA 398, 415 (1990).²

V. Order

Pursuant to section 2423.29 of the Authority's Regulations and section 7118 of the Statute, the Federal Aviation Administration, Northwest Mountain Region, Renton, Washington, shall:

1. Cease and desist from:

(a) Unilaterally changing working conditions of unit employees in the bargaining unit represented by the National Air Traffic Controllers Association (NATCA), including the selection and installation of carpeting, carpet tile, wall finishes, and related design features at the Denver International Airport's TRACON and Tower facilities, without first

² Because the Judge's use of Molen's statement is not relevant to our decision in this case, we deny the General Counsel's request that we "find as a matter of fact that Molen's description 'very pretty, beautiful' applied to his impression of the size of the TRACON, not the interior design features of both the TRACON and the Tower." Exceptions at 5.

notifying NATCA and affording it the opportunity to bargain to the extent consonant with law and regulation.

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their 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 Statute:

(a) Upon request of NATCA, bargain to the extent consonant with law and regulation concerning the selection and installation of carpeting, carpet tile, wall finishes, and related design features at the Denver International Airport's TRACON and Tower facilities, and, if requested and necessary to implement the results of any agreement reached, replace existing design features.

(b) Post at its TRACON and Tower 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 Air Traffic Division Manager, Northwest Mountain Region, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Regulations, notify the Regional director, Denver 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.

Recall that notice or opportunity to bargain must be given to the union if the change to be instituted has more than de minimis impact on the bargaining unit employees. SSA and AFGE, 19 FLRA 827 (1985). In VA Medical Center, Prescott and AFGE, 46 FLRA 471 (1992), the Authority found that changing the schedule of two housekeeping aides had more than a de minimis impact. The Authority looked at the impact of the decision on the employees and found that employee's concerns about child care and family obligations created an impact that was more than de minimis.

The activity violated sections 7116(a)(1) and (5) of the Statute when it unilaterally changed the existing time frame for processing cases within its Estate and Gift Tax Group without giving prior notice to the union and affording it an opportunity to consult or negotiate concerning impact and implementation of the change when the change had a substantial impact on the employees' working conditions. The fact that the completion dates were easily changed and that none of the attorneys were subjected to meetings with the Chief of the Branch is of no import as the absence of enforcement bears solely on the remedy and

not on the change. Department of Treasury IRS, Jacksonville District and NTEU, 3 FLRA 630 (1980).

The Past Practices Doctrine.

Often a local employment-related practice is established informally (known as a "past practice") and a management action changes the past practice without affording the union an opportunity to negotiate

Negotiations. This doctrine requires local management to negotiate within the recognized scope of bargaining on changes in informally established personnel policies, practices and working conditions which may be (1) covered by ambiguous language in the contract; or (2) not covered at all by the contract. The obligation to bargain on such changes is enforceable as an unfair labor practice under §§ 7116(a)(1) and (5). Thus, where local management wants to change an established personnel practice, it must offer to negotiate with the union. The extent of negotiation required varies according to the following:

If the change by management concerns matters that are mandatorily negotiable, management must negotiate to the full extent of its discretion, whether to have the change and how to make the change.

If the change sought by management is an attempt to enforce management rights that have been afforded employees which were optionally negotiable, management must also negotiate fully but only as to the impact and implementation of the change but need not negotiate the decision whether to continue the practice.

If the change by management is in response to a requirement of law or an assertion of prohibited negotiable rights (for which there is no authority to allow the concession), management should revoke the illegal practice immediately, giving notice concurrently to the union that it stands ready to negotiate the impact and implementation which local management can control. See Navy and AFGE, 34 FLRA 635, (1990).

The doctrine does not apply to negotiations:

if there is no exclusive representative; or

if there is a specific CBA provision which gives management the right to the unilateral change. See Border Patrol, El Paso ad AFGE, 48 FLRA 61 (1993); or

where the subject is not negotiable.

The past practices doctrine does not render permissive nor prohibited matters negotiable. Further, negotiation is required only to the extent that the change is controlled by local management. But management's decision to adopt a higher headquarters' policy or regulation, which changes a past practice, triggers the obligation to notify the union. See

DODDS and OEA, 50 FLRA 197, 206 (1995)(DODDS decision to implement the revised DOD JTR triggered requirement to notify union).

The Authority found that the agency violated §§ 7116(a)(1) and (5) when it unilaterally eliminated an established past practice by issuing an instruction stating that leave without pay (LWOP) will not be granted to employees who had reached the maximum allowable earnings for a pay period, and then failing to bargain in good faith over this change and its impact on unit employees. The Authority found that a past practice of granting LWOP at the discretion of supervisors existed and rejected the agency's argument that it was effectively discontinued. Whatever attempt made by the activity to end the practice was not communicated to the union, nor was it ever made clear to management's own supervisors. Portsmouth Naval Shipyard, 5 FLRA 352 (1981). Similarly, the Authority found that the Agency committed a ULP when it terminated the practice of permitting employees to smoke inside fire stations without discussing the change with the union in Air Force Materiel Command, Wright Patterson AFB and Int'l Ass'n of Firefighters, 56 FLRA No. 118 (2000). See also, GSA and AFGE, Local 2431, 55 FLRA No. 84 (1999) (Agency unilaterally reduced the amount of performance awards after ten years of using the same standard); U.S. Customs Service and NTEU, 55 FLRA No. 16 (1998) (holding that a unilateral change to videotaping employee interview was a ULP if there was no reasonable connection between the change and a security practice).

Annual picnic and Post Exchange privileges as past practices. See AG Publications Center, 24 FLRA 695 (1986); AFGE v. FLRA, 866 F.2d. 1443 (D.C. Cir. 1989).

The FLRA has ruled that a past practice is irrelevant when it does not affect bargaining unit employees or is within management's exclusive authority. AFGE Local 2761 v. FLRA, 866 F.2d 1443 (1989).

The duty to bargain also includes an obligation to provide information under 5 U.S.C. § 7114((b)(4). This provision states that the agency must “furnish to the exclusive representative, or its authorized representative, upon request and, to the extent not prohibited by law, data which is normally maintained by the agency in the regular course of business; which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining 5 U.S.C. § 7114((b)(4) emphasis added). Further, the agency's statutory duty to furnish information to the exclusive representative extends to a full range of representational activity, not just in the context of pending negotiations between labor and management. FAA and National Air Traffic Controllers, 55 FLRA No. 44 (1999)(finding the agency committed an ULP by not giving the exclusive representative of bargaining unit employees information that was necessary for it to determine seniority under the parties' collective bargaining agreement).

Privacy Act Information: If sanitized information will serve the purpose and protect Privacy Act concerns, that information must be provided to the exclusive representative. Department of Justice, Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota v. FLRA, 144 F.3d 90 (D.C. Cir. 1998) (holding the agency violated the

FSLMRS by failing to provide the union with copies of sanitized disciplinary actions taken against employees).

Reasonably Available: Failing to provide information in a timely manner is an unfair labor practice. HQDA, 90th Regional Support Command and AFGE, Local 1017, 1999 FLRA LEXIS 200, FLRA ALJ Dec. No. 144 (1999) (finding the agency committed an ULP when it did not give the union documents when it asked for them and instead told the union it could have official time to make copies itself). Further, the FLRA held that failing to inform the union that the requested information no longer exists is also an unfair labor practice. DOJ, INS Northern Region, Twin Cities, and National Border Patrol Council, AFGE, 52 FLRA 1323 (1997); SSA, Dallas and AFGE, AFL-CIO, Local 1336, 51 FLRA 1219, 1226-1227 (1996).

Necessary: It is an ULP to refuse to provide documentation when the union has shown a particularized need for the information and no countervailing interests outweigh the need. AFGE Local 2343 v. FLRA, 144 F.3d 85 (D.C. Cir 1998) (rejecting union's claim that particularized need is automatically established when requested documents discuss a specific incident); DOJ, INS v. FLRA, 144 F.3d 90 (D.C. Cir. 1998) (agency committed ULP when it failed to give union a copy of an investigatory file for which the union showed it had a particularized need; Air Force v. FLRA, 104 F.3d 1396 (D.C. Cir 1997) (agency violated the FSLMRS when, after the union showed a particularized need for information concerning disciplinary action taken against a supervisor who allegedly used physical force against a BU member, the agency failed to provide the requested documentation).

DOD v. FLRA,
114 S.Ct. 1006 (1994).
(Summary)

Analysis of this issue involves a number of statutes. The Federal Service Labor-Management Relations Statute provides that information may only be released to the union if release is not otherwise prohibited by law. 5 U.S.C. § 7114(B)(4). The Privacy Act prohibits release of information in systems of records, such as civilian personnel records, unless an exception applies. 5 U.S.C. § 552a(b). The only applicable exceptions are where a published routine use allows release, or where the Freedom of Information Act (FOIA) requires release. 5 U.S.C. § 552a(b)(3), 5 U.S.C. § 552a(b)(2).

(The Office of Personnel Management has published a routine use that allows the release of names and home addresses to unions where the unions do not have any other way to reach employees. Guidance for Agencies in Disclosing Information to Labor Organizations Certified as Exclusive Representatives Under 5 U.S.C. Chapter 71, FPM Letter 711-164 (September 17, 1992); List of OPM Privacy Act Systems of Records, Federal Register, August 10, 1992. Here the union has access to the employees at work so the routine use does not apply.)

The Privacy Act allows release of information if the FOIA requires release. 5 U.S.C. § 552a(b)(2). FOIA, however, never requires release if, balancing the personal interest in privacy against the public interest in ensuring that government activities are open to public scrutiny, the release would result in a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). When the Supreme Court affirmed that the public interest in union activity was not a public interest in relation to the FOIA, there remained no public interest to weigh against the private interest in privacy.

Release of this information, absent consent by the subject of the record or a valid Privacy Act exemption, is a violation of the Privacy Act.

**FAA, New York Tracon, Westbury, NY and
National Air Traffic Controllers Assoc.,**

51 FLRA No. 12 (1995)(Tracon II)

The Union alleged that the FAA violated section 7116(a)(1), (5) and (8) of the Statute by refusing to provide the Union with a copy of an EEO settlement agreement requested under section 7114(b)(4) of the Statute. The Authority found that the FAA did not violate the Statute because disclosure of the requested information was prohibited by the Privacy Act.

In arriving at this result, the Authority applied the framework announced in FAA, New York TRACON, 50 FLRA 338 (1995)(Yes, it was the same agency and union).

In New York TRACON, the union requested unsanitized copies of all bargaining unit employee performance appraisals. When the agency refused to provide the information, the union filed an unfair labor practice charge. The Administrative Law Judge ruled against the agency and the agency filed exceptions to the decision with the FLRA. While the case was pending before the FLRA, the Supreme Court decided DOD v. FLRA. The FLRA adopted the Supreme Court's holding in DOD v. FLRA.

The framework announced by the FLRA is the same as that used in determining the release of information under the Freedom of Information Act (FOIA). The agency seeking to withhold information in reliance on the Privacy Act "bears the burden of demonstrating:

- (1) that the information requested is contained in a system of records under the Privacy Act;
- (2) that disclosure of the information would implicate employee privacy interests; and
- (3) the nature and significance of those privacy interests."

If the agency makes the required showing, the burden shifts to the General Counsel of the FLRA (on behalf of the union) to:

- "(1) identify a public interest that is cognizable under the FOIA; and
- (2) demonstrate how disclosure of the requested information will serve the public interest."

Once the respective interests are identified, the FLRA then balances the respective interests to determine releasability.

In New York TRACON, the FLRA began by reciting the federal labor union's statutory right to information contained in the FSLMRS and the "to the extent not prohibited by law" limitation it contains. The FLRA determined that this limitation brings requests for information under the FSLMRS within the protections of the Privacy Act. In past decisions, the FLRA used the statutory right to information contained in the FSLMRS to find a public interest that justifies releasing information. As a result of the Supreme Court's decision in DOD v. FLRA, the FLRA no longer considers this statutory right to information in determining the applicable public interest to be weighed against the individual's privacy concern. Rather, the FLRA only considers how the information sheds light on the agency's performance of its statutory duties or informs the public about what the Government is doing.

Two other interests used by the FLRA in past cases to tip the balance in favor of disclosure of information were rejected in this case. The FLRA no longer considers the early resolution of grievances in defining the public interest. Early resolution of grievances does not shed light on how the agency functions. Similarly, the FLRA no longer considers "the proper administration of a collective bargaining agreement" as a public interest to be used in the balancing process, absent a showing that the disclosure would permit an assessment of how the agency administers its labor contract. Taking these statutory weights out of the balancing process makes it much more difficult for unions to overcome the employee's privacy interests.

The FLRA rejected the argument that the Supreme Court's decision in DOD v. FLRA was limited to requests for names and home addresses. The FLRA could find no basis for defining public interest differently in cases involving other kinds of information requested by a union. Under the FSLMRS, unions have a variety of statutory rights and responsibilities.

These interests are unique to the union and the FLRA will not consider them in assessing public interest under the Privacy Act.

Applying the new framework to the requested information in New York TRACON, the FLRA found a significant privacy interest in information that reveals how a supervisor assesses an employee's work performance. Favorable information in an employee evaluation report, if released, might embarrass an employee or incite jealousy among co-workers. Releasing unfavorable information in an employee evaluation report, if released, could lead to embarrassment and injury to the reputation of the employees concerned. In New York TRACON, the FLRA balanced this privacy interest in an employee's appraisal against the public interest in knowing that the agency was carrying out its personnel functions fairly and in accordance with the law. After balancing the private and public interests, the FLRA found the public interest in release was outweighed by the substantial invasion of employee privacy.

In Tracon II, the Authority found a public interest in knowing how an agency dealt with discrimination complaints. However, this public interest was insufficient to overcome the privacy interest of the employee. The Authority also noted that a redacted document would not protect the privacy interests of the employee since the settlement applied to one employee and was requested by the employee's name.

NOTE: The FLRA has consistently upheld the agencies' refusal to release unredacted copies of documents to unions since FAA, New York Tracon was decided. However, that does not relieve the obligation to provide documents with the private information redacted, where redaction will protect the privacy interests.

Refusal to honor an agreement is also an unfair labor practice.

Agency's refusal to honor "the unambiguous terms of the settlement agreement by which it was bound . . . constituted repudiation and, as such, violated section 7116(a)(1) and (5) of the Statute." DODDS and OEA, 50 FLRA 424 (1995).

6-7. Failure to Cooperate in Impasse Procedures.

It is an unfair labor practice for an agency to fail or refuse to cooperate in impasse procedures and impasse decisions (Section 7116(a)(6)).

U.S. ARMY AEROMEDICAL CENTER FORT RUCKER, & HQ, U.S. ARMY HEALTH SERVICES COMMAND FORT SAM HOUSTON, and AFGE LOCAL 1815

49 F.L.R.A. 361 (1994)

(Extract)

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached decision of the Administrative Law Judge.

The complaint alleged that the U.S. Army Aeromedical Center, Fort Rucker, Alabama (Respondent Fort Rucker) violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by engaging in a course of conduct that constituted bad faith bargaining concerning the Charging Party's efforts to bargain over on-call procedures and its attempts to invoke the services of the Federal Service Impasses Panel (the Panel). The complaint further alleged that the Headquarters, U.S. Army Health Services Command, Fort Sam Houston, Texas (Respondent Fort Sam Houston) violated section 7116(a)(1) and (6) of the Statute by refusing to approve, and declaring nonnegotiable, provisions that the Panel ordered Respondent Fort Rucker to adopt.¹ The Respondents did not file an answer to the complaint within 20 days after it was served on them, as prescribed in section 2423.13(a) of the Authority's Rules and Regulations. When no answer was filed, the General Counsel filed a motion for summary judgment under section 2423.13(b) of the Rules and Regulations.² In their response to the General Counsel's motion, the Respondents included an answer to the complaint, in which they admitted the factual allegations of the complaint and denied the legal allegations.

¹ The Panel issued its decision in 91 FSIP 115 (May 30, 1991), directing the parties to adopt the Union's proposal regarding procedures to be followed by employees who are on call. The proposal is set forth in an Appendix to this decision.

² Section 2423.13(b) of the Rules and Regulations provides, in relevant part:

Failure to file an answer or to plead specifically to or explain any allegation [of the complaint] shall constitute an admission of such allegation and shall be so found by the Authority, unless good cause to the contrary is shown.

The Judge granted the motion for summary judgment as to Respondent Fort Rucker. The Judge found that there was no good cause for the Respondents' failure to timely file an answer to the complaint. Therefore, in accordance with section 2423.13(b) of the Rules and Regulations, the Judge found that the failure to timely answer the complaint constituted an admission that Fort Rucker had violated section 7116(a)(1) and (5) of the Statute. No exceptions were filed to this portion of the Judge's decision.

The Judge denied the motion for summary judgment as to Respondent Fort Sam Houston on the basis that summary judgment was inappropriate in the circumstances of this case. The Judge also recommended that the portion of the complaint alleging a violation of the Statute by Respondent Fort Sam Houston be dismissed. The General Counsel filed exceptions to the Judge's findings and conclusions with respect to Respondent Fort Sam Houston.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, we have reviewed the Judge's decision and find that no prejudicial error was committed. Upon consideration of the Judge's decision and the entire record, and noting that no exceptions were filed in this regard, we adopt the Judge's findings and conclusion that Respondent Fort Rucker violated section 7116(a)(1) and (5) of the Statute. We further adopt the Judge's denial of the motion for summary judgment with respect to Respondent Fort Sam Houston and we agree, for the reasons set forth below, that the complaint against Respondent Fort Sam Houston must be dismissed.

In denying the motion for summary judgment, the Judge found that the failure to timely answer the complaint did not establish that Respondent Fort Sam Houston violated section 7116(a)(1) and (6) of the Statute. The Judge reasoned that, absent a determination by the Authority that the matter was negotiable, Respondent Fort Sam Houston "retained the right to contest the negotiability of the proposal ordered adopted by the [Panel]." Judge's decision at 7. The Judge noted that the complaint did not allege that there had been a prior negotiability determination on the same or substantially similar provision or that the Panel had "treated the negotiability of the Union's proposal." *Id.* at 8. According to the Judge, in these circumstances, a finding of negotiability is necessary in order to sustain a violation of the Statute, and, therefore, "admission of the factual allegations set forth in the Complaint does not support a legal conclusion that the Union's proposal was negotiable." *Id.*

The General Counsel excepts to the partial denial of the motion for summary judgment and the dismissal of the complaint against Respondent Fort Sam Houston. The General Counsel asserts that under section 2423.13(b)(2) of the Authority's Rules and Regulations, the failure to respond to the complaint constituted an admission of the allegations

contained therein and the Authority is required to find the violations, as alleged, unless good cause to the contrary is shown. The General Counsel contends that because the Judge found that the Respondents' failure to timely answer the complaint was not for good cause, all the facts of the complaint, including the allegation concerning Respondent Fort Sam Houston, were deemed admitted as true. Therefore, the General Counsel asserts that it is entitled to summary judgment as a matter of law.

The General Counsel further maintains that the Judge incorrectly applied Authority precedent in concluding that a finding of negotiability was required before a violation of section 7116(a)(1) and (6) could be found. Rather, the General Counsel argues that in cases in which there has been no prior negotiability finding by the Authority, it is the responsibility of the Judge to make the necessary negotiability determination. In this regard, the General Counsel asserts that the Judge erroneously "appears to conclude[] that the complaint did not allege sufficient facts to show that the provision in question . . . was negotiable." Exceptions at 7. In the General Counsel's view, "the admitted facts and pleadings are sufficient, as a matter of law, to support the alleged violation of the Statute." *Id.* at 9.

The General Counsel also objects to what it views as the Judge's implication that the General Counsel should have specifically alleged that the Panel-imposed provision was negotiable. According to the General Counsel, the Judge was required to make a negotiability determination and the burden was on the Respondents to show that the Panel-imposed provision was nonnegotiable. However, even assuming that it bore the burden of proving the proposal's negotiability, the General Counsel claims that the admitted facts, as well as the Panel's decision and Authority case law, clearly establish that the proposal is negotiable.

Alternatively, the General Counsel argues that if the Authority concludes that the pleadings are insufficient to support the conclusion that the Panel-imposed provision was negotiable, the Judge erred in dismissing the complaint against Fort Sam Houston. According to the General Counsel, the Judge should have "remand[ed] the complaint to the Atlanta Region for a trial on the facts[.]" *Id.* at 3.

Initially, we find, contrary to the General Counsel's assertions, that the Judge correctly concluded that the Respondents' failure to timely answer the complaint is insufficient to support a conclusion that Respondent Fort Sam Houston violated section 7116(a)(1) and (6) of the Statute. As the Judge noted, the General Counsel did not allege in its complaint that the provision was negotiable or that the Authority previously had found a substantially similar provision negotiable. Therefore, the Respondents' failure to timely answer the complaint does not constitute an admission that the provision is, in fact, negotiable. Absent such an admission, a finding by the Authority that the Panel-imposed provision is

negotiable is a prerequisite to a finding that Respondent Fort Sam Houston violated the Statute by disapproving the provision.

In this connection, the Authority previously has stated that the mere act of reviewing provisions imposed by the Panel does not constitute a violation of the Statute. See U.S. Department of the Army, Headquarters, and DARCOM HQ, 17 FLRA 84 (1985), *aff'd in relevant part sub nom. National Federation of Federal Employees v. FLRA*, 789 F.2d 944 (D.C. Cir. 1986). Rather, as relevant here, an agency commits an unfair labor practice by disapproving a provision imposed by the Panel that is not materially different from one previously found negotiable by the Authority or that the Authority finds, in either an unfair labor practice or a negotiability proceeding, is not contrary to the Statute or any other law, rule, or regulation. See U.S. Department of Health and Human Services, Public Health Service and Centers for Disease Control, National Institute for Occupational Safety and Health, Appalachian Laboratory for Occupational Safety and Health, 39 FLRA 1306, 1311 (1991); Department of the Treasury and Internal Revenue Service, 22 FLRA 821, 828 (1986). The General Counsel concedes that it "did not present [the Judge] with a case in which the Authority had already deemed a proposal negotiable." Exceptions at 7. Absent such a finding, it would be incorrect to conclude that Respondent Fort Sam Houston's conduct in disapproving the Panel-imposed provision violated section 7116(a)(1) and (6) of the Statute.

We also reject the General Counsel's assertions with respect to which party bears the burden of establishing the negotiability of the provision. In order for the Authority to determine that the provision is negotiable and, therefore, that Respondent Fort Sam Houston violated section 7116(a)(1) and (6) of the Statute, the General Counsel was required to allege and demonstrate that the matter was negotiable. As we noted, the General Counsel did not allege, let alone establish, that the provision is negotiable. As a result, the General Counsel has not met its burden of proof solely as a result of the Respondents' untimely answer to the complaint.

However, we agree with the General Counsel that the Judge erred in dismissing the complaint with respect to Respondent Fort Sam Houston, absent a finding that the Panel-imposed provision is nonnegotiable and, therefore, was properly disapproved. In other words, our conclusion that the General Counsel was not entitled to summary judgment as to this allegation of the complaint does not resolve the underlying issue of whether, in disapproving the Panel-imposed provision, Respondent Fort Sam Houston violated section 7116(a)(1) and (6) of the Statute. As noted, such a finding is contingent on whether the provision is negotiable.

Both the General Counsel, in its exceptions, and Respondent Fort Sam Houston, in its response to the motion for summary judgment,

maintain that the Authority should remand this case for a determination as to the negotiability of the provision. Such a remand would be appropriate if the record contained insufficient evidence on which to resolve the issue.

However, we find that the record provides a sufficient basis on which to assess the negotiability of the provision. In their pleadings filed with the Authority, as well as the supporting documentation, the parties presented sufficient arguments with respect to the merits of the provision to enable the Authority to resolve the matter. Consequently, in light of the Authority's role in resolving negotiability disputes, set forth in section 7105(a)(2)(E) of the Statute and the cases cited above, and in order to provide an expeditious resolution of this case, we will now address the negotiability of the Panel-imposed provision in order to determine whether Respondent Fort Sam Houston's conduct in disapproving the provision violated section 7116(a)(1) and (6) of the Statute.

The provision, fully set forth in the Appendix, relates to civilian nurses who work in an operating room and who are on call to return to duty. Among other things, the provision prescribes the length of time that these employees have to return to work. Specifically, the employees are provided 25 minutes to prepare themselves to start their drive to work and a reasonable amount of driving time to arrive at their duty location. The provision also states that the employees will not be required to meet stricter standards than those contained in the provision. For the following reasons, we conclude that the provision is nonnegotiable because it would excessively interfere with the right to assign work under section 7106(a)(2)(B) of the Statute.

The Authority previously has held that proposals or provisions that determine when work will be performed directly interfere with the right to assign work. *See, for example, American Federation of Government Employees, AFL-CIO, Local 3769 and U.S. Department of Agriculture, Federal Grain Inspection Service, League City Field Office, Texas, 45 FLRA 92, 94-95 (1992)* (portion of proposal guaranteeing 10 consecutive hours off duty between certain work assignments found to directly interfere with management's right to determine when certain work assignments would occur). *See also National Association of Government Employees, Local R12-33 and U.S. Department of the Navy, Pacific Missile Test Center, Point Mugu, California, 40 FLRA 479, 486 (1991)* (elimination of overlap between shifts found to directly interfere with the right to assign work by preventing the agency from determining when the duties of the shift would be performed). The provision here would impermissibly affect management's ability to determine when work will be performed by preventing management from calling the nurses back to duty in a lesser period of time than allowed by the provision. For example, if there were an emergency situation necessitating the nurses' presence in the operating room, management would not be able to require the nurses to reduce their preparation time in order to arrive at work to perform their

assigned duties. Accordingly, the provision directly interferes with the right to assign work.

The provision may nonetheless be negotiable if it constitutes an appropriate arrangement under section 7106(b)(3) of the Statute. In National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA 24, 31-33 (1986) (KANG), the Authority established an analytical framework for determining whether a proposal constitutes an appropriate arrangement. First, we determine whether the proposal constitutes an arrangement for employees adversely affected by the exercise of a management right. To do this, we ascertain whether the proposal in question seeks to address, compensate for, or prevent adverse effects on employees produced by the exercise of management's rights. See National Treasury Employees Union, Chapter 243 and U.S. Department of Commerce, Patent and Trademark Office, 49 FLRA No. 24 (1994) (Member Armendariz, concurring in part and dissenting in relevant part). Second, if we conclude that the proposal is an arrangement, we then determine whether the proposal is appropriate, or inappropriate because it excessively interferes with the exercise of a management right. We make this determination by weighing "the competing practical needs of employees and managers" to ascertain whether the benefit to employees flowing from the proposal outweighs the proposal's burden on the exercise of the management right or rights involved. KANG, 21 FLRA at 31-32.

Even assuming that the provision constitutes an arrangement for adversely affected employees, we find that the provision is nonnegotiable because it would excessively interfere with management's right to assign work. In reaching this result, we note that the provision would benefit employees by providing them a sufficient amount of time in which to make whatever adjustments are necessary to their schedules before reporting back to work. The provision would also provide employees with a reasonable driving time beyond that which the employees would have for preparation purposes. We view such benefits as significant. At the same time, however, the provision mandates that the employees can never be held to stricter requirements than the allowance of 25 minutes preparation time followed by a reasonable driving time. The provision thus contains an absolute prohibition against the assignment of duties in any lesser period of time than is authorized under the provision. As we stated above, the employees involved here are operating room nurses who may be called upon to respond to emergency situations. Management's inability to require the nurses to comply with a shorter response time would, in our view, seriously impair management's ability to meet patient care needs and provide quality medical care. On balance, therefore, we conclude that the provision would excessively interfere with management's right to assign work under section 7106(a)(2)(B) of the Statute.

Insofar as the provision excessively interferes with the exercise of a management right, we find that Respondent Fort Sam Houston properly disapproved the provision. Consequently, its conduct in disapproving the Panel-imposed provision did not violate section 7116(a)(1) and (6) of the Statute. See Department of Defense Dependents Schools (Alexandria, Virginia), 33 FLRA 659, 662-64 (1988) (agency's disapproval of provision pertaining to academic freedom did not violate the Statute because the provision was inconsistent with section 7106(a)(2)(A) and (B) of the Statute). Accordingly, we will dismiss the allegations of the complaint with respect to Respondent Fort Sam Houston.

Finally, we agree with the Judge that a bargaining order is appropriate to remedy the violation of section 7116(a)(1) and (5) of the Statute by Respondent Fort Rucker for engaging in a course of bad faith bargaining. Such a remedy is also consistent with our view that where a provision is found to be nonnegotiable and properly disapproved by an agency head, the parties are obligated to return to the bargaining table with a sincere resolve to reach agreement. Department of Defense Dependents Schools (Alexandria, Virginia), 27 FLRA 586, 595 (1987), *rev'd and remanded as to other matters sub nom. DODDS v. FLRA*, 852 F.2d 779 (4th Cir. 1988), *decision on remand*, 33 FLRA 659.

* * *

APPENDIX

The employee on call agrees to make himself or herself available for duty at his or her duty station as quickly as possible; however, employees will not be required to meet more stringent requirements than stated below;

- a. Employees will have 25 minutes to prepare themselves to start the drive to their duty location.
- b. Employees will be allowed a reasonable driving time to their duty location, considering traffic laws and the location of residence or area from which the notification was received. This expected driving time will be communicated in writing to each employee by the Employer at the time they are placed in a position that will require them to be in an on-call status.

Agencies must maintain the *status quo* while an issue is pending before the FSIP. Any failure or refusal to maintain the *status quo* would, except where inconsistent with the necessary functioning of the agency, be a violation of section 7116(a)(1) (a derivative violation), (5) (avoiding the bargaining obligation), and (6) (failure to cooperate in impasse procedures). BATF and NTEU, 18 FLRA 466 (1985); EEOC and National Council of EEOC Locals #216, 48 FLRA 306 (1993).

6-8. Regulations in Conflict with CBA.

Section 7116a(7) provides that it is an unfair labor practice for an agency:

to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed.

DEPARTMENT OF THE TREASURY and NTEU

9 FLRA 983 (1982)

(Extract)

* * *

The first issue before the Authority concerns the negotiability of those portions of Article 2 sections 1A and B, Article 32 section 10A and Article 40 section 3 which establish that whenever provisions contained in the negotiated agreement conflict with Government-wide or agency-wide rules or regulations issued after the date the agreement became effective, the agreement provisions will prevail. The Authority, in agreement with the Union, concludes that these provisions are consistent with the language of the Statute and its legislative history. In this regard, section 7116(a) provides, in relevant part, as follows:

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

* * *

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed. . . .

The conference committee report concerning this section stated as follows:¹²

The conference report authorizes, as in the Senate bill, the issuance of government-wide rules or regulations which may restrict the scope of

¹² H. Rep. No. 95-1717, 95th Cong., 2d Sess. 155 (1978).

collective bargaining which might otherwise be permissible under the provisions of this title. As in the House, however, the Act generally prohibits such government-wide rule or regulation from nullifying the effect of an existing collective bargaining agreement. The exception to this is the issuance of rules or regulations implementing section 2302. Rules or regulations issued under section 2302 may have the effect of requiring negotiation of a revision of the terms of a collective bargaining agreement to the extent that the new rule or regulation increases the protection of the rights of employees.

Consequently, while the duty to bargain under section 7117 of the Statute¹³ does not extend to matters which are inconsistent with existing Government-wide rules or regulations or agency-wide rules or regulations for which a compelling need is found to exist, once a collective bargaining agreement becomes effective, subsequently issued rules or regulations, with the exception of Government-wide rules or regulations issued under 5 U.S.C. § 2302 (relating to prohibited personnel practices), cannot nullify the terms of such a collective bargaining agreement. Thus, the provisions here in dispute are within the duty to bargain under the Statute.

* * *

6-9. Catch-all Provision.

Section 7116a(8) provides that it is an unfair labor for an agency:

to otherwise fail or refuse to comply with any provision of this chapter.

¹³ Section 7117 of the Statute provides, in pertinent part, as follows:

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation . . . only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

**DEPARTMENT OF DEFENSE
DEFENSE CRIMINAL INVESTIGATIVE SERVICE
and AFGE, LOCAL 2567**

28 FLRA 1145 (1987)

(Extract)

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached Decision of the Administrative Law Judge filed by the General Counsel. An opposition to the exceptions was filed by the Defense Criminal Investigative Service (DCIS).¹⁴ The issue is whether the Respondents violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by denying employees their right under section 7114(a)(2)(B) of the Statute to union representation at investigatory examinations. For the reasons discussed below, we find that DCIS violated section 7116(a)(1) and (8) of the Statute by interfering with the right of employees to union representation under section 7114(a)(2)(B). We also find that no further violation was committed by DCIS or the other Respondents.

II. Background

The facts are fully set forth in the Judge's Decision. Briefly, they indicate that the American Federation of Government Employees is the exclusive representative of a consolidated unit of employees of the Defense Logistics Agency (DLA). The Defense Contract Administration Services Region, New York (DCASR NY) is a field component of DLA. Within DCASR NY is the Defense Contract Administration Services Management Area, Springfield, New Jersey (DCASMA), at which the Charging Party, AFGE Local 2567, is the local representative. Organizationally, at all times relevant to this case, DLA was "a separate [a]gency of the Department of Defense under the direction of the Assistant Secretary of Defense (Manpower, Reserve Affairs and Logistics)." Post-hearing Brief of DLA and DCASR NY at 17.

DCIS is the criminal investigative component of the Office of Inspector General in the Department of Defense (DOD). Organizationally, DCIS is within the Office of the Assistant Inspector General for Investigations who, together with other Assistant Inspectors General, reports to the Inspector General. The latter, in turn, reports to the Secretary of Defense.

¹⁴ An opposition to the General Counsel's exceptions filed by the Respondents Defense Logistics Agency and Defense Contract Administration Services Region, New York was untimely filed and therefore has not been considered.

The functions of the Inspector General and DCIS are more fully described by the Judge in his Decision. We note here that DCIS has various responsibilities within DOD, including the authority to investigate alleged criminal incidents involving DLA employees in connection with their official duties. Once DCIS decides to conduct an investigation, no one within DOD may interfere with the investigation except the Secretary of Defense and then only on matters affecting national security.

An incident occurred in January 1985, involving an alleged gun shot at the home of a DCASMA supervisor. The incident was reported to the local police as well as to the Deputy Director of DCASMA. The latter, in turn, notified DCASR NY which then referred the matter to DCIS. As a part of its investigation, DCIS separately interviewed two employees employed at DCASMA. One of the employees was named as a possible suspect by the supervisor at whose home the shooting occurred. The other employee was thought to own a vehicle matching the description of one observed in the vicinity of the supervisor's home. Both employees were interviewed at their place of employment by an investigator from DCIS and a member of the local police force. The Deputy Director of DCASMA provided a room for the interviews and had the employees summoned to the interview.

Prior to the interview with the first employee, the Deputy Director informed the DCAS investigator that the DLA-AFGE collective bargaining agreement provided that a union representative was entitled to be present during the questioning of an employee, if the employee requested representation and if the employee reasonably believed that the questioning could lead to disciplinary action. The DCIS investigator informed the Deputy Director that DCIS was not bound by the parties' agreement and that the so-called "Weingarten rule" did not apply to DCIS investigations. In each of the interviews, the employees requested and were denied union representation by DCIS and the local police. No request for union representation was made to DCASMA and no one from DCASMA, DCASR NY or DLA was present at either of the interviews.

III. Judge's Decision

The Judge concluded that neither DLA nor DCASR NY violated the Statute as alleged. In reaching that conclusion, he found that if the interviews had been conducted by DLA, DCASR NY, or DCASMA, the employees would have had a right to union representation under section 7114(a)(2)(B) of the Statute and denial of their requests for representation would have violated section 7116(a)(1) and (8). However, the Judge further found that in this case neither DLA nor any of its constituent components questioned or examined the employees.

The Judge also found no violation by DCIS which, with the local police, refused the employees' request for union representation. The Judge found that DCIS was independent of DLA and was not acting as an agent or representative of DLA. The Judge further found that DCIS itself was not obligated to afford the employees union representation under section 7114(a)(2)(B) since DCIS has no collective bargaining relationship with the Union.

In reaching his conclusions, the Judge found it unnecessary to determine whether use of DCIS reports by DLA to justify disciplining employees would have violated the Statute.

IV. Positions of the Parties

The General Counsel filed exceptions to numerous portions of the Judge's Decision including the Judge's finding that it was not necessary to reach any question regarding DCIS reports and their potential uses. The General Counsel argues that DCIS is a "representative of the agency" within the meaning of section 7114(a)(2)(B) of the Statute. Essentially, the General Counsel's position is that DCIS acted as an agent of DLA in conducting the interviews and, therefore, that both DCIS and DLA violated section 7114(a)(2)(B) of the Statute by failing to afford the employees their right to union representation. To remedy the alleged unlawful conduct, the General Counsel requests that any documents, reports, and references to the interviews be expunged from the official personnel folders of the two employees, and that the Respondents be ordered to refrain from using the information obtained or derived from the interviews in any disciplinary action initiated against either employee subsequent to the date of the interviews.

In its opposition, DCIS argues that the Judge was correct in not making findings regarding the DCIS reports and was also correct in finding that no violation was committed by DLA, DCASR NY, or DCIS. More specifically, as to the reports, DCIS noted that no reports had been provided to DLA concerning the investigation and no disciplinary action had been taken against any employees as a result of the investigation.

V. Analysis

Under section 7114(a)(2)(B) of the Statute, in any examination of a unit employee by a representative of an agency in connection with an investigation, the employee has the right to have a union representative present if the employee reasonably believes that the examination may result in disciplinary action and the employee requests representation. United States Department of Justice, Bureau of Prisons, Metropolitan Correctional Center, New York, New York, 27 FLRA 874 (1987); Department of the Treasury, Internal Revenue Service, Jacksonville District and Department of the Treasury, Internal Revenue Service, Southeast Regional Office of

Inspection, 23 FLRA 876 (1986). There is no question here that the employees had a reasonable belief that disciplinary action might result from the examinations and that the employees requested union representation. The Judge noted that the employees were each advised prior to the examination that a criminal investigation was being conducted and that both employees made their requests for union representation to DCIS. The parties disagree, however, as to whether the examinations were conducted by a "representative of the agency" within the meaning of section 7114(a)(2)(B).

As to that point of disagreement, we agree with the Judge's finding that DCIS, which conducted the examination with the local police, was not acting as an agent or representative of DLA. As described above, DCIS and DLA are organizationally separate from each other. DCIS is empowered to conduct criminal investigations within DOD and reports to the Secretary of Defense. However, we find that DCIS, as an organizational component of the Department of Defense was acting as a "representative of the agency," that is, DOD, within the meaning of section 7114(a)(2)(B). Clearly, DOD is an "agency" within the definition of the term in section 7103(a)(3) of the Statute as the parties have acknowledged in the complain and answers in this case. As the investigative arm of DOD, DCIS was conducting an investigation into alleged criminal activity involving DLA employees. That a criminal investigation may constitute an "examination in connection with an investigation" was recognized by the Authority in the Internal Revenue Service case cited above, and is not in dispute in this case. Accordingly, we find that each of the interviews with the employees constituted an examination in connection with an investigation within the meaning of section 7114(a)(2)(B) of the Statute at which the employees were entitled to union representation, upon request.

We have previously noted that the purpose of Congress in enacting section 7114(a)(2)(B) of the Statute was to create a right to representation in investigatory interviews for Federal employees similar to the right of private sector employees as described by the Supreme Court in NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975). For example, see Bureau of Prisons, 27 FLRA 874, slip op. at 5-6. Under Weingarten, when an employee makes a valid request for union representation in an investigatory interview, the employer must: (1) grant the request, (2) discontinue the interview, or (3) offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview. *Id.* at 6.

In this case, although DCIS was not the employing entity of the employees, once it was aware of the employees' statutory right to union

representation in the interview, it could not act in such a manner so as to unlawfully interfere with that right.¹⁵

DCIS was informed by the Deputy Director of DCASMA that the employees were entitled to union representation upon request.¹⁶ When the employees requested representation, DCIS should have (1) granted their request, (2) discontinued the interview, or (3) offered the employees the choice between continuing the interview unaccompanied by a union representative or having no interview.

However, DCIS failed to properly act on the requests and instead denied the requests and continued with the examinations. DCIS therefore interfered with the statutory right of the employees to have union representation at the examinations. Accordingly, we find that DCIS violated section 7116(a)(1) and (8) of the Statute.

As noted above, the General Counsel disagreed with the Judge's finding that it was not necessary to reach any questions regarding reports prepared by DCIS. We find that the matter of DCIS' reports is not properly before us. The complaint in this case contained no allegation that the reports were in any way violative of the Statute. Also, as noted by DCIS, no reports were submitted to DLA following the investigation and no employee was disciplined as a result of the investigation.

To remedy DCIS' violation of the Statute, we shall order that DCIS cease and desist from unlawfully interfering with the statutory rights of employees represented by the Charging Party to union representation at examinations in connection with investigations. We find no basis on which to grant the General Counsel's request that the Respondents be ordered to expunge any documents referring to the examinations from the official personnel folders of the two employees interviewed and to refrain from using information from the interviews in any action initiated against the employees. The record before us does not indicate that any documents were placed in the employees' official personnel folders or that any action was initiated against the employees.

¹⁵ An organizational entity of an agency not in the same "chain of command" as the entity at the level of exclusive recognition violates section 7116 of the Statute by unlawfully interfering with the rights of employees other than its own. See Headquarters, Defense Logistics Agency, Washington, D.C., 22 FLRA 875 (1986).

¹⁶ Although not alleged as a violation of the Statute, we note that the conduct of DCASMA Deputy Director in providing a room and having the employees summoned for the interviews did not constitute a violation in the circumstances presented. As previously stated, no one within DOD may interfere with a DCIS investigation except the Secretary of Defense, and then only in limited circumstances. For DCASMA to have refused to provide a room or to summon the employees for the interviews arguably would have interfered with the investigation.

Finally, we believe that it would be appropriate for the Secretary of Defense, the Inspector General, or other officials with administrative responsibility for DCIS, to advise DCIS investigators of the pertinent rights and obligations established by Congress in enacting the Federal Labor-Management Relations Statute. More particularly as to matters raised in this case, DCIS investigators should be advised that they may not engage in conduct which unlawfully interferes with the rights of employees under the Statute.

In Customs Service, 5 FLRA 297 (1981), the Authority adopted the ALJ's finding that the agency violated §§ 7116(a)(1) and (8) by failing to provide an employee an opportunity to be represented by a union representative at an investigatory interview of that employee. Although the representative was afforded full opportunity to assist the employee at the initial interview, in the subsequent taped interview, where the form of the questions was different from the initial interview, the representative was admonished not to speak out or make statements.

An agency's obligation to deduct dues is based not upon a contractual obligation but rather upon an obligation imposed by the Statute. The failure to comply with this mandatory obligation constitutes a violation of section 7116(a)(8) of the Statute. DLA, 5 FLRA 126 (1981). See AFGE v. FLRA, 835 F.2d 1458, (D.C. Cir. 1987).

6-10. Management/Employee Complaints Against Unions.

Department of Army managers rarely file an ULP. Management, in other agencies of the Federal sector, has filed ULPs on a more frequent basis. Regardless, very few cases are reported.

Section 7116(b) provides:

For the purpose of this chapter, it shall be an unfair labor practice for a labor organization--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to cause, or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) (A) to call, or participate in a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

Section 7114 provides:

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

The following case illustrates the current interpretation of this provision.

NATIONAL TREASURY EMPLOYEES UNION v. FLRA

800 F.2d 1165 (D.C. Cir. 1986)

(Extract)

BORK, Circuit Judge:

The National Treasury Employees Union petitions for review of a decision and order of the Federal Labor Relations Authority and the Authority cross-applies for enforcement of its order. The Authority held that the union committed an unfair labor practice by refusing to provide attorneys to represent employees who were not members of the union on the same basis

as it provided attorneys to members. The attorney representation sought related to a statutory procedure to challenge a removal action and not to a grievance or other procedure growing out of a collective bargaining agreement.

The question before us is whether the distinction between procedures that arise out of the collective bargaining agreement and those that do not is dispositive or irrelevant under the pertinent provision of the Federal Service Labor-Management Relations Statute. The union contends that it is dispositive because the statute enacts the private-sector duty of fair representation, a duty that is limited to those matters as to which the union is the exclusive representation of the employees. Since the NTEU was not the exclusive representative as to the statutory appeal involved here, the duty of fair representation did not attach, and, the union contends, it was free to provide representation to members that it denied to non-members. The Authority, on the other hand, argues that the statute enforces a duty of nondiscrimination broader than that of private-sector fair representation, a duty that extends to all matters related to employment.

The facts being undisputed, we have before us a single, clearly-defined issue of statutory construction. We think the statute does not admit of the Authority's interpretation and therefore reverse.

I.

NTEU is the exclusive representative of all non-professional employees of the regional offices of the Bureau of Alcohol, Tobacco and Firearms, Department of Treasury. In August, 1979, BATF gave notice of its intention to institute an adverse action against Carter Wright, a BATF inspector in Denver, Colorado. The action would, if successful, result in Wright's discharge. Wright, who was not an NTEU member, telephoned Jeanette Green, president of NTEU chapter representing his bargaining unit, and asked whether non-members were eligible to obtain an NTEU attorney. He did not tell Green what kind of a case was involved. She replied that it was NTEU's "policy generally not to furnish legal counsel to non-members." Green suggested that Wright call an NTEU staff attorney in Austin, Texas, for more information, but Wright instead telephoned NTEU National Vice-President Robert Tobias in Washington, D.C. They discussed the details of Wright's case, and Tobias said he would consult the union's national president. Wright called back a few days later and Tobias said the president had decided it "wouldn't be advisable" for the union to provide an attorney. He and the president thought Wright's case not a good one. Tobias said they handled cases for union members automatically but that non-members with poor cases did not necessarily receive representation.

Several weeks later the national president of NTEU sent a memorandum to all local chapter presidents stating that NTEU would continue its policy of refusing to supply attorneys to non-members. This

policy applied across the board, to procedures related to the collective bargaining agreement as well as to those not so related. This court, as will be seen, has held that the discrimination between members and non-members with respect to procedures of the former type violates the statute.

BATF proceeded against Wright and ordered him removed. Wright hired private counsel, pursued the statutory appeals procedure created by the Civil Service Reform Act, See 5 U.S.C. §§ 7512, 7513, and 7701 (1982), and ultimately prevailed when the Merit System Protection Board overturned the agency's removal decision.

II.

BATF filed an unfair labor practice charge against NTEU and its Denver chapter. FLRA's General Counsel then issued a complaint alleging that the union violated 5 U.S.C. § 7114(a)(1) (1982), a provision of the Federal Service Labor-Management Relations Statute, by following a policy of discrimination between union members and non-members in the provision of attorney representation. The violation of section 7114(a)(1) meant, it was charged, that the union had committed unfair labor practices in violation of section 7116(b)(1) and (8) of the statute.¹⁷ The union was also charged with a separate unfair labor practice under section 7116(b)(1) for violating section 7102.¹⁸

The Administrative Law Judge found that both the Denver chapter and the NTEU had committed the unfair labor practices charged. The ALJ assumed without deciding that the NTEU had no duty to represent any employee before the MSPB but held that, if the NTEU provided representation to union members, it must provide equal representation to non-members. See Joint Appendix ("J.A.") at 109.

¹⁷ The charges under these sections depend upon a finding that § 7114(a)(1) was violated. Section 7116(b)(1) provides that it is an unfair labor practice for a union "to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter." 5 U.S.C. § 7116(b)(1) (1982). Section 7116(b)(8) makes it an unfair labor practice for a union "to otherwise fail or refuse to comply with any provision of this chapter."

¹⁸ That section provides:

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right--

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to the heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

5 U.S.C. § 7102 (1982).]

The Authority held that the Denver chapter violated the statute but adopted the ALJ's other findings, conclusions, and recommendations. J.A. at 103. The NTEU petitioned this court for review and the FLRA cross-applied for enforcement of its order.

III.

The scope of the NTEU's duty depends upon the meaning of the second sentence of section 7114(a)(1) of the statute. That section provides:

A labor organization which as been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representation is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership. 5 U.S.C. § 7114(a)(1) (1982).

Each party contends that its position is compelled by the plain language of the second sentence: the union, that the statute embodies only the private-sector duty of fair representation; the Authority, that the statute states a flat duty of nondiscrimination in all matters related to employment. We, on the other hand, find nothing particularly plain or compelling about the text, standing alone.

The statute requires the union to act evenhandedly with respect to the "interests" of employees. Adopting the ALJ's analysis, the FLRA found that Wright had an "interest," within the meaning of section 7114(a)(1)'s second sentence, in pursuing his appeal under the Civil Service Reform Act and so must be furnished counsel by the union for that purpose if the union furnishes counsel for the same purpose to union members. The difficulty with this analysis is that the meaning of "interests" is not given by the statute and is not self-evident. Unless the word is taken to mean all things that employees might like to have--a meaning that neither party attributes to the word--"interests" requires further definition. While deference is owed the Authority's statutory construction, we think the circumstances of this case--the structure of the statute, and, more particularly, the history against which section 7114(a)(1) was written--establish Congress' intent to enact for the public sector the duty of fair representation that had been implied under the private sector statute and therefore preclude the Authority's interpretation. See Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843 n.9, 104 S. Ct. 2778, 2782 n.9, 81 L.Ed.2d 694 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

The structure of section 7114(a)(1) supports the union's position--that the "interests" protected are only those created by the collective bargaining agreement and as to which the union is the exclusive representative. Thus, the first sentence establishes the union as the "exclusive representative" and states what the union is entitled to do in that capacity: "act for, and negotiate collective bargaining agreements covering, all employees in the unit." The second sentence of a discrete provision such as this might reasonably be expected to relate to the same subject as the first. A natural, though not necessarily conclusive, inference, therefore, is that the duty of representing all employees relates to the union's role as exclusive representative.

This inference is reinforced by the way the statute deals with representation in procedures of various sorts.

Section 7114(a)(5) provides:

The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from--

(A) being represented by an attorney or other representative, of the employee's own choosing in any grievance or appeal action; or

(B) exercising grievance or appellate rights established by law, rule, or regulation;

except in the case of grievance or appeal procedures negotiated under this chapter.

5 U.S.C. § 7114(a)(5) (1982).

The statute itself thus distinguishes between the employees' procedural and representational rights by drawing the line the union urges here, the line between matters arising out of a collective bargaining agreement and other matters. Section 7114(a)(5) does not address the precise question before us but it employs a distinction that is familiar from private sector cases and thus suggests that section 7114(a)(1) may similarly be drawn from private sector case law with which Congress certainly was familiar.

These observations bear upon a line of argument the FLRA apparently found persuasive. The ALJ, whose rulings were affirmed and whose findings and conclusions were adopted by the Authority, reasoned that the Federal Service Labor-Management Relations Statute imposes a broader duty of fair representation upon unions than courts have implied in the private sector under the National Labor Relations Act.

The doctrine of fair representation developed in the private sector is applicable under the Statute; but with an important and significant difference: § 14(a)(1) specifically provides that "An exclusive representative is

responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership". . . . The first sentence of § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), is substantially similar to the first sentence of § 14(a)(1) of the Statute; but the language of the second sentence of § 14(a)(1) . . . is wholly absent in § 9(a) of the NLRA. . . . Consequently, under the Statute that statutory command of § 14(a)(1), *i.e.*, a specific non-discrimination provision, must be enforced, not merely the concept of fair representation developed in the private sector as flowing from the right of exclusive representation. J.A. at 119. This is the only reasoning offered and it is unpersuasive in light of the history of, and the rationale for, the duty of fair representation. The ALJ, and hence the Authority, reason that the private-sector duty of fair representation cannot have been intended because Congress added to this statute a sentence about unions' duties that is not found in the NLRA. The quick answer is that the duty of fair representation was imposed upon the NLRA by courts reasoning from the NLRA's equivalent to the first sentence of section 7114(a)(1). Subsequently, Congress wrote the Federal Service statute and added a second sentence that capsulates the duty the courts had created for the private sector. The inference to be drawn from Congress' use of the language of the judicial rule of fair representation is not that Congress wished to avoid that rule. To the contrary, the inference can hardly be avoided that Congress wished to enact the rule.

The duty of fair representation was first formulated by the Supreme Court in Steele v. Louisville & Nashville R.R., 323 U.S. 192, 65 S. Ct. 226, 89 L. Ed. 173 (1944). The Court found the duty to be inferred from the union's status as exclusive representative of the employees in the bargaining unit. Thus, the Court said, "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, but it also imposed on the representative a corresponding duty." *Id.* at 202, 65 S. Ct. at 232 (citation omitted). The Court stated it was "the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against the." *Id.* at 202-03, 65 S. Ct. at 231-32.

So long as a labor union assumes to act as the statutory representative of a craft, it cannot refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its members, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith. *Id.* at 204, 65 S. Ct. at 233.

It will be observed that the Court, in the case creating the duty of fair representation, repeatedly rooted the duty in the powers conferred upon the union by statute, the powers belonging to the union as exclusive representative.¹⁹ The duty was thus co-extensive with the power; the duty is certainly not narrower than the power, and this formulation indicates that it is also not broader.

This view of the duty as arising from the power and hence coterminous with it is expressed again and again in the case law:

Because "[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit," Vaca v. Sipes, 386 U.S. 171, 182 [87 S. Ct. 903, 912, 17 L.Ed.2d 842] (1967), the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility equal in scope to its authority, "the responsibility of fair representation." Humphrey v. Moore, [375 U.S. 335] at 342 [84 S. Ct. 363, 368, 11 L.Ed.2d 370 (1964)]. . . . Since Steel v. Louisville & N.R. Co., 323 U.S. 192 [65 S. Ct. 226, 89 L. Ed. 173] (1944), . . . the duty of fair representation has served as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." Vaca v. Sipes, *supra*, 386 U.S. at 182, 87 S. Ct. at 912.

Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 564, 96 S. Ct. 1048, 1056, 74 L.Ed.2d 231 (1976).²⁰

If this were a private sector case, it would seem clear that the union has not violated its duty of fair representation because the rationale that gives rise to that duty does not apply here. In the case before us the union's authority as exclusive representative did not strip Wright of redress as an

¹⁹ Of course, a minority union has never been held to act under a duty of fair representation. A minority union cannot be recognized as the exclusive bargaining representative without violating the NLRA. See International Ladies' Garment Workers' Union, AFL-CIO v. NLRB, 366 U.S. 731, 81 S. Ct. 1603, 6 L.Ed.2d 762 (1961). This provides additional support for the view that the duty arises from, and its contours are defined by, a union's status as exclusive representative.

²⁰ See International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. NLRB, 587 F.2d 1176, 1181 (D.C. Cir. 1978); 1199 DC, National Union of Hospital and Health Care Employees v. National Union of Hospital and Health Care Employees, 533 F.2d 1205, 1208 (D.C. Cir. 1976); Truck Drivers and Helpers, Local Union 568 v., NLRB, 379 F.2d 137, 141 & n.2 (D.C. Cir. 1967); see *generally* H. Wellington, Labor and the Legal Process 129-84 (1968). For a recent statement and application of the duty of fair representation, see, e.g., Kolinske v. Lubbers, 712 F.2d 471, 481-82 (D.C. Cir. 1983).

individual. To the contrary, Wright actively pursued his statutory appeal rights and won. He did not do that by the union's suffrage but as a matter of right. Not only was that appeal procedure open to him but the union was forbidden by section 7114(a)(5) from attempting to control it.

The NTEU position thus runs along the line established by the private-sector case law and suggested by the structure of the relevant statutory provisions. The Authority's position adopts a new line that is not to be found in the case law antedating the statute or in the statute's structure. Counsel for the FLRA was asked at oral argument whether, on the Authority's reasoning, a union that provided probate advice to its members would thereby be obligated to provide the same advice to non-members. Counsel replied that the union would not have that duty, the distinction being that the provision of probate services does not relate directly to the members' or non-members' employment. Of course, the statute does not even imply that distinction, nor does the pre-existing case law.

The ambiguity that will often exist in determining whether a service is or is not directly related to the employment relationship may be a reason to be wary of the Authority's proffered test. It is easier to determine whether the service provided grows out of the collective bargaining relationship. There is, moreover, a clear and articulated policy reason for confining the scope of the union's duty to the scope of its exclusive power: the individual, having been deprived by statute of the right to protect himself must receive in return fair representation by the union. Rights are shifted from the individual to the union and a corresponding duty is imposed upon the union. No such policy supports the additional line drawn by the Authority. The FLRA's position depends not upon the reciprocal relationship of the union's rights and duties but upon a demand for equality of services when the employment relationship is involved. Yet the distinction between services that are employment-related and those that are not seems arbitrary. All services provided by the union are employment-related in the sense that they are provided to employees only. When, as here, the individual retains the right to protect himself in the employment relationship, it is by no means obvious why the union's provision of an attorney to assist in a statutory appeal action is more valuable than the union's provision of an attorney to draft a will. Both are services employees will value, both would cost the individual money, so that it is not apparent why it is discrimination to provide one service to union members only but not discrimination to provide the other in that restricted fashion.

Thus, we cannot accept as reasonable the Authority's claim that, in including the second sentence in section 7114(a)(1), Congress intended to impose a duty broader than that implied in the private sector. The Supreme Court in Steele and subsequent cases drew from the first sentence of section 9(a) of the NLRA an implication of a duty that is substantially expressed in the second sentence of 5 U.S.C. § 7114(a)(1) (1982), the federal sector

provision. The logical, and we think (in light of the history and the rationale for the duty of fair representation) conclusive, inference is that when Congress came to write section 7114(a)(1) it included a first sentence very like the first sentence of section 9(a) and then added a second sentence which summarized the duty the Court had found implicit in the first sentence.

In short, Congress adopted for government employee unions the private sector duty of fair representation.

Two additional factors persuade us that this is the correct inference. First, if Congress were changing rather than adopting a well-known body of case law, one would expect mention of that intention somewhere in the legislative history. The Authority has referred us to, and we are aware of, nothing of that sort. Second, if the union's duty had been broadened beyond the scope of its right of exclusive representation, one would expect the range of the new duty to be delineated, or at least suggested, probably by some indication in the statute or its legislative history of what the term "interests" means. It is conceded that the word does not cover everything an employee might like to have, which would mean that the union may not differentiate between members and non-members in any way whatever. But that is not the case, the statute gives no direction of any sort unless it adopts the private sector equation of the scope of the union's right and its duty.²¹

This leaves only the Authority's argument that our decision in NTEU v. FLRA, 721 F.2d 1402 (D.C. Cir. 1983), is "dispositive" of this case. The FLRA contends that we affirmed its decision that "discrimination based on union membership in any representational activity relating to working conditions which an exclusive representative undertakes to provide unit employees is violative of the Statute. . . . At no point did this court in its decision in 721 F.2d 1402 intimate that it was reaching its decision only in connection with discrimination in grievance arbitration or other contractually created proceedings." Brief for the Federal Labor Relations Authority at 17-18 (emphasis in original). It is instructive to compare that representation by counsel for the Authority with the case counsel is discussing.

²¹ The ALJ found that NTEU's failure to provide Wright with an attorney constitute not only a violation of § 7114(a)(1), but also "an independent violation of section 7116(b)(1) of the Statute by interfering with the employees' protected right under section 7102 of the Statute to refrain from joining a labor organization." J.A. at 103. The Authority appears to have adopted these conclusions: "[T]he Authority finds that NTEU has failed and refused to comply with section 7114(a)(1) of the Statute, and therefore has violated section 7116(b)(1) and (8) of the Statute." J.A. at 104.

It follows from our holding that the Union did not violate § 7114(a)(1) that there was no independent violation of § 7102. The latter section provides in pertinent part: "Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right." 5 U.S.C. § 7102 (1982). Were we to conclude that although a union's provision of counsel to members but not to non-members concerning matters unrelated to the collective bargaining agreement do not violate § 7102. Not even the Authority contends that the statute compels this result. Accordingly, our conclusion that the Union has not violated § 7114(a)(1) requires the same conclusion with respect to § 7102.]

This court stated the practice under review in 721 F.2d 1402 as follows:

Under a policy adopted and implemented by the Union, only Union members are furnished assistance of counsel, in addition to representation by local chapter officials and Union stewards, with respect to grievances or other matters affecting unit employees in the context of collective bargaining. Non-members, however, are limited to representation by chapter officials and stewards, and are expressly denied the assistance of counsel in matters pertaining to collective bargaining. 721 F.2d at 1403 (emphasis added and omitted).

These discrepant policies framed the issue the court thought it was deciding. The court stated that the duty of fair representation "applies whenever a union is representing bargaining unit employees either in contract negotiations or in enforcement of the resulting collective bargaining agreement." *Id.* at 1406. This court thus stated the duty of fair representation as the NTEU states it here, not as the Authority states it, as extending to all matters relating to employment.

To put a cap on it, the court stated: [T]he Union is incorrect in suggesting that the challenged policy merely reflects an internal Union benefit that is not subject to the duty of fair representation. Attorney representation here pertain directly to enforcement of the fruits of collective bargaining. Therefore, as exclusive bargaining agent, the Union may not provide such a benefit exclusively for Union members. *Id.* at 1406-07 (emphasis added).

It is difficult to know what could have prompted counsel to say that the case stands for the proposition that a union may not differentiate between members and non-members as to any representational function and that at no point did the opinion intimate that the decision rested on the fact that the representation related to contractually created proceedings. We would have thought that no one could read the case in that fashion. This court's opinion in 721 F.2d 1402 clearly proceeds on a rationale that supports the position here of the NTEU, not that of the FLRA.²² So clear is this that, if we had

²² The Authority states that its construction of the statute is "fully consistent with private sector precedent" and cites Del Casal v. Eastern Airlines, 634 F.2d 295 (5th Cir.), *cert. denied*, 454 U.S. 892, 102 S. Ct. 386, 70 L.Ed.2d 206 (1981), and Bowman v. Tennessee Valley Authority, 744 F.2d 1207 (6th Cir. 1984), *cert. denied*, 470 U.S. 1084, 105 S. Ct. 1843, 85 L.Ed.2d 142 (1985). Brief for the Federal Labor Relations Authority's position at 15 n.10. Neither case supports the Authority's position here. Del Casal involved the union's refusal to represent an employee in a grievance procedure governed by the collective bargaining agreement on the ground that he was not a union member. That was held breach of the duty of fair representation. Bowman made a similar holding where the union had negotiated a collective bargaining agreement giving members preferential transfer rights. The court linked the duty of fair representation to the right of exclusive representation. Since both cases involved discrimination against non-members as to matters within the union's role as exclusive representative, neither provides any support for the Authority's position here. If these

before us only the precedent of that case, and nothing more, we would have difficulty holding for the Authority.

For the foregoing reasons, the Authority's decision is hereby Reversed.

At least one other Circuit Court of Appeals and the FLRA have agreed with the D.C. Circuit's interpretation. See AFGE v. FLRA, 812 F.2d 1326 (10th Cir. 1987); DODDS, 28 FLRA 908 (1987).

In AFGE, Local 2000, 14 FLRA 617 (1984), the president of a local union stated to the most vocal of the nonmembers that the nonmember was a "troublemaker" and that she would "get" him. The statement constituted a threat and, made in the presence of other nonmembers, also had a chilling effect upon the right of other employees to refrain from joining or assisting any labor organization "freely and without fear of penalty or reprisal." Accordingly, the union violated § 7116(b)(1).

Unions have a duty of fair representation to all union members. See FLRA General Counsel Memorandum to Regional Directors, subject: The Duty of Fair Representation, January 27, 1997, available at www.flra.gov/gc/dfr_mem.html. However, federal employees do not have a private right of action against their unions for breach of the duty of fair representation. See Karahalios v. NFFE, 489 U.S. 527 (1989).

Strikes and Picketing

A unanimous panel of the U.S. Court of Appeals for the District of Columbia Circuit held that the FLRA did not abuse its discretion by stripping PATCO of exclusive representation rights for striking the FAA in 1981. It upheld the FLRA finding that PATCO "willfully and intentionally" ignored federal laws prohibiting federal employee strikes. Section 7120(f) of the FSLMRS says that when the FLRA finds that a union has committed the ULP of striking, it shall revoke the union's status as bargaining representative or "take any other appropriate disciplinary action." This seems to suggest that the FLRA has discretion in strike cases. But presumably such discretion would only be exercised to take action short of decertification if a strike were proved to be a wildcat. See Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority, 685 F.2d 547 (D.C. Cir. 1982).

FSLMRS § 7116(b) provides: "Nothing in paragraph (7) of this subsection [which prohibits work stoppages/slowdowns] shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice." The Department of Army still prohibits picketing on the installation except in "rare instances." See Department of Army message, Subject: Clarification of Department of

cases are "fully consistent" with the FLRA's position, that can be so only in the sense that they are not explicitly inconsistent.

Army Policy on Informational Picketing, 24 February 1979. The rationale is that picketing always interferes with the mission. The installation, however, must be prepared to articulate how the picketing interferes with the agency mission. Fort Ben Harrison and AFGE, 40 FLRA 558 (1991).

Although Section 7116(b)(7) contains a general prohibition against picketing if it interferes with the agency's mission, Section 7116(b) further provides that

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

Thus, when an agency (Social Security Administration) filed an ULP charge against a union (AFGE) for picketing the lobby of its building and a complaint issued on the charge, the Authority dismissed the complaint because there was no interference with the agency's operations. Social Security Administration and AFGE, 22 FLRA 63 (1986). Because there were only 11 pickets, the picketing lasted only 10 minutes, and the pickets were silent, there was no disruption of the mission.