UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: September 15, 2004

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: FEDERAL AVIATION ADMINISTRATION
AIRWAYS FACILITIES DIVISION
NORTHWEST MOUNTAIN REGION
RENTON, WASHINGTON

Respondent

and Case No. SF-CA-04-0200

PROFESSIONAL AIRWAYS SYSTEMS
SPECIALISTS, AFL-CIO

Charging Party

Pursuant to section 2423.27(c) of the Final Rules and Regulations, 5 C.F.R. § 2423.27(c), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed is a Motion for Summary Judgment and other supporting documents filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
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FEDERAL AVIATION ADMINISTRATION AIRWAYS FACILITIES DIVISION NORTHWEST MOUNTAIN REGION RENTON, WASHINGTON Respondent	
and PROFESSIONAL AIRWAYS SYSTEMS SPECIALISTS, AFL-CIO Charging Party	Case No. SF-CA-04-0200

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been submitted to the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. §2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **OCTOBER 18, 2004**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

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PAUL B. LANG
Administrative Law Judge

Dated: September 15, 2004

Washington, DC

OALJ 04-43

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

FEDERAL AVIATION ADMINISTRATION AIRWAYS FACILITIES DIVISION NORTHWEST MOUNTAIN REGION RENTON, WASHINGTON Respondent	
and PROFESSIONAL AIRWAYS SYSTEMS SPECIALISTS, AFL-CIO Charging Party	Case No. SF-CA-04-0200

Amita Baman Tracy
For the General Counsel

Kirsten Crawford
For the Respondent

Before: PAUL B. LANG
Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

Statement of the Case

On December 31, 2003, the Professional Airways Systems Specialists, AFL-CIO (Union) filed an unfair labor practice charge against the Federal Aviation Administration, Airways Facilities Division, Northwest Mountain Region, Renton, Washington (Respondent). On April 30, 2004, the Union filed an amended charge against the Respondent. On April 30, 2004, the Regional Director of the San Francisco Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing in which it was alleged that, on September 22, 2003, and October 22, 2003, the Respondent held formal discussions with a member of the bargaining unit represented by the Union. It was further alleged that the discussions concerned a grievance by the bargaining unit member, that the Respondent failed to provide the Union with notice of the discussions or an opportunity to attend as required by §7114(a)(2)(A) of the Federal Service Labor-Management Relations Statute (Statute) and that the Respondent thereby committed unfair labor

practices in violation of §7116(a)(1) and (8) of the Statute.

A hearing was originally scheduled in Spokane, Washington on June 11, 2004. The hearing was subsequently postponed to August 27, 2004, and was then indefinitely postponed pending consideration of the motion for summary judgment which was filed by the General Counsel on July 19, 2004. The Respondent has neither responded to the motion nor requested an extension of the deadline for doing so.[1]

Findings of Fact

An examination of the Respondent's Answer to the Complaint indicates that the following facts are undisputed:

1. The Respondent is an agency as defined in §7103(a)(3) of the Statute (Complaint and Answer, ¶2).

2. The Union is a labor organization as defined in §7103(a)(4) of the Statute and is the exclusive representative of a unit of the Respondent's employees which is appropriate for collective bargaining (Complaint and Answer, ¶3).

3. On or about September 22, 2003, the Respondent, through George Baty and Dee Knapp, each of whom was a supervisor, representative or management official of the Respondent, held a meeting with a member of the bargaining unit during which the Respondent discussed the resolution of a portion of the employee's pending formal complaint to the Equal Employment Opportunity Commission (EEOC) (Complaint and Answer, ¶¶7 through 12).

4. On or about October 22, 2003, the Respondent, through Baty, Knapp and David Hainline, who was also a representative of the Respondent, held another meeting with the same employee. At that meeting, the Respondent discussed the resolution of the employee's pending formal complaint to the EEOC and resolved the complaint (Complaint and Answer, ¶¶7 through 10, 13, 14).

5. The meetings of September 22 and October 22, 2003 were held without affording the Union an opportunity to be represented (Complaint and Answer, ¶¶17, 18).

[1] Pursuant to §2423.27(b) of the Rules and Regulations of the Authority, a response to a motion for summary judgment is due 5 days after service. In accordance with §2429.22 of the Rules and Regulations, an additional 5 days are allowed when, as in this case, service was effected by mail.

The following facts are established by the affidavits of Janice Tewel, who was then the cognizant Union representative, and Cindy Lundberg both of which were submitted by the General Counsel along with the motion for summary judgment:

1. Lundberg is a member of the bargaining unit. She filed a formal complaint against the Respondent in late 2002 or early 2003.

2. Prior to the scheduled hearing on her complaint Lundberg engaged in alternate dispute resolution (ADR) with the Respondent. She attended an ADR meeting on September 22, 2003. The meeting was arranged several weeks in advance between Lundberg's private attorney and an attorney for the Respondent. Also present, besides Lundberg, her husband and her attorney, were Baty, Knapp (Lundberg's second line supervisor) and two mediators. The meeting lasted from 10½ to 11 hours and culminated in the preparation of a settlement agreement which was signed by Baty; Lundberg signed the agreement 12 days later. The agreement provided for another mediation session within 60 days to address additional workplace issues.

3. Lundberg and her attorney attended a second mediation session on October 22, 2003. Baty, Knapp and Hainline (Lundberg's first line supervisor) also attended along with the two mediators. The meeting lasted for 6 hours during which an additional written agreement was drafted. The agreement was signed by Lundberg, her attorney, Knapp, Hainline and the mediators. After this meeting Lundberg's formal complaint to the EEOC was resolved.

4. After the meetings Lundberg informed Tewel that the meetings had resolved her complaint to the EEOC. She further informed Tewel that bargaining unit employees might be "seeing some changes". Lundberg did not inform Tewel of the details of the agreements because of the terms of the settlement.[2]

5. Tewel had no prior notice of the two meetings. She was the representative who would have received such notice on behalf of the Union.

Discussion and Analysis

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[2] Lundberg's settlement agreement with the Respondent is not part of the record.

The Applicable Law

The Authority has held that, in considering motions for summary judgment, it will apply the criteria used by federal courts in considering motions filed pursuant to Rule 56 of the Federal Rules of Civil Procedure, *Department of Veterans Affairs, Veterans Affairs Medical Center, Nashville, Tennessee*, 50 FLRA 220, 222 (1995). Rule 56(c) provides that summary judgment is to be "rendered forthwith if the pleadings . . . and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law".

§7114(a) of the Statute provides, in pertinent part, that:

> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at-
>
> > (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment . . . .

The Mediation Sessions Were Formal Discussions Concerning a Grievance

In its Answer the Respondent has denied that the two mediation sessions were formal discussions. In support of its position the Respondent has cited *Luke Air Force Base v. F.L.R.A.*, 208 F.3d 221 (9th Cir. 1999) (issued without a published opinion) in which the court reversed the decision of the Authority in *Luke Air Force Base, Arizona*, 54 FLRA 716, 723 (1998) (*Luke I*). In that decision the Authority held that the mediation of an EEOC complaint was a formal discussion and that the complaint itself was a grievance within the meaning of §7114(a)(2)(A) of the Statute.

It is unclear whether the 9th Circuit rejected all or only a part of the Authority's rationale. In any event, in *United States Department of the Air Force, Luke Air Force Base, Arizona*, 58 FLRA 528, 533 (2003) (*Luke II*) the Authority reaffirmed the rationale of *Luke I* and rejected the proposition that the decision of the 9th Circuit was controlling. In support of its conclusion the Authority

reviewed the legislative history of the Statute and cited *Department of the Air Force, 436th Airlift v. F.L.R.A.*, 316 F.3d 280 (D.C. Cir. 2003) (*436th Airlift*) in which the court enforced the decision in *U.S. Department of the Air Force, 436th Airlift Wing, Dover Air Force Base, Dover, Delaware*, 57 FLRA 304 (2001) (*Dover*). In *Dover* the Authority again held that the mediation of an EEOC complaint was a formal discussion which concerned a grievance. In view of the holdings of the Authority in *Dover* and *Luke II*, the Respondent's reliance on the 9th Circuit decision is misplaced.

In *Luke II* the Authority confirmed that the right of a union to be present at a meeting is dependent upon whether (a) the meeting is a discussion, (b) the discussion is formal, (c) the discussion is between representatives of an agency and either a bargaining unit employee or the representative of that employee, and (d) whether the discussion concerns a grievance or any personnel policy or practice or other general condition of employment, 58 FLRA at 531. The undisputed evidence indicates that each of those elements is present in this case.

In *Luke I* (the rationale of which was reaffirmed in *Luke II*) the Authority recognized that the terms "meeting" and "discussion" are synonymous and that a mediation session is formal even though it involves two-way discussion. In *Luke II* the Authority held that the formality of a mediation session is not affected by the fact that mediators are not representatives of the agency so long as responsible agency representatives are also present, 58 FLRA at 533.

It is clear that Lundberg and her attorney as well as one or more of the Respondent's representatives were present at each of the mediation sessions, thus satisfying the third element of the *Luke II* test. In *Luke II* the Authority held that, in view of the legislative history of the Statute, the definition of a "grievance" is not dependent upon the scope of the contractually negotiated grievance procedure, and that an EEOC complaint by a bargaining unit member against an employing agency comes within the meaning of the definition, 58 FLRA at 533.[3]

As shown above, all of the necessary elements described in *Luke II* were present in the mediation sessions which are at issue in this case. Therefore, the Respondent was

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[3] The Authority also held that its jurisdiction was not diminished by the authority of the EEOC to examine allegations of discrimination, 58 FLRA at 532.

obligated under §7114(a)(2)(A) of the Statute to provide the Union with advance notice of each of the sessions and an opportunity to attend.4

The Remedy

The General Counsel has submitted a proposed order which includes the requirement that the Respondent provide the Union with advance notice of meetings to mediate formal complaints by bargaining unit employees to the EEOC. Such a requirement would be appropriate to this case where Lundberg did not object to the presence of a Union representative. However, the Authority has not yet been presented with a case in which the employee concerned has raised such an objection. However, in *436th Airlift*, 316 F.3d at 287 the court indicated that the employee's objection to the union's presence would create a direct conflict which should be resolved in favor of the employee. See also, *National Treasury Employees Union v. F.L.R.A.*, 774 F.2d 1181, 1189, n.12 (D.C. Cir. 1985).

In anticipation of the future resolution of this issue by the Authority, and in order to avoid the possibility of future conflicts with such a resolution and the consequent interference with the rights of employees, I have modified the proposed order so as to exclude a specific reference to discussions concerning formal complaints to the EEOC. I have also excluded the reference to discussions regarding personnel policies or practices or other general conditions of employment because such discussions were not at issue in this case.

For the reasons set forth herein I have concluded that the Respondent committed unfair labor practices in violation of §7116(a)(1) and (8) of the Statute by failing to provide the Union with notice of the mediation sessions of September 22 and October 22, 2003, and by failing to afford the Union the opportunity to attend the sessions. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

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4 Although Lundberg did not inform the Union of the mediation sessions until her EEOC complaint had been resolved, there is no evidence or allegation that she objected to the Union's presence, nor has it been alleged that the presence of the Union would have been inconsistent with the requirement, if any, of confidentiality.

IT IS HEREBY ORDERED that the motion of the General Counsel for summary judgment be, and hereby is, granted.

IT IS FURTHER ORDERED, pursuant to §2423.41(c) of the Rules and Regulations of the Authority and §7118(a)(7) of the Federal Service Labor-Management Relations Statute (Statute), that the Federal Aviation Administration, Airways Facility Division, Northwest Mountain Region, Renton, Washington shall:

1. Cease and desist from:

(a) Failing and refusing to provide the Professional Airways Systems Specialists, AFL-CIO (Union) with advance notice and the opportunity to be represented at formal discussions with bargaining unit employees or their representatives concerning grievances.

(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:

(a) Provide the Union with advance notice and the opportunity to be represented at formal discussions with bargaining unit employees or their representatives concerning grievances.

(b) Post at Spokane Systems Support Center, where bargaining unit employees are located, copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the Supervisor, 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 § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director of the San Francisco Region, Federal Labor Relations Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, September 15, 2004

PAUL B. LANG
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF

THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Federal Aviation Administration, Airway Facilities Division, Northwest Mountain Region, Renton, Washington, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to provide the Professional Airways Systems Specialists, AFL-CIO with advance notice and the opportunity to be represented at formal discussions with bargaining unit employees or their representatives concerning grievances.

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

WE WILL provide the Professional Airways Systems Specialists, AFL-CIO with advance notice and the opportunity to be represented at formal discussions with bargaining unit employees or their representatives concerning grievances.

_____
(Agency)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, San Francisco Regional Office, whose address is: Federal Labor Relations Authority, 901 Market Street, Suite 220, San Francisco, CA 94103-1791, and whose telephone number is: 415-356-5002.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. SF-CA-04-0200, were sent to the following parties:

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CERTIFIED MAIL AND RETURN RECEIPT	**CERTIFIED NOS:**
Amita Baman Tracy **4366** Counsel for the General Counsel Federal Labor Relations Authority 901 Market Street, Suite 220 San Francisco, CA 94103-1791	**7000 1670 0000 1175**
Kirsten Crawford **4373** Labor Relations Specialist FAA Northwest Mountain Region Human Resources Div., ANM 12 L 1601 Lind Avenue, SW Renton, WA 98055	**7000 1670 0000 1175**
Janice Tewel **4380** PASS, Spokane SS 18912 N. Division Road Colbert, WA 99005	**7000 1670 0000 1175**

Dated: September 15, 2004
Washington, DC