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

U.S. DEPARTMENT OF THE AIR FORCE LUKE AIR FORCE BASE, ARIZONA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1547 Charging Party	Case Nos. DE-CA-01-0174 DE-CA-01-0244

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves her 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 **JUNE 17, 2002**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
607 14th Street, NW, Suite 415
Washington, DC 20424

_____
SUSAN E. JELEN
Administrative Law Judge

Dated: May 17, 2002
Washington, DC

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

MEMORANDUM DATE: May 17, 2002

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF THE AIR FORCE
LUKE AIR FORCE BASE, ARIZONA

Respondent

and Case Nos. DE-CA-01-0174
DE-CA-01-0244

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1547

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. § 2423.34(b), 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 are the transcript, exhibits, and any briefs filed by the parties.

Enclosures

OALJ 02-41

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

U.S. DEPARTMENT OF THE AIR FORCE LUKE AIR FORCE BASE, ARIZONA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1547 Charging Party	Case Nos. DE-CA-01-0174 DE-CA-01-0244

Phillip G. Tidmore, Labor Counsel
Capt. James W. Richards, Labor Counsel
For the Respondent

Sue T. Kilgore, Esquire
For the General Counsel

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of two unfair labor practice charges filed by the American Federation of Government Employees, Local 1547 (Union) against the U.S. Department of the Air Force, Luke Air Force Base, Arizona (Respondent), as well as two Complaints and Notices of Hearing issued by the Regional Director of the Denver Region of the Federal Labor Relations Authority (FLRA). Based on an unopposed motion of the General Counsel, the two cases were consolidated for hearing. (G.C. Exh. 1(j), G.C. Exh. 2(j) and Tr. 4) The complaint in Case No. DE-CA-01-0174 alleged that the Respondent violated § 7116(a)(1) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, *et seq.* (Statute) by a comment made during a performance review of a Union representative on or about October 16, 2000, that he was unable to perform satisfactorily because he was at

the Union office all the time. The complaint in Case No. DE-CA-01-0244 alleged that the Respondent violated § 7116 (a)(1) and (5) of the Statute on or about November 30, 2000, by changing conditions of employment with respect to requests for official time without affording the Union notice and an opportunity to bargain.

A hearing in this matter was held in Phoenix, Arizona, on November 8, 2001. The parties were represented and afforded a full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses and file post-hearing briefs. Both the General Counsel and the Respondent filed timely briefs.

Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law and recommendations.[1]

Statement of the Facts

Background Information

The Union is the exclusive representative of a bargaining unit of employees composed of eligible Air Force employees paid from appropriate funds and serviced by the Luke Air Force Base Civilian Personnel Flight. (Jt. Ex. 1)

At the time of the events underlying these cases, the Union and the Respondent were parties to a collective bargaining agreement. This agreement, which was signed on December 6, 1996, had a term of 3 years from the date it was signed by the parties and provided for 1-year extensions. (Jt. Exh. 1) I find that a 1-year extension occurred on

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[1] Respondent's Motion to correct the hearing transcript, to which there was no objection, is granted and the transcript is hereby corrected as follows: on page 98, line 23, the word "Irene" is changed to "Aberdeen." The General Counsel's unopposed motion to reopen the record to include Respondent's Answers was approved on January 3, 2002.

December 3, 1999.[2] (Tr. 6-7) Article V of the agreement addresses, among other things, official time. Of relevance to the dispute in these cases, the agreement authorizes use of official time by Union representatives and sets forth procedures and criteria that pertain to obtaining official

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[2] The parties entered the collective bargaining agreement into the record as Joint Exhibit 1. At the time that the collective bargaining agreement was introduced into evidence, I asked whether it was still in effect. Respondent's representative replied that although a 1-year extension, which had occurred on December 3, 1999, had ended, the parties are "still following" the agreement. (Tr. 6) The General Counsel did not dispute the Respondent's statement that a 1-year extension occurred on December 3, 1999, and that it has since ended. Therefore, I find that the collective bargaining agreement was in effect during the period December 3, 1999, through December 2, 2000, and that subsequent to that date it expired.

time.[3] Implicit in Article V is a requirement that Union representatives request and obtain approval for official time from their supervisors prior to its use. It is clear from witness testimony that both the Union and the

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[3] Article V provides in relevant part:

> Section B
>
> . . .
>
> 2. Union representatives properly designated as such may accompany, represent, and advise an employee in preparing and presenting a grievance to Management. The representative will be excused from normal duties without charge to leave for the time required for such representation. In addition, the representative will be allowed a reasonable amount of official time without charge to leave to prepare for a hearing or inquiry into an appeal or grievance.
>
> 3. A Union representative will be permitted to represent employee(s) or the Union on official time unless additional representatives are otherwise authorized by statute, the specific provisions of this Agreement, or mutually agreed upon by the parties. In third party proceedings, the Union shall be entitled to the same number of representatives as the Employer.
>
> 4. The Union representative must provide to their supervisor information identifying the purpose of the request (i.e., consultation, grievance, etc.) and location (organization) to be visited and the actual amount of official time spent upon return to their work area. In addition, when a Union representative desires to visit a unit employee or a management official on official Union business, the Union representative must secure advance permission from the employee's immediate supervisor, or arrange a mutually agreeable time to meet with the management official, prior to entering either individual's work area.
>
> 5. The time period requested by the employee or the Union representative must not adversely impact the accomplishment of their organization's operations. If the granting of such requests would result in such a situation, the employee and their immediate supervisor will attempt to

Respondent understood this to be a requirement of Article V and followed it in practice. (Tr. 19, 64, 77-78, 84)

Harley Hembd is a machinist in the 56th equipment maintenance squadron at Luke Air Force Base and, at all times material, was assigned to the Metals Technology Shop. (Tr. 17) This shop was one of three within the Fabrication Flight. (Tr. 94) From approximately August 1997 until he retired in March or April 2000, Master Sergeant (MSgt) Therdo Brooks was Hembd's first line supervisor. (Tr. 21, 25, 84-85) After Brooks' departure, Sgt. Scott Vincent was Hembd's first line supervisor until approximately September 2000 when he left Luke Air Force Base. (Tr. 25-27, 83-85) With Vincent's departure, Sgt. Clinton Bowdry became Hembd's supervisor and remained so through the date of the hearing in these cases. (Tr. 27, 91, 99)

During the period from 1997 through the date of the hearing, Hembd served in various capacities as a union representative. (Tr. 18-19) From January 1998 through December 2000, which encompassed the period relevant to the events in this case, Hembd was Vice President of the Union.[4] (Tr. 18)

Hembd's Performance Review in October 2000

On or about October 13, 2000, Bowdry and Hembd met for a progress review, or feedback discussion, on Hembd's performance.[5] (Tr. 36, 99-100; G.C. Exh. 3) At least one progress review, which is meant to provide feedback to the employee about his/her performance that may impact the rating given at the end of the appraisal period, is called for during the annual appraisal period. (G.C. Exh. 3) Hembd and Bowdry offered different versions of what occurred during this particular performance review.

The following is an abbreviated report of Hembd's description of the meeting. Bowdry ran his finger down a

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[4] In January, 2001, Hembd became the Treasurer of the Union.

[5] Hembd testified that this meeting occurred on October 16, 2000. (Tr. 36) The "Civilian Progress Review Worksheet," a form used in conjunction with this particular progress review, which was signed by both Bowdry and Hembd, was dated October 13, 2000. (G.C. Exh. 3) I find that a determination of whether the meeting occurred on October 13 or 16 is immaterial to the disposition of the complaint.

list of Hembd's performance elements, orally giving a rating of satisfactory, marginal or unsatisfactory on each one and making additional comments at various points. (Tr. 37-38) These additional comments were statements such as: Hembd didn't get along with anyone; it was Hembd's way or no way; Hembd was always negative; although Hembd might think that he intimidated Bowdry, he did not. (*Id.*) In conjunction with one unsatisfactory rating, Bowdry stated that Hembd was always at the Union office. (Tr. 37, 40) At another point, Bowdry said that he didn't believe that the situation with the lockers needed to go as far as it did. (Tr. 37) During his testimony, Hembd asserted that this last comment referred to an incident in which the Union threatened to file an unfair labor practice charge in response to an attempt by Bowdry to reduce the number of lockers in Hembd's use. (Tr. 39-40) After his oral comments, Bowdry handed Hembd a blank "Civilian Progress Review Worksheet," which he asserted that he (Bowdry) didn't have to fill out, and Hembd signed it and added a notation that it was blank. (Tr. 38, G.C. Exh. 3)

According to Bowdry, the meeting lasted 15-20 minutes. (Tr. 100) Bowdry testified that because he had been supervisor for such a short period of time, he limited himself to informing Hembd about his expectations as chief of metals technology rather than giving Hembd feedback about his performance. (*Id.*) Other than denying that he made any "union statements" during the meeting, Bowdry did not provide any further description or details of the meeting. (*Id.*)

Insofar as the accounts of Bowdry and Hembd differ on what occurred at the October performance review meeting, I credit Hembd. I do so because Hembd appeared to have a much clearer memory of the meeting than Bowdry and his account was much more detailed.

Official Time Issue

Past History of Hembd's Official Time Requests

According to Hembd's uncontested testimony, the practice with respect to official time requests during Brooks' tenure as his supervisor was very flexible. Specifically, Brooks entertained requests at any point during the work day and also in advance of the day(s) for which the time was sought; Brooks entertained requests made by telephone or by Hembd simply writing an appointment on a "grease board" calendar maintained in the work area. (Tr. 21, 22) Hembd testified that Brooks responded to his

requests immediately. (Tr. 23) From Hembd's perspective, he had no problems in obtaining official time from Brooks. Hembd testified that the practices pertaining to requests for official time that existed under Brooks remained the same under Vincent. (Tr. 25-27) Vincent's testimony, for the most part, corroborated Hembd's description of the practices that existed when he functioned as Hembd's supervisor.[6] Vincent stated that although the workload in the Metals Technology Shop was extremely heavy and priority projects and "pressing jobs" were a constant presence, he would "work with" Hembd in an attempt to accommodate his requests for official time. (Tr. 86-90) Vincent stated that generally he could anticipate the daily work needs and, consequently, was able to release Hembd on official time without waiting until after the morning meeting at which the work within the Fabrication Flight was coordinated.[7] (Tr. 86, 93)

The testimony of Vincent and Hembd diverges, however, on the question of whether Hembd ever had to wait for a response to his official time requests. According to Hembd, Vincent never made him wait for a response to his request. (Tr. 26) Vincent, on the other hand, testified that there were occasions when he delayed responding to Hembd's request for official time for one-half to one hour while he consulted with Sgt. Barber, who was in charge of floor production in the Metals Technology Shop, to determine the feasibility of releasing Hembd. (Tr. 89, 96) Vincent also testified that on occasion he asked Hembd to wait for a response to a request for official time until after the morning meeting. (Tr. 93) On the question of whether Vincent ever delayed in responding to Hembd's requests for official time, I credit the testimony of Vincent. In this

[6] For 2½ years prior to becoming Hembd's supervisor, Vincent was assigned to the Metals Technology Shop and acted as supervisor when Brooks was absent. (Tr. 83)

[7] This morning meeting, which occurred daily, normally began at 7:30 a.m. and lasted until about 8:00 a.m. (Tr. 30, 86) The meeting involved the Officer-in-Charge of the Fabrication Flight and representatives of the three shops within the Flight and was for the purpose of coordinating work and production within the Flight. (Tr. 86, 92, 104-05) Based on the uncontested testimony of Bowdry and Vincent, I find that discussions at the morning meeting could affect the work demands placed on Metals Technology Shop personnel on a particular day. (Tr. 86, 92, 103, 104-05) For example, a requirement that the Metals Technology Shop provide personnel to support one of the other shops might emerge from the morning meeting. (Tr. 92, 104-05)

regard, I found Vincent very professional and forthright and his account of events clear and detailed. Vincent struck me as less emotionally involved in the dispute than Hembd and I found his observations and recollections more objective and reliable. I also find Vincent's account more consistent with a workload that was heavy and often demanding immediate attention and, consequently, more credible.[8]

Vincent described Hembd's official time use as evolving from not requesting as much official time during the beginning of the period that he was Hembd's supervisor to requesting official time every day first thing in the morning by the time Vincent left. (Tr. 92) Hembd testified that he would request official time from Vincent at various times of the day. (Tr. 54)

Hembd asserted that for approximately 3 months after Bowdry became his supervisor, practices with respect to requesting official time remained the same as they had been under Brooks and Vincent. (Tr. 29)

Alleged Change in Official Time Practices

Hembd testified that on November 29, 2000, at approximately 7:00 a.m., he requested official time and Bowdry responded that he would no longer "discuss" official time requests prior to the morning meeting. (Tr. 30) Hembd testified that on November 30, 2000, he again made an official time request to Bowdry at approximately 7:00 a.m. and Bowdry responded that he told Hembd the previous day he was not going to discuss any official time requests until after the morning meeting. (Tr. 33-34) Since that time, according to Hembd, Bowdry has: insisted that all official time requests wait until after the morning meeting; generally not granted any requests made by telephone; and refused to entertain any requests made in advance of the date on which official time would be used. (Tr. 34-36) Hembd testified that the only exceptions involved requests for official time for contract negotiations pursuant to specific ground rules provisions and instances where a request was coordinated with the Labor Relations Office.

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[8] In this regard, Hembd's testimony suggests that from his perception there wasn't much work in the shop, let alone priority work. (Tr. 40) I find Vincent's testimony that the workload was heavy and involved many "priority jobs" more convincing. Again, Vincent exhibited a high level of professionalism and objectivity. Additionally, as shop supervisor, Vincent was better positioned than Hembd to be fully aware of and sensitive to the work demands in the shop.

(Tr. 35, 42-44) Hembd testified that Bowdry's refusal to release him until after the morning meeting hampered his ability to meet early morning commitments. (Tr. 32-36)

Bowdry's description of the central facts was less clear and direct than Hembd's. Although Bowdry asserted that subsequent to November 29, 2000, he has approved official time in advance for Hembd, it appeared that those instances involved requests that were coordinated through the Civilian Personnel Office. (Tr. 101-103) Bowdry stated that when Hembd requested official time on a day-to-day basis, information obtained at the morning meeting was critical to determining whether to grant the request. (Tr. 103, 105, 107) Drawing a distinction between when a request for official time could be made and when it would be answered, Bowdry asserted that although he would not answer requests until after the morning meeting, Hembd could make the request at any time. (Tr. 111) Bowdry testified that one of the means that Hembd has continued to use in communicating official time requests is by telephone. (Tr. 107)

I find that on or about November 29, 2000, Bowdry advised Hembd that *as a rule* he would not address requests for official time until after the morning meeting on the day the official time is to be taken. In this regard, Hembd's testimony was clear, direct and detailed. Bowdry's testimony did not specifically confirm or deny Hembd's account of the conversation that occurred on or about November 29, 2000. Bowdry did, however, corroborate that on a day-to-day basis he does not respond to official time requests until after the morning meeting. At the same time, I find that Bowdry's assertion that Hembd could nevertheless make a request for official time at any time is consistent with Hembd's testimony that Bowdry told him that he wouldn't "discuss" any official time requests before the morning meeting. (Tr. 30, 32, 33-34) Thus, I find that while the limitation that Bowdry imposed restricted Hembd to waiting until after the morning meeting before any request for official time would be answered, it did not restrict Hembd from making the request for official time before the morning meeting. This distinction may not have been clear to Hembd and in large measure was one that made no practical difference to him.

I find that the record does not establish that Bowdry expressly prohibited Hembd from using the telephone to communicate official time requests. Although Hembd testified that Bowdry told him that he wouldn't take requests for official time by telephone, his testimony on

this point lacked specifics or detail as to what Bowdry said and when.[9] (Tr. 50) Also, Hembd's testimony on this point was coupled with an assertion that Bowdry generally denied his requests in a brusque fashion when he called for extensions of official time in conjunction with contract negotiations. (*Id.*) One practical effect of Bowdry's requirement that Hembd wait until after the morning meeting before being released to use official time was that it virtually eliminated the utility of using the telephone for making requests. This may have fostered Hembd's perception that Bowdry prohibited him from making requests for official time by telephone.

In an e-mail dated November 30, 2000, and addressed to Jerry Berger and Jim Finfrock in the Respondent's Labor Relations Office, Brock Henderson, the President of the Union, asserted that Bowdry had changed the procedures by which Union representatives requested official time. (G.C. Exh. 4, Tr. 68) In that e-mail, Henderson demanded that the new procedures cease and that the Respondent bargain over the issue. (G.C. Exh. 4) According to Henderson, he received no response to his demand to bargain. (Tr. 70)

Discussion

Positions of the Parties

General Counsel

Case No. DE-CA-01-0174

Counsel for the General Counsel contends that the Respondent violated Section 7116(a)(1) of the Statute by the conduct of MSgt. Bowdry in making a statement to Mr. Hembd concerning the latter's Union activity during a performance review meeting conducted on October 16, 2000. Specifically, the General Counsel asserts that Bowdry indicated to Hembd that his performance was unsatisfactory because of the amount of time he spent in the Union office and implied that Hembd could receive an unsatisfactory rating on his annual appraisal if he did not reduce the amount of time spent in

[9] At one point during his testimony, Hembd described a exchange with Bowdry in which the latter told him that he had to "come in in person and request official time, and then not until after my morning meeting can you leave." (Tr. 34) This exchange occurred in the context of a request that Hembd made one day for official time that he wanted for the next morning. This exchange was focused on whether Hembd could get advance approval rather than on whether Hembd could make a request by telephone.

the Union office. The General Counsel contends, moreover, that Bowdry's statement linking a negative performance rating to Hembd's official time use was not made in the context of an attempt to balance the needs of the Union with the Respondent's need to accomplish its work efficiently. The General Counsel argues that, viewed objectively, Bowdry's statement to Hembd was threatening and violated the Statute. *See U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky*, 49 FLRA 1020, 1034 (1994) (*Frenchburg Job Corps*).

Case No. DE-CA-01-0244

Counsel for the General Counsel contends that Respondent violated section 7116(a)(1) and (5) by changing the procedures Harley Hembd used in requesting official time without providing the Union notice and an opportunity to bargain. The General Counsel asserts that under long-standing practice, Hembd's supervisors permitted him to request official time at any time of the day and did not require him to wait until after they returned from the morning meeting to decide whether to release him. The General Counsel maintains that Hembd's supervisors also allowed him to request official time by telephone and in advance of the day(s) on which it would be used. The General Counsel contends that the procedures Hembd used for requesting official time constituted fully negotiable conditions of employment that were established past practices and could not be changed without prior bargaining. *See U.S. Patent and Trademark Office*, 39 FLRA 1477 (1991). The General Counsel asserts that on November 30, 2000, MSgt. Bowdry changed these practices by no longer allowing Hembd to: obtain routine official time until after the morning meeting; request official time by telephone; or request routine official time in advance.

Counsel for the General Counsel argues that the Respondent did not timely raise a "covered by" defense. *See U.S. Department of Housing and Urban Development*, 56 FLRA 593, 596 (2000) (*HUD*). In support of this argument, the General Counsel contends that the Respondent did not raise any affirmative defense in its answer to the complaint in the case nor did it assert "covered by" as an affirmative defense in its prehearing disclosure in this case. The General Counsel asserts that Respondent's statement during the hearing that everything concerning official time was

covered by the parties' collective bargaining agreement was

not sufficient to present a covered-by defense and, in any event, the Respondent did not introduce evidence to support a covered-by defense.

Counsel for the General Counsel argues that even assuming that a covered-by defense was properly raised, the matters over which the Union sought to bargain were not covered by the parties' collective bargaining agreement. More specifically, the General Counsel contends that the matters of when during the day a Union official would be granted official time, whether requests for official time could be made by telephone and whether requests could be made in advance were neither expressly contained in the agreement nor inseparably bound up with any provision in the agreement. See *U.S. Department of the Treasury, Internal Revenue Service*, 56 FLRA 906, 911-12 (2000).

Respondent

Case No. DE-CA-01-0174

Respondent denies the alleged violation. Respondent asserts that MSgt. Bowdry did not make any statement regarding the Union at the performance feedback session that he conducted with Mr. Hembd on October 13, 2000, and that Bowdry's description of the meeting should be credited. In addition, Respondent argues that the circumstances surrounding the October 13 meeting make such a statement improbable. Specifically, the Respondent contends that in view of the short period that he had been Hembd's supervisor at that point, Bowdry would have been unfamiliar with Hembd's performance and would have had no reason to comment on his Union involvement. Additionally, the Respondent contends that Bowdry's claim that he provided no evaluation during the meeting is supported by the fact that the "performance feedback sheet (Jt. Ex. 3)" [sic] that was used contains no comments on Hembd's performance.

Case No. DE-CA-01-0244

Respondent denies the violation alleged in this case also. Respondent argues that Article V of the parties' collective bargaining agreement covers official time for union representatives and that all of Hembd's supervisors have followed these provisions when addressing Hembd's official time requests. The Respondent contends that there was no change in the procedures used in granting Hembd official time and no requirement to provide the Union notice and an opportunity to bargain. The Respondent asserts that what changed was Hembd's pattern of asking for official

time; that is, Hembd moved from a random pattern in terms of the timing of his requests to a pattern of asking for official time every day first thing in the morning.

Analysis

Case No. DE-CA-01-0174

The issue in this case is whether a statement that Bowdry allegedly made during a progress review of Hembd's performance that linked a negative rating in one performance element to the amount of time that Hembd was in the Union office violated section 7116(a)(1) of the Statute. As set forth above, I credit Hembd's account and find that Bowdry made a statement in conjunction with a negative rating on one element that Hembd was always in the Union office. The question then becomes whether the statement amounted to a violation of the Statute.

Section 7102 of the Statute protects employees in the exercise of the right to form, join, or assist a labor organization, or to refrain from any such activity, without fear of penalty or reprisal. Section 7116(a)(1) provides that it is an unfair labor practice for an agency to interfere with, restrain, or coerce any employee in the exercise of their section 7102 rights. The legal standard for determining whether comments by agency officials violate section 7116(a)(1) is set forth in *Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah,* 35 FLRA 891, 895-96 (1990):

> The standard for determining whether management's statement or conduct violates section 7116(a)(1) is an objective one. The question is whether, under the circumstances, the statement or conduct tends to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement . . . . In order to find a violation of section 7116(a)(1), it is not necessary to find other unfair labor practices or to demonstrate union animus. . . . while the circumstances surrounding the making of the statement are taken into consideration, the standard is not based on the subjective perceptions of the employee or on the intent of the employer.

(Citations omitted). *See also Frenchburg Job Corps,* 49 FLRA at 1034.

As I found above, during the progress review, Bowdry coupled the comment "unsatisfactory" as to one of Hembd's performance elements with a comment that Hembd was always at the Union office. It was reasonable for Hembd to infer that at least one reason for the unsatisfactory evaluation was the amount of time that he spent in the Union office or, put another way, engaged in protected activity. It follows that linking the time spent in the Union office with the view that Hembd's performance was deficient suggested to Hembd that Bowdry was penalizing him for the amount of time that he spent on protected activity and would reasonably tend to discourage him from engaging in protected activity in the future. In this latter regard, it was reasonable for Hembd to infer that if he continued to spend as much time as he had on Union activity, Bowdry would continue to view his performance as deficient.

In *Frenchburg Job Corps,* the Authority found that by making statements that linked an employee's use of official time with perceived performance problems the agency violated section 7116(a)(1). In that decision, the Authority acknowledged that where management perceives a conflict between its right to manage efficiently and an employee's right to engage in protected activity, management may lawfully seek to accommodate the conflict. 49 FLRA at 1034-35. The Authority found, however, that criticism of an employee's use of time for protected activity that was unaccompanied by an attempt to resolve such a perceived conflict violated section 7116(a)(1). *Id.* at 1035. Here, Bowdry's criticism of the amount of time that Hembd was spending on Union business, like the circumstances involved in *Frenchburg Job Corps*, was not accompanied by any attempt on Bowdry's part to resolve any conflict that he perceived as existing between Hembd's protected activity and management's need to manage efficiently and effectively. *See id.*, 49 FLRA at 1034-35.

I find that by linking the amount of time that Hembd was spending on protected activity with a negative evaluation of his performance, the Respondent, through Bowdry's statement, interfered with, restrained, or coerced employees in their exercise of protected activity. Accordingly, I conclude that Respondent violated section 7116(a)(1) of the Statute.

Case No. DE-CA-01-0244

Preliminary Issue

As a procedural matter, the General Counsel asserts that notwithstanding Respondent's reference to a covered-by defense during the hearing, a covered-by defense was not properly or timely raised. "Covered-by" is an affirmative defense. *E.g.*, *HUD*, 56 FLRA at 596. Section 2423.23(c) requires in prehearing disclosure parties to give a brief statement of and exchange all theories of the case, including any and all defenses to the allegations in the complaint. Pursuant to section 2423.24(e), failure to fully comply with prehearing disclosure requirements may result in sanctions.

In adopting the requirements for prehearing disclosure that are currently contained in its regulations, the Authority identified two reasons for doing so. 62 *Fed. Reg.* 40911, 40912 (July 31, 1997). In the Authority's view, prehearing disclosure would (1) facilitate dispute resolution and (2) clarify the matters to be adjudicated. As to the second point, the Authority stated that prehearing disclosure would enable the parties to knowledgeably and more efficiently prepare their cases without having to guess what evidence or theories others in litigation would offer. *Id.*

I find, contrary to the General Counsel, that a covered-by argument is properly before me. In its prehearing disclosure submission, Respondent set forth the following as its "theory":

> The Respondent was following the parties' collective bargaining agreement on official time for union officials and no requirement existed to negotiate. There was no change in a condition of employment that required Respondent to have to negotiate.

Although this statement does not use the term of art "covered by" and also lacks clarity, it nevertheless suggests principles that underlie the "covered by" defense and tracks a description of a "covered by" defense that was set forth in *Department of the Navy, Marine Corps Air Logistics Base v. FLRA*, 962 F.2d 48, 62 (D.C. Cir. 1992) (*Marine Corps Air Logistics Base v. FLRA*). That is, the statement asserts that a collective bargaining agreement authorized the action taken and because it already bargained with respect to the matter, the Respondent had no further obligation to bargain.

See Marine Corps Air Logistics Base v. FLRA, 962 F.2d at 62. Put another way, the Respondent's theory asserts that collective bargaining agreement authorized Respondent to do what it did and, consequently, the action did not effect a "change" in conditions of employment, so no bargaining obligation arose. *See id.*

The circumstances here are distinguishable from those present in *HUD*. In finding that the respondent failed to clearly and explicitly raise a "covered by" defense, Judge Oliver specifically cited the respondent's failure to state "that it had no obligation to bargain based on the terms of a negotiated agreement." 56 FLRA at 596. Rather, the bases on which respondent in *HUD* defended its actions were that there was no change in conditions of employment and employees suffered no adverse impact. *Id.* In this case, Respondent asserted, albeit indistinctly, in prehearing disclosure that it had no obligation to bargain based on the terms of a negotiated agreement.

Respondent's Duty to Bargain

In *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1004 (1993), the Authority established a test for determining when a matter is contained in or covered by a collective bargaining agreement so as to relieve an agency of the obligation to bargain. The Authority clarified this test in *U.S. Customs Service, Customs Management Center, Miami, Florida*, 56 FLRA 809 (2000).

The test, as clarified, consists of two prongs. Under the first prong, a determination is made on whether the matter in dispute is expressly encompassed within an agreement provision. *See Department of the Treasury, Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri*, 57 FLRA 126, 128 (2001). If the agreement does not expressly contain the matter, a determination is made under the second prong whether the matter in dispute is inseparably bound up with, and thus plainly an aspect of, a subject covered by the contract. *See id. at 128-29.* The analysis, under the second prong, as deemed necessary, includes consideration of the parties' bargaining history or intent. *See id. at 129.*

What emerges from the testimony of Hembd and Bowdry is that on November 29, 2000, Bowdry began insisting that with the exception of time that was prearranged through the Civilian Personnel Office or an agreement such as ground rules for negotiations, Hembd wait until after the morning meeting for a decision on whether he would be released. The

apparent reason that Bowdry imposed this restriction was to enable him to reconcile Hembd's use of official time with the daily operational needs of the shop. As a practical matter, Bowdry's requirement precluded Hembd from obtaining release in advance of the day on which the official time was being used and from using means such as the "grease board" or telephone for securing approval in advance of the designated day or prior to the end of the morning production meeting. I find that the collective bargaining agreement between the parties was in effect at the time that Bowdry took this action.

The matter in dispute here is Bowdry's action in insisting that, as a general rule, he would not respond to Hembd's requests for official time until after the morning production meeting. Applying the first prong of the covered-by test, I find that the matter of when a supervisor will respond to requests for official time is not expressly contained in the parties' collective bargaining agreement. That is, although Article V of the collective bargaining agreement deals with official time, the matter of when a supervisor will respond to requests is not expressly articulated in the article.

Applying the second prong of the test, I find, however, that the matter of when a supervisor will respond to requests is inseparably bound up with and plainly an aspect of the provisions of Article V. This is particularly true where, as here, the timing of the response is tied to a desire to reconcile official time use with the work needs of the organization.

Article V establishes several principles that govern official time use. In particular, Article V authorizes use of official time by Union representatives and employees and it tacitly requires that Union representatives and employees seeking official time must request it and obtain supervisory approval. The article further provides that the time period for which official time is requested must not adversely impact the accomplishment of operations and that where there is a conflict between releasing an employee on official time and accomplishment of operations, the employee and supervisor will attempt to work out a mutually acceptable alternative for official time use. It establishes time frames within which use of official time will be allowed in circumstances where the time originally requested conflicts with operational needs. I find that the matter of when a supervisor responds to official time requests is an integral part and plainly an aspect of the process of requesting and approving official time and reconciling conflicts between official time and accomplishment of operations.

Consequently, I find that Bowdry's action came within the scope of the principles governing official time that were established by Article V. *Cf. NLRB v. U.S. Postal Service*, 8 F.3d 832, 838 (D.C. Cir. 1993) (in rejecting a reading of covered by that limited its application to matters that a contractual provision specifically addresses as "crabbed," court noted that collective bargaining agreements establish principles to govern a myriad of fact patterns rather than attempting to anticipate and address every hypothetical grievance); *United Mine Workers, District 31 v. NLRB*, 879 F.2d 939, 942-44 (court found that matter was "covered by" collective bargaining agreement despite fact that applicable agreement far from addressed the full gamut of issues that could be raised).

Because Bowdry's action in insisting that Hembd wait until after the morning meeting for a decision on official time requests was covered by the collective bargaining agreement, the Agency had no obligation to bargain over that action. I emphasize that my findings are limited only to the issue of whether the agreement applies to Bowdry's action. I do not reach the question of, or suggest, whether Bowdry's action was a correct or incorrect application of the principles set forth in the agreement. The typical forum for addressing this question would be the grievance procedure. *Cf. id.* at 944 (court noted that although the contract may have left many unresolved and difficult questions, those questions were properly resolved through the contractual grievance procedure).

I conclude that the Respondent's action did not violate section 7116(a)(1) and (5) as alleged. I therefore recommend dismissal of the complaint in this case.

It is therefore recommended that the Authority adopt the following order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the U.S. Department of the Air Force, Luke Air Force Base, Arizona, shall:

1. Cease and desist from:

(a) Making coercive statements to Union officials during performance evaluation meetings that indicate a relationship between their job performance and time spent engaged in Union activity that is protected under the Statute.

(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 Federal Service Labor-Management Relations Statute:

(a) Post at its facilities at U.S. Department of the Air Force, Luke Air Force Base, Arizona, where bargaining-unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the commander, Luke Air Force Base, 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.

(b) Pursuant to section 2423.41(e) of the Authority's Rules and 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.

It is further ordered that the complaint in Case No. DE-CA-01-0244 be, and hereby, is dismissed.

Issued, Washington, DC, May 17, 2002

_____

SUSAN E. JELEN
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 U.S. Department of the Air Force, Luke Air Force Base, Arizona, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with bargaining unit employees by making coercive statements to Union officials during performance evaluation meetings that indicate a relationship between their job performance and time spent engaged in Union activity that is protected under the Statute.

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.

_____
(Respondent/Activity)

Date: _____ By: _____
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Denver Regional Office, Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 100, Denver, CO 80204-3581, and whose telephone number is: 303-844-5224.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case Nos. DE-CA-01-0174 and DE-CA-01-0244, were sent to the following parties:

_____

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CERTIFIED MAIL: **CERTIFIED NOS:**

Sue T. Kilgore, Esq. 7000 1670 0000 1175 0245
Counsel for the General Counsel
Federal Labor Relations Authority
1244 Speer Boulevard, Suite 100
Denver, CO 80204-3581

Phillip G. Tidmore 7000 1670 0000 1175 0238
Labor Counsel
AFLSA/JACL
1501 Wilson Boulevard
7th Floor
Arlington, VA 22204-2403

James W. Richards, Captain, USAF 7000 1670 0000 1175 0221
Chief, Labor Law
56 FLO/JA
7383 No. Litchfield Road, Suite 2040
Luke Air Force Base, AZ 85309

Brock Henderson, President 7000 1670 0000 1175 0214
American Federation of Government
Employees, AFL-CIO, Local 1547
7275 N. Fighter County Avenue
Luke Air Force Base, AZ 85309-1229

REGULAR MAIL

National President
American Federation of Government
Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

Issued: May 17, 2002
Washington, DC